MORAL RIGHTS AND CREATIVE FREEDOM:
A STUDY OF POST-COMMUNIST LAW REFORM IN RUSSIA

by

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ABSTRACT

This thesis explores the relationship between law reform and social transformation in post-socialist countries. It deals with the doctrine of the moral right of the author, an aspect of copyright law that seeks to protect the personal interests of an author or artist in his creative work. The thesis argues that moral rights can make an important contribution to democratisation in the post-socialist world. The doctrine of moral rights helps to provide adequate and appropriate protection for creative freedom, an unequalled source of diversity and integrity in the realm of ideas – the very essence of democratic values.

In spite of their importance for post-socialist countries, moral rights have not been a focus of copyright reform. Rather, new copyright laws reflect the pressure to conform to international standards, especially those set by the World Trade Organisation (WTO). The WTO considers copyright to be an area of commercial regulation with crucial implications for the international trade regime; its personal and cultural aspects, especially moral rights, are viewed with suspicion. As a result, moral rights have not been emphasised in post-socialist law reform, and, more generally, there has been little investigation of their implications for the special needs of transitional and economically less-developed countries.

To illustrate this situation, the thesis undertakes a detailed study of moral rights in Russia. It shows that Soviet Russia had developed legal protection for moral rights in its copyright law. However, the extreme censorship practices of an autocratic state meant that moral rights had little practical value for authors and artists. Instead, their potential contribution to creative freedom remained virtually unrealised. In post-Communist times, law reform has focussed on bringing Russian copyright law into line with WTO requirements. However, given the importance of creative freedom for social change in post-Communist Russia and the special suitability of moral rights doctrine to protecting creativity, Russia should now reconsider its treatment of moral rights.

This thesis argues that moral rights should be an integral part of copyright law and policy in all post-socialist countries. It goes on to suggest that the development of moral rights after socialism will be facilitated by new conceptual approaches to the doctrine. In particular, a consideration of the manipulative treatment of authors and artists, and the passive role of copyright law in socialist society shows moral rights to be closely aligned with freedom of creativity. The thesis proposes a "new" model of moral rights for post-socialist societies, based on the close relationship between the moral rights of authors and the human right to free creative expression. This model is not only relevant to the post-socialist world; it also provides a new way of looking at moral rights in the international community, which faces an authentic, though largely unacknowledged, need to affirm the humanistic values inherent in culture and creativity.

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to
my teacher
Professor David Vaver
who taught me for my LLB at Osgoode Hall Law School,
and thought it worthwhile to teach me again
for my DPhil at Oxford.

NOTE ON THE STRUCTURE OF SOVIET LAW

In the Soviet legal system, the Fundamentals of Civil Legislation, *osnovy,* provided legal guidelines for all of the Soviet republics. Each republic was required by law to implement in its law the provisions of the Fundamentals. For example, the copyright provisions of the 1961 Soviet Fundamentals of Civil Legislation were incorporated into the law of the Russian republic (RSFSR) in the Civil Code of 1964. The copyright provisions of the Fundamentals and the Russian copyright law are virtually identical. However, certain differences may arise; for example, in the 1961 Fundamentals, it was left to the republics to determine the duration of copyright beyond the author's lifetime, specified in Article 496 of the Russian legislation as 25 years.

The Italian philosopher, Mazzini, says that the creation of true art may happen by two means. At the end, or at the beginning of an epoch, a true artistic renaissance may arise. There is some truth in this claim. Generally speaking, when the people of a nation experience genuine passion, courage, and fame, the birth of great art becomes possible. In times of depression and decay, great sages may appear to redeem the nation; but artistic development is very unlikely in such a place and at such a time.

We Tamils have lost our prowess; our valour; we have no country, no nation; we do not have self-government. In such conditions, will Saraswati, the Goddess of Knowledge, be born here?

– CS Bharati, Indian National Poet, 1882-1921

[B]efore [the] Revolution, Russian poetry was a kind of spiritual government of [the]... people...[T]he metaphorical language of poetry was [our] only way to express our *nostalgie* for freedom. That's why Russian people traditionally respect[...] poetry....When Stalin died, the political stage,...[the] social stage, was completely empty; we didn't have any kind of dissidents' movement because all potential dissidents... were in concentration camps or already killed.... So we young poets, [the] new generation, we were [the] only free voices [at]... that moment... [T]hat's why people sink their own unrealized hopes in our poetry. That's why, in Gorbachev's parliament we had so many writers, because our poetry was a cradle of *glasnost,* and *glasnost* was a cradle of our democracy. Our democracy is still very childish, undemocratic; it's probably inevitable because we don't know what to do with freedom. I don't think that in the rest of humanity people know what to do with...freedom [either].

– Yevgeny Yevtushenko

It is not awful to be struck dead by bullets,
It is not bitter to be left without shelter –
We will preserve you, Russian speech,
Great Russian word.
We will bear you free and pure
Bequeath you to our grandchildren, and forever save you from captivity.

– Anna Akhmatova

I. INTRODUCTION

Since the end of European socialism, law reform has become a characteristic feature of the transition in Central and Eastern Europe.[1] Russia alone has seen two successive waves of reform – the first, in the early 1990s, following the final collapse of the Soviet government, and the second, in the middle of the decade, with a view to revising the hasty and awkward measures initially adopted under political duress.[2] Yet another phase of legal transformation now appears to be underway in the post-socialist world. While the first period of reform was characterised by a general preoccupation with constitution-writing, leading one lawyer to comment that "Eastern Europe... has become

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[1]After the fall of the Berlin Wall in 1989 and the dissolution of the Soviet Union in 1991, it is tempting to refer to the "end of socialism" *per se*. However, socialist government continues to be alive and well in Cuba and China – in the latter case, with major implications for the world of intellectual property regulation.

[2]Copyright provides an example of this process. The need for new copyright legislation was recognised in the Soviet Union as early as 1990, in the context of the Agreement on Trade Relations between the United States and the Soviet Union. However, a new Copyright Law was not actually adopted until 1993; not only has it been the subject of subsequent amendments, but the framework for copyright protection is also undergoing a radical new series of reforms at the hands of the Private Law Commission under the Office of the Russian President. The evolution of copyright in the last days of the Soviet Union is described by C Prins "Emile Zola Receives an Answer: The Soviet Union Is to Join the Berne Convention" (1991) 7 EIPR 238, 242-47. See also Russian Federation Law on Copyright and Neighbouring Rights *(Zakon Rossiiskoi Federatsii Ob avtorskom prave i smezhnykh pravakh) VSND i VS RF,* 1993 No 32, Item 1242; *Rossiiskaia gazeta* 3 Aug 1993 (as am by Federal Law of the Russian Federation of 19 July 1995, *Rossiiskaia gazeta* 26 July 1995). Available online: Law No 5351-I of July 9, 1993, Russian Patent & Trademark Office, <http://www.rupto.ru/ruptoen/law/intel.htm>. A recent attempt at revising the law appears to be the Draft of Federal Law #42061 "On amending the RF Law 'On Copyright and Neighbouring Rights,'" prepared by Rospatent and made available through the Russian legal database Garant. Amendments that are currently pending are described in I Motsnyi "Russia: Russia is About to Amend its Copyright Laws" Mondaq Business Briefing, online: <http://www.mondaq.com>.

the world's most exciting laboratory of constitutional reform,"[3] the focus of the current movement is on ever more sophisticated reforms to "private" law.[4] Among the most important of these new areas of law reform has been the field of intellectual property rights.[5]

The adoption of new or revised intellectual property statutes is closely tied to international economic developments. In particular, the creation of the World Trade Organisation (WTO) and the adoption of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs) in 1995[6] has fundamentally transformed

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[3]See GM Danilenko "International Law in the Russian Legal System" (*Proceedings of the 91st Annual Meeting of the American Society of International Law* 295 (1997), American Society of International Law).

[4]These two periods of reform also involve overlapping and intersecting concerns. Nevertheless, this author would argue that it is important to be aware of the progressive nature of the reform process, as the general movement from public to private law and back again is an overarching trend, and reflects the dynamics of legal culture in the transition. Indeed, the distinction between public and private law, often problematic, is particularly unclear in the socialist context, see GM Danilenko & W Burnham *Law and Legal System of the Russian Federation* (New York: Parker School of Foreign and Comparative Law, Columbia University; Juris Publishing, 1999) 1-10. Arato provides a critique of the initial tendency towards "constitutionalism": see A Arato "Dilemmas Arising from the Power to Create Constitutions in Eastern Europe" in M Rosenfeld ed. *Constitutionalism, Identity, Difference, and Legitimacy: Theoretical Perspectives* (1994) 165.

[5]Revisions of intellectual property law were recognised as an immediate concern after the breakdown of the Soviet Union, coinciding with the beginning of the Uruguay Round of trade talks which would eventually lead to the adoption of the TRIPs Agreement. See S Fraser "Berne, CFTA, NAFTA & GATT: The Implications of Copyright *Droit Moral* and Cultural Exemptions in International Trade Law" (1996) 18 Hastings Comm & Ent LJ 287, 311-16. However, it was 1993 before a new Copyright Act had come into force, and copyright law has been the subject of ongoing re-assessment ever since.

[6]*Marrakesh Agreement Establishing the World Trade Organisation,* 15 April 1994 (entered into force 1 January 1995) [hereinafter WTO Agreement]; *Agreement on Trade-Related Aspects of Intellectual Property Rights,* Annex 1C to the *Agreement Establishing the World Trade Organisation,* 15 April 1994, 33 I.L.M. 1197 (entered into force 1 January 1996), online: WTO Homepage (Legal Texts).

perceptions of intellectual property law – its structure, aims, and social significance – throughout the world. Traditionally, intellectual property law has been understood as a technical and highly specialised branch of regulation. However, it was also recognised to have broad implications for society, most obviously, affecting culture, education, and the arts. With the TRIPs Agreement, intellectual property rights have now become fully integrated into the general regime for international trade. This shift of focus has led to greatly circumscribed interest in the social role of intellectual property rights.

The TRIPs Agreement has necessitated the adoption of advanced intellectual property standards in most countries. Reform has been most intense in less-developed jurisdictions, including, not only transitional states, but also, developing and even "least-developed" countries. In the process of international standardisation, however, the potential impact of Western-style standards on developing societies has not been properly assessed. The difficulties of doing so are at least three-fold, having to do with the paucity of empirical studies dealing with this relationship, the superficiality of theoretical investigations to date, and, inevitably, a lack of political will at the

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<http://www.wto.org/wto/legal/finalact.htm> (entered into force 1 January 1995) [hereinafter TRIPs Agreement]. The legal structure of the WTO is based on a series of agreements governing different aspects of international trade, of which TRIPs is one. For a country to become a WTO member, adherence to all the basic agreements is required. In a sense, the agreement which holds all the others together is the *Understanding on Rules and Procedures Governing the Settlement of Disputes,* Annex 2 to the *Agreement Establishing the World Trade Organisation,* 15 April 1994, online: WTO Homepage (Legal Texts) <http://www.wto.org/wto/legal/finalact.htm> (entered into force 1 January 1995). TRIPs and the DSU are explicitly identified as the most important elements of the trade regime by RC Dreyfuss & AF Lowenfeld "Two Achievements of the Uruguay Round: Putting TRIPs and Dispute Settlement Together" (1997) Va J Intl L 275.

international level.[7]

In post-socialist countries, systems for the protection of intellectual property have historically diverged from both international norms and American or Western European model laws. This situation has become acute in recent years, due to substantial legal development in Western countries, itself a product of rapid technological change.

The new structure and approach to intellectual property at the international level has meant far-reaching changes to the treatment of intellectual property rights after socialism.[8] While the process of modernising intellectual property systems has been broad and comprehensive in terms of legislative reform, it has been surprisingly weak from the point of view of policy development. Ex-socialist countries uniformly see integration into international economic life, primarily through participation in the WTO system, as a remedy for the stagnation suffered by them under authoritarian rule. As a result, intellectual property law reform has become largely a means to an end, a struggle to re-make domestic standards in the image of international requirements, on the one

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[7]There are only a handful of well-publicised empirical studies, such as RT Rapp & RP Rozek "Benefits and Costs of Intellectual Property Protection in Developing Countries" (1990) 24 J World Trade 75; H Hansmann & M Santilli "Authors' and Artists' Moral Rights: A Comparative Legal and Economic Analysis" (1997) 26 J Legal Stud 95; and WM Landes & RA Posner "An Economic analysis of Copyright Law" (1989) 18 J Legal Stud 325. Only a few writers seem to have undertaken conceptual studies, in article-length works: see AS Oddi "The International Patent System and Third World Development: Reality or Myth" (1987) 5 Duke LJ 831; E Henderson "TRIPs and the Third World: The Example of Pharmaceutical Patents in India" (1997) 19(11) EIPR 651; and RM Sherwood "The TRIPS Agreement: Implications for Developing Countries" (1997) 37 IDEA: J L & Tech 491.

[8]The isolation of socialist legal systems from Western and international law was, of course, as much due to the moral barrier of socialist legal philosophy as the physical barrier of the Berlin Wall between West and East. The special features of socialist legal concepts are usefully summarised by Danilenko & Burnham (n 4) 1-10.

hand, while implementing "enforcement measures" that will discourage phenomena such as the unauthorised copying of books, music, and technology, on the other.[9] Many of these issues have typically been dealt with in law reform as self-contained and technical problems, capable of resolution through measures that are straightforward, at least in their adoption, if not in their practical realisation.

This over-simplification of intellectual property issues is disturbing and, ultimately, inaccurate. Even a cursory survey of intellectual property-related debates in international circles illustrates the breadth of social issues that may be implicated where rights in creation and innovation arise – for example, literacy and access to education, or the availability of medications.[10] Yet the fundamental question of what should be the role of the new intellectual property laws in post-socialist society has remained at the outer fringes of reform.

It is increasingly apparent that intellectual property rights could have far-reaching implications for life after socialism in Central and Eastern Europe. At the end of the socialist era, many informed observers thought of socialist countries as

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[9]TN Samahon "TRIPs Copyright Dispute Settlement after the Transition and Moratorium: Nonviolation and Situation Complaints against Developing Countries" (Spring 2000) L & Pol'y in Intl Bus 1051, 1051 observes that "most losses result from an absence of 'on the ground' enforcement." This assessment of intellectual property problems in less-developed jurisdictions has even found its way into the news media. For example, writing on piracy, an Economist writer argues: "Lack of legislation is not the problem. China, for instance, passed new laws on intellectual property in July [2001]. These should bring it into line with standards set by the World Trade Organisation, which is to accept China as a member on November 10th.... Generally speaking, though, laws are not enforced." See "Counterfeiting in Asia: Phonies galore" in The Economist, November 10th-16th 2001.

[10]These concerns are increasingly a focus of international scholarship; for some examples, see Henderson (n 7); Sherwood (n 7); and N Kumar "Cultural Imperialism and Third World Publishing" [1983] Copyright 17, a unique, older study.

essentially modern and developed societies, except that certain aspects of industrial growth were retarded due to the inefficiencies of socialist economic planning. In the same vein, it was believed that the lifting of "totalitarian" restrictions on citizens' speech and actions would somehow allow democratic government to be restored "naturally."

The experiences of the past decade suggest that the reality is more complex. The countries of the region vary greatly in their levels of economic and political development, and progress towards greater prosperity and social stability has been far from uniform. Eastern Europe is a region of great cultural and social diversity, a fact that was masked from outside eyes for most of the twentieth century by the façade of socialist homogeneity. Cultural variety implies a range of new and strange environments in which accepted legal models must now survive and flourish. More than a decade after the dissolution of the Soviet Union, the period of "transition" is not yet over; in some countries, at moments of crucial tension, the transition itself has come into question, with the unexpected and, to Western eyes, incomprehensible resurgence of socialist values and socialist politics.[11] In this volatile and unfamiliar context, meaningful law reform cannot be confined to the technical problem of how to incorporate new norms and foreign models into the post-socialist legal framework, exhausted by ideology and power politics. Rather, the technical difficulty of legislative drafting and the creation of institutions for implementing the new laws is additionally complicated by the economic, political, and, essentially, cultural problem of how the

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[11]For example, a survey of socialist political parties in Eastern European countries during the mid-1990s is provided by RW Fontaine "Red Phoenix Rising? Dealing with the Communist Resurgence in Eastern Europe" (June 1996) Cato Policy Analysis Number 255, online: <http://www.cato.org/pubs/pas/pa-255.html>.

new intellectual property laws will relate to post-socialist transformation.

From a legal perspective, the "transition" evokes the fundamental problem of how law is related to social change. In particular, how can law reform in transitional countries make a positive contribution to development after socialism? Given the ongoing internationalisation of intellectual property standards through the machinery of global trade, this question takes on a special importance in relation to intellectual property rights, with far-reaching implications throughout the world.

The study undertaken here is concerned with one particular dimension of this general problem: whether the aspect of copyright law known as moral rights can contribute to political development in transitional countries. Moral rights provide legal protection for the personal and artistic interests of authors in their work; they complement and complete a regime of protection for authors' economic rights.[12] This thesis argues that moral rights make a valuable contribution to democracy by helping to protect the freedom and integrity of creative expression, a primordial source of ideological diversity. It considers in some detail the question of how this contribution can be realised in transitional countries. In part, it will depend on the development of a new conceptual approach to the doctrine – one that accepts, unambiguously and comprehensively, its distinctly non-commercial *raison d'etre.*

A model that would facilitate the contribution of moral rights to democratisation might attempt to incorporate these rights into a broader legal framework for the

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[12]In civil law systems, however, the status of moral rights is quite different: at least in theory, they are at the origin of all authorship rights, whether economic or personal. See C Colombet *Grands principes du droit d'auteur et des droits voisins dans le monde: Approche de droit comparé* (2ième éd Libraire de la Cour de cassation/Unesco Paris 1992) 40.

protection of human rights in creativity and free expression. This "new" model of moral rights will require two fundamental adjustments in the traditional approach to copyright law. First, in terms of the distinction between private and public law, the general categorisation of copyright in primarily private-law terms must be re-examined. Perhaps in contrast to other aspects of copyright, moral rights, in order to improve both their conceptual consistency and their practical effectiveness, should be understood equally as a public-law right: a right of authors to be protected against arbitrary, unreasonable, or excessive state censorship of their work. In this way, one of the important implications of the new model will be to reconsider the scope and significance of Article 17 of the *Berne Convention for the Protection of Literary and Artistic Works,*[13] the basic legal instrument for the international protection of copyright, which has traditionally allowed national governments to restrict the dissemination of copyright works on grounds of *ordre public.*

Secondly, the relationship between the economic and moral rights of authors will need to be re-examined. In most copyright systems of the world, moral rights occupy a place of secondary importance to economic rights. No doubt, this is due to the practical difficulty of protecting moral rights, on the one hand, and to the uncertainty, economic and otherwise, that they impose on publishing industries, on the other. The global technological revolution has brought more intense pressure to bear on moral rights than ever before, at times, making them seem irrelevant, or even dangerous for technological progress. However, as this thesis will demonstrate, the fact that moral

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[13]9 September 1886, 828 UNTS 221, Paris Act of July 24, 1971, as am September 28, 1979, online: World Intellectual Property Organisation <http://www.wipo.int/treaties/ip/berne/index.html> [hereinafter Berne Convention].

rights have become increasingly difficult to recognise and enforce makes it, in fact, especially important to clarify and promote their role in protecting creative freedom.

This thesis presents historical, conceptual, and practical arguments that address these underlying themes, as it seeks to build support for a human rights understanding of moral rights. It suggests that the interest of a human rights approach is not limited to transitional countries. Rather, this model may have the wider benefit of enriching law reform in different countries around the world, especially those that suffer from underdevelopment. It may also present a much-needed alternative to the increasingly commercial orientation of copyright law in the international arena.

A. GLOBALISATION AND COPYRIGHT

While copyright law is a relatively recent discipline – for example, compared to venerable branches of the common law such as contract – its pedigree nevertheless extends back more than a century.[14] The Berne Convention first codified international copyright law in 1886.[15] It was a product of tense circumstances in the publishing trade of the day, and negotiations involved a number of celebrated literary names, including Emile Zola and, as a Russian observer of the proceedings, Ivan Turgenev.[16] Through a series of revisions, the Berne Convention continued to be the primary instrument of international copyright law until 1995. It was reasonably successful in combining

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[14]Indeed, the Statute of Anne of 1709-10, though not a copyright law in the modern sense, is traditionally considered to be the first UK copyright statute; during the eighteenth century, the English courts also developed some interesting cases on copyright, including authors' non-commercial interests. See M Rose *Authors and Owners: The Invention of Copyright* (Harvard University Press Cambridge 1993).

[15]N 13.

[16]For a treatment of the Convention in historical perspective, see S Ricketson *The Berne Convention for the Protection of Literary and Artistic Works: 1886-1986* (Kluwer, Centre for Commercial Law Studies, Queen Mary College London 1987).

copyright provisions from the different principles of common-law and civilian traditions, and in bringing developing countries into the international legal arena, first as colonies, and later, as independent states. The Berne system operated by setting an international benchmark standard, with which member countries were expected to attempt compliance. Since the Convention was strictly an instrument of international law, without specific "enforcement" mechanisms that could be employed in member countries, the implementation and enforcement of copyright in member states necessarily remained flexible.

The Berne Convention eventually came to be administered by the World Intellectual Property Organisation (WIPO), a specialist agency of the United Nations. One of the aims of WIPO was to provide assistance to developing countries in drafting and implementing modern copyright provisions. Despite, or perhaps because of, the pressures exerted by developing countries on the Berne Union, culminating in a serious crisis at the Stockholm conference of 1967,[17] some progress was made in addressing copyright issues of special concern to the developing world. In particular, the improvement of literacy and education, and the protection of cultural heritage, became familiar themes of international copyright discourse.

The adoption of the TRIPs Agreement in 1994 has altered this situation fundamentally. The Agreement was a response to a number of factors affecting international copyright, including the growing importance of copyright industries in the United States and other industrialised countries, and their prominence in international

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[17]For a discussion of the participation of developing countries in the Berne Union and the problems that arose during the 1967 Stockholm conference, see the detailed treatment in Ricketson (n 16) 590-632.

trade. Indeed, it may be said that American dissatisfaction with the Berne copyright system, in which the United States controversially refused to participate until 1989, provided the spark for a new international approach to copyright.[18]

The TRIPs Agreement brought copyright out of the United Nations system and made it an integral part of the international trade regime. Copyright industries were now to be treated as any other group of industries included in the series of agreements and structures constituting the WTO. Most importantly, a country's failure to maintain the standards of copyright protection set out in TRIPs could become the subject of dispute settlement proceedings under the general measures of the WTO. Under the Dispute Settlement Understanding, it had become possible for the Dispute Settlement Body to impose trade sanctions on a country in virtually any area of trade to punish copyright infringement.[19] International lawyers have been quick to point out that the linkage of international trade with dispute settlement unquestionably represents the most significant accomplishment in the creation of the WTO.[20]

The new approach to copyright at the World Trade Organisation has generated a great deal of controversy. The main current of dissatisfaction flows from the developing world. Due to the connection between intellectual property and the

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[18]For a detailed discussion of these issues, see RL Gana "Prospects for Developing Countries Under the TRIPs Agreement" (1996) 29 Vand J Transnatl L 735, 739-42, and RM Gadbaw & RE Gwynn "Intellectual Property Rights in the New GATT Round" in TJ Richards & RM Gadbaw eds. *Intellectual Property Rights: Global Consensus, Global Conflict?* (Westview Press Boulder 1988) 38, 48.

[19]In the language of international trade, trade concessions can be suspended: see Article 22 of the DSU on "Suspension of Concessions." It should be noted that, under Article 64.3 of the TRIPs Agreement, the Council for TRIPs may also have a role to play in dispute settlement; but the implications of this provision remain unclear.

[20]See Dreyfuss & Lowenfeld (n 6).

settlement of international trade disputes, developing countries have perceived the TRIPs regime to be coercive in nature. Their concerns seem justified by the fact that developing countries were practically excluded from negotiations for the Agreement, which would presumably tend to prioritise the interests and concerns of the industrialised world as a result – indeed, this point has been noted by legal scholars in industrialised as well as developing countries.[21] However, so unusual is the TRIPs framework, that the controversy surrounding TRIPs has not been confined to developing countries: it has also resulted in friction between industrialised countries. For example, the question of "cultural industries," pitting the United States against France and Canada, has been fraught with contention.[22]

In spite of their concerns, developing countries have uniformly chosen to join the TRIPs Agreement.[23] Renouncing the WTO has not been seen as a realistic economic option by governments in any of these countries, in part, because of the demonstrated ineffectiveness of alternative developmental models over the years, as well as the increasingly limited range of ideological options available to support policies unfavourable to trade and economic liberalisation.[24] Change from within the WTO

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[21]See Dreyfuss & Lowenfeld (n 6). A series of essays from India confirms the ambivalence of developing countries towards TRIPs negotiations: for example, see KRG Nair & A Kumar *Intellectual Property Rights* UDCCS Seminar Papers Series No. 1 (Allied Publishers New Delhi 1994), 11.

[22]See Fraser (n 5 above).

[23]A current list of WTO members can be found on the organisation's web site: <http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm>.

[24]See MJ Trebilcock & R Howse *The Regulation of International Trade* (Routledge London 1995) 301-22: they trace the post-War evolution of theories of development. One of the ironies of the demise of socialism in Eastern Europe, which does not escape their observation, is the current international predominance, verging on exclusivity, of market-based economics, and therefore, of trade-based models of

system may be the hope of many developing countries, and some tentative propositions in this regard were advanced by India in the course of the first TRIPs dispute under the DSU, involving a complaint by the United States against India's pharmaceutical patent provisions.[25] In the meantime, developing countries have undertaken comprehensive programmes of law reform under the TRIPs Agreement, including, of course, copyright provisions.

The movement from Berne to TRIPs has also signified a major change in the international position of "transitional" countries. During the socialist period, many of these countries had joined the Berne Convention: Bulgaria, Czechoslovakia, the German Democratic Republic, Hungary, and Yugoslavia were all signatories to the most current, 1971 Paris revision. However, a significant group of socialist countries also remained half-hearted participants: Poland and Romania were members of the Berne Union, but they adhered only to the 1928 Rome text.[26] Despite earlier expressions of interest, the Soviet Union remained entirely excluded from the Berne system, and its first foray into international copyright relations was membership in the

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development.

[25]In its submissions, India pointed out that developing countries' understanding of TRIPs requirements should be weighed in the interpretation of the TRIPs Agreement under the DSU, but the panel did not respond to this argument. See *India– Patent Protection for Pharmaceutical and Agricultural Chemical Products (Complaint by the United States) (1997),* WTO Doc. WT/DS50/R (Panel Report) para 6.17, online: <http://www.wto.org/wto/dispute /distab.htm>. The case is cursorily summarised in MJ Adelman & S Baldia "Prospects and Limits of the Patent Provision in the Trips Agreement: the Case of India" (1996) 29 Vand J Transnatl L 507, 525-29.

[26]This information is summarised by M Ficsor "The Past, Present and Future of Copyright in the European Socialist Countries" (1983) 118 RIDA 33, 57 in a useful chart.

less rigorous Universal Copyright Convention, at the late date of 1973.[27]

Due to their general isolation from international affairs, and Russian suspicion of international copyright law, the socialist countries were not an influential group in international copyright relations. As in other areas of international activity, their position in the copyright system was quite ambiguous. Although many of them were officially part of the Berne Union, the feeling in the international community was that socialist countries were not serious about copyright. There was a widespread perception that membership in the international agreements did not impose any obligation on socialist states to honour the rights of their own authors, who were subject to rigorous censorship regimes. At the same time, the international flow of copyright materials into and out of socialist countries was limited by the political restrictions of the day.

The TRIPs Agreement was the first instrument of international copyright law to include fully the countries of Central and Eastern Europe. In the process of integrating formerly socialist countries into the international regime, the issue of accommodating their needs arose for the first time. As the TRIPs Agreement was finalised, it became apparent that, in relation to international copyright matters, the "transitional" countries in many ways resembled developing nations. Like developing countries, transitional countries faced the need for rapid development to remedy the ill effects of a prolonged period of oppression and stagnation. Access to internationally current knowledge and information, and the encouragement of creativity and innovation at home, had become

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[27]Russia was among the first countries to become interested in the Berne Convention, and the Tsar even organised a conference to discuss Russia's involvement in international copyright matters in 1906: see Ricketson (n 16) 88-89.

crucial objectives of copyright policy. In its final form, the TRIPs Agreement recognises this kinship between the interests of developing and transitional countries. The Agreement makes provision for developing countries to "phase in" intellectual property protections over a five to ten year period, depending on the developmental level of the country in question.[28] Transitional countries are included in these measures.[29]

Growing protests against globalisation and the vehemence of the anti-globalisation movement have led to a sense that the future of the WTO may, itself, be uncertain. Nevertheless, the TRIPs Agreement has introduced a new and radically different concept of intellectual property rights into the legal arena. It has opened a Pandora's box of consequences, both practical and conceptual, and going back to an older way of thinking about intellectual property may no longer be either possible or desirable.

B. MORAL RIGHTS IN THE INTERNATIONAL COPYRIGHT SYSTEM

Although the TRIPs Agreement has succeeded in standardising most aspects of copyright norms, the moral right of the author remains a notable exception. Moral rights are a form of legal protection for the non-economic interests of the authors of creative works. They are based on the idea that an author has a special relationship with his work, so that, for example, it is important for him to be identified as the author,

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[28]The period of transition has been set at five years for developing and transitional countries, and eleven years for least-developed countries. With regard to product patent protection, developing countries are generally allowed a ten-year transition period. See Part VI of the TRIPs Agreement on Transitional Arrangements. For a consideration of some of the issues arising as these transitional periods expire, see Samahon (n 9).

[29]See Part VI of the TRIPs Agreement on "Transitional Arrangements."

and to prevent people from damaging, defacing, or distorting his work. Copyright generally assigns to authors an exclusive right to govern the reproduction and distribution of their work, with a view to ensuring that authors have some degree of control over the revenues generated by sales. In contrast, moral rights are not directly concerned with the economic aspect of creative work; their preoccupation is with its personal, artistic, and cultural value.

The doctrine of moral rights can lead to unusual legal consequences. For example, an author may continue to vindicate his moral rights even after he has sold the economic rights to his work. The extension of copyright protection to a range of "works" beyond traditional creative works, such as computer programs, has led to the controversial situation where moral rights may potentially be applicable to these new kinds of copyright works, as well.[30] As these examples illustrate, moral rights can be very powerful; indeed, concern about the economic impact of moral rights has led some jurisdictions to limit their exercise by means of controversial devices such as standard form waivers in artists' contracts.[31]

At the international level, the TRIPs Agreement has adopted a strange formula

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[30]The potential problems in allowing moral rights to apply to computer programs as "literary works" has led at least one jurisdiction, India, to make computer programs ineligible for moral rights protection. See section 57 of the Indian Copyright Act; this provision was most likely a consequence of judicial consideration of the issue in *Statart Software Pvt Ltd* v *Karan Khanna;* the case is described in detail by P Anand "The Concept of Moral Rights under Indian Copyright Law" (1993) 27 Copyright World 35, 36-37.

[31]The treatment of waivers in a number of common-law jurisdictions, including Canada, the United States, the United Kingdom, India, and Nigeria, is considered by G Dworkin "The Moral Rights of the Author: Moral Rights and the Common-law Countries" (Spring/Summer 1995) Columbia-VLA J L & Arts 229, 244-45, 256-57, 261-64. The significance of waivers is also discussed by Fraser (n 5) 290-96.

for dealing with moral rights. Article 9.1 of the Agreement requires member countries to "comply with Articles 1 to 21 of the Berne Convention (1971)."[32] Since international moral rights are codified in Article 6*bis* of the Berne Convention, signatories to the TRIPs Agreement are apparently required to protect moral rights in their national legislation in accordance with the provisions of Berne Article 6*bis*. However, Article 9.1 of TRIPs goes on to specify that, "[m]embers shall not have rights or obligations under this Agreement in respect of the rights conferred under Article 6*bis* of that Convention or of the rights derived therefrom." The effect of this elliptical formula is that Article 6*bis* rights cannot be enforced through the dispute settlement mechanism of the WTO. In other words, while copyright as a whole has moved into an international framework built on the principle of enforcement, moral rights continue to be governed by an international standard which may be best understood as aspirational, rather than mandatory.

Is the failure to standardise moral rights under the TRIPs Agreement a positive or a negative development? There is no clear answer to this question. In one sense, moral rights have remained an area of flexibility in an increasingly rigid international copyright system. However, the failure to achieve "enforceability" for these rights in the WTO system may also signal a loss of prestige and importance attached to them at the international level. Rather than attempting to determine whether the exclusion of

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[32]Although the Berne Convention was amended in 1979, the 1971 version, adopted at the Paris Conference, is the latest revision of the Convention to become internationally accepted. It should be noted that WIPO has also generated a Copyright Treaty in 1996, but this is a special agreement within the meaning of Article 20 of the Berne Convention, which allows member countries to agree upon measures to improve copyright standards beyond the provisions of Berne. It should be noted that there is also a statement on relations between WIPO and the WTO: see WIPO, on-line <http://www.wipo.org>.

moral rights from TRIPs is ultimately for the best, it may be more interesting to consider the implications of their ambiguous position for the development of international copyright law.

The difficulty of achieving an international standard for moral rights is hardly surprising. Moral rights have been an area of persistent international controversy for decades. The divisions separating countries and legal systems over moral rights have deep historical and cultural roots. For example, the United States has long been wary of moral rights for a variety of reasons, including the possibility that they may potentially be in conflict with provisions of the American Constitution concerning the appropriate policy basis for copyright law. The American Constitutional framework suggests a need to balance rights of authorship against the right of the public to have access to works of the mind.[33] Among the arguments historically presented against moral rights is the perception that they are too strongly oriented towards authors' interests, and too restrictive of the uses of knowledge, to be compatible with the intentions of the framers of the Constitution.[34] Nevertheless, after joining the Berne Convention, the United States enacted the Visual Artists' Rights Act, which introduced limited moral rights protection for visual artists, thereby "soften[ing]...[the] prohibition of explicit Moral

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[33]The Constitution of the United States, Article I, Section 8, Clause 8: the purpose of copyright protection is to "promote the Progress of Science and useful Arts." the implications of the provision are discussed in S Fraser "The Conflict between the First Amendment and Copyright Law and its Impact on the Internet" (1998) 16 Cardozo A & E LJ 1, 12.

[34]These arguments are discussed in detail by Fraser (n 33); see also NC Suhl "Moral Rights Protection in the United States under the Berne Convention: A Fictional Work?" (2002) 12 Fordham IP, Media & Ent LJ 1203, 1213-15 for a summary of the Constitutional aspects of American copyright.

Rights protection."[35] Moreover, in the recent decision of *Eldred* v *Ashcroft,* the United States Supreme Court found that there was no conflict between copyright law and the rights of free speech under the First Amendment; indeed, copyright law, through the idea-expression dichotomy and the "fair use" defence, provides built-in protection against the violation of free speech principles.[36] It remains to be seen whether this decision will remove at least one of the obstacles to greater recognition for moral rights in the United States.

In the recent negotiations for the TRIPs Agreement, the United States was again uneasy about bringing moral rights protection formally into American law. Apart from legal tradition, however, political factors were also an important influence on the American position towards moral rights. A powerful film industry lobby, whose members were concerned that moral rights could have far-reaching economic implications for the production and distribution of movies, campaigned against them.[37]

The American approach to moral rights has met with widespread criticism from European countries, as well as Canada. The most bitter opponents of the US view are probably the French, who have what is generally acknowledged to be the strongest

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[35]Suhl (n 34) 1215; she also emphasises the narrowness of the circumstances in which the VARA can actually be invoked. Nimmer discusses the strange situation surrounding American accession to the Berne Convention, where the United States claimed to include adequate protection for moral rights through its common law, but passed the VARA: see D Nimmer "Conventional Copyright: A Morality Play" (1992) 3 Ent LR 94. It should be noted that the Lanham Act also was protection to moral rights, particularly the attribution right, as a form of consumer protection and truth-in-marketing legislation: see Suhl (n 34) 1216-22.

[36]*Eldred* v *Ashcroft,* 123 SCt 769, 789 (Jan 15, 2003).

[37]In the case of films, the question of authorship and who would have the right to assert moral rights is potentially problematic. For example, see Nimmer (n 35) 95. The point is also made by Fraser (n 5) 311-20.

tradition of moral rights protection in the world, and who have often emphasised the importance of distinguishing between cultural and commercial concerns in international trade negotiations. In a less drastic form, the opposition between France and the United States over moral rights is replicated within the European Union, itself. Here, the contrast lies between the civilian legal traditions of Continental European countries and the British common-law system. Continental systems such as those of France and Germany have traditionally assigned great importance to authors' moral rights, to some extent, constructing their copyright systems around these rights. In Britain, copyright is based on the notion of ownership and its economic consequences, rather than authorship and its cultural implications. This particular division is an important reason why the drive to harmonise intellectual property rights within the European Union has yet to make substantial progress in the area of moral rights.[38]

The perspectives of developing countries on moral rights are equally distinctive and interesting. Legal theorists have often linked moral rights with the particular historical and cultural context of European Romanticism, and this viewpoint implies that moral rights may not be well-adapted to the greatly divergent cultural traditions of the developing world.[39] Nevertheless, the vast majority of developing countries have adopted moral rights provisions, citing as strong incentives the "prestige" associated

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[38]The issues surrounding the harmonisation of moral rights standards are detailed in a 1995 Green Paper Presented by the European Commission. What is striking, is that the issue appears to have remained at a standstill since then. See Commission of the European Communities "Green Paper: Copyright and Related Rights and Information Society" (19.07.1995) COM(95)382 final, Section VII: Moral Rights, 65.

[39]For example, see the seminal study of moral rights in historical context by M Woodmansee "The Genius and the Copyright: Economic and Legal Conditions of the Emergence of the 'Author'" (1984) 17 Eighteenth-Century Studies 425.

with these rights and their potential cultural value.[40] Moreover, the approach of developing countries to moral rights is often highly innovative. Many of these countries have attempted, not only to adapt moral rights to their distinctive cultures, but also, to fashion them into effective tools of particular cultural policies.

The main international controversies underlying moral rights may be summarised as the American versus the European view, civilian legal tradition versus the common-law, and an industrialised versus a development orientation. In different ways, the three dichotomies underlying international moral rights protection all originate from the same point of fundamental tension. The ambivalence reflected in moral rights is perhaps most accurately expressed in over-arching terms as an opposition between commercial and cultural views of copyright.

With the adoption of the TRIPs Agreement, the conflict between trade and culture has now become a competition of the future with the past. The character of the international copyright regime has changed. Moral rights are not only a casualty of this change – as illustrated by the difficulties of achieving an international standard for moral rights protection – but they are also a window onto the conceptual fault lines underlying the international edifice of copyright law as a whole. Copyright, itself, is caught between its past as a *mélange* of commercial concepts and cultural policies, and

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[40]See EW Ploman & LC Hamilton *Copyright: Intellectual Property in the Information Age* (Routledge & Kegan Paul London 1980) 22-25. Ploman & Hamilton cite Claude Masouyé, who tries to explain the appeal of copyright and moral rights for developing countries in terms of their association with the ideals of "cultural progress" and "national prestige." Despite the fact that it was published two decades ago, Ploman & Hamilton's work remains an important study of copyright in the developing world.

its future as an instrument of international trade.[41] The conflict over moral rights is symptomatic of the fundamental conceptual contradictions underlying our modern view of copyright.

C. COPYRIGHT AND MORAL RIGHTS IN TRANSITIONAL COUNTRIES

In relation to moral rights, socialist countries drew heavily on their heritage of European civil law: in many ways, socialist provisions on moral rights reflected the legal traditions of Western Europe. However, socialist law also developed a different approach to moral rights. Their treatment of moral rights doctrine was based on their unique cultural traditions, and, superimposed upon them, the political ideology of socialism, which influenced the character and content of the law.

Copyright and moral rights after socialism have become dependent on international standards to an unprecedented degree. Formerly socialist countries face international pressure to harmonise their laws, not only with the TRIPs Agreement, but also, with two other, distinct copyright systems.

After the WTO, a second international influence on the development of copyright in post-socialist countries has been the European Union, which has developed parallel legislation complementing the WTO framework. Many countries of Central and Eastern Europe will be joining the European Union over the next decade, including a group of countries in 2004, and the EU has clearly indicated that their copyright

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[41]For example, see Prins (n 2) 238-42. As he points out, the Soviet Union's failure to adhere to the Berne Convention was viewed by Soviet authors as enforced isolation from the world of international literature. From another point of view, the contrasting perspective of the government, which was ostensibly concerned about paying royalties to foreign authors, represents a common development problem in international copyright.

standards will have to be aligned with the European harmonisation directives.[42] However, the EU influence is also felt in Russia, where hopes of future free trade with the EU hinge on the implementation of adequate measures for copyright protection.[43]

A third influence on copyright after socialism is presented by the WIPO Internet treaties. These two treaties, drafted by WIPO in 1996 to bring international copyright norms into conformity with the new requirements of communications technologies, entered into force in March and May of 2002.[44] A number of ex-socialist countries have joined one or both of these treaties, and conformity with their provisions may prove to be quite important for improving their access to international technology.[45]

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[42]Lithuania, Latvia, Estonia, Poland, Slovakia, the Czech Republic, Hungary, Slovenia, Malta and Cyprus are slated for membership in 2004: see "European Commission Recommends 10 Countries For EU Membership in 2004," 10/9/2002, online: <http://www.arge28.com/dst_SZ_Details.asp?SNID=75>. The projected date is 1 May 2004: EU DG – Enlargement, online: <http://europa.eu.int/comm/enlargement/enlargement.htm>.

[43]The Russian Federation actually concluded an "Agreement on Partnership Incorporation" with the European Union on 24 June 1994: for details of the agreement, see M Elst "The Interaction of European Community and Russian Copyright Law: A Matter of Partnership and Cooperation" (1996) 22:3 Rev C & E Eur L 267, 276-85.

[44]The WIPO Copyright Treaty entered into force on March 6, 2002; the WIPO Performances and Phonograms Treaty, on May 20, 2002. See J Reinbothe & S von Lewinski "The WIPO Treaties 1996: Ready to Come into Force" (2002) 24(4) EIPR 199,199.

[45]Belarus, Bulgaria, Croatia, Czech Republic, Hungary, Kyrgyzstan, Latvia, Lithuania, Moldova, Romania, Slovakia, Slovenia, and Ukraine are signatories to the WIPO Copyright Treaty (as of July 25, 2002); all of these countries and Albania are signatories to the WIPO Performances and Phonograms Treaty (as of October 15, 2002). An up-to-date list of signatories to the Internet Treaties is available on the WIPO web site: <http://www.wipo.int/treaties/ip/wct/index.html>, and <http://www.wipo.int/treaties/ip/wppt/index.html>. Although Russia is not yet a signatory to either of the treaties, it has recently undertaken amendments to its copyright legislation to meet their standards for the protection of new technologies. For a summary of the provisions pending, see I Motsnyi "Russia: Russia is About to Amend its Copyright Laws" Mondaq Business Briefing, online: <http://www.mondaq.com>.

Faced with these international pressures, it would be difficult to exaggerate the scope and extent of copyright reform in Eastern Europe. In most countries, the law has been revised to the point where virtually nothing remains of the pre-transition legal framework. The involvement of international expertise in these projects has also been extensive and, at times, controversial. For example, law reform has occasionally taken the form of literally translating provisions from American or, occasionally, European law into local languages.[46]

A question that arises is why such extensive reform has become the norm in relation to copyright. As noted above, all formerly socialist countries had copyright laws during the socialist era, and, with the notable exception of Russia, a number of them were also members of the Berne Union, based on the internationally-accepted 1971 Paris text of the Convention.[47] It would therefore be reasonable to assume that copyright law in this part of the world bore some resemblance to the international shape of the law, and that post-socialist reform should have involved a much simpler and less invasive treatment of copyright. Increasing the duration of copyright protection and incorporating new provisions to deal with technological change should have been sufficient.

However, there are at least three important reasons why considerations like

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[46]Law reform in Eastern Europe and certain other jurisdictions, particularly in its "American version", receives an informative and helpful critique in J DeLisle "Lex Americana? United States Legal Assistance, American Medical Models, and Legal Change in the Post-Communist World and Beyond" (Summer 1999) 20 U Pa J Intl Econ L 179.

[47]Russia was a member of the Universal Copyright Convention, another international copyright document that has, however, been historically much less significant than the Berne Convention: see Prins (n 2) 241-42.

these have not limited reform. First, socialist copyright laws, even when they were superficially compatible with the Berne Convention, bore the stamp of socialist policies concerning authors' rights. This was certainly a problem in relation to economic rights, but it also affected personal rights. As Mihály Ficsor pointed out in 1983:

> [T]he question that may emerge is *where to place any socialist or non-socialist elements of copyright if the most important rights and their limitations are determined by precise provisions of the [international] conventions.*
>
> The *interpretation* of the conventions is the right of the member States. So even by way of interpretation certain differences may and do occur and that is influenced – among other factors – also by the nature of the legal systems. However[,] those differences represent only some isolated elements of copyright law. There is the possibility of having also *provisions* which are not compatible with the conventions, but those can prevail only for *internal situations* (for the relations between national authors and users, where no international obligation is involved).[48]

This passage is particularly interesting because Ficsor draws attention to the limited influence of international copyright provisions in socialist countries, while he appears reluctant to accord this recognition its full significance. The caveat appears in the last sentence, where he points out that socialist copyright provisions will inevitably dominate the lives of domestic authors, due to the restricted reach of international standards. This concern may explain the rather peculiar reaction of Western countries to the decision of the Soviet Union to adhere to the Universal Copyright Convention in 1973; as Corien Prins observes, "[s]everal observers feared that the Soviet legislature would use the ratification just for the purpose of suppressing the writings of dissidents."[49] Despite the overlay of international agreements, copyright at that time

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[48]Ficsor (n 26). His somewhat sceptical interpretation of the Berne Convention does, however, make sense from the perspective of a socialist legal scholar.

[49]Prins (n 2) 232. He also cites similar concerns among the Soviet intelligentsia.

remained a territorially-based right.[50]

Ficsor goes on to make a second point on the interaction of international and socialist copyright law. He argues:

> Much more important is the fact that the [international] conventions regulate only the rights themselves and do not contain any provision about *the utilisation of those rights.*[51]

Here, Ficsor appears to be emphasising the contrast between the letter of the law and its implementation. International conventions allowed member countries a degree of flexibility in implementing their provisions in national legal systems; they did not include coercive mechanisms for the implementation of rights, but were based on the good faith adherence of member countries; and they could only assure the rights of foreign nationals in member countries, without imposing standards for the treatment of domestic authors. Due to these features of the international copyright system, socialist membership in international conventions did not necessarily mean everything it could have meant.

The contrast between socialist legislation and its implementation in practice has been another major impulse driving post-socialist law reform. Since the socialist provisions had often not been tested in practice, they may have been perceived as

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[50]It should be noted that, in the current copyright system, it still remains theoretically possible for states to discriminate between their own nationals and the nationals of other WTO countries. However, there is great political pressure under TRIPs to harmonise the treatment of national and international authors, which has led observers to comment on the relatively greater rigidity of the TRIPs system in relation to the earlier framework for international copyright under the Berne Convention. For example, Gana draws a distinction between "globalisation" and "internationalisation" of copyright law, distinguishing the TRIPs Agreement from the Berne Convention. See RL Gana "Has Creativity Died in the Third World? Some Implications of the Internationalisation of Intellectual Property" (1995) 24 Denv J Intl L & Pol'y 109, 121.

[51]Ficsor (n 26) 48.

unwieldy, and potentially difficult to implement or enforce. Moreover, socialist copyright law may have suffered from the same internal contradiction between word and meaning that afflicted public law in the Soviet era. For example, extensive constitutional norms and human rights were enshrined in the laws of Soviet Russia, while Soviet citizens often lived in extreme conditions of oppression, even in terror for their lives.[52]

These two concerns relate to the movement out of socialist legality; a third reason necessitating intellectual property law reform in the region, perhaps the most pressing of all, has been the movement towards democracy, and a corresponding resurgence of domestic needs related to creativity and innovation. This is not only an issue of making new technology and innovation more accessible to the citizens of post-socialist countries, an urgent issue in its own right. Rather, formerly socialist countries face the subtler challenge of reviving the capacity of their own citizens to participate actively in development, growth, and change. This task not only involves the idea of providing incentives for enterprise, an accepted policy basis for copyright law, but it will also require the removal of obstacles, such as fear of discovery and persecution, from the creative process.

This study seeks to establish a sound conceptual foundation for exploring moral rights in the post-socialist world. What is the perception of moral rights in formerly socialist countries? Have moral rights been a focus of law reform? How closely has

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[52]It is interesting that the first wave of Soviet dissent in the 1960s included an insistence that state officials should respect the *letter* of the law. For example, in a 1965 protest, Alexander Esenin-Volpin, the son of Russian poet Sergei Esenin, demonstrated his opposition to the government by displaying a sign that read "Respect the Constitution." The incident is described in G Hosking *A History of the Soviet Union 1971-1991* Final Ed (Fontana Press London 1992) 417.

moral rights reform been integrated into copyright reform? Above all, what should be the conceptual approach to moral rights after socialism? How important are these rights in the post-socialist legal and cultural environment? What, if anything, is their potential contribution to democratisation? This study seeks to explore the range of these issues through an analysis of the situation of moral rights in the Russian Federation, a country that is at once representative of post-socialist legal challenges, and a distinctive example in its own right of the possibilities and limitations of moral rights doctrine.

D. MORAL RIGHTS IN RUSSIA

Although it is by far the largest and most powerful of the formerly socialist countries, Russia's experience of transition has been particularly difficult.[53] There are a number of reasons behind post-socialist instability in the Russian Federation. Russia was the centre of an empire which began to disintegrate with the fall of the Berlin Wall in 1989, and which continues to undergo the process of dissolution in the form of a bitter, ongoing war of independence in Chechnya. The collapse of the Soviet Union not only created uncertainties about the relationship between Russia and the Republics, but it also generated a power vacuum within Russia, itself, which many groups, from former Communists to Mafia chiefs, have subsequently tried to fill. In psychological terms, Russia was also the country where Eastern European socialism originated, and where the concept of socialist society extended its most penetrating roots. As the heartland of socialism in Eastern Europe, Russia after the fall of the Soviet Union has had to come to terms with the consequences of its historic leadership, and to face its proportionately

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[53]Other countries that have experienced especially intense problems are Albania, Belarus, and Romania, the poorest of the post-socialist countries. Nevertheless, wild instability remains a characteristic of the Russian situation that is not apparent elsewhere.

greater share of responsibility for the troubled post-War history of the region.

The similarities between Russia and other countries of the region lend great interest to a study of Russian law reform for other regional initiatives. Central and East European countries share a common legacy of socialist government and socialist law with Russia. Their post-war legal systems reflect the framework of Russian law under the Communists, and as such, Russian law is an important strand in the texture of their legal fabric. Many Eastern European countries also share a Slavic culture with Russia. These considerations are among the reasons why a study of Russian legal developments will be relevant and important throughout Central and Eastern Europe.

Russia's particularly problematic experience of transition and legal reform also means that problems connected more generally with the process of law reform can be examined in detail through a study of the Russian example. These lessons about reform will be of particular interest to developing countries in other parts of the world who are engaged in intensive law reform, themselves, as a result of the TRIPs Agreement and the exigencies of the new international intellectual property regime.

A third insight to be gained from an analysis of Russian moral rights reform has to do with the international problem of conceptual poverty in the area of intellectual property law. Common wisdom among experts is that little can be learned from the study of legal systems in developing jurisdictions – at least, nothing that will be directly applicable to the concerns of industrialised countries, or in the international legal arena, which they naturally dominate. This attitude has translated into an absence of diversity in international law, and in conceptual models of the law in the industrialised world. In relation to intellectual property law, this problem is an especially serious one. In its own way, the industrialised world, too, is "developing" in this area, as the legal systems

of industrialised countries struggle to come to terms with the consequences of twenty-first century technological developments and the range of new creative possibilities they represent, whether in science, industry, or art. Law in industrialised countries is in need of a new wellspring of ideas to deal with current developments. The Russian experience of legal transition may be one such source of new legal concepts. They are concepts taken from an environment in which the extremes of oppression and creativity, power and vulnerability have co-existed as perhaps nowhere else. They offer hard-won and unique insights about the social role of law, and the international community should not be too quick to discard them.

E. STRUCTURE OF THIS STUDY

This study is concerned with the basic question of whether intellectual property rights, and moral rights in particular, can contribute to democratisation in post-socialist countries. The thesis begins by elaborating a theory of the relationship between intellectual property law and political change that will clarify the significance of moral rights reform in transitional countries. It goes on to develop a historical study of moral rights in Russia, examining how the doctrine and the law evolved under Russia's different governments, and culminating in an exploration of the relationship between moral rights and censorship, conflicting doctrines which experienced a powerful collision in the 1966 "show trial" of Andrei Siniavskii and Yuli Daniel, two Soviet writers of fiction.[54] The thesis concludes with an examination of how current Russian reforms of copyright and moral rights have responded to the historical legacy of

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[54]A contemporary account of the trial, including background information and an English translation of the trial transcript, was compiled by the noted American scholar of Russia, Max Hayward: see M Hayward *On Trial: The Soviet State Versus "Abram Tertz" and "Nikolai Arzhak"* (Harper & Row New York 1967).

Communist legality, and the lessons for the international legal community that can be drawn from Russia's struggles with authorship rights.

In spite of the disintegration of its former role as the world's second "great power," Russia's political, economic, and cultural influence in Europe and the world remains profound. The progress of legal transformation in Russia may also prove to be of interest and value to the world copyright community because it has the potential to enrich the relatively narrow field of ideas and practices animating international copyright law. Regardless of how the Russian situation may develop in years to come, Russian reform offers the international legal community at least one extraordinary opportunity: a chance to reconsider the logic of international trade, and in particular, to reassess the controversial entanglement of trade law with the world of ideas.

II. INTELLECTUAL PROPERTY LAW AND POLITICAL TRANSFORMATION

Intellectual property rights have a number of implications for the transition to democracy. However, the relationship between intellectual property and political change in post-socialist countries has not received the attention it deserves. Over the past decade of intensive efforts, reform has instead been dominated by international demands for the implementation of intellectual property rights that reflect the practices of economically-advanced countries. The standards of North American and Western European countries are embodied in the TRIPs Agreement, the most powerful legal instrument in the history of international copyright relations.[1] Despite its coercive character, which is generally acknowledged throughout the world,[2] the TRIPs Agreement offers the overwhelmingly strong incentive of full participation in the international trade regime to economically less-developed countries. Transitional countries, like developing countries, have uniformly chosen to pursue membership.

Ex-socialist countries have distinctive and deeply-rooted needs in relation to intellectual property. In some instances, international levels of protection may well correspond to domestic requirements. Often, however, a conflict arises between the domestic needs of transitional countries, on the one hand, and the requirements of the

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[1] *Agreement on Trade-Related Aspects of Intellectual Property Rights,* Annex 1C to the *Agreement Establishing the World Trade Organisation,* 15 April 1994, 33 ILM 1197 (entered into force 1 January 1996) [hereinafter TRIPs Agreement], online: WTO Homepage (Legal Texts) <http://www.wto.org/wto/legal/finalact.htm>.

[2] For example, see the discussion in RC Dreyfuss & AF Lowenfeld "Two Achievements of the Uruguay Round: Putting TRIPs and Dispute Settlement Together" (1997) Va J Intl L 275, 301-02.

international copyright regime, on the other. In these circumstances, the implementation of Western-style intellectual property standards may not be compatible with their underlying needs. Rather, the adoption of international standards may actually undermine development and democratisation in the region.

Special policy concerns related to intellectual property law in a "transitional" environment raise at least three distinctive issues. These are the role of "intellectual property" in the process of democratisation; the status of culture after socialism; and the problem of technological backwardness. In some respects, these problems are unique to the political circumstances of the post-socialist world. In other ways, however, related problems also arise in non-Western and less economically-developed jurisdictions throughout the world.

The variety of creative and innovative activity that is designated by the term, "intellectual property," is an especially important resource for post-socialist countries. Intellectual property represents human potential which, in many cases, was unable either to express or to realise itself under socialist rule. Since the collapse of socialism, post-socialist countries have experienced an intense need for the products of intellectual activity, creative and innovative work that will help their societies to progress towards greater openness and prosperity. At the same time, the transitional need for creation and innovation is deeper and more complex than the issue of access to knowledge. Transitional countries also need to revive the ability of their people to engage in creative activities, after a long period of time when creativity was strongly discouraged, either actively or implicitly, by state policy.

Intellectual property rights therefore have a dual significance for transitional countries. They must not impede the public from having adequate access to new works, but they must also provide an effective system, in traditional copyright parlance, of "incentives to create." Considered closely, the question of incentives is surprisingly complex: not only does it signify the provision of economic incentives, but it also encompasses larger issues, such as adequate legal protection for one's personal rights, and protection from state persecution of personal expression, or disadvantageous official exploitation of works or inventions.

Transitional countries must also deal with the problem of cultural reconstruction. In socialist countries, culture endured a long period of oppression. In some countries, cultural oppression simply meant the neglect of pre-existing culture; in others, it involved the active and systematic modification, mutilation, or destruction of culturally-important works, accompanied by a simultaneous quest to destroy the reputations, personalities, and even physical existence of creative authors. Post-socialist governments must therefore address the problem of restoring rights and reputations to the works and authors of the past. This process is one of ongoing historical discovery and revision, and it is likely to be ongoing for many years.

In addition to cultural issues, access to knowledge and technology that are internationally current is crucial for transitional countries. By bringing their copyright laws into line with the TRIPs Agreement, transitional countries hope that they will be able to assure themselves of access to current technologies, particularly those that originate in the United States and Western Europe. However, their need for technology is especially

intense, while their ability to pay for the rights to use new technologies is limited.

It is apparent that intellectual property policy in transitional countries must satisfy complex demands. A successful approach to law reform in the region will be correspondingly difficult to achieve. Indeed, many of the shortcomings of the past decade of reform reflect the absence of a larger perspective on the full range of issues involved. However, it is certain that the achievement of lasting legal change in post-socialist countries will depend on a change of orientation in the future.

An approach to intellectual property rights that addresses transitional concerns will require a fundamental shift in the conceptual framework behind reform. Law reform should not be driven exclusively, or primarily, by the requirements of international copyright standards. Rather, it should respond to the special needs of ex-socialist countries. This chapter suggests that a transitional approach to intellectual property reform should be based on three, interrelated, guiding principles.

First, in dealing with intellectual property issues, transitional countries should be understood as areas that are, in political and economic terms, "developing." The circumstances of transitional countries closely resemble the difficult situation of intellectual property law in the developing world. By recognising that many of the problems of transitional countries are developmental in nature, it becomes clearly apparent that intellectual property law must fulfil different policy objectives in these countries than those of the industrialised world.

Secondly, transitional countries are involved in a movement from an oppressive regime restricting the circulation of information in society, in both legal and practical

terms, to a "free" environment for knowledge. Intellectual property rights, which are fundamentally concerned with the circulation of knowledge throughout society, are part of this transition. Intellectual property rights will therefore have a role in facilitating the post-socialist movement into a new information regime.

Thirdly, and finally, the discussion in this chapter introduces the idea that the values inherent in copyright law can make a positive contribution to political change. The structure and content of copyright law in these countries should therefore reflect the role of copyright principles in supporting democratisation.

A conceptual approach to law reform that is built on this foundation will make intellectual property law more responsive to the special needs of transitional countries, both in the short-term period of transition, and in the long-term maintenance of social stability. It also presents the possibility of a new way of looking at intellectual property rights, themselves. Intellectual property reform in transitional countries may help to generate new international models of intellectual property rights. This thesis will explore one model emerging from the socialist and post-socialist experience of intellectual property law, a human rights vision of authors' moral rights.

The abuse of creative freedom in socialist regimes has led to an especially strong need to protect creativity in post-socialist societies. Historical necessity raises the possibility of building a legal bridge between authors' rights and human rights. However, the relevance of a human rights model is not limited to the transitional experience. Rather, it can make an important contribution to international copyright law, which, in recent years, has become increasingly dominated by commercial priorities, and is experiencing a

renewed, though largely unacknowledged, need for humanitarian values.

The transitional needs of post-socialist countries can best be studied through a historical and comparative approach to intellectual property rights. A historical approach makes it possible to understand the nature of the socialist intellectual property regimes – an important legal legacy, and, inevitably, a constituent element of the present legal framework in the region. The failure to undertake an adequate historical analysis, to date, is among the more serious problems of law reform. It has made reform unresponsive to historical needs, and encouraged the development of a mythology of socialist law, a false and counterproductive situation.

As a complement to the historical perspective, the approach of comparative law to reform is a very great value: it allows reformers to identify and understand the unique features of transitional legal systems. The comparative perspective is important for foreign experts who hope to make a contribution to the reform effort; it may also bring a welcome sense of distance and clarity to the local reformers who are intensely and personally involved in the high-stakes gamble of national transformation.

A. TRANSITION AND DEVELOPMENT

New intellectual property standards in post-socialist countries have been adopted from international models, often with little analysis of the potential implications of these foreign provisions for societies in transition. As William Butler comments:

> [I]t must be elementary comparative law that no one attempts to transplant wholesale one legal culture into another; that one works in the language of the recipient legal system; that one has a thorough command of the recipient legal system. As regards the former Soviet Union this is rarely the case, to the considerable disadvantage of everyone concerned. Law reform assistance to this

day remains substantially uncoordinated, underfunded, and rendered by individuals and institutions who are not adequately equipped to deliver the product which is required.[3]

The primary objective of intellectual property reform in transitional countries has been to bring national intellectual property legislation into facial conformity with international requirements, particularly as these are expressed in the TRIPs Agreement.[4] Reform has also been concerned with ensuring adequate "enforcement measures" for these provisions, mainly in the form of coercive and punitive measures rather than preventive ones. However, it is increasingly apparent that intellectual property rights have a larger role to play in the process of post-socialist transition. Intellectual property rights are a key element in the transformation of post-socialist "information regimes," and in the democratisation of political values related to culture and expression. How should policy-makers attempt to harness the potential for development in intellectual property rights?[5]

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[3]WE Butler "Foreign Legal Assistance in the CIS: Lessons from the Early Years" in G Ginsburgs, DD Barry & WB Simons (eds) *The Revival of Private Law in Central Eastern Europe: Essays in Honour of FJM Feldbrugge* (Kluwer Law International The Hague 1996) 499, 509.

[4]Through the Harmonisation Directives, the European Union has also been an important influence on intellectual property reform: for example, the impact of the Copyright Harmonisation Directives on Russian copyright law is discussed in detail by M Elst "The Interaction of European Community and Russian Copyright Law: A Matter of Partnership and Cooperation" (1996) 22(30) Rev Cent & E Eur L 267, 285-324. Elst 276-85 also discusses the influence of an Agreement on Partnership and Cooperation between the EU and Russia on Russian copyright.

[5]Interestingly, the Communists adopted a "social engineering" approach to law which could be a problem for policy-makers now, as they may be reluctant to adopt an obviously similar posture. For a discussion of "parental law" in Soviet legal theory, A Schmidt "Soviet Civil Law As Legal History: A Chapter or a Footnote?" in Ginsburgs (n 3) 45, 49-50, 57-62.

In fact, intellectual property law in Eastern Europe must satisfy two competing and potentially conflicting kinds of demands: those arising out of domestic policy objectives, and those flowing from international requirements.[6] As in every legal system, intellectual property rights in post-socialist countries will favour certain kind of interests at the expense of others; achieving the appropriate balance of rights is one of the important tasks of policy-makers. However, the reality of the post-authoritarian transition means that the appropriate balance of rights in the transitional environment is almost certain to differ fundamentally from the equilibrium accepted in Western jurisdictions. Since socialist governments relied on ideology as the primary means of maintaining political power, the rights of authors and "users" of intellectual property were balanced, not only against one another, but against the overpowering political interests of the state in controlling and manipulating information, often wielding it against those who produced or created it.[7]

At the same time, intellectual property law must accommodate the reality of a deficient economic and social legacy in the wake of socialist rule. In economic terms, the

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[6]This point is raised in relation to developing countries by EW Ploman & LC Hamilton *Copyright: Intellectual Property in the Information Age* (Routledge & Kegan Paul London 1980) 29. Writing in 1980, Ploman & Hamilton did not assign the same importance to this distinction in socialist countries. However, their discussion of socialist legal systems may suffer from certain unavoidable limitations. Prior to Gorbachev's ascension to power in the Soviet Union in 1985, it was difficult for outsiders to assess the extent of economic collapse in the republics. With hindsight, it seems highly appropriate to consider the similarities between the challenges facing socialist systems and those in developing countries.

[7]The complex relationship between Bolshevik "power" and "culture" in the early years of Soviet government is discussed by S Fitzpatrick *The Cultural Front: Power and Culture in Revolutionary Russia* (Cornell University Press Ithaca 1992) 1-15. See also G Hosking *A History of the Soviet Union 1971-1991* Final Edition (Fontana Press London 1992) 170, 179.

developmental level of post-socialist countries is significantly behind that of the West; the role of intellectual property rights in societies where economic growth is urgently needed must be determined. Here, too, the types of intellectual property protection and the balance among different kinds of intellectual property rights may be quite different from norms that are accepted in the West.

In this tension between domestic and international priorities, transitional countries closely resemble developing countries.[8] Like developing countries, the societies of transitional countries suffer from a number of historical disadvantages. While the problems of developing countries tend to be viewed primarily through an economic lens, the subtleties of development issues in transitional countries are more readily apparent.[9] Most developing countries must endure a daily struggle in meeting basic needs, such as feeding their populations. In most ex-socialist countries, impoverishment is less extreme, and economic problems can often be traced directly to the political mismanagement of socialist leaders.[10] Development problems in ex-

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[8]For a discussion of this situation in developing countries, see Ploman & Hamilton (n 6) 29-30.

[9]The connection between economics and politics in developing countries is also controversial and poorly understood. One aspect of the pioneering work of an Indian economist, Amartya Sen is his emphasis on the positive relationship between democracy and development; for example, he points out that democratic government has helped India to manage economic crises more effectively. For an introduction to Sen's comprehensive approach to development, see A Sen "Radical Needs and Moderate Reforms" in A Sen & J Drèze eds *Indian Development: Selected Regional Perspectives* (Oxford University Press Delhi 1997) 1-32.

[10]This distinction is useful in distinguishing post-socialist from developing countries, but slightly artificial: the poverty of developing countries, especially those that are large and rich in human and natural resources, is often due to political mismanagement,

socialist countries are recognised, above all, as a matter of political modernisation.

Intellectual property law is among the most powerful legal instruments dealing with information, knowledge, and culture. As such, it must fulfil objectives of information and cultural policy at the domestic level. At the very least, it should not impede the implementation of domestic policies. However, intellectual property laws must also meet the demands of the international harmonisation and standardisation of intellectual property rights, in order to enable active participation in economic and technological advances in the international arena. One of the most highly publicised aspects of the new international openness in transitional countries is the need to implement internationally viable intellectual property standards to help them attract foreign investment.[11]

The special needs of developing jurisdictions in relation to intellectual property require a sensitive legal treatment. In particular, development issues call for the achievement of an effective equilibrium between rights of control and rights of access, domestic policy objectives and international standardisation, and, ultimately, intellectual property rights and other legally protected interests. These conflicts have historically been at the root of tensions between developing and industrialised countries over the appropriate

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as well.

[11]For example, see SP Boylan "United States-Poland Economic Treaty: A Blueprint for Intellectual Property Reform in Eastern Europe and the Developing World?" (1990) 6 Fla J Intl L 101, 113-17. The biased outlook of Boylan's analysis should be noted: although he draws a connection between the economic situations of post-socialist and developing countries, in his view, the transitional countries are victims of political oppression and, therefore, deserving of special intellectual property measures, whereas "nations in the so-called developing world" implicitly are not. To date, it is not yet known whether higher intellectual property standards have in fact encouraged greater foreign investment.

international treatment of intellectual property rights.[12] Developing countries have accorded great importance to rights of access, and they have sought structural flexibility in the application of intellectual property rights. In different ways, they have also raised concerns about the impact of intellectual property protection on human rights and culture.[13]

Now, transitional countries find themselves confronting similar questions about the nature of a workable equilibrium among diverse rights and interests within their post-socialist and democratising societies. The virtual absence of empirical research on the relationship between intellectual property rights and development complicates this inquiry.[14] At the same time, the need for a suitable conceptual approach to intellectual property rights in the context of political and economic development is an inescapable reality of post-socialist reform.

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[12]For example, the debate between developing and industrialised countries over the appropriate treatment of intellectual property rights in the developing world came to a head in the 1967 Stockholm revision conference of the Berne Convention. The way in which these issues were played out in the Stockholm Protocol on special provisions for developing countries is discussed in detail by S Ricketson *The Berne Convention for the Protection of Literary and Artistic Works: 1886-1986* (Kluwer, Centre for Commercial Law Studies, Queen Mary College London 1987) paras 11.16-11.48.

[13]For example, see N N'diaye "Influence du droit d'auteur sur le développement de la culture dans les pays en voie de développement" (1975) 86 RIDA 59; TS Krishnamurti "Copyright – Another View" (1968)15:3 Bull Copyrt Soc'y USA 217; and C Masouyé "Décolonisation, indépendance et droit d'auteur" (1962) 36 RIDA 85. Not surprisingly, these writers all have distinctive views on the nature of human rights and culture, as well.

[14]This point is implicit in Henderson's discussion of patent rights and developing countries: see E Henderson "TRIPs and the Third World: the Example of Pharmaceutical Patents in India" (1997) 19(11) EIPR 651, 654-57. See also AS Oddi "The International Patent System and Third World Development: Reality or Myth" (1987) 5 Duke LJ 831. One of the few empirical studies on intellectual property rights in developing countries might be RT Rapp & RP Rozek "Benefits and Costs of IP Protection in Developing Countries" (1990) 24(5) J World Trade L 75.

The problem of intellectual property in developing societies is concisely expressed by N'dene N'diaye of Senegal:

> [L]e problème qui se posa...[aux pays en voie de développement après l'indépendence des puissances coloniales] fut celui de savoir s'ils devaient trouver à la base des droits de l'homme la même notion d'homme et si les exigences du développement se concilient avec la pleine application, en général, des droits que tous affirment solennellement dans leur constitution – et en particulier ceux relatifs à la propriété....
>
> Les pays en voie de développement sont ainsi souvent contraints de n'accorder la priorité qu'aux entreprises visant à réaliser le développement de la société. Ce faisant, pour établir l'ordre et assurer le développement, d'aucuns relèguent au second plan la liberté et la justice, singulièrement la liberté dans l'acte de création et la justice dans la rémunération de l'auteur...[15]

It is clear that the relevance of N'diaye's argument is not restricted to the countries traditionally thought of as "developing" over the past half-century; it applies equally to the "transitional" countries of today. The resemblances between them suggest that transitional countries can benefit from a comparison of their experiences with intellectual property law and reform in developing countries.

B. INTELLECTUAL PROPERTY LAW IN TRANSITION

Intellectual property law in Central and Eastern Europe reflects the general disarray of law after socialism. Law reform has assumed a central role in enabling the transition out of socialism to occur smoothly. At the same time, the character of law has been altered fundamentally by the peculiarities of the transitional environment. Time, the "fourth dimension," is a factor that transforms the ordinary significance of legal rules. Reform of intellectual property rights is conditioned by these unique historical circumstances. New

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[15]N'diaye (n 14) 69.

law in this field, whether it originates with legislators, judges, or international conventions, must strive to meet the special requirements of historic social change.[16]

1. The Role of Law Reform in Post-Socialist Societies

Law reform, in one guise or another, has been an integral part of the post-socialist transition from its earliest days. New laws have played an essential role in transforming political institutions to cope with the disintegration of socialist governments. The public of formerly socialist countries also appears to have attached great moral significance to law reform. The development of new constitutions has become a characteristic way of reassessing political values, and allowing post-socialist politicians to affirm to their populations a solid commitment to democratic constraints on power.[17]

Law reform in the aftermath of socialism has fulfilled a number of important functions. It has brought a degree of legitimacy to the new political regimes, assured citizens of protection from governmental abuse of power, and provided an essential

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[16]It is interesting to note that, in Russia, international conventions to which Russia is a party are automatically integrated into Russian law and, in case of incompatibility, may even take precedence over Russian provisions: see CL Broadbent & AM McMillian "Russia and the World Trade Organisation: Will TRIPs Be a Stumbling Block to Accession?" (1998) 8 Duke J Comp & Intl L 519, 534.

[17]The phenomenon of post-socialist constitutionalism is analysed by A Arato "Dilemmas Arising from the Power to Create Constitutions in Eastern Europe" in M Rosenfeld ed *Constitutionalism, Identity, Difference, and Legitimacy: Theoretical Perspectives* (1994) 165. See also the interesting theoretical discussion of "transitional constitutionalism" in RG Teitel *Transitional Justice* (Oxford University Press New York 2000) 192-206. Teitel's analysis draws on the experiences of diverse transitional environments, including South Africa, South America, post-World War II Germany, and Eastern Europe.

regulatory framework for economic liberalisation.[18] Legal reform has been driven by the apparently irrefutable logic that political and economic development after socialism must go hand-in-hand with legal modernisation. In some areas, such as private property and private contractual relations, the complete absence of relevant legal provisions has been a problem. In other respects, socialist law may have been adequate in strictly legal terms, but it has become morally discredited – for example, in relation to the protection of human rights and freedoms, and their expression in constitutional instruments.[19]

Interestingly, the importance accorded to law reform in Central and Eastern Europe is itself suggestive of a legal culture that has been profoundly transformed by the socialist experience. There is a curious element of historical continuity in the prestige and pervasiveness of reform after socialism. For example, as Albert Schmidt points out, the Russian preoccupation with legal reform as an aspect of revolutionary change can be traced back to the October Revolution. Schmidt notes:

> Lenin's belief that "all law is public",... in itself is a ringing definition of socialist law,... and articulates one of the most unique features of Soviet power – its

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[18]For a brief overview of the situation in Russia, see GM Danilenko & W Burnham *Law and Legal System of the Russian Federation* (Juris Publishing Parker School of Foreign and Comparative Law, Columbia University New York 1999) 7-10.

[19]For example, the Stalinist Constitution of the USSR provided extensive protections for human rights, but, of course, they were not respected by the government. The adoption of a new Russian Constitution in 1993 was a symbolic act that signified a new status for constitutional rights in Russian society. It marked Russia's movement to a new legal culture, through unprecedented public involvement in the adoption of the Constitution by referendum, and in the legal status of the new document. See Danilenko & Burnam (n 17) 12-13; *Constitution of the Russian Federation,* December 12, 1993, *Rossiiskoi gazeta* 25 December 1993, Garant Internet, online: <http://www.constitution.ru/en/10003000-01.htm>.

inseparability from politics.[20]

The distinctiveness of the socialist mind-set in this regard presents a striking contrast to Alan Watson's general observation:

> [T]he lesson of history is that over most of the field of law, especially private law, in most political and economic circumstances, political rulers need have no interest in determining what the rules of law are or should be... Rulers and their immediate underlings can be, and often have been and are, indifferent to the nature of the legal rules in operation. This simple fact is often overlooked; indeed, it is habitually denied... It demonstrates the general accuracy of the proposition that government is usually unconcerned with the precise nature of most of the legal rules in operation.[21]

In spite of its vast range of practical consequences, the intuition that legal change is an essential part of the post-socialist transition has not been informed by systematic or well-developed conceptual guidance. The relationship between law and the social transformation occurring in the region remains largely unexplored. The intuitive drive towards legal renewal has given rise to massive and complex legal structures, without, however, identifying a clear rationale and purpose behind them.

On closer examination, law reform in formerly socialist countries appears to be driving at the creation of Western-style legal systems in Eastern Europe. This approach to law reform can be explained in two ways. In one sense, it is a purely pragmatic conception of the law: since formerly socialist countries want to structure their economic and political life to mirror Western norms, Western laws are presumably best adapted to this endeavour.

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[20]Schmidt (n 5) 45, 59. The quotation from Lenin may be found in JN Hazard *Communists and Their Law* (University of Chicago Press Chicago 1969) 77.

[21]A Watson *Roman Law & Comparative Law* (Athens 1991) 97. The quotation appears in Schmidt (n 5) 59.

In another sense, the collapse of socialist law has created a legal vacuum in post-socialist societies, and Western laws appear to be the "right" laws to fill it. The historian Francis Fukuyama notoriously announced the "end of history" after the collapse of Communist regimes in Central and Eastern Europe.[22] The end of socialism signifies a deeper victory for Western values at many levels, including those that touch the law. Objective analysis now seems to demand that the existing laws of Western societies be universally recognised as the "best" laws. In attempts at reform, the model laws of successful Western societies may come closest to the ideal.[23]

The aggressively Western approach to reform reflects a situation of chaos and collapse in the aftermath of socialism. An important reason for the conceptual shallowness of Eastern European law reform has undoubtedly been the urgency of the situations which legal reform has had to confront in Central and Eastern Europe. Especially in its initial stages, the movement out of socialism was experienced as a political and economic crisis; in Russia, this has continued to be the case up to the present time. In these circumstances, Western norms have provided the hope of a quick and easy path towards stability.

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[22]See F Fukuyama *The End of History and the Last Man* (Free Press New York 1992).

[23]The blurring of the distinction between "law that is" and "law that ought to be," identified by HLA Hart as a characteristic feature of the post-World War II era, now seems to be complete. See HLA Hart "Positivism and the Separation of Law and Morals" (1958) Harv LR 593, 595-606. It is no accident that the post-World War II debate about the connection between law and morality has been revived in the wake of socialism. The manipulation of law by the Nazis was later declared to be "illegal"; similarly, the oppressive law of Communist regimes is now considered to be devoid of legality. This fundamental problem is typical of "transitional" situations, and as such, it is emphasised by Teitel (n 17) 15.

The ongoing process of transition in post-socialist countries suggests that a crisis-oriented approach to law reform is no longer adequate. The expectation of a rapid transition out of socialism that characterised the post-socialist euphoria of the early 1990s has had to be modified in the light of experience.[24] Reformers can no longer afford to approach law reform as a matter of expediency and short-term efficiency. On the contrary, the movement out of authoritarianism has proven to be far more arduous than either the populations of Eastern Europe or outside observers could have anticipated. The question of whether law, in its own right, can contribute to political transformation in the region has become an increasingly important issue. If, indeed, legal modernisation can facilitate the development of democracy, it has now become crucial to investigate more sophisticated approaches to law reform that may help to release the transformative potential of law in the region.

2. Law in Transition

Over the past decade, post-socialist law reform has focused intensely on the present political moment. It has developed largely as a response to overwhelming political crises – the collapse of governments and ideologies, and the dissolution of an empire. As reform enters a more stable period, it is apparent that legal modernisation involves somewhat neglected considerations of historical continuity.

In a unique study on the phenomena of post-authoritarian legal change, Ruti Teitel

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[24]German reunification is a case in point: the former GDR continues to suffer serious economic difficulties, and extremist violence seems to be worsening in Eastern Germany. For an overview of the situation, see "Schröder's Journey" in The Economist, Aug 26th-Sep 1st 2000, and "Togetherness: A balance sheet" in The Economist, Sep 28th 2000.

emphasises that the shape of new laws in post-authoritarian societies reflects the circumstances of oppression in the past.[25] New laws are a response to the character of the old political regime; inevitably, they aim at rectifying the abuses of authoritarian rule.

Once we understand the extent to which law reform is conditioned by the circumstances of authoritarianism, the reasons for law's special importance in post-socialist countries become clear. In Western history, changes of regime have most often been accomplished by violent overthrow, with the discrediting of the old regime and its structures, and the dispossession and destruction of its leaders, ensuring a clean and permanent break with the past.[26] In contrast, the contemporary, "velvet revolutions" of Central and Eastern Europe have been less clear-cut. Although the authoritarian past has been repudiated, its legacy remains a deep and ever-present undercurrent in post-socialist developments.[27]

While law in post-socialist societies must come to terms with an authoritarian past, it must also project forwards, into an increasingly free and open future. Here, too, the post-socialist understanding of law's functions must be distinguished from typical perceptions of the law in stable, democratic societies. Of course, law in democracies is policy-driven in a variety of ways. However, the problem of developing policy for a future that aspires to

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[25]For example, see Teitel (n 17) 4-6.

[26]The point is also noted by Teitel (n 17) 204, and is central to her discussion.

[27]The resurgence of Communist political parties and politicians in certain formerly socialist countries can perhaps be traced to this unresolved situation. The phenomenon is noted in "The left is back – in the centre" in The Economist, Sep 27th 2001, and "A new misery curtain" in The Economist, May 31st 2001.

depart fundamentally from historical tradition, and a long-established economic and social order, brings a peculiar intensity to post-authoritarian legal reform.[28] In this context, the very act of developing new law is premised on a belief in the transformative power of the law. New laws become part of the process of transforming society into a new shape, one based on new political values and newly acknowledged social needs.

The dilemma of situating law reform in its appropriate historical context is captured by Ruti Teitel:

> Law is caught between the past and the future, between backward-looking and forward-looking, between retrospective and prospective. ... Transitions imply paradigm shifts in the conception of justice; thus, law's function is deeply and inherently paradoxical. In its ordinary social function, law provides order and stability, but in extraordinary periods of political upheaval, law maintains order, even as it enables transformation. Accordingly, in transition, the ordinary intuitions and predicates about law simply do not apply. In dynamic periods of political flux, legal responses generate a sui generis paradigm of transformative law.[29]

However, Teitel's characterisation of the unusually dynamic quality of law in transitional countries as paradoxical seems incomplete. Teitel emphasises that the apparent contradiction between stability and transformation occurs because law in transitional countries has come to signify change, rather than maintaining its traditional association with stability and continuity. However, the transitional problem has an additional

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[28]The different experiences of the transition among different countries is partly a reflection of different cultural traditions. For example, a number of Central European countries, such as Poland and the Czech Republic, appear to have experienced less trauma and relatively greater success in achieving stability. See H Izdebski "General Survey of Developments in Eastern Europe in the Field of Law" in G Ginsburgs (n 3) 3, 3 and P Karel "Political, Economic, and Legal Aspects of the Association of the Czech Republic with the European Union" (1997) 23(3) Rev Cent & E Eur L 205, 207-08 on the liberal past of the Czechs.

[29]Teitel (n 17) 6.

dimension: it arises because the role of law in socialist societies was fundamentally different from its role in democratic societies. The oppressiveness of socialist regimes when it came to political and social freedoms did not occur in a legal vacuum. Rather, oppression occurred within a legal framework; law was an accepted tool of political power, available for use by the state and its agents against potential enemies. For example, Katharina Pistor identifies the need "to overcome the crudely instrumental use of law by the state and to rid the legal system of direct political influence."[30]

In contrast, democratic societies are defined by the concept of law-limited power, whether in relation to private individuals, corporate entities, or the state. Law in post-socialist societies is itself in need of rehabilitation, and this is the fundamental difficulty confronting legal reform in virtually every field: the restoration of substance, values, and credibility to the law. Law in these peculiar circumstances becomes closely allied with moral values.[31] Law reform in the post-authoritarian context is infused with a normative character that ultimately aspires to the moral transformation of civil society.[32]

The role of law and legality in the transition period is likely to have a lasting impact on traditional conceptions of the law. The new concepts of law that are generated by the

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[30]K Pistor "Supply and Demand for Law and Russia" (1999) 8(4) E Eur Const Rev 105, 106.

[31]Teitel's discussion traces the path of an earlier debate between legal theorists HLA Hart and Lon Fuller about the legality of Nazi law. She argues that the problem does not involve "essential, universal attributes of the rule of law," but "is particular to the transitional context." See Teitel (n 17) 15.

[32]Ironically, a certain conceptual continuity with Marx's view of progressive historical development through socialism is worth noting.

historical movement out of authoritarianism and into a more democratic pattern of society will extend their reach well beyond the transition period, and are likely to affect both transitional countries and law in the international arena. In effect, the historical phenomena of the transition will transform law in their own right, leading to new legal models that should become a permanent feature of post-authoritarian legal culture around the world. From this perspective, the transition represents an exciting opportunity for creative thinking about the law.

3. A New Information Regime

The transition is a unique environment for intellectual property rights. Intellectual property law, too, is caught within the temporal continuum that affects law as a whole in the transitional environment. In the case of Russia, intellectual property rights are influenced both by the Soviet past, and by a more remote, tsarist legacy. At the same time, the current Russian administration confronts the task of crafting intellectual property policies that will facilitate the development of a fundamentally different future in Russia.

The "transitional" difficulty facing intellectual property rights in Russia is the movement away from a certain kind of authoritarian government based on ideological control, where the manipulation of knowledge, information, and culture was the chief means of maintaining political power and legitimacy,[33] to a society based on ideals of intellectual and expressive freedom, and ideological diversity. The legal framework for controlling these intangibles may be understood as an "information regime." The movement out of an authoritarian system of information management is an important part

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[33]Hosking (n 7) 408.

of the transition process. Russia's new information regime must aspire to compatibility with democratic institutions and values.[34]

Intellectual property law is an increasingly prominent feature of information policy. New intellectual property laws will have to respond to concerns about the protection of intellectual freedom, the encouragement of creativity and innovation among long-oppressed populations, and appropriate limitations on the power of the state to control information and knowledge – problems which may not be in evidence to the same extent in other jurisdictions. For example, modern copyright provides for the strong protection of individual rights of authorship, both in their proprietary and personal dimensions, in a way that was not possible, for ideological and practical reasons, within the Soviet legal system.[35] In dealing with the legacy of intellectual property under Soviet rule, Russia's

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[34]The recent standoff between the Russian government and Chechnyan rebels who held theatre-goers hostage in Moscow illustrates the culture of restrictiveness that continues to be characteristic of Russia's approach to information. Russian troops eventually stormed the theatre to release the hostages. Before they entered the theatre, however, they released a gas into the environment that was supposed to sedate the hostage-takers. In the event, a number of the hostages died from the effects of the gas. The Russian government greatly complicated matters by refusing to tell doctors caring for the hostages what kind of gas they had used. The information was finally released after several days, following intense pressure from the international community. The incident is described in "What is fentanyl?" 31 October 2002, BBC News Online: <http://news.bbc.co.uk/1/hi/health/2380661.stm>.

[35]See Ploman & Hamilton (n 6) 123; they observe, "[f]ollowing the socialist doctrine, an author's right is not regarded as the equivalent of private property." The adaptation of copyright to the political conditions of Soviet life is also examined by MA Newcity *Copyright Law in the Soviet Union* (Praeger New York 1978) 17-31. Interestingly, Soviet law did recognise a right of remuneration for creative work; Newcity argues that, after amendments permitting the alienation of material rights in 1973, the Soviet provision "suggests a substantive right of ownership akin to that enjoyed by copyright proprietors in the West." Newcity 83.

reformers must strive for a sense of historical coherence. Post-Communist law may depart fundamentally from the legal norms of the Soviet era, but it must also respond creatively to the problems and failures of that era. By confronting these issues of information policy, intellectual property law can make a valuable contribution to legal modernisation.

The post-socialist treatment of intellectual property rights should attempt this project on two levels. First, intellectual property law in the transition should aim to ensure that information is protected from manipulation and abuse, particularly by the state, but also, by private entities and individuals against one another.[36] Specific concerns from the past that intellectual property law should address are rights of privacy, access to information, protection for broadcasting and communications media, and the rehabilitation of creative authors and intellectuals who suffered censure in the authoritarian period. Copyright law has a role to play in all of these areas, especially in relation to the individual rights of authors.

Secondly, revised intellectual property laws should reflect the aspirations of post-socialist societies for the future, and ensure that the information policies of post-socialist governments help to further political, social, and economic development. The new laws must demonstrate their practical effectiveness in building an appropriate framework for liberalisation, but they must also seek to recover the moral stature that was compromised by the degraded legal practices of authoritarian states. Indeed, the importance of restoring

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[36]For example, in Russia, information needs to be protected from corporate abuse and organised crime. The realities of business and crime in today's Russia are described in "States within the state" and "Russia: A reconditioned model" in The Economist, Survey on Russia, Jul 19th 2001.

moral authority to intellectual property rights should not be underestimated. Rights for creators can have a moral and ethical force in the post-authoritarian context that may not be immediately apparent in countries where the large-scale repression of creativity is unknown.

C. AUTHORS' RIGHTS AND DEMOCRATISATION

Intellectual property rights are involved in the transition from a restrictive and highly politicised information regime under authoritarian rule to a democratically-informed treatment of knowledge in the transition period. How can copyright law help to build a democratic approach to knowledge in post-socialist societies?

Copyright law has long been viewed primarily as a technical field. This is due in large part to its close association with creative and innovative work, and the technologies supporting its development and dissemination. However, the technical aspects of intellectual property rights should not obscure their role in expressing social values, especially those related to creativity. The failure of post-socialist law reform to recognise and explore the values built into Western-style intellectual property protection is a serious shortcoming of the reform effort. In particular, reform should consider the possible impact of these values on democratisation in the region.

Through the dissemination of values about creative expression, copyright law can make a positive contribution to democracy, in both conceptual and practical terms. Certain aspects of copyright values are highly relevant to post-socialist reform. Through the creation of incentives for creative and innovative work, copyright seeks to promote

individual creativity and, depending on the nature of the creation, entrepreneurship.[37] Copyright seeks to protect the individual rights of authors in their creative expression, emphasising the importance of the creative works, themselves. Implicit in copyright is also a basic desire to protect the human rights of authors, reflected in the protection of both authors' economic and personal rights through copyright law.[38]

Post-socialist reform of copyright law has been approached primarily as a matter of economic policy. The close connection between copyright, international trade, and foreign investment has largely determined the shape of the new copyright provisions.[39] At the same time, the relationship between copyright and democratisation in Eastern Europe has not been explored in any depth. A more careful consideration of this relationship is important for understanding the extent to which intellectual property rights may be implicated in political development. A democratically-aware approach to intellectual property rights may improve their uncertain status in post-socialist societies.

The development of the TRIPs Agreement has recently led some scholars to consider the implications of increasingly powerful intellectual property rights for political change. One school of thought argues that copyright is by its very nature an expression of

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[37]For a thought-provoking discussion of the policy objectives that copyright is traditionally supposed to accomplish, see Ploman & Hamilton (n 6) 22-30.

[38]The humanistic element underlying copyright is reflected in the inclusion of authors' rights in international instruments of human rights law. For example, see the Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III)), Art 27, and the International Covenant on Economic, Social and Cultural Rights (16 December 1966) 993 UNTS 3 (entered into force 3 January 1976) Art 15.

[39]Boylan (n 11) 116-17 emphasises the issue of foreign investment.

democratic values. On this view, the adoption of the copyright norms in TRIPs by diverse countries around the world inevitably signifies a liberalising trend. As Marci Hamilton argues:

> It is no accident that intellectual property norms are spreading worldwide at the same time that totalitarian regimes are falling. A people must value individual achievement and believe in the appropriateness of change and originality if it is going to concede to and adopt a Western-style intellectual property regime. Indeed, there is an intimate link between respect for individual human rights and respect for a copyright system that values and promotes individual human creative achievement....
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> The encoded message within TRIPS is that change, creativity, and originality are positive goods.[40]

The connection that Hamilton draws between copyright and the social value of individual creativity is appealing. However, she goes on to argue that TRIPs, which imposes strict and rigid protections for intellectual property rights on member countries, is a form of "freedom imperialism."[41] This choice of expression is unfortunate: in its application to developing countries who are struggling to bring their intellectual property regimes into line with TRIPs requirements, it seems patronising and devoid of nuance. Indeed, the argument that TRIPs will bring about greater liberalisation and freedom in relation to knowledge through coercion – by the imposition of its Western-style, advanced norms on other legal systems – is disturbing, and possibly even dangerous.

Hamilton's proposition is subject to two powerful criticisms. First, the TRIPs Agreement adopts a stance of unprecedented protectionism towards those who control

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[40]MA Hamilton "The TRIPS Agreement: Imperialistic, Outdated, and Overprotective" in AD Moore (ed) *Intellectual Property: Moral, Legal, and International Dilemmas* (Rowman & Littlefield Lanham 1997) 243, 245, 247.

[41]Hamilton (n 39) 243.

knowledge, while the consequences of increased intellectual property protection for public access to knowledge, information, and technology remain unclear.[42] Secondly, the standards in TRIPs reflect a very limited international consensus on intellectual property rights. TRIPs provisions were not achieved through international debate and compromise. They signify, above all, the internationalisation of Western copyright norms.[43] As a result, the character of the TRIPs Agreement has widely been viewed as coercive and potentially damaging to non-Western interests.[44]

In an interesting series of articles, Neil Weinstock Netanel argues that copyright may indeed support democratic values. However, he points out that this democratic potential cannot be secured simply by the adoption of TRIPs norms. Rather, the realisation of the democratic values inherent in copyright will depend on achieving the appropriate balance of rights between the authors and "users" of copyright works. He observes:

> [C]opyright law serves fundamentally to underwrite a democratic culture: By according creators of original expression a set of exclusive rights to market their literary and artistic works, copyright fosters the dissemination of knowledge, supports a pluralist, nonstate communications media, and highlights the value of

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[42]For example, the Anglo-American distinction between authorship and ownership of copyright can create problems. Where works are created in situations of employment, the employer rather than the employee may control its use. In industrial society, the employer and owner of the work will often be a representative of corporate power. The weak position of the creator in these situations is noted by Ploman & Hamilton (n 6) 27; they also trace the historical roots of the distinction (Ploman & Hamilton 16-17).

[43]The lack of involvement of developing countries in the TRIPs negotiations, and their relative inability to resist membership in the agreement for economic reasons, are noted by Dreyfuss & Lowenfeld (n 2) 301-02.

[44]For example, see BS Chimni "Towards Technological Wastelands: A Critique of the Dunkel Text on TRIPs" in KRG Nair & A Kumar eds *Intellectual Property Rights* (UDCCS Seminar Papers Series No 1, Allied Publishers New Delhi 1994) 91, 100-01.

> individual contributions to public discourse. In this view, copyright's constitutive, democratic purpose is both the primary rationale for according authors proprietary rights in original expression and the proper standard for delimiting those rights. Copyright holder rights should be sufficiently robust to support copyright's democracy-enhancing functions, but not so broad and unbending as to chill expressive diversity and hinder the exchange of information and ideas.[45]

In particular, Netanel emphasises:

> The notion that upward harmonisation under TRIPs will contribute to global democracy is seriously misguided. Copyright's constitutive value for democratic development depends heavily on local circumstances. Indeed, copyright may sometimes impede democratisation unless substantial limits are placed on copyright holder rights. Asserting copyright's democratic principles in the global arena would entail a far more nuanced approach than TRIPS's apparent insistence on maximalist global copyright protection.[46]

Realising the democratic potential of copyright will depend, not only on the achievement of an appropriate balance between rights of control and rights of access to knowledge, but also, on balancing different kinds of rights within copyright. Post-socialist reform needs to weigh commercial and non-commercial interests, individual and non-individualistic creation, private and public concerns, personal and state power. Copyright laws that support democratisation may eventually prove to be somewhat broader in scope than currently accepted, international models of the law.

If a single value can be said to be most characteristic of copyright law, it is almost certainly the protection of free and individual creative expression.[47] It is interesting to

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[45]NW Netanel "Asserting Copyright's Democratic Principles in the Global Arena" (1998) 51 Vand L Rev 217, 220.

[46]Netanel (n 45) 222.

[47]The underlying value of individuality is especially emphasised by current scholarship that traces the development of modern copyright concepts to the rise of Western European Romanticism. For example, see M Woodmansee "The Genius and the

consider that creative expression, despite its historic associations with patronage and elitism, can be a deeply democratic phenomenon. In modern societies, creative expression at its best is diverse, suspicious of convention, and, even in the face of physical danger, stoically independent.[48] If democracy means ideological diversity and the aspiration towards free thought and judgement, the right to creative expression must be given its due as an essential feature of modern, democratic life.

In the context of Western society, where modern copyright first developed, creativity has come to be valued primarily in commercial terms. The commercial benefit of creative work ultimately accrues to the owner of the copyright, whether or not he is one and the same person as the author. However, moral rights can only be exercised by the author, whether or not he is the owner of copyright. Through moral rights doctrine, copyright law also achieves a non-commercial, purely legal method of valuing creativity. It may even protect the non-commercial aspects of creative expression at the cost of economic losses to persons other than the author.[49] It is important to recognise that copyright has historically

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Copyright: Economic and Legal Conditions of the Emergence of the 'Author'" (1984) 17 Eighteenth-Century Studies 425.

[48]There are many moving examples of creative authors and artists who have resisted persecution, as there were in Communist regimes and in countries dominated by colonial rule. One recent example is Nigerian writer and activist Ken Saro-Wiwa, whose death at the hands of a corrupt Nigerian government in 1995 led to an international outcry. See "Symbolic funeral for Saro-Wiwa" Apr 25th 2000, BBC News online: <http://news.bbc.co.uk/hi/english/world/africa/newsid_725000/725009.stm>.

[49]Indeed, it is important to note that moral rights, which protect authors' personal interests in their work, may have serious economic implications. This is one of the main reasons why common-law countries, which have traditionally preferred to leave authors' personal interests to the more informal mechanisms of tort law, have been reluctant to adopt moral rights legislation. The United States is a case in point: a powerful film

developed as an instrument of both commercial and cultural policy; it reflects a certain understanding of culture and a particular means of recognising and protecting its value.[50]

The idea of authorship, and its protection through copyright and moral rights, has a number of legal consequences. It assures the social status of the creative arts; it allows authors to earn a livelihood from their work; it creates incentives for at least certain kinds of creative activity, and supports cultural industries such as publishing, broadcasting, translation, and film. By protecting authorship, copyright potentially supports democratic institutions and values. However, its success in doing so depends on our understanding of copyright's content, the status of copyright within the hierarchy of domestic laws, and the development of a viable balance between international and domestic standards. Realising the contribution of copyright to democratisation in post-socialist societies is a matter of considering and reconciling diverse interests and issues among individuals, communities, the public, and the state. In the absence of policy-minded investigation, it is unlikely that post-socialist reforms will succeed in achieving this delicate balance.

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industry lobby blocked the adoption of comprehensive moral rights legislation when the US joined the Berne Convention in 1989. For a discussion of the ambiguous American position on moral rights, see D Nimmer "Conventional Copyright: A Morality Play" (1992) 3 Ent L Rev 94. Moral rights issues in Britain are considered in a similar light by WR Cornish "Moral Rights under the 1988 Act" (1989) 11(12) EIPR 449, 449.

[50]A different balance between the commercial and cultural aspects of copyright is achieved in different legal systems, though they invariably coexist. For example, moral rights have traditionally been emphasised in the civil-law systems of continental Europe, to the extent that they may be said to provide a conceptual foundation for copyright protection in these countries. To some extent, this is reflected even in the terminology for copyright – *droit d'auteur* in France, and *Urheberrecht* in Germany. See T Dreier "Authorship and New Technologies from the Viewpoints of Civil Law Traditions" (1995) 26(6) IIC 989, 991-93, who points to the close connection between moral rights and authorship, especially in France.

D. APPROACHES TO REFORM

A consideration of these factors leads to the conclusion that intellectual property reform in Eastern Europe is conditioned by the special situation of post-socialist societies, in terms of both place and time. Reform of intellectual property rights is part of a comprehensive legal transition, and its progress will be strongly influenced by the circumstances of the present historical moment in Eastern Europe. An informed methodology of reform should therefore be based on historical analysis: new laws must respond to past injustices and, in doing so, define a different legal order for the future. At the same time, an analysis that is broad and comparative in scope will bring a wealth of new intellectual property concepts to a region that has long been isolated from international developments in this field, and is urgently in need of foreign expertise.

1. Intellectual Property Rights in Historical Context

The successful development of a post-socialist intellectual property regime depends on the achievement of a systematic and comprehensive understanding of what intellectual property law was under socialism. This approach to law reform might seem paradoxical at first glance; and, indeed, reformers have so far preferred to deal with the socialist past by burying it. After all, what is the relevance of past legal approaches in an area that reformers hope to see radically transformed in the future?

Perhaps not surprisingly, intellectual property law reform to date has been a relatively straightforward exercise in the abolition of old provisions and the enactment of

new ones. The Russian Copyright Act of 1993 is a case in point.[51] In many cases, the old laws were outdated and out of tune with current developments, and it may have been easier to introduce new law than to reform old provisions.[52] However, it is apparent that the old laws were also discarded on the basis of an equally influential, implied inadequacy, a barely-concealed and perhaps inevitable aversion to all things Communist.

Given this superficial approach to intellectual property reform, new intellectual property laws rest uneasily on a deep and potentially turbulent surface. Historical necessity makes the shape of post-socialist intellectual property laws reactionary in essence. Current laws are defined by their separation from the socialist past, what it was in reality, and what the present governments remember it to have been. However, like old paintings that have been covered over with new images, time and wear may start to strip away the new layer to reveal the unknown shapes beneath. The consequences of such a re-emergence of the past, unforeseen and unresolved, could present obstacles to legal progress.

Schmidt emphasises the importance of recognising and studying socialist law as a legal-historical phenomenon in its own right:

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[51]Russian Federation Law on Copyright and Neighbouring Rights *(Zakon Rossiiskoi Federatsii Ob avtorskom prave i smezhnykh pravakh) VSND i VS RF,* 1993 No 32, Item 1242; *Rossiiskaia gazeta* 3 Aug 1993 (as am by Federal Law of the Russian Federation of 19 July 1995, *Rossiiskaia gazeta* 26 July 1995). Available online: Law No 5351-I of July 9, 1993, Russian Patent & Trademark Office, <http://www.rupto.ru/ruptoen/law/intel.htm>. The circumstances in which the new law was developed, with particular attention to Western European influences on the law, are discussed by Elst (n 4) 267-85.

[52]This would certainly have been the case in relation to the issues raised by modern technologies, including computer programs, databases, and the Internet. For example, one of the first US requests in Poland was that the country should extend copyright protection to computer programmes: see Boylan (n 11) 107-11.

> Cataloging [*sic*] Soviet and post-Soviet failures does not...eradicate the history of the past three-quarters of a century. A Soviet Union with a novel system of law did, in fact, exist. This nominally socialist state was structured in accord with the most powerful ideological legacy of nineteenth-century industrialism. Its civil law embodied this ideology in both its verbiage and broad-based economic law, which were crafted onto a centuries-old Roman law.[53]

At least three different types of problems may result from the absence of historical continuity in intellectual property reform. First, an imperfect understanding of past legal principles means that the intellectual property culture in which the new laws must function is poorly understood. Socialist provisions and their application over most of a century have surely left a mark on the industries, processes, and products of intellectual property, with which reforms will have to contend.

Secondly, most post-socialist countries have identified themselves as civil law jurisdictions, in keeping with their pre-socialist legal traditions.[54] However, it is not at all clear that the historical distinction between civilian and socialist legal systems is without consequences for reform in formerly socialist jurisdictions.[55] The shape, content, and purpose of socialist legal codes was substantially different from their counterparts in the civilian systems of Western Europe. For example, the extensive treatment of economic policy through the framework of law, or the extreme emphasis on legislation at the expense of judicial interpretation, are important points of departure from Western European

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[53]Schmidt (n 5) 61.

[54]It is interesting to consider whether religious law may play a role in the once Islamic republics of Central Asia.

[55]The characteristics of the "socialist" legal system in Soviet Russia, and the peculiarities of civil law tradition in this context, are discussed by Danilenko & Burnham (n 18) 2-7.

practice. The legal heritage of post-socialist jurisdictions is not a "purely civilian" one.[56]

Finally, and somewhat disturbingly, the uncritical dismissal of past intellectual property provisions means that the legal approaches which they represented have been discarded without a proper assessment of their continued relevance, if any, to the new system. There is a natural tendency to assume that principles of socialist law do not belong in a democratic legal regime. Additionally, legal principles that have become tainted by their association with Communism may need to be discarded for psychological reasons – for example, the basic rights in the Stalinist Constitution.[57] Nevertheless, an objective approach to reform demands that, where legal principles have proven their worth in the past, they should not be dismissed out of hand without a consideration of their potential value in the future.

2. Comparative Law: The Strengths of an Outsider's View

The revision of intellectual property laws in Central and Eastern European countries is by nature an exercise in comparative law. The primary objective of reform has been to evaluate domestic legal provisions against foreign and international models, with a view to reshaping domestic laws according to international standards. The internationalisation of national laws is part of a more fundamental transformation of one kind of legal system, the "socialist" system, into another, most probably a Western European-style combination of civil law and market economy. Not surprisingly, foreign legal experts, though mainly

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[56]See Schmidt (n 5) 56-58 (also citing Butler).

[57]Alexander Esenin-Volpin's insistence that the Constitution should be respected helped to bring about the empowerment of dissent: see Hosking (n 7) 417-18.

Americans, have been the most prominent advisers on the new shape of intellectual property law in the region. It is difficult to say how much of the foreign flavour of new intellectual property legislation is due to their direct influence, and how much is a result of the collapse of domestic legal systems, most dramatically, in Russia.

The approach to intellectual property rights in post-socialist countries can be described as a process of legal "transplantation."[58] Those who are involved in reform hope to bring international models to Russia and make them successful on international terms within the Russian environment. However, the notion of making a successful "transplant" would seem to suggest a process of adaptation, as well. Measures enabling a transplant to be successfully integrated into its new environment could be quite complex; the new environment must provide the necessary nourishment for the transplant to grow and develop, and the transplant itself may have to evolve special characteristics to survive in hostile conditions.

A more accurate way to characterise the pattern of post-socialist law reform may be as a "legal export."[59] The idea of "exporting" intellectual property rights seems to convey more effectively the somewhat crude, unsystematic, and commercially-driven basis of intellectual property reform after socialism.[60] In intellectual property reform, the fundamental differences between Western legal models and post-socialist legal culture

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[58]For example, see Butler (n 3) 509.

[59]U Mattei "Three Patterns of Law: Taxonomy and Change in the World's Legal Systems" (1997) 45 AJCL 5, 7.

[60]Problems with reform are described in detail by Butler (n 3) 509.

have remained largely unarticulated. The adoption of new intellectual property laws in the post-socialist environment has not been matched by the creative development of conceptual thinking related to intellectual property rights. The comparative law exercise is therefore badly realised, not primarily because of the practical conduct of reform, but because of the underlying conceptual limitations of accepted comparative approaches in this context. As Ugo Mattei observes:

> [T]he real problems faced by intellectual globalisation are found in domains where very different conceptions [of law] clash with each other. In such domains transplants take place, but the phenomenon is better captured by the notion of legal imperialism. The transfer of knowledge, rather than being a pattern of communication and exchange between different legal systems, becomes a one-sided exportation of legal rules and concepts that usually end up being rejected, or creating intellectual dependency. The existence of exporting and importing... legal cultures is a fact. It is also a fact... that this one-sided attitude winds up with... rather serious problems.[61]

Mattei's analysis of legal imperialism is an apt description of the approach to intellectual property law in post-socialist countries over the past decade. Problems in developing, implementing, and enforcing intellectual property rights can be traced to the unsophisticated treatment of legal reform. Foreign experts appear to have a poor understanding of indigenous legal systems, how they developed under socialism, and how socialist legal frameworks were related to political ideology, social values, and culture. The consequences of an "imperialistic" outlook include an inability to evaluate legal systems and norms objectively. The logic of the importing legal system becomes inaccessible to the adviser, and the methods of reform which he advocates are therefore narrow, incomplete, and inadequate.

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[61]Mattei (n 59) 7.

For Mattei, the conceptual weaknesses of traditional comparative scholarship may be traced to an outdated approach to the classification of legal systems. Western comparative law has traditionally identified the common law and civil law systems as the two main types of the world's legal systems, with socialist law as a third category, and a "residual" category of "other" systems.[62] However, this classification system may lead to "the marginalisation of...'radically different cultures' from the mainstream of comparative legal research." For example, by classifying non-Western systems together as "other," comparativists fail to recognise the distinctiveness of non-Western legal systems and to explore the intellectual significance of these differences. Mattei identifies some of the historical reasons why he believes this approach to classification should be reconsidered. Interestingly, he links post-socialist reform with post-colonial modernisation:

> Current classifications in legal families, in addition to being largely Euro-American centric, need to be revised because the geo-legal map of the world is substantially different... The first and most obvious difference is due to the "fall" of Communist ideology in Central and Eastern Europe, an event which called into question the "socialist law" family. The second less obvious, but equally important, difference is due to the "success" of the same political system in China, and consequently increased importance of legal sinology among comparative disciplines. The third relevant factor is the increased importance and the extraordinary progress of Japanese law in the past 30 years. The fourth difference is due to the increasing awareness on [the] part of the Islamic world of its cultural, and consequently legal, peculiarities. The independence achieved by the entire African continent represents the fifth historical development which comparative law must take into account.[63]

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[62]Mattei (n 59) 8. Interestingly, Danilenko & Burnham (n 18) 1 recognise only "three major groups or families" until "recent revolutionary changes in Russia and Eastern Europe." One wonders how they would propose to incorporate non-Western legal systems into their comparative scheme, and whether their analysis of current Russian law might not be impaired by substantially overlooking the legal systems and traditions in the developing world.

[63]Mattei (n 59) 12.

The problems with foreign involvement in post-socialist intellectual property law do not mean that foreign expertise is irrelevant to reform. On the contrary, the assistance of informed outsiders is indispensable for post-socialist countries. The distinctiveness of post-socialist legal systems may well be most clearly apparent to outsiders, who are not caught within the trauma of change in the region. Like Rousseau's *législateur,* their personal distance and lack of involvement in political change should enrich the reform process by a disinterested and objective approach.[64] Their special contribution to the reform effort may be a degree of clarity in identifying the characteristic features of post-socialist legal culture and the legacy of socialist law, the environment to which new laws should be properly adapted. At the same time, they are in a position to communicate the essence of the favoured foreign models to local reformers. However, the intellectual and cultural distance of foreign advisers must be combined with the knowledge and passion of legal reformers from within the post-socialist framework to yield the most creative and effective shape for future laws.

A new approach to intellectual property reform will require a reassessment, not only of the factors determining the actual shape of the law, but, in more fundamental terms, of the objectives and goals of intellectual property rights after socialism. The arrogance and self-interest of the international intellectual property community, what Mattei aptly calls the "nothing to learn attitude" of "exporting legal cultures... against importing systems,"[65]

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[64]J-J Rousseau *Du contrat social.*

[65]See Mattei (n 59) 5; he argues that "[t]his parochial attitude is extremely evident in modern American academia, as has traditionally been the case with French legal scholarship."

is at fault. Arrogance is a cultural tradition; self-interest is inevitably involved in the internationalisation of intellectual property rights, since advanced industrial economies are becoming increasingly dependent on intellectual property for wealth creation.[66] However, the failure to study the special features of intellectual property law in transitional countries will lead to losses that are felt, not only by transitional and developing countries, but also, by the international community as a whole. The new intellectual property regime established by the TRIPs Agreement continues to generate great controversy, and its logic is far from being universally accepted. Areas such as moral rights remain totally unresolved in the TRIPs system, leading to confusion.[67] An open-minded exploration of law in post-socialist countries can help to resolve international conflicts over intellectual property rights. The efforts of informed observers to assess the strengths and weaknesses of foreign dealings with intellectual property can bring new strength, sophistication, and subtlety to international models in this field.

E. CONCLUSIONS

It would be difficult to exaggerate the scope and complexity of law reform in post-socialist countries. Intellectual property law is an integral part of this comprehensive process of reform. Information, knowledge, and expression of all kinds were infused with a special

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[66]For example, in relation to pharmaceutical patents in India, Henderson comments: "Perhaps the U.S. is not so much motivated by the economic benefit that India will supposedly gain, but by a concern that India is already benefiting at their expense." Henderson (n 14) 663.

[67]See Article 9.1 of the TRIPs Agreement. This provision requires countries to adhere to the moral rights provisions of Article 6*bis* of the Berne Convention, but exempts them from the WTO dispute-settlement mechanism.

significance in the authoritarian regimes of the region, where political domination was intimately connected with the manipulation of ideas. Intellectual property rights after socialism should reflect the democratisation of knowledge in these newly democratic and developing societies.

Copyright law is among the most important means of regulating expression in modern societies. Its main purpose is commercial; but, especially through the protection of moral rights, copyright also transcends commercial concerns and becomes deeply implicated in culture and human rights. Copyright has a special contribution to make to legal modernisation and democratisation, by offering much-needed support to the ideals of creative expression and authorship. However, the realisation of this potential will depend on a sophisticated, well-informed, and long-term commitment to navigating the challenges of law reform in the largely uncharted waters of the transition.

III. MORAL RIGHTS IN RUSSIA: THE TSARIST AND COMMUNIST EXPERIENCES

The early development of copyright and moral rights in Russia closely resembles its progress in Western European countries.[1] In the United Kingdom, a country that is generally regarded as the first to develop modern copyright principles,[2] copyright law was the regulatory response to an unprecedented new technology for disseminating knowledge: Caxton's printing press.[3] Printing was at first tightly controlled by a monarchy that was concerned about the political implications of a free press.[4] However, political liberalisation and the rise of humanitarian theories of authorship and creative rights led to a parting of ways between copyright and censorship.[5]

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[1]This chapter follows Russian and civil law tradition in using the term "copyright" to designate both copyright and moral rights, as a synonym for *droit d'auteur, Urheberrecht*, and *avtorskoe pravo.* The terminology of "moral rights" and "personal rights" has also been used interchangeably to designate legal protection for the extra-commercial interests of authors.

[2]See EW Ploman & LC Hamilton *Copyright: Intellectual Property in the Information Age* (Routledge & Kegan Paul London 1980) 11, and MA Newcity *Copyright Law in the Soviet Union* (Praeger Special Studies New York 1978) 3: he points out that England is "the birthplace of the copyright concept." Strömholm's interesting discussion of common-law copyright focusses on the issue of why moral rights have received such ambivalent treatment in this most established tradition: see S Strömholm *Le droit moral de l'auteur en droit allemand, français et scandinave avec un aperçu de l'évolution internationale: Etude de droit comparé,* vol 1, *Première Partie: L'Evolution historique et le mouvement international* (PA Norstedt & Söners Förlag Stockholm 1967) 428-29 (but see the contrasting discussion in P Drahos *A Philosophy of Intellectual Property* (Ashgate Aldershot 1996) 28.

[3]Caxton's press was founded in 1476, shortly after Gutenberg's invention of the device in 1436: see Newcity (n 2) 3-5 and Ploman & Hamilton (n 2).

[4]See Ploman & Hamilton (n 2) 9-11, and Newcity (n 2) 3-5.

[5]The impact of natural rights theories of authorship on copyright, especially on the development of English common law, is considered by Drahos (n 2) 22-28. An overview of the issues can be found in Ploman & Hamilton (n 2) 13-14; Newcity (n 2) 4 also alludes to the influence of Locke on freedom of the press.

Internationally, copyright retains formal ties to the possibility of restricting free expression in the interests of "public order," particularly through Article 17 of the *Berne Convention for the Protection of Literary and Artistic Works.*[6] As Ricketson observes,

> [E]ven in the most liberal democracies, there will be instances in which governments will wish to suppress the publication or dissemination of particular works on the grounds of national security or offence to generally accepted notions of public morality... In recent times, we have become particularly aware of this in relation to the distribution of subject matter over the Internet.[7]

However, the threshold requirements for invoking such measures in democratic societies are set at a relatively high level, and are usually subject to Constitutional justification, or other safeguards.[8]

Copyright in Russia, as in the West, was a response to the introduction of printing. However, printing technology was relatively slow to take root: the first printed book did not appear in Russia until 1564, and publishing was not to develop as

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[6]See Article 17 of the *Berne Convention for the Protection of Literary and Artistic Works* (Berne, 9 September 1886), 828 UNTS 221 (Paris Act of 24 July 1971, as am 28 September 1979); its significance is discussed by S Ricketson "The Boundaries of Copyright: Its Proper Limitations on Exception: International Conventions in Treaties" (1999) 1 IPQ 56, 73-77. Ricketson points out that Article 17 may also be used for the purpose of controlling "monopolistic and other anti-competitive practices." It should be noted that such provisions are not without practical effect, even in democracies. For example, in the "Spycatcher" case, surrounding the publication of memoirs by a British Secret Service agent that alleged illegality and incompetence in the department, the government of the UK attempted to restrict publication on the grounds of breach of confidence. The case failed, but the House of Lords made the interesting observation that it may have been prepared to grant the Crown an "equitable copyright" in Peter Wright's book: *Attorney General* v *Guardian Newspapers (No. 2),* [1990] 1 AC 109 (HL).

[7]Ricketson (n 6) 75.

[8]For example, in the case of the United States, the First Amendment of the Constitution protects free speech; in the United Kingdom, where the structure of the Constitution is much more complex, freedom of speech can still be identified as a cornerstone of British democracy.

a socially important industry until the rule of Peter the Great, early in the eighteenth century.[9] This time lag of close to a century meant that Russian copyright law developed in a fundamentally different historical environment from Western copyright, a factor that was to prove especially significant for the development of moral rights.

As in the United Kingdom and other Western European jurisdictions, copyright regulation in Russia was initially one element in a programme of strict control over the spread of the written word. However, a number of crucial differences in the Russian situation led to a distinctive trajectory for the development of Russian copyright law. In tsarist Russia, government was based on the absolute power of the tsar; authors were perceived as a potential threat to his power, and it was therefore difficult for authors' rights to achieve a definitive separation from censorship. The arrest and exile of Dostoevsky for his participation in the Utopian "Petrashevsky Circle" is one example of how the tsars dealt with literary dissent; on an earlier occasion, Pushkin wrote and circulated anonymously a "blasphemous" poem, for which he ultimately requested and received a personal pardon from Nicholas I, delivered with the "characteristic" phrase, "I know all about this case and consider it closed."[10]

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[9]See Newcity (n 2) 4-6.

[10]The incident is described in M Hayward *On Trial: The Soviet State Versus "Abram Tertz" and "Nikolai Arzhak"* (New York: Harper & Row 1967) 31-32. Hayward mentions that the term "characteristic" is used by the correspondent of Komsomolskaya Pravda in an article on the Pushkin case that "coincidentally" appeared as the Siniavskii-Daniel trial was nearing its end. The poem was called, "The Gabrieliad," and is described by Hayward 31 as "a blasphemous epic in which Lucifer and the Archangel Gabriel compete for the favours of the Virgin Mary, with the result that there is some question as to the paternity of Jesus Christ." A special government commission was actually established in 1828, the year of the censorship statute that also set out copyright principles for the first time, to "investigate authorship of the poem." As for Dostoevsky, the consequences of his participation in idealist politics, including the terrible mock execution that he endured, are described in R Pevear's Introduction to

The revolutionary reassessment of authors' rights in the period of Bolshevik rule immediately following the October revolution of 1917 proved to be short-lived, and, both for reasons of practice and theory, could not succeed in laying the foundation for a regime of authors' rights that would be truly independent of political considerations. Instead, there is a surprising undercurrent of continuity in the Russian approach to authors' rights, interrupted briefly by the Revolution, from tsarist through to the end of Soviet times.

Two distinctive and enduring features of Russian life were to leave a permanent imprint on the structure and content of copyright law. The first was the persistence of absolutist and totalitarian government, which sought to exploit literature and art for political and ideological ends. The form of government may have differed – tsarism versus Communism – but this element was ultimately central to both. The second was the crucial role of writers and artists in Russian political development – in the liberalisation of Russian society under the tsar, and later, in their anti-Soviet activism. Ironically, these two, Janus faces of Russian political life reflect a commonly-held belief in the importance of creative expression shared by writers and rulers.[11] As Osip Mandelstam, the Russian poet, apparently commented to his wife, "Poetry is respected only in this country – people are killed for it."[12]

F Dostoevsky *The Brothers Karamazov* trans R Pevear & L Volokhonsky (Vintage Books New York 1990).

[11]Hosking refers to the contribution of literature to national identity as building "[a] version of Russia as 'imagined community'": see G Hosking *Russia: People and Empire 1552-1917* (Cambridge Harvard University Press 1997) 286.

[12]Quoted in G Hosking *A History of the Soviet Union 1917-1991* (Final Ed Fontana Press London 1992) 408.

A. PRE-REVOLUTIONARY MORAL RIGHTS

In dealing with the issue of authors' personal, or "moral," interests, Russian legislators were concerned with three rights of authorship: attribution, integrity, and first publication, or disclosure. All three rights are recognised in different international jurisdictions, and are a focus of copyright systems in the civil law countries of Continental Europe; some countries also recognise additional moral rights, such as a right to withdraw one's work from circulation on the grounds that it has ceased to represent one's opinions, and even a right against excessive criticism.[13]

The right of attribution provides that the author has the right to be associated by name with his own work, or possibly, to publish under a pseudonym or anonymously; the right of integrity allows an author to protest the mistreatment of his work, usually where his reputation or "honour" is at stake; and the right of disclosure, or first publication, permits the author to choose whether, and how, his work is released to the public. Attribution and integrity rights were explicitly included in international copyright law for the first time in the 1928 revision of the Berne Convention for the Protection of Literary and Artistic Works, the primary international instrument for copyright protection.[14] In keeping with international trends, moral rights provisions in

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[13]These rights are protected in France, traditionally the strongest moral rights jurisdiction in the world: see the *Code de la propriété intellectuelle du 1er juillet 1992,* JO, 3 juillet 1992, Titre 2, Chapitre 1, Articles L 121-1, L 121 - 4; available online: <http://www.adminet.com/code>. Though the right against excessive criticism is not specifically mentioned in the *Code,* it appears to be part of French tradition, and can certainly be considered one aspect of the integrity right. Michaélidès-Nouaros argues that criticism must be done "avec sincérité [with sincerity]" and in "termes corrects [appropriate terms]." See G Michaélidès-Nouaros *Le droit moral de l'auteur: Étude de droit français, de droit comparé et de droit international* (Librairie Arthur Rousseau Paris 1935) para 168.

[14]N 6.

Soviet Russia were concerned with these three rights, and they have also remained the focus of recent, post-Communist legislation on moral rights.[15]

In one form or another, moral rights appear to have been implicated in the development of Russian copyright since the earliest legislative efforts in this field.[16] Russia's first copyright regulation was issued in 1828, as five articles in a statute on censorship;[17] its last copyright statute before the Revolution was the copyright law of 1911.[18] With the adoption of the 1911 law, moral rights were explicitly incorporated

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[15]Russian Federation Law on Copyright and Neighboring Rights *(Zakon Rossiiskoi Federatsii Ob avtorskom prave i smezhnykh pravakh) VSND i VS RF,* 1993 No 32, Item 1242; *Rossiiskaia gazeta* 3 Aug 1993 (as am by Federal Law of the Russian Federation of 19 July 1995, *Rossiiskaia gazeta* 26 July 1995). Available online: Law No 5351-I of July 9, 1993, Russian Patent & Trademark Office, <http://www.rupto.ru/ruptoen/law/intel.htm>. See also the provisions of moral rights in the currently pending Draft Civil Code (November 30, 2001), which has been translated into English by OM Kozyr and EV Luchits. The document was provided to me by David Lametti of the Faculty of Law, McGill University, Montreal, and is available at McGill as part of the Faculty's long-standing involvement in the provision of advice on legal reform to Russia.

[16]The difficulties of investigating copyright and moral rights in tsarist Russia should be duly noted. Due to a number of factors, including the intervention of dramatic historical events, the Soviet government's frequent attempts to "erase" pre-Communist history in Russia, and the chaotic and disorganised nature of the tsarist legal regime itself, it is a challenge to reconstruct accurately the copyright regime of the era. This analysis is based on the most comprehensive consideration possible in the circumstances of original documents, documents in translation, and contemporary and historical research by legal scholars.

[17]*Ustav o Tsenzure* (Censorship Statute), *Polozhenie o Pravakh Sochinitelei* (Law on Creators' Rights) ss 135-39, 22 April 1828 (as am 1830), *Polnoe Sobranie Zakonov Rossiiskoi Imperii* (Sob II) (Second Complete Collection of the Laws of the Russian Empire), *Sanktpeterburg* 1830, Vol III, Item Nos 1979-80.

[18]Russian Copyright Law of 20 March 1911, *Polnoe Sobranie Zakonov Rossiiskoi Imperii* (Sob III) (Third Complete Collection of Laws of the Russian Empire), Sanktpeterburg 1914, Vol XXXI, Item No 34, 935. Incorporated into the Civil Code (*Svod Zakonov*) as ss 695(1)-695(15) of the Civil Laws (Volume X, Part 1, 1914 ed); *Sobranie Uzakonenii i Rasporyazhenii Pravitel'stva,* (Collection of Regulations and Government Decrees), 30 March 1911, No 61, Item 560.

into Russian copyright legislation.[19] However, the focus of moral rights on the individual rights of authors made them incompatible with the requirements of tsarist rule, leading to an enduring tension between authorship and politics.[20]

1. Russian Theories of Moral Rights

Copyright and moral rights in pre-Revolutionary Russia suffered from a degree of conceptual poverty. In general, the development of Russian legal theory was greatly inhibited by the system of tsarist government, where law was subordinate to the political authority of the tsar. Indeed, the absolute character of the tsar's rule meant that law was identified with him personally. As Susan Heuman points out:

> From the time of Peter the Great the tsars established a governmental system designed to serve the will of the center. Law was identified with the head of state rather than with legal precepts. Although during each reign the failure to codify the law was recognised as a problem, the tsars drew back from permitting the establishment of an overarching theory of law. To acknowledge any principle of authority higher than the autocracy itself was unacceptable.[21]

As the nineteenth century progressed, the underdevelopment of law and legal culture came to be seen as a serious obstacle to the modernisation of Russian society. This perception was shared by the tsar, who could not ignore the potential for instability inherent in Russian backwardness, and the emerging Russian intelligentsia, including as one of its most dynamic groups, writers. Russian intellectuals across a range of disciplines applied themselves to this problem and developed ideas on Russian legal

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[19]For example, see the points made by Strömholm (n 2) 423, and the general discussion in the contemporary account of the law by LP Rastorgoueff "The New Law of Copyright in Russia" (1911) J Soc'y Comp Leg 302, 305, 308.

[20]For example, see the discussion in S Levitsky "Continuity and Change in Soviet Copyright Law: A Legal Analysis" (1980) 6 Rev Socialist L 425, 433.

[21]SE Heuman "Perspectives on Legal Culture in Prerevolutionary Russia" in P Beirne (ed) *Revolution in Law: Contributions to the Development of Soviet Legal Theory, 1917-1938* (ME Sharpe Armonk 1990) 3, 3.

development, embracing the extremes of anarchism and legal nihilism, the legal positivism of the "analytical school," and a special variety of Russian "liberalism."[22]

For Russian liberals, legal modernisation meant a movement away from tsar-centred legality to the development of a society based on the concept of individual rights.[23] However, the idea of individual rights developed by Russian liberal theorists was not limited to Western-style constitutional rights: in their view, the Russian legal system should be strongly and directly focused on individual rights, so that "all individual and social freedoms or rights" should be "primary rights," in contrast to the residual, "secondary" nature of rights in Western constitutional democracies.[24] Both the importance of individual rights for legal modernisation and their incompatibility with the Russian autocracy are concisely expressed by Heuman:

> The autocracy dealt with the population as subjects who were granted certain rights and privileges based on their social and economic status. To transform the legal and political system in the Russian Empire would necessitate a change in the relationship between the individual and the state. But the tradition of the French Enlightenment did not have the impact on the Russian Empire that it had in Western Europe, where it produced a sense of natural rights. Natural rights might have given birth to a concept of civil rights that were independent of the bureaucratic state and ideological framework.

In this legal environment, the notion of moral rights, with its strong basis in an individual and personal right of the author, presented a fundamental challenge to the established legal culture. At the same time, the importance of encouraging authorship

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[22]See Heuman (n 21) 5-7.

[23]An alternative was presented by the anarchists, who recognised that law in Russia had been "an instrument of ruling class oppression, the antithesis to human freedom." See Heuman (n 21) 6-7; in different forms, the same idea inspired thinkers as distinguished and diverse as Mikhail Bakunin, Prince Kropotkin, and Leo Tolstoy.

[24]These ideas are characteristic of Russian "liberal legal theorist," BA Kistiakovsky, quoted in Heuman (n 21) 8.

for the sake of Russian development was a factor motivating the government to improve authors' rights, including, as in Western European model laws, protection for their personal interests. Indeed, the development of a Russian doctrine of moral rights would entail both the adoption of foreign legal theories and the successful progress of liberal legal thinking within Russia, itself, which was necessary for legal reform to become possible. In fact, the reformed Russian copyright law of 1911 included protection for moral rights. The presence of moral rights in Russian legislation can be traced to three sources: the traditional and growing importance of authors in Russian society, the idealistic and reform-minded attitude of the drafters of the new Copyright Act, and the influence of French and German theory on Russian copyright law.

In particular, the influence of Western European legal theories of authors' rights on Russian law deserves a more detailed consideration. Russian copyright was developing at a time when natural law theories of authors' rights had gained widespread currency in Western Europe. Russia's Copyright Act of 1911 was intended to modernise thoroughly the Russian treatment of authors' rights, and it was closely based on the German copyright law of 1901.[25] If political restrictions under the tsar had limited the development of copyright, cultural factors within Russia may have compensated by increasing the pressure on the government to modernise copyright and moral rights – in particular, the increasing prominence of authors in Russian political and social development.[26] As Geoffrey Hosking points out, authorship came to be

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[25]See Newcity (n 2) 8.

[26]Nevertheless, a substantial lag of more than five years intervened between the recommendation of the Russian Ministry of Justice on the urgency of a new copyright law, and the actual adoption of a new legislation. See Newcity (n 2) 8-9.

desperately important in nineteenth-century Russia, where it was seen as an essential instrument of nation-building.[27]

The idea that the prerogatives of authorship should be understood as natural rights grew increasingly influential in the countries of Continental Europe throughout the eighteenth and nineteenth centuries, especially in France and Germany.[28] In France, the impact of natural rights theory on copyright law has been particularly strong, leading, in the views of at least one commentator, to the enduring "pre-eminence...[of] moral rights [over economic rights] as clearly expressed in the Copyright Act."[29] Russia's legislative commitment to moral rights at the turn of the century is at least partially a reflection of the international growth and development of the doctrine during the formative years of its copyright regulation.

Indeed, an interesting contrast may be drawn with the development of copyright law in the United Kingdom. As Strömholm points out, UK copyright law was firmly established by the beginning of the eighteenth century, well before natural rights approaches to authorship had developed. Strömholm suggests that this is a major reason for Britain's historical reluctance to adopt legislative measures for protecting

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[27]See the detailed analysis of this issue in Hosking (n 11) 286-311.

[28]For example, see the discussion in Ploman & Hamilton (n 2) 108-116.

[29]Ploman & Hamilton (n 2) 108. According to Pontier *et al,* this continues to be the case in French law today: J-M Pontier, J-C Ricci & J Bourdon *Droit de la culture* (2d ed Dalloz Paris 1996). However, it is true that moral rights occupy relatively little space in the French Act, though this is in some measure due to the open-ended way in which they are formulated, and Strowel feels that they are not as important in French law as they are widely said to be: see his interesting consideration of this issue in A Strowel *Droit d'auteur et copyright: Divergences et convergences, Etude de droit comparé* (Bruylant Bruxelles 1993) 81-171.

moral rights.[30]

Prior to the Revolution, Russian copyright had begun to develop along the doctrinal lines favoured by Russian liberalism and its influence on legal theory. Russian copyright had always been an "author's right": in contrast to the American tradition, which places a great deal of importance on the rights of copyright owners, or the publisher-based development of British law,[31] the person of the author was clearly the focus of Russian law. Initially, the position of the author reflected the social importance of authorship in Russia. For example, individual authors were occasionally able to influence the development of copyright, and at least two major changes in Russian copyright, affecting the author's rights to control translations and the duration of copyright protection, were brought about by Pushkin.[32] Turgenev was later part of Russia's delegation to the conference for the adoption of the Berne Convention. By 1911, however, the consolidation of the authors' rights approach to copyright in a

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[30]See Strömholm (n 2) 428-29. The UK adopted moral rights legislation for the first time in its history in amendments to the Copyright, Designs and Patents Act in 1988. While the provisions have great symbolic significance, their practical reach is disappointingly limited. The moral rights provisions are discussed in WR Cornish "Moral Rights under the 1988 Act" (1989) 11(12) EIPR 449; they receive a vivid critique in D Vaver "Moral Rights Yesterday, Today & Tomorrow" (1999) 7(3) IJLIT 270, who also offers an interesting "public interest case" for moral rights, justifying them in ways that are perhaps more compatible with common-law tradition – for example, on the basis of truth-in-marketing, and cultural preservation.

[31]The author's right was recognised "implicitly, if not explicitly": his right was essentially the right to sell his work to the Stationers' Company, which would have the right to copy it. See Ploman & Hamilton (n 2) 11-13. In the Statute of Anne of 1709, the author's *property right only* was codified, along with the right of the publisher, which was obtained by assignment from the author. Over time, the publishers did not hesitate to invoke authors' rights in defense of their own interests: see the discussion in Ploman & Hamilton (n 2) 13-14.

[32]Pushkin's widow sued for, and obtained, this right for Russian authors: see Rastorgoueff (n 19) 307.

modern law could also be said to reflect the growing influence of Western legal theory and Russian humanism on legal culture.

Russian copyright law maintained a very close connection between economic and moral rights. In this sense, the influence of the German copyright statute of 1901 is evident: in keeping with the German "monist" doctrine of moral rights, economic and moral rights were practically inseparable.[33] However, the very high level of moral rights protection in Russian law is more reminiscent of French tradition, where moral rights arguably provide the very rationale for copyright protection.[34] In practice, the distinction between monist and dualist theories of moral rights affects the term of protection: in monist systems, moral rights expire with economic rights, while dualist systems typically grant perpetual protection of moral rights. In Russia, a term of protection has never been specified in legislation – an omission that would continue to characterise Soviet copyright law – but the convention is that they were granted perpetual recognition in Russian law.[35] Russia's mixed approach, employing the

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[33]Two streams of theory related to moral rights are usually distinguished, the "dualist" school, separating moral and economic rights into two distinct areas, is usually associated with the development of moral rights doctrine in France, while the "monist" school, regarding the two kinds of interests as two branches of a single right, is associated with Germany. The two ways of thinking lead to different terms of protection: in France, moral rights enjoy perpetual protection regardless of the term of protection for economic rights, while Germany provides an equal term of protection for both. This distinction is not entirely clear-cut; see S Strömholm "Droit Moral – The International and Comparative Scene from a Scandinavian Viewpoint" (1983) 14(1) IIC 1,10-12. He emphasises that the modern understanding of moral rights is a mixture of "French practical solutions" with "German theorising."

[34]For example, see the discussion in Pontier (n 29).

[35]See B Karakis "Moral Rights: French, United States and Soviet Compliance with Article 6bis of the Berne Convention" (1994) 5 Touro Intl L Rev 105, 133-34. Her assertion is based on Levitsky's research; however, she goes on to state that "unlike... copyright, an author's moral rights, could not be passed by inheritance"– an assertion that is not consistently supported by the legislation.

advantages of both systems, undoubtedly reflects a deep cultural tradition of respect for authors and veneration of the arts.

2. Moral Rights in Russian Legislation

Prior to the Revolution, Russia developed three major pieces of copyright legislation: the censorship statute of 1828,[36] the copyright provisions of the Russian Civil Code of 1887,[37] and the copyright law of 1911.[38] All three statutes included a notion of moral rights. However, the treatment of moral rights in Russian law was developed and expanded greatly in the 1911 revisions, which set a new standard of protection for authors' rights in Russia.

(a) Moral Rights and Censorship: The Censorship Statute of 1828

The first Russian legislative provisions on copyright were part of a general statute on censorship, issued by tsar Alexander in 1828. The tightened censorship regime was a response to the political turbulence of the decade, culminating in the Decembrist revolt of 14 December 1825.[39] By this time, the Russian publishing industry was flourishing, and included works by Russian authors as well as translations of works from throughout the Russian empire and abroad. The increased market for books among the Russian public meant that the publishing industry had to confront irregularities that had long been problematic in Western European countries.

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[36]N 17.

[37]Russian Civil Code (*Svod Zakonov Rossiskoi Imperii)* 1887, Volume X, Part 1, Section 420, Civil Laws. The provisions are cited and discussed in V Gsovski *Soviet Civil Law: Private Rights and Their Background under the Soviet Regime,* HE Yntema (ed) Michigan Legal Studies Series (University of Michigan Law School Ann Arbor 1948).

[38]N 18.

[39]The episode and its consequences are described in Hosking (n 11) 142-45.

The new copyright regulations had to serve a dual purpose. First, the legislation needed to deal with developments in the Russian publishing industry. As the nineteenth century progressed, it had become both possible and profitable for Russian publishers to print books which they did not have a license to print for the Russian market, infringing on the contracts of other publishers, a problem that had come to be known as "piracy" in the Western European book trade. Piracy would have entailed significant economic losses for Russian publishers.

Interestingly, the problem of piracy also had an impact on the tsar's ability to control the circulation of information in the wake of political turmoil. As Newcity points out, effective censorship demanded that censors should have access to all published works, whether or not they were published legitimately.[40] Piracy indirectly caused problems for censorship by allowing books to circulate in an unauthorised and unmonitored fashion, so that censors were not entirely aware of what was actually available on the literary market. The political effect of piracy was to limit the tsar's access to literary works that might challenge the legitimacy of his power.

It is therefore not surprising that the censorship statute of 1828 introduced a system of regulating the publishing industry based on the author's right in his own work, the easiest and most assured way of controlling publication activities. An interesting side effect of the author-centred approach, however, was that the legislation laid the foundation for considering authors' rights in their totality – as being both economic and personal in nature – rather than focusing, in the Anglo-American tradition, on the economic rights of authorship to the exclusion of personal rights from

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[40]Newcity (n 2) 6.

copyright legislation.[41] Even at this early date, Vladimir Gsovski identifies the system as one of *droit d'auteur* or *Urheberrecht,* and the structural potential for recognising moral rights as part of the authors' law is clearly built into the system.[42]

While the statute of 1828 conferred an exclusive right of publication on the author, in keeping with the requirements of censorship, it did not make explicit provision for the personal right of the author. Instead, the author's right was justified on economic grounds.[43] It is interesting that, at this basic level, the problem of the author's right ironically seems to come down to the question of who should have the right to control publishing – in other words, exercise powers of censorship – authors or the state. The theme of the government using authors' rights to camouflage its own censorship activities is also noteworthy; while it is far from unique to Russia, the Soviet government was to have extensive recourse to this strategy in its fight for ideological hegemony.[44]

Copyright in the censorship statute of 1828 was exclusively a "writer's right," applicable only to literary works.[45] The legislation granted to the author an exclusive

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[41]Of course, common-law systems offer protection to authors' personal interests by other legal methods, including tort law, an argument that was long advanced by Britain to support its claim to be in conformity with Article 6*bis* of the Berne Convention on moral rights, and now, to an important extent, by the United States for the same reason: Cornish (n 30).

[42]N 37, 606.

[43]See Levitsky (n 20) 443: his analysis supports the view that moral rights were implicitly recognised, though he points to theoretical and practical obstacles to acknowledging them openly in Soviet copyright law.

[44]For example, censorship considerations were at the origin of copyright in the UK and France, as well: see the discussion in Ploman & Hamilton (n 2) 10.

[45]Rastorgoueff (n 19) 302 calls it "the first law of the 'rights of writers.'"

right to publish and sell his work. The duration of copyright was the lifetime of the author and 25 years after his death. Copyright was also alienable, and could be inherited by the author's heirs.

The distinction drawn between publication and sale in the copyright statute suggests that a moral right of first publication, or disclosure, was implicit in the right of publication. Arguably, publication in the Russian statute means not only the right to sell, but it also signifies the additional right to disclose the work to the public. Unfortunately, the statute does not specify whether or not the right of publication could be alienated by the author, so that it is difficult to arrive at a definitive interpretation. However, this view does seem to be supported by the nature of the right: it flows directly from the creation of the work and, in contrast to the American system based on registration, for example, it arises automatically out of the creative act.[46]

It is interesting to note that copyright protection was available, not only to original authors, but also, to translators, who were granted an original copyright in their translated works. Indeed, Russian law embraced a broad principle of "freedom of translation" which created a situation of potential conflict in relation to the author-centred theory and practice of Russian copyright. In Russia, freedom of translation meant that translators were not required to secure the author's consent before publishing translations, or to provide a share of any profits from sales of the translation to the original author. At best, it appears that the translator would have been required to acknowledge authorship of the original work.

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[46]The right of disclosure, or first publication – *le droit de divulgation* in the original French expression – is explained, and its place in the doctrine of moral rights is discussed, by C Colombet *Grands principes du droit d'auteur et des droits voisings dans le monde: Approche de droit comparé* (2d ed Litec/Unesco Paris 1992) 42-43.

By refraining from adopting restrictions on translation rights, the Russian approach served the important Imperial policy of unifying Russia's diverse peoples through a common literature, as well as the goal of improving literacy.[47] From the point of view of Russian authors, however, freedom of translation could lead to both economic and moral losses. Although it was never abandoned, this principle was gradually modified in subsequent legislation to reflect some of their concerns. Interestingly, even after Russian authors acquired some rights over translation, the works of foreign authors could still be translated freely into Russian. Although some attempts were made to resolve the resulting international tension through bilateral treaties between Russia and Western European countries that were adopted in the wake of the 1911 copyright statute,[48] the problem eluded a complete resolution until Russia's accession to the Universal Copyright Convention in 1973.[49]

(b) Moral Rights and Property Rights: The Civil Code Reform of 1887

In the decades following the promulgation of copyright provisions, a number of regulations modified specific aspects of the copyright law. In 1830, a decree clarified that authors' rights were analogous to proprietary rights, and were subject to alienation by the author.[50] In the 1840s, copyright protection was extended from literary works

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[47]This is a significant point of continuity throughout Russian and Soviet copyright law according to Levitsky (n 20) 425, as well.

[48]For a history of Russia's involvement in bilateral copyright arrangements, see Newcity (n 2) 10-15.

[49]See the discussion in Newcity (n 2) 32-45.

[50]As Newcity (n 2) 7 points out, "an author's rights in his works were proprietary in nature and could be assigned, devised, or otherwise transferred."

only to musical and artistic works.[51] Interestingly, two important modifications to the law were also brought about by the direct intervention of Pushkin. The first of these provided that the publication of a translation that appeared alongside an original work was subject to the consent of the original author, a restriction on the principle of unfettered "freedom of translation" in Russian copyright law.[52] The second, on the request of Pushkin's widow, was for an extended term of copyright protection, which, in 1857, became the life of the author and 50 years after his death.[53] Both served to emphasise the focus of the law on the person of the author as its main subject and beneficiary, with his heirs continuing to benefit from his work after his time.

In 1887, copyright law was incorporated into a reformed Russian Civil Code.[54] The new structure of copyright was significant for several reasons. From the perspective of authors' rights, a positive development of fundamental importance was that the new copyright legislation broke completely with censorship regulations for the first time. Accordingly, Russian law had acquired a new potential to deal with copyright as individual rights of authorship, with political concerns relegated to a definitely subsidiary position. Copyright also acquired a new status through the Code, signifying greater stability and permanence. However, sources suggest that moral rights were not further elaborated in the Civil Code provisions. Rather, building on the 1830 decree, the Civil Code provisions treated copyright as one aspect of the law of property,

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[51]See Newcity (n 2) 7 and Gsovski (n 37) 607.

[52]Newcity (n 2) 7.

[53]See n 37; Gsovski (n 37) 607 and Newcity (n 2) 7.

[54]See Newcity (n 2) 8: copyright became part of the chapter on property law in the Civil Code.

and stated that "[e]very author or translator of a book shall enjoy for his lifetime the exclusive right to publish and vend it in his discretion *as his legally acquired property* [my italics]."[55] Once again, this provision lends itself to interpretation as a personal right to disclose the work, as well as an economic right to sell it. However, a moral right of disclosure can only be implied, and its existence is far from clear; no explicit provision for one is made.

In spite of the innovative introduction of an independent copyright regime included within the Civil Code, the essential structure of the law dated from 1828, and was gradually showing signs of strain under the pressures of Russia's turn-of-the-century. The shortcomings of the law, coupled with an increasing range of activities affected by copyright regulations, led to difficulties in interpreting and applying it. Rastorgoueff refers to one notorious case, litigated over a five-year stretch, where a dispute between two publishers was ultimately decided in favour of both parties – and thus, in effect, neither. It appears that the conflict arose precisely because of an absence of clarity about the doctrinal basis of copyright protection, "it being found that one [publisher] had the right of property and the other the right of publication in the same book!"[56]

(c) Moral Rights in the 1911 Act: A *Sui Generis* Approach

Dissatisfaction with copyright law as it had developed over the course of the nineteenth century led to a comprehensive reassessment of the Russian approach to copyright in the early years of the twentieth. Existing law, with its rather crude and minimalist

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[55]N 37. The translated provision appears in Gsovski (n 37) 607.

[56]The case is discussed by Rastorgoueff (n 19) 302; see also Newcity (n 2) 8. A similar situation arose under UK law in the case of Re Dickens [1935] Ch 267 (CA).

approach to copyright, was becoming inadequate to deal with the increasingly complex needs of Russia's authors, and its rapidly developing publishing industry. At the same time, the tsarist government felt that cultural activities were essential for Russian modernisation, and should be adequately recognised and protected by law.

The Copyright Act of 1911 was fated to be the last copyright statute before the upheavals of socialism.[57] It was inspired by the German copyright law of 1901, and it was the product of a thorough re-examination of Russian copyright law as it had developed to date.[58] It was to inaugurate a new copyright regime based on principles that, despite the intervention of the Revolution, would continue to colour Russian and Soviet legislation for decades to come.

The 1911 Act rejects the idea of property as a basis for copyright protection. Instead, it treats copyright as a *sui generis* right; it is divided into a series of chapters, each of which is concerned with one particular genre of copyright works. Rastorgoueff points out, "[c]opyright is no longer construed as 'property,' and Art[icle] I simply states that copyright subsists in literary, musical, artistic, and photographic works, enumerating examples of such works in illustration of its meaning."[59] With the removal of this basic conceptual limitation, the 1911 Act goes on to elaborate moral rights in some detail, protecting the author's moral right of integrity, and offering some implied recognition of disclosure and attribution rights. Significantly, the author is also said to enjoy an "exclusive" right to reproduce, publish, and disseminate his work.[60]

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[57]N 16.

[58]Newcity (n 2) 8.

[59]Rastorgoueff (n 19) 303.

[60]Article 2.

The Act expresses protection for authors' moral rights in a somewhat unusual formula. The moral right of integrity is set out in Article 20, which states:

> A person who has been granted, fully or in part, the author's right in the work is not allowed to publish or perform the work publicly with additions or abridgements, or with any alterations whatsoever, without the consent of the author or his heirs, except in the case of those caused by obvious necessity, to which the author himself, out of his good will, would not refuse consent.[61]

The effect of this provision is to prevent the unauthorised modification of an author's work. However, it is specifically concerned with the treatment of the work by the person to whom copyright is assigned – normally speaking, the publisher. Interestingly, this approach was to be resurrected in the Soviet integrity right, but, in that case, on the basis of a socialist theory of copyright that aimed to protect the individual author against the exploitation of his labour by the publisher.

As Gsovski observes:

> The law of 1911 sought to protect a Russian author against the publisher. Any person to whom the copyright was assigned was prohibited...[from] publish[ing] or perform[ing] the work with any additions, omissions or other alterations without the consent of the author, except those necessary alterations which the author could not reasonably refuse.[62]

As a result, protection for the moral right of integrity in the Act is very broad in requiring the author's consent to a variety of practices, but it is also strangely narrow in specifying who can be held responsible for an infringement. Following Serge Levitsky's analysis, it seems clear that the provision is not so much intended to restrict the scope of the integrity right, as to avoid introducing the unfamiliar and politically uncomfortable terminology of "personal," moral or individual interests into Russian

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[61]Article 20 of the Copyright Act (n 18); trans A Kokcharov & M Sundara Rajan.

[62]Gsovski (n 37) 610-11.

law.[63] This reading of the Act seems to be supported by a consideration of Article 70, which appears in Chapter 7, on Publishing Contracts. Article 70 restates the author's moral right of integrity, in almost identical terms to Article 20, except that it identifies the publisher, in particular:

> The publisher does not have the right, without the consent of the author or his heirs, to make any changes whatsoever to the work...except those to which the author, out of his good will, would not refuse his consent.[64]

Indeed, in his comparative study of moral rights, Strömholm does not hesitate to observe:

> Le droit moral n'est pas dépourvu de traditions en Russie. La loi de 1911 connaissait le droit au respect...et déclarait le droit d'auteur insaisissable entre les mains de l'auteur et de ses héritiers...[65]

In addition to the moral right of integrity, the Act of 1911 includes a number of other provisions related to moral rights. Notably, it creates a specific offence out of the failure to indicate the author's name on a published work, punishable by imprisonment for a minimum period of three months.[66] The Act thereby appears to provide some protection for the author's right of attribution. It also provides for calculating the term of copyright protection in the case of anonymous or pseudonymous works, suggesting that the right of the author to choose whether or not to be associated with his work by

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[63]See Levitsky (n 20) 433: his discussion deals with the issue of individual rights of authorship in Russian copyright law in the context of the 1928 amendments.

[64]Trans A Kokcharov & M Sundara Rajan. Of course, the provision would presumably apply *a fortiori* to an unauthorised publisher as well, which would extend its reach to mistreatment of the work in unauthorised publications, but would still not address mistreatment of the authorised publication by "users" other than the publisher.

[65]Strömholm (n 2) 423.

[66]Amendments and modifications of existing law, Article V, Item 620.

name is part of the law.[67] Article 27 of the Act provides that the "publication of literary work or of its content if it has never been published before is not allowed without the consent of the author" – a right of disclosure.

The Act also dealt with the issue of assigning copyright in future works: the assignment of copyright in works that had not yet been created could only be valid for a maximum period of five years, whatever the contract terms might state.

Finally, the 1911 Copyright Act introduced some restrictions on the principle of freedom of translation. A Russian author would be allowed to reserve the right to issue a translation of his work for a period of ten years.[68] This provision contributes indirectly to the status of an author's moral rights, as well, by allowing him greater control over the quality of translations.[69] This is often a key issue for writers in countries such as Russia, where both national reputations, through translation into regional languages, and an international name may be made or broken by the appeal of

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[67]See Rastorgoueff (n 19) 308. Disguising authorship was explicitly recognised as one aspect of the attribution right in the Fundamentals of Civil Legislation of 1961, Article 98. An English translation of the copyright provisions is available in Newcity (n 2), Appendix A, 182.

[68]Gsovski (n 37) 610 explains that, "[a] Russian author or the author of a publication which appeared in Russia enjoyed the exclusive right of translation, provided he printed a reservation clause on the title page or in the preface. This right was protected for ten years provided he published the translation within five years after the publication of the original." In other words, provided that the author published the translation within five years, no one else was allowed to issue an unauthorised translation for a period of ten years from the time of publication. It should be noted that scholarly works were excepted from the principle of freedom of translation, as had already been established in Russian law of the nineteenth century.

[69]It should be remembered, however, that the provision would not apply to foreign authors.

works in translation.[70]

This provision undoubtedly reflects the influence of international copyright law: Article 5 of the Berne Convention of 1886 secured to authors a 10-year period during which they could reserve translation rights. However, translation rights in subsequent revisions to the Berne Convention moved forward rapidly, and the provision appeared very restrictive by contemporary international standards. For example, Article 8 of the 1908, Berlin Act of the Berne Convention provided that authors have the right to make or authorise translations of their original works for the entire duration of copyright protection – the lifetime of the author, and 50 years after his death.[71] The United Kingdom was one of the 15 signatories of the Berlin Act, and the UK Copyright Act of 1911 provided a similar right to make or authorise translations for 50 years after the death of the author, without any need for the author to reserve the right.[72]

3. The Status of Moral Rights before the Revolution

By the time of the October Revolution, Russia had succeeded in developing a vision of copyright law that was conceptually consistent and relatively modern. The Copyright Act of 1911 was based on Western European principles of copyright law, though it included a few provisions that were a product of its special concerns in relation to copyright, notably, in the area of translations. The Russian approach to translation was not, in itself, innovative; but Russia's reluctance to restrict translation rights continued

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[70]For a discussion of this issue, see MT Sundara Rajan "Moral Rights in the Public Domain: Copyright Matters in the Works of Indian National Poet C Subramania Bharati" [2001] SJLS 161, 185-90.

[71]Berlin Act 1908, Article 7.

[72]Copyright Act 1911, c 46. The provision also resembles a US provision of 1870.

to be characteristic of Russian copyright law long after it had ceased to be internationally current, especially as expressed in the relevant provisions of the Berne Convention. The departure of Russian law from a property-based notion of copyright is also noteworthy, as is the Russian integrity right, with its special focus on the relationship between author and publisher, and its attempt to empower the author. Taken together, these factors lent a special flavour to Russian copyright law, one which it was to retain until Soviet accession to the Universal Copyright Convention in 1973, although they may not have constituted a sufficiently individual approach to claim to propose a "Russian model" of copyright.

The technical shortcomings of this law of 1911 are also noteworthy. Commentators of the period, such as Rastorgoueff, and later commentators like Newcity, characterise it as a "modern, well-conceived" and sophisticated statute.[73] In fact, this assessment is quite lenient: the Act is poorly structured, repetitive, and unclear on how to define or apply vague concepts such as the "good will of the author." As far as the moral rights of authors are concerned, it potentially seems to include a broader vision of these rights than what is explicitly stated in the Act. In a sense, the Russian treatment of moral rights paralleled the international situation: moral rights were discussed in the conference leading to the adoption of the Berlin Act of the Berne Convention in 1908, but they were not actually incorporated into Berne until the Rome revision of 1928.

In spite of the constraints of an autocratic government which was

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[73]Newcity (n 2) 9.

understandably preoccupied with censorship issues,[74] it is interesting to note that a systematic concept of authors' rights became firmly entrenched in Russian law with the Act of 1911. This was no mean accomplishment. For Russian legislators, authors' rights included both the economic and the personal rights of the author, though there was a clear reluctance to provide open recognition for authors' moral rights. Russian drafters may have been hesitant to deal openly with moral rights as individual rights, *per se,* but the treatment of the rights of integrity, attribution, and disclosure shows an unmistakable awareness of the personal dimension of the author's copyright. The concept of moral rights was thereafter to remain a constant presence in Russian law, an area of continuity before and after the Revolution. However, its development after 1917 was to be conditioned by the political realities of a new style of authoritarian government: Soviet rule.

B. REVOLUTION AND REFORM: THE TRANSFORMATION OF MORAL RIGHTS UNDER COMMUNISM

The decisive seizure of power by the Bolshevik party in October of 1917 set in motion an enormous wave of instability. As a tidal wave engulfs everything in its path, the immediate effect produced by revolutionary success was nearly total destruction of the existing regime. The concern of the Bolsheviks was to break conclusively from the tsarist era – to destroy the institutions on which tsarist power had reposed. Since Bolshevik power was also strongly idealistic – an idealism that would be irrevocably

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[74]Pyotr Chaadaev's statement seems apt: "It is a great mistake to suppose that unlimited freedom is a necessary condition of intellectual development.... We blame the government for everything. But the government is merely doing its business – that is all. So let us do ours." Quoted in GA Hosking "The Institutionalisation of Soviet Literature" in GA Hosking & GF Cushing (edd) *Perspectives on Literature and Society in Eastern and Western Europe* (Macmillan Press, School of Slavonic and East European Studies University of London 1989) 55, 55.

corrupted into ideology within a decade – bringing about conceptual consistency between Russian social institutions and Marxist doctrines was a second, but equal, priority. For example, decrees that nullified the private ownership of property and land were among the earliest pronouncements of the new Bolshevik government.[75]

The revolutionary *élan* of the Bolsheviks would exert a powerful influence on authorship and authors' rights in the newly created Soviet Union. Among its other implications, the Revolution signified a new relationship between state and culture in the light of socialist ideals and hopes for Russia's future. Initially, the policy of the new state towards culture meant that creative authorship was swept up in radical change. As the Revolution stabilised, however, the approach to authors' rights, like many aspects of revolutionary change, would solidify into a new shape.

Copyright and moral rights under the more mature Soviet administration represented a somewhat different approach to culture than that of the Bolsheviks. The Soviet treatment of culture would come to reflect the complex dynamic between state, law, and literature in a society where the government aspired to totalitarian domination. Copyright and moral rights in the Soviet period were couched in the official language of socialist ideology. However, authors' rights under Soviet rule had a great deal in common with the tsarist pattern of copyright, as well. This dual legacy points to the essential resemblances between tsarist and Soviet power. It is perhaps most accurate to say that socialist ideology lent a distinctive colour to a legal regime for authors' rights largely inherited from tsarist Russia. Ideology was the key to interpreting and

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[75]See Hosking's discussion of the evolution of property rights from the Bolshevik period to the post-World War II era, in *A History of the Soviet Union* (n 12) 214.

understanding authors' rights under Soviet rule.

1. A Shift in Cultural Policy

The initial euphoria of revolutionary success was reflected in a bold and activist approach to culture. On the one hand, somewhat in keeping with tsarist tradition, the Bolsheviks wanted to exploit the power of Russian creativity for their own political objectives. In this endeavour, they did not suffer from the limitations of the tsar, who did not have the forces of ideology and social theory at his disposal; they intervened wholeheartedly and even recklessly into the cultural sphere to put their policy into action. On the other hand, the Bolsheviks probably had a true, Russian sense of the power and importance of literature, and its capacity to transform the most fundamental revolutionary battlefield, the minds of the people, into something new. It seems that Lenin and other Bolshevik leaders believed that literature's potential contribution to the Revolution would be as much social as political. It is fair to say that their desire for radical change, political and social, found some sympathy and support among writers, as well. This attitude was to change as the renewed precariousness of their own position, and of broader social interests in the new regime, gradually became apparent.[76]

As early as December of 1917 , the new Bolshevik government embarked on an ambitious program of nationalising literary works. Initially, the government took over publication rights in classic works of Russian literature whose authors were no longer living, including Pushkin, Tolstoy, Dostoevsky, Gogol, Chekhov, and Turgenev.[77] In

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[76]This process is described in Boris Pasternak's now classic novel, *Dr Zhivago,* published in 1957.

[77]This was accomplished through a Decree of 29 December 1917: see C Prins "Emile Zola Receives an Answer: The Soviet Union Is to Join the Berne Convention" (1991) 13(7) EIPR 238, 239-40.

November of 1918, the nationalisations were extended to the works of living authors, as well.[78]

The nationalisation program highlights a number of interesting features of the developing relationship between socialism and culture. Already, in this early period of Soviet rule, culture was perceived to be an area of special importance for revolutionary progress. The rationale behind the nationalisations was presumably to make the wealth of Russian literature available as widely as possible to the public. The Bolsheviks believed that this literature would have value for the Revolution – value in education and in nation building, no doubt. The fact that most of the authors whose works were nationalised, with the notable exception of Chekhov, came from upper-class backgrounds was irrelevant. As Sheila Fitzpatrick points out, the "specialist" skills of writers and artists, and their importance for Russian development, were acknowledged by the Bolsheviks. However, from the point of view of Russian intellectuals, the attention of the Bolsheviks had ambiguous consequences. Fitzpatrick observes:

> [T]he complex relationship between the Bolshevik Party and the Russian intelligentsia in the decade after the Revolution is probably best understood as two competing elites, essentially interdependent, jealously jockeying for position, and withal constituting the only possible claimants for leadership in a fragmented and unsettled postrevolutionary society. It was a cliché of the 1920s that the Soviet regime could not survive without the collaboration of "bourgeois specialists."[79]

Notwithstanding its potentially negative impact on authors' rights, it is not difficult to sympathise with the initial program of nationalisations undertaken by the Bolsheviks. The idea of making classic literature widely available to the public without

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[78]Decree of 26 November 1918; see Prins (n 77) 240.

[79]S Fitzpatrick *The Cultural Front: Power and Culture in Revolutionary Russia* (Cornell University Press Ithaca 1992) 6-7.

the hindrance of fees and restrictions arising from copyright is understandable, and suggests an appealing and idealistic notion of democratising culture. However, this policy, and the Bolshevik approach to culture more generally, met with a mixed reception from writers and intellectuals. Blok, Mayakovsky, and Gorky were initial supporters of the Revolution, whose support would eventually be tested beyond the point where it could be maintained, while many others were ambivalent from the start.[80]

Indeed, the Bolsheviks are far from being the only government ever to undertake such measures: they have been subsequently adopted in at least one post-colonial jurisdiction, where the contribution of literature to development and the growth of national consciousness has been very important to newly-independent countries.[81] Nationalisation for the Bolsheviks was equivalent to imposing state control. In contrast, post-colonial nationalisation, in at least one important instance, literally meant "making public": private printers acquired the right to print competing versions of national literature for profit to themselves.[82] However, if the policy of nationalising classic works attracts ready sympathy, the subsequent decision of the Bolshevik government to extend nationalisations to living authors seems to cross the line separating revolutionary idealism from arbitrary control.

In both cases, the total neglect of authors' personal rights raises some problems.

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[80]The position of writers with respect to the "cultural revolution" initiated by the Bolsheviks is discussed by *A History of the Soviet Union* (n 12) 178-82.

[81]An example is the case of the Indian national poet whose copyright was placed in the public domain by the Indian government, discussed in Sundara Rajan (n 70).

[82]The purpose of the policy was, of course, to make important literature widely available; but its impact on the integrity of the works, especially when the copyright enters the public domain so quickly can be devastating. The issues are discussed in Sundara Rajan (n 70).

In the case of deceased authors, nationalisation would have had two kinds of implications for authors' descendants. First, it would have deprived them of the financial benefits of inherited royalties, a policy that has both negative and positive aspects.[83] Secondly, however, the heirs of the author would lose their ability to claim protection for the author's moral rights. Lack of protection for moral rights means that the maintenance of the author's personal rights of attribution and integrity becomes difficult after his death. The negative consequences of this inability to protect a deceased author's moral interests are not restricted to him and his descendants. Rather, the expiry of moral rights has broader implications for cultural heritage, and, in relation to classic works of literature, presents a potentially serious issue. Maintaining attribution and integrity interests after an author's death would contribute to the preservation of cultural heritage and an accurate historical record, to name but the two most obvious benefits flowing from these rights.[84] Of course, in order for broader cultural benefits to be realised from moral rights protection, it is not necessary that the rights should be vindicated by the author's personal heirs and descendants: they could no doubt be effectively protected through a number of special arrangements, by allowing individuals, organisations, or even state agencies to assert them on behalf of the author. However, it is not certain who would be best placed to protect moral rights most effectively.

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[83]The example of Pushkin's widow pleading for extended copyright benefits illustrates the problem. The impoverishment of literary families, especially in cases where the poet may have died prematurely, can be an injustice. Madame Pushkin's suit is discussed by Rastorgoueff (n 19) 307.

[84]The reach and importance of moral rights for cultural heritage are examined in MT Sundara Rajan "Moral Rights and the Protection of Cultural Heritage: *Amar Nath Sehgal* v *Union of India*" Intl J Cultural Property 79, 79-83, 89-90.

The extension of the nationalisation program effectively brought the rights of living authors prematurely into the public domain – before the expiry of the usual duration granted by law – or, more precisely in this case, into the ambit of state control. Where the rights of living authors are also not recognised, the problem of protecting works in the public domain becomes acute. Moreover, it seems likely that the deprivation of a degree of control over the publication process would make authors generally ambivalent about the commercialisation of their works. The policy indicates a lack of sensitivity to authors' perceptions of their own interests and needs. The decree reveals the extent to which concepts of individual rights of authorship, whether for reasons of doctrine or practice, came to be disregarded in effect by the socialists. Nevertheless, the second decree was applied in practice only to the works of two living authors.[85]

With the decline of revolutionary politics by the end of the 1920s, conventional concepts of law were resurrected to deal with the business of a government that was beginning to show traces of its pre-Bolshevik ancestry. Above all, a change of direction was compelled by Russia's extremely straitened economic circumstances after the onset of World War I, a theme of economic collapse that was to reappear in the final years of the Soviet Union. It is extraordinary to consider that, in 1922, scattered reforms to the copyright regime even reintroduced the notion of private property in creative and intellectual work.[86] As Newcity observes:

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[85]Levitsky (n 20) 425 mentions that Upton Sinclair was the only author whose works were nationalised under the 1918 decree. However, according to Newcity (n 2) 19, Russian translations of the works of Upton Sinclair and the writings of Georgiy V Plekhanov were nationalised by a third decree, issued on 14 May 1925.

[86]Levitsky (n 20) 429.

> The introduction by Lenin of the New Economic Policy (NEP) in March 1921 resulted in a temporary slackening of the nationalisation trend that had until then characterised the development of Soviet copyright law. In order to encourage private enterprise, in May 1922 the laws governing invention and copyright were revised to provide property incentives to the enterprising inventor and author. Under the terms of this law, copyright was recognised as a fundamental private property right, to be protected and encouraged.[87]

In the mid-1920s, the legal development of author's rights in ordinary legal instruments, rather than extraordinary decrees, once again became a relevant issue. The shift in cultural policy that had initially taken place with the Bolshevik accession to power now underwent a further process of transformation. The Bolsheviks had been preoccupied with the problem of popular access to knowledge; they were prepared to prioritise accessibility over all other interests, including those of authors and artists. Indeed, the potential co-operation of at least some authors may have strengthened their resolve, though revolutionary zeal would almost certainly have driven them to continue even without their support. As the 1920s progressed, however, the relatively fluid relations between the government and the intelligentsia hardened into a new mould. The government's need for culture was as urgent as ever, but it was combined with other factors that made it more complex, including a need to control the circulation of knowledge and information. Authors and artists increasingly felt alienated, disillusioned, and victimised by the Revolution, a situation that is tragically symbolised by Mayakovsky's suicide in 1930.[88]

The Soviet government had to make some effort to redress the disenchantment of intellectuals with the Revolution. In 1925, a new copyright law that reflected the

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[87]Newcity (n 2) 20.

[88]See the discussion of the circumstances surrounding Mayakovsky's death in *A History of the Soviet Union* (n 12) 181, 183.

changed circumstances of Russian socialism was drafted, and its provisions were refined in further legislation only three years later. The Copyright Act of 1928 was to govern authors' rights in the Soviet Union for more than three decades, and would establish the defining principles of copyright law under Soviet rule.

2. Soviet Theories of Moral Rights

As the Soviet government retreated from its radical, revolutionary leadership, the distinction between legal theory and ideology became increasingly relevant to the interpretation of legislation. When the Bolsheviks initially came to power, they candidly acknowledged the absence of a developed socialist theory of law to guide them in the legislative domain.[89] Marx's treatment of law was incomplete and enigmatic, and the Bolsheviks were only able to assert that Marxist society should enjoy a simple and direct approach to conflicts, one that would not require recourse to the complex framework of "bourgeois" legislation. In the course of the 1920s, Soviet jurists attempted to confront the theoretical void, and develop a systematic approach to law that was based on Socialist values. The most influential pioneer of Soviet legal theory was almost certainly EB Pashukanis. His *General Theory of Law and Marxism* became the standard textbook analysis of law from the perspective of "historical materialism."[90]

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[89]See R Sharlet, PB Maggs & P Beirne "PI Stuchka and Soviet Law" in Beirne (n 21) 48. They observe, "[t]o our knowledge, there was no serious debate about law among Russian Marxists before 1919....Stuchka himself,...[comments that] there was no theoretical work on law from a revolutionary Marxist perspective before December 1919. It was at the state that the Collegium of the People's Commissariat of Justice, of which Stuchka had been Commissar since March 1919, provided the first official Soviet definition of the concept of law."

[90]Substantial excerpts from the *General Theory* may be found in PB Maggs (ed) *Pashukanis: Selected Writings on Marxism and Law* (Academic Press New York 1980); portions are reprinted in WE Butler (ed) *Russian Legal Theory,* TD Campbell (ed) The International Library of Essays in Law and Legal Theory Series (New York University

However, as Soviet power matured and lost its early veneer of idealism, Pashukanis' insistence that law was by nature incompatible with a socialist society and would ultimately "wither away" like the state, itself, became unfashionable. His eventual fall from grace was terrible: he was among those destroyed in Stalin's purges of the late 1930s.[91]

Pashukanis' fate was symbolic of the fate to be endured by law, itself, in the Soviet Union. Theoretical impoverishment became a persistent problem in Soviet law, and could be traced directly to the pre-eminent role of ideology in Soviet government. If the development of a distinctively Soviet legal theory was a true intellectual possibility, it could probably have been realised only in the revolutionary early years. Even the Khrushchev period, despite the government's hopes of a renewed, "socialist" legality, was arguably too sober and disillusioned to allow socialist theorising to develop in the legal sphere.

Rather, the progress of Soviet law over the course of the twentieth century came to emphasise the importance of ideology over theory. Soviet law was strongly coloured by the conventions of Marxist ideology. The impact of ideology on authors' rights, with their potentially close connection to capitalist concepts like property and contract, was quite important. At the same time, the absence of a socialist theory of law meant that the Soviet law of authors' rights, in its structure and content, retained many aspects of conventional copyright.

Press Reference Collection New York 1996) 229-320.

[91]Pashkanis and his work were rehabilitated in 1953: see P Beirne & R Sharlet "Toward a General Theory of Law and Marxism: EB Pashukanis" in P Beirne (ed) (n 21) 17, 19.

The imprint of Marxist ideology is apparent in the copyright legislation of 1925 and 1928, which replaced the copyright regime of pre-revolutionary Russia with a "new," Soviet regime. The first-ever piece of Soviet copyright legislation promulgated in 1925 was in fact closely based on the pre-revolutionary act of 1911.[92] As Levitsky points out,

> The framers of the Copyright Act of 1925... had carefully abstracted the principal provisions of the 1911 Act, re-arranging them systematically into a dozen Sections, to serve as "fundamental principles [*osnovy*]" of copyright. Thereupon, each Section selected was carefully reviewed: What changes were needed to reflect new political realities, or new developments in the field of intellectual creation?... Only in very few cases were brand new Sections added which had no equivalents in the Copyright Act of 1911....[93]

The 1925 Act retained the conventions of Marxism in only two noteworthy respects. First, it limited the duration of copyright protection to 25 years from the first publication of a work, departing from the previously well-established principle of protection for at least the lifetime of the author in Russian law. In Levitsky's view, the elimination of the concept of inheritance from Soviet law is the main reason for this change; in fact, the restriction of copyright term also fits with the rationale of the Bolsheviks in making collective access to knowledge and culture an overwhelming priority over individual prerogatives of authorship. However, it is worth noting that the shortened term was not exceptionally limited by international copyright standards: US law of the time offered protection for a 28-year term that could be renewed for a further 28 years, but, in the case of many works, the term was not renewed.[94]

Secondly, the Act repudiated the brief recognition of property rights in the

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[92]USSR Laws 1925, no 67 (30 January 1925).

[93]Levitsky (n 20) 426.

[94]Amendments to US Copyright Act 1909.

copyright provisions of 1922 – the notion was apparently permissible in an emergency, but not as an established part of the Soviet copyright system.[95] However, it should be noted that the Soviet squeamishness about property concepts was not an entirely new thing: the 1911 Act also represented a conscious departure from property-based rights for authors, and was in fact based on a *sui generis* model of copyright. The difference lies in the theory supporting the concept, as the reasons for rejecting property in the Soviet provisions were ideological in nature.

The re-examination of the copyright principles of 1911 and their appropriateness for the Soviet regime undertaken in the law of 1925 was achieved fully only in 1928. As Levitsky observes:

> With the enactment of the... Copyright Act of 1928, the "crutch" of 1911 was no longer needed. Soviet copyright legislation was now fully on its own. The 1928... Act represented a marked improvement over the [earlier act]: Where the latter was but a sketch, the new Act was a broad panorama.[96]

The Copyright Act of 1928 reintroduced some important, substantive principles from Russian law into Soviet copyright legislation.[97] In this respect, the legislation of 1928 brought Russian copyright full circle, from the comprehensive and ambitious Act of 1911, through a revolutionary interruption, and back to many of the 1911 principles in 1928. It restored the term of protection to the lifetime of the author, and an additional 15 years after his death.

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[95]See Levitsky (n 20) 429.

[96]Levitsky (n 20) 432: it should be noted that Levitsky prefers to deal with the RSFSR Act of 1926, which was, however, bound by law and practice to follow the "principles" (*osnovy*) of 1925.

[97]USSR Laws 1928, no 246 (16 May 1928). An English translation of a number of the provisions may be found in JN Hazard *Materials on Soviet Law* (Columbia University New York 1947) 35-37.

The 1928 law was to serve as the basis for copyright and moral rights in the Soviet Union until further revisions to the Civil Code in 1961 brought copyright within its ambit.[98] As such, it provided the framework for copyright for most of the Soviet period. What was the theory of moral rights behind the 1928 law, and how was it subject either to change or further refinement in the 1961 reforms?

In keeping with Marxist ideology, the Copyright Act of 1928 avoided a property-based theory of copyright law. However, it did not return to the *sui generis* formula of 1911. Rather, it followed, and tried to perfect, a trend set in the 1925 legislation, towards distinguishing copyright from property. The 1928 Act dealt with the problem of property rights in two ways. In the first instance, the drafters tried explicitly to eliminate references to property and property concepts from the body of the law. An example from the 1925 Act, retained in the 1928 revisions, is cited by Levitsky, and deals with works of joint authorship: the Act of 1911 had specified that the relationship of joint authors was "analog[ous] to the rules applicable to *joint property,*" reproduced in the 1925 text such that "the relations between co-authors were governed by agreement."[99]

A second approach was to continue to grant limited recognition to the property interests of authors, but to place them within the broader context of a non-property theory of authorship. Interestingly, the theory of choice was the protection of individual

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[98]Fundamentals of Civil Legislation of the USSR and the Republics, *VVS SSSR,* 1961 No 50, Item 525.

[99]Levitsky (n 20) 429. It should be noted that Levitsky is discussing the RSFSR Copyright Act of 1926, based on the 1925 USSR legislation, which presumably remained in the 1928 Act. Levitsky's own analysis moves quite freely between the two: for example, see Levitsky (n 20) 431.

authors from the exploitative treatment of publishers – an idea that had already informed the 1911 Act.[100] As expressed in a 1938 commentary on the Russian copyright law:

> In bourgeois society, the author's right is a monopoly, establishing the exclusive right to distribute the products of science, literature and art....
>
> [It] is characteristic that, except for a small group of bourgeois authors, the author's right is the property, in bourgeois society, not of the author, but of the publisher, of a big capitalist, an industrialist....[T]he author's right in capitalist countries is made into a tool of the interests of the monopolist-publisher, a means of exploiting the author and retarding the cultural growth of the masses of the people....
>
> The basic principles of the Soviet author's right are completely different...[It] has the objective of protecting to the maximum the personal *and property* interests of the author, coupled with the assurance of the widest distribution of the product of literature, science and the arts among the broad masses of the toilers [my italics].[101]

In many ways, the substantive treatment of authorship in the 1928 Act retained a number of key resemblances to property rights, but they could be justified under a broad theory of authors' rights and, in particular, on the grounds that the author needed to be protected against the interests of his publisher. In this way, Soviet copyright continued to originate automatically in the creation of a work, and the Soviet author's right was exclusive and fully subject to alienation.[102] For example, Section 7 of the 1928 Act provides that the author is entitled to "extract property benefits by all legal means from this exclusive right."

In keeping with the focus on authorship, the author's personal rights were protected quite comprehensively. To a significant degree, however, the approach to

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[100]Gsovski (n 37).

[101]"A Text Writer's Opinion," *Grazhdanskoe Pravo* (Civil Law), Part I, Moscow 1938, 254-55; translated in Hazard (n 97) 35.

[102]See ss 7 & 16, reprinted in English translation in Hazard (n 97).

personal rights continued to be indirect and understated: the implied reach of the law was actually somewhat broader than what was overtly expressed in its language. Section 7 of the Act protects the author's right of attribution, allowing him not only the "exclusive right" to publish his work "under his own name," but also, to publish under a pseudonym or anonymously, if he so chooses. The structure of section 7, granting the author "the exclusive right to publish his productions," clearly implies protection for the moral right of disclosure, or disclosure to the public, alongside the economic right of publication.

The right of integrity is strongly protected in section 18. In keeping with the socialist model of protecting the author against the publisher, the right specifically prohibits publishers and theatre companies from making any changes to the author's work during his lifetime, without his consent. The publisher is even prohibited from introducing illustrations to the work without the author's consent. Section 11 strengthens the integrity right in section 18 by providing additionally that the author's right is protected from infringement where "*no* property interests" are at issue, a broad, general provision protecting personal interests by implication.[103] However, these rights are weakened by the presence of section 16, which states that the author's right may be alienated "in whole or in part" on the basis of an agreement between the author and the publisher, or other legal authorisation.[104]

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[103]Levitsky (n 20) 433. But see I Pozhitkov "Copyright and Neighbouring Rights Protection in the Russian Federation" (1994) 22(1) Rev Central & E Eur L 53, 76: his assertion that "Soviet law did not recognise moral liability" must refer to Soviet law after 1961, notably, the special remedies for infringement of moral rights in Article 499 of the RSFSR Civil Code of 1964: *VVS RSFSR,* 1964 No 24, at 406.

[104]It is for this reason that strong moral rights jurisdictions, such as France, specify that they are inalienable, and can only be waived in limited circumstances.

The question of why the author's personal right is protected by the oblique formulae of the 1928 Act is an interesting one. In fact, the possibility of specifying that property and personal rights would each be protected in Soviet copyright law in their own right was raised in the 1925 revisions, and even introduced in the draft version of the 1925 law.[105] However, it was eventually eliminated, and an open reference to authors' "personal rights" was not reconsidered until 1961. This is a curious feature of a law that purported to be based on individual authorship, and did in fact make provision for the protection of a number of moral rights in specific circumstances. Levitsky simply observes that "the legislature still hesitated in calling 'personal' interests by their name."[106]

An examination of Russian and Soviet practice suggests that, in its conceptual ambivalence towards authors' personal rights, the Act of 1928 followed an established pattern. Granting explicit legal recognition to the personal interests of authors might be inconsistent with a general policy of state supremacy in the realm of knowledge – the basic idea that knowledge and culture were to be controlled by the state, to serve its objectives and needs, while the interests of authors were definitely subordinate to its priorities.

3. Moral Rights Provisions in Soviet Law

The Copyright Act of 1928 proved to be surprisingly long-lived, providing the basis of Soviet copyright law for more than thirty years. Any adjustments that became necessary along the way were made through individual decrees and regulations issued

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These issues are among those discussed by Colombet (n 46) 40-55.

[105]See Levitsky (n 20) 433.

[106]Levitsky (n 20) 433, and see also 443.

by the government.[107] By the late 1950s, however, the growing inadequacy of the law and the possibility of change under Khrushchev led to a process of reform. New copyright legislation was adopted in 1961.[108]

There were at least two important reasons behind the revision of the 1928 law. First, the law had become technologically outdated. The growth of communications and broadcasting technologies since the 1930s, including television, made it difficult for Soviet lawyers to continue to attempt to extend the basic principles of the 1928 Act to the increasingly special cases thrown up by the new technological environment.[109] However, a second and deeper problem was posed by the growing divergence between copyright law as it had come to be observed in the three decades of the Soviet Union's existence, and the principles on which copyright was protected in the 1928 Act – after just one decade of socialist society, punctuated by the extraordinary circumstances of the Great War. As Levitsky points out, one of the major concerns of the era in relation to copyright was the need to "settle doctrinal controversies which...reflected the growing discrepancy between trends and concepts long accepted by jurisprudence, and the statutory terminology dating back to the NEP period."[110]

The reforms of the 1950s resulted in the appearance of new copyright legislation in 1961.[111] The new law showed substantial technical progress over the Act of 1928. A major innovation was to bring copyright into the Civil Code: although copyright had

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[107]See the description of ongoing changes to the law in Newcity (n 2) 26-29.

[108]Fundamentals of Civil Legislation (n 98).

[109]See Newcity (n 2) 27; he draws attention to the importance of television.

[110]Levitsky (n 20) 443.

[111]See Fundamentals (n 98).

long been considered part of civil law, it was included in the Civil Code for the first time since 1887.[112] The law was also better organised and clearer in categorising the various aspects of copyright protection, as well as being better suited to its function as model provisions to be enacted in the Civil Codes of the Soviet Socialist Republics.[113]

Moral rights in the 1961 Fundamentals of Civil Legislation reflect the generally improved technical quality of copyright law. The Fundamentals group the moral and economic rights of the author together into a single provision, Article 98 on "rights of the author." Article 98 sets out three moral rights, a right of disclosure, or first publication, a right of attribution, and a right to the integrity of the work. In keeping with the tradition established in previous legislation, the right of attribution includes protection for the author's right to publish under a pseudonym, or anonymously. However, the right of integrity is greatly simplified from previous formulae, which specifically attempted to protect the author against the unauthorised intervention of the publisher. Rather, under Article 98, the author is simply assured, "the right... to the inviolability of the work."

The technical improvements in the 1961 legislation should not, however, disguise the troubling reality that their overall effect is to tighten the Soviet copyright regime, restricting the rights of authors. The language of Article 98, while providing a basis for protecting both the economic and moral rights of authors, actually removes the promise of an "exclusive" right of authorship, a long-standing fixture of Soviet and Russian copyright law. Changes in the level of copyright protection include a reduced

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[112]See Levitsky (n 20) 439.

[113]This point is emphasised by Levitsky (n 20) 439.

standard for the duration of protection: Article 105 provides only that copyright is protected for the lifetime of the author, without specifying any required duration of protection after his death. Moreover, the inheritance of copyright, and the assertion of the right by the author's heirs under the 1961 provisions, was to be "limit[ed]." The main purpose of the limitation was to restrict the apparently exorbitant royalties enjoyed by many authors' descendants; but the possibility of an author's descendants asserting attribution or integrity rights is also implicated in the provision, and cannot be said to be favoured by the law.[114]

Although the impact of the revision on copyright legislation was generally restrictive, moral rights did benefit from greater recognition than what had been the case in previous Soviet, or even Russian, legislation. These positive changes are certainly linked with the political developments of the period. As Levitsky points out, in his discussion of the implementation of the 1961 Fundamentals in the Civil Code of the Russian Soviet republic (RSFSR) of 1964, Article 499 of the revised Russian Code explicitly introduced the terminology of the "personal rights" of authors for the first time, a change made possible by the "more propitious ideological climate for [their] recognition."[115] The "Thaw," a temporary loosening of ideological restrictions in the period of national reassessment after Stalin's death, made it possible to think of greater freedom for authors under Khrushchev's leadership. This would have affected the development of the new copyright provisions, embarked upon in the late 1950s.

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[114]For details of the problem, see Levitsky (n 20) 444.

[115]The quotation is from Strogovich, and appears in Levitsky (n 20) 443, 460 (n 56). See RSFSR Code (n 103) (as am through Oct 1976), Article 499 on "Protection of the Personal Non-Property Rights of the Author": an English translation may be found in Newcity (n 2) 495, and on the Russian legal database, Garant.

At the same time, it is important to recognise that the change of terminology flowing from the 1961 Fundamentals was not as legally significant as it might have been in different political circumstances. The new terminology became possible in a copyright regime that had systematically eviscerated moral rights over a period of decades, and where the terminology of "personality rights" could not conceivably damage the government's ability to control literature and publication. The very real restrictions on authors' moral rights arose, not from legislative provisions, but from the interaction of the legislative framework with conditions in a publishing industry that had effectively succumbed to state control over decades of persistent interference and restructuring by the Soviet government. This situation became pronounced after 1962, the year of publication of Alexander Solzhenitsyn's *A Day in the Life of Ivan Denisovich,* the first work to chronicle the experience of individuals in Stalin's concentration camps. The appearance of the book, openly and uncompromisingly describing what had so long been a common but taboo experience, unleashed a flood of public emotion, and marked the high point of "official tolerance" towards literature.[116] The ideological climate after the brief respite of the Thaw shifted towards renewed repression and, in particular, affected writers very badly.

Copyright and moral rights in the Soviet Union were to undergo one final series of revisions in the early 1970s. These changes were necessitated by the Soviet Union's controversial decision to join the Universal Copyright Convention (UCC), with effect from May 27, 1973.[117] UCC membership led to a loosening of some of the measures

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[116]See Hosking (n 12) 413.

[117]Levitsky (n 20) 452; Prins (n 77) 242 points out that the amendments to Soviet law only took effect on June 1, 1973.

adopted in the 1961 Fundamentals. In keeping with international standards, the minimum duration of protection for copyright and moral rights was extended to the lifetime of the author and 25 years after his death, the longest period of protection ever enjoyed by Russian authors.[118] Limitations on the payment of royalties to the author's heirs were lifted. Significant changes were also introduced to the principle of "freedom of translation," which had been a part of Russian copyright law from its inception: according to the revised Article 102 of the Fundamentals, the author or his heirs had to authorise translations, and, within its limits, this change represents a positive development for authors' moral rights in translations. The moral rights of the author in Article 98 remained unchanged, although the Article included a new provision that the procedures for authorising the use of a Soviet work outside the Soviet Union "shall be established by the legislation of the USSR."[119]

C. THE SOVIET UNION AND INTERNATIONAL PROTECTION OF MORAL RIGHTS

International copyright relations had always been problematic for pre-revolutionary Russia. Tension continued to dominate copyright relations under the Soviet regime, and the theme of conflict between domestic and international priorities has recently resurfaced in the context of post-Communist Russia's accession to the TRIPs Agreement and the World Trade Organisation. It is interesting to note that the situation of Russia with respect to international copyright law is quite different from the

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[118]The period was to be calculated from January 1 of the year following the author's death, rather than January 1 of the year of his death: see the comparative texts of Article 105 of the Fundamentals, before and after the UCC-related revisions, reproduced in English translation in Newcity (n 2) 186.

[119]See the discussion on "Changes mandated by accession to the UCC" in Levitsky (n 20) 453-55.

circumstances of other Central and East European countries, most of whom had already acceded to the current version of the Berne Convention in socialist times, and many of whom were also members of the latest draft of the Universal Copyright Convention. [120] Historically, Russia has been ambivalent towards membership in international copyright agreements for economic and political reasons, as well as copyright tradition. Doctrinal issues arose because of the manner in which the government's economic and social policy came to be expressed in copyright law, but they were also a product of Russia's distinctive way of conceptualising authors' rights *per se*. In all three respects, a clear distinction could be drawn between the domestic objectives of Russian copyright law and the requirements of the international copyright community.

1. <u>Economic Issues</u>

In grappling with the economic issues raised by the international movement of literature, Russia's position closely resembled that of other "developing" countries. Relative to its European neighbours, who were keen to secure Russia's participation in international copyright in order to protect their own authors and publishing industries, Russia suffered from a degree of underdevelopment. Russia was both economically and socially "backward,"[121] and both elements contributed to the conflict surrounding copyright. In tsarist as well as Communist times, Russia had a tremendous need to make literature widely available to the public, in order to improve the general level of

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[120]For example, see the list of socialist countries and each country's membership in the different versions of the two Conventions: see M Ficsor "The Past, Present and Future of Copyright in the European Socialist Countries" (1983) 118 RIDA 33, 58. The Soviet Union was not a member of the Berne Convention, and it had adhered only to the 1952 Geneva version of the UCC.

[121]The term is used broadly in scholarly literature to denote Russia's developmental difficulties – though it is not fortuitous.

literacy and development. The historical survey of Russian copyright, and especially, the ways in which copyright was reshaped by the urgency of popular education under the Bolsheviks, shows how deeply this problem influenced authors' rights in Russia.

In a sense, it was particularly important for the Russian public to have access to foreign works that might contribute to its development. However, recognising the copyright of foreign authors would involve the payment of substantial royalties to foreign writers, translators, and publishers, potentially a heavy economic burden for the state. The dilemma is captured by Corien Prins in his discussion of the circumstances surrounding the Copyright Act of 1911, and the issue of Russian accession to the Berne Convention:

> The Russian Government stressed that joining the Berne Convention would result in a financial drain caused by the payment of royalties to foreign authors, mainly because of the massive consumption of foreign literature in Russia. Another reason why the government regarded the international convention with distrust was because it is thought to be an instrument to protect solely the interests of publishers, primarily French publishers, since Russia was the consumer of a large amount of French literature. In the eyes of the Russian Government the Convention would only cause damage to Russian authors and society.
>
> Those who considered it preferable to shift the Russian focus of copyright protection to an international approach, tried to convince the government that the above-mentioned arguments were wrong and obsolete... The advocates of joining the Berne Convention argued that the consumption of Russian literature in other European countries was no less than the consumption of foreign literature in Russia.[122]

Indeed, the decision to exclude copyright protection for foreign authors, and to subject them to the unrestricted application of the principle of freedom of translation, even after Russian authors had been granted a measure of control over translations in the copyright law, can be understood in the light of these considerations. Granting

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[122]Prins (n 77) 239.

moral rights to foreign authors would also have the potential to restrict the use and dissemination of foreign works, as the results of a successful suit on the grounds of the integrity right, for example, could have important economic consequences, while the availability of legal protection might inhibit the dissemination of works.[123] Concerns about the economic consequences of copyright protection in many of today's developing countries have led them to object to the trend towards increasingly stringent protections for authors' rights in the international copyright arena.[124]

Economic considerations were at the heart of Russia's decision not to join the Berne Convention when it was adopted in 1886. Russian delegates, including so celebrated a name as Ivan Turgenev, were part of the early development of the ideas behind the Berne Union, but Russian membership was never considered to be a realistic possibility.[125] In particular, the Berne Convention supported national treatment for all authors who were nationals of any of the member countries, and, in the Berne revision

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[123]An example is the case of American director, John Huston's, film "The Asphalt Jungle"; the director's estate argued that the colourisation of the film amounted to a violation of his right of integrity. The claim was supported by a French court, and the colourised version of the film was withdrawn from circulation. The French case was a victory for the director's aesthetic sense, but it was gained at the cost of losses for the film's distributors. *Huston* c *Turner Entertainment,* CA (Court of Appeals) Versailles, ch réunies, Dec 19, 1994, 164 RIDA 389 (1995), on remand from Cass 1e civ, May 28, 1991, 149 RIDA 197 (1991).

[124]Concerns like these generated a crisis in international copyright law, which was resolved by the adoption of the Stockholm Protocol: "special provisions regarding developing countries." The circumstances surrounding the development of the protocol and its importance for developing countries and international copyright, generally, is discussed by S Ricketson *The Berne Convention for the Protection of Literary and Artistic Works: 1886-1986* (Kluwer Centre for Commercial Law Studies, Queen Mary College London 1987) 593-664.

[125]See Ricketson (n 124) para 2.7, on the international literary congress of 1878, leading to the foundation of the *Association litteraire et artistique internationale* (ALAI), which produced the first draft of an international convention for authors' rights in 1883.

of 1908, the "complete assimilation of translation rights" into the author's copyright.[126] Russian authors would stand to make some gains from the ability to protect their rights abroad, and the main reason behind Russia's early interest in international copyright was a belief among the intelligentsia that they stood to gain from international protection. Nevertheless, these provisions were difficult for Russia to accept on grounds of economic and social policy, and these policy concerns continued to dictate Russia's policy towards international copyright law until the 1970's.

2. <u>Political Issues</u>

The political issues surrounding international copyright protection were somewhat more complex. Tsarism and Communism, each in its own way, were absolutist forms of government. Both regimes experienced a need for ideological control. Under the tsar, this need was reflected in a censorship regime. Because the tsar had to control the appearance of authorised and unauthorised publications, copyright law developed as a part of the tsar's censorship programme: authors and publishers who were able to control the appearance of unauthorised works indirectly helped to facilitate censorship. The tsar also had to control both domestic and foreign publications. Indeed, suspicion of foreign literature, which might bring dangerous ideas into Russia, was characteristic even of the rule of Peter the Great and Catherine I, though they were comparatively liberal, Western-oriented rulers. Notwithstanding this situation, Russia's need for literature was such that Russian authors commanded a degree of legal space within which they could carry on their activities, leading to an author-centred copyright regime

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[126]Translators were granted a copyright in their translations as original works, but their right to translate depended on the consent of the author of the original work. See Article 8 of the Berlin Act, 1908.

that tended naturally towards the recognition of moral rights. Foreign literature was completely denied copyright protection, and in particular, protection from unauthorised translation; but the Russian translators of foreign literature enjoyed the same personal and property rights as an author of original literature in Russian.

Under the Communists, ideological control became an even more pressing concern of the government. The tsar had been concerned with maintaining political power; the Communists had to exercise power by maintaining Communist ideology. The control and manipulation of authors was an essential part of this enterprise. Authors were drawn into a web of state activity – state publishing and broadcasting, ideological censorship of works before they could be published – from which they could not escape as long as they continued to be active in the Soviet Union. The alternative was to "write for the desk drawer," or, through the 1960s and 1970s, to "self-publish" works through the risky, private network of *samizdat.*[127] However, publishing outside the Soviet Union might be another method of evading Soviet censorship, and this was one avenue of literary escape that the Soviet government would have liked to eliminate. For the Soviet government, publication abroad meant the loss of ideological control at home. It also had the unpleasant side effects of negative international publicity, and the possibility that anti-Soviet "propaganda" might reach the ears of the Soviet public by indirect means.

Initially, the government's concern that Soviet authors might acquire rights abroad that they did not have within the Soviet Union through international copyright

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[127]*Samizdat* means "self-publishing"; the term was a retort to *gosizdat,* state publishing. An interesting chronicle of *samizdat,* its history and a number of important texts appear in French in *Samizdat: La voix de l'opposition communiste en URSS* (Combats Seuil Paris 1969).

conventions contributed to its reluctance to participate. When the Soviet Union eventually did decide to join the Universal Copyright Convention in 1973, the decision caused great concern, both within Russia and internationally, that the government was confident of being able to exploit its membership to repress further the activities of dissidents within the Soviet Union.

The main objective of the Soviet government in joining the UCC was to secure some economic benefit to the country from membership. In contrast to the situation surrounding the Berne Convention, almost a century earlier, the Soviet Union's place in the world of publishing was quite different. As Newcity, writing in 1978, shortly after the Soviet Union's accession to the Universal Copyright Convention, observes:

> Each year the Communist Party-controlled publishing houses of the Soviet Union print and disseminate more books than the publishers of any other country in the world.... Books in the Soviet Union are published in 89 of the languages spoken in the country, as well as in many foreign languages, and cover the entire gamut of subjects from the sciences to poetry and belles-lettres.[128]

However, membership in the UCC carried a genuine risk of increased powers of censorship. This problem was due to certain features of Soviet copyright law that allowed the government to acquire copyright in works, published or unpublished, by means of compulsory purchase. The relevant provision of the 1961 Fundamentals was Article 106, which stated that, "[c]opyright in the publication, public performance, or other use of a work may be compulsorily purchased by the state from the author or his heirs, in the manner provided for by the legislation of the union republics."[129]

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[128]Newcity (n 2) v.

[129]As translated in Newcity, Appendix A, 187; see Newcity (n 2) 153-54. It should be noted that, under this provision, only the governments of the republics, rather than the federal government, could effect a compulsory purchase. This represented a

According to Soviet convention, copyright would be acquired by the state for a lump-sum fee paid to the author or his heirs, in an amount determined by the government.[130] Since the acquisition of copyright was not a confiscation of rights in the work, in formal terms, it may not have been obviously contrary to international norms. However, the purpose of the provision was generally acknowledged in Soviet jurisprudence to be "compelling recalcitrant authors who showed no enthusiasm for sharing their work with society, and particularly of forcing their stubborn heirs, to do so."[131]

It is interesting to note that Article 106 provides that only certain "uses" of an author's work could be compulsorily purchased by the state. In effect, according to Soviet copyright doctrine, an author's copyright could not be alienated in its entirety, even by the state. Moral rights of disclosure, attribution, and integrity in the work could probably not be acquired by the state.[132] However, the issue of the extent to which copyright could be alienated by the author in accordance with Soviet doctrine remained unclear. As Levitsky observes:

> [T]he concept of 'alienation of copyright in its entirety'... was permitted by the Copyright Act of 1928 but was persistently criticised in Soviet jurisprudence....[A]n 'alienation in part' of the author's copyright... had also been permitted by the Copyright Act of 1928, but disappeared as a concept during the reforms of the early 1960s... Alas, the legal nature of the 'transfer' would remain in doubt for more than a decade, and is still far from being

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change in the law from 1928 to 1961: see SL Levitsky "The State As a Subject of Copyright in Soviet Law" (1980) 1 (2) J Media L & Prac 137, 143.

[130]Levitsky (n 129) 141.

[131]Levitsky (n 129) 141, 142.

[132]This point is also made by Levitsky (n 129) 142, who observes that, even under the earlier Soviet legislation of 1925 and 1928, acquisition of an author's copyright by the state did not include the author's moral rights.

resolved.[133]

Notwithstanding the limitations of the legal provisions on compulsory purchase of copyright, both the international community and Soviet authors, themselves, were deeply concerned about the implications of membership in the UCC. No doubt, their interpretation of events was based both on the vagueness of Soviet legal theory in this area, and on the proven heavy-handedness of the Soviet government in its approach to law and legality. For example, a consideration of international moral rights cases involving Soviet authors shows that the Soviet government was able to act "on their behalf" by "obtaining their permission."

At least in crude terms, if not in doctrinally correct ones, Article 106 could therefore allow the Soviet government to exercise copyright, and even moral rights, for the purposes of the UCC. It would thereby be in a position to restrict the publication of a work or its translation in any member country of the UCC, and, twisting the initial logic of the provision, suppress the publication of an unpublished work that was "in contradiction to the interests of socialist society."[134] If the government, relying on ambiguous legal provisions, considered its rights over acquired works to include the moral rights of the author, they could prove to be an important and particularly dangerous instrument of censorship. For example, the conformity of internationally publicised works with Soviet norms could be enforced through the integrity right, which the Soviet government could potentially assert in the name of the author.

In fact, two examples illustrate how this kind of situation might arise in practice.

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[133]Levitsky (n 129) 141-42.

[134]According to LV Glebova, this was the main reason underlying the compulsory purchase provisions: Glebova (1972), cited in Levitsky (n 129) 144.

The first is a case from 1948, involving a film entitled *The Iron Curtain,* which featured the music of four Soviet composers, Shostakovich, Prokofiev, Khatchaturian, and Miashkovsky. The film chronicled the activities of Soviet spies in Canada, and its treatment of the subject matter was distinctly unflattering to the Soviet Union.[135]

The musical works featured in a film were all in the public domain; as the court said, they "enjoy[ed] no copyright protection whatever."[136] The Soviet government brought a suit in the name of the composers against Twentieth-Century Fox, the studio which had produced the film.[137] The legal basis on which the state acted is unclear. In Soviet law, copyright passed by inheritance to the heirs of the author; the period of protection was relatively short, the lifetime of the author and 25 years after his death.[138] There was no special provision in the Fundamentals regarding copyright in the public domain. However, Article 502 of the RSFSR Civil Code provided that works could be "declared the property of the state by the decision of the Council of Ministers of the RSFSR." The idea of declaring a public-domain work state property can be traced back to the nationalisation decrees of the Bolsheviks, and seems to be an informal procedure, justifiable by the state on arbitrary grounds of its choice. When this was the case, presumably, the Soviet government felt at liberty to deal with public domain works as if it were responsible for their moral rights.

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[135]*Dmitry Shostakovich et al* v *Twentieth Century-Fox Film Corporation* (June 7, 1948), 196 Misc 67; 80 NYS 2d 575, 77 USPQ 647. The circumstances of the case are described by Newcity (n 2) 34-35.

[136]*Shostakovich* (n 135) 68.

[137]*Shostakovich* (n 135).

[138]RSFSR Civil Code (n 103) Article 496; the minimum duration of copyright specified in the Fundamentals was simply the lifetime of the author – see Article 105.

In effect, the *Shostakovich* suit was a moral rights claim, although, in keeping with US practice in this area, it was brought on the grounds of defamation: the "composers" argued that the association of their work with the film was damaging to their reputations, and should be barred. However, the court found that, unless the music, itself, had been distorted, the claim could not succeed.

Interestingly, the same suit was brought as a moral rights case in France, where, based on the natural rights rationale of French copyright law, it was possible at that time for authors of any nationality to expect protection of their rights of authorship in a French court.[139] The French Cour de Cassation decided in 1959 that the authors' moral right of integrity had been violated.[140] They ordered the film to be removed from circulation, and awarded damages to the plaintiffs.

The second case occurred in 1964, and involved a novel by Anatoli Kuznetsov, *The Continuation of a Legend.* When the work was first submitted to the Soviet publisher the author was told to modify it by "add[ing] more 'optimistic' passages" before it could be published.[141] The modified version of the work was published; but shortly thereafter, a French translation, based on the original manuscript, appeared. Again, the Soviet government undertook a lawsuit "on behalf of" the author – in this case, on the basis of a "denunciation" of the translation requested from him by the Soviet state. Once again, the "author's" claim that his right of integrity had been violated was upheld by the French courts, resulting in the withdrawal of the work from circulation and an award of damages. Interestingly, Kuznetsov defected to England in

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[139]This was the case until 1964: see Newcity (n 2) 35.

[140]See *Huston* (n 123).

[141]Newcity (n 2) 155.

1969, at which time he wrote to the French authorities, asking them to reopen the case and affirming his support for the French translation which "[captured] the very essence of my novel."[142] However, the case was never reconsidered in France.[143]

These two cases of Soviet copyright protection abroad show how copyright law became entangled in issues of freedom of expression under the Soviet regime. They highlight the particularly close relationship between moral rights and free creative expression. The government of the Soviet Union was prepared to manipulate authorship rights for its political purposes, and, in these two important cases, it proved its ability to wield the most characteristic of authorship rights, personal or "moral" rights, against the authors, themselves. Against this background, the fears of Soviet dissidents about the consequences of joining the international copyright community through the UCC seem well-founded.

The government's own pronouncements in this regard were quite contradictory. Its statements ranged from aggressive assertions that it would attempt to suppress further the writings of dissidents, and that "Western publishers would bear 'legal responsibility'" for publishing their work,[144] to assurances that "there was no intention whatsoever of applying the [UCC] against dissidents."[145] This situation suggests that the possibility of wielding copyright law against Soviet writers was, at the very least, a latent reality. For their part, writers and other dissidents believed in the gravity of the

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[142]See Newcity (n 2) 155-56.

[143]See Newcity (n 2) 156, n 18; he suggests that the case was never reopened because of the expiry of a limitation period. However, this is a peculiar conclusion, since French law recognises moral rights in perpetuity.

[144]Newcity (n 2) 153.

[145]Newcity (n 2) 153.

danger; one writers' group pointed out,

> Our books will be stifled not only during the lives of their authors, but forever, until the end of publishing on earth. This situation did not exist even in Stalin's time, for the books then ended by coming to the surface, at least posthumously.[146]

Newcity, a contemporary observer writing shortly after the Soviet accession to the UCC, seems relatively optimistic about the internationalisation of Soviet copyright. In particular, he argues that the Soviet government had no need to use copyright law for suppressing dissent: the "depressing" reality was that other, more effective means of control were available. According to him, criminal charges were among the strongest means of suppression, and he mentions the suitability of Article 70 of the Russian Criminal Code on "anti-Soviet propaganda," which was exploited for this purpose in the notorious show trial of Siniavskii and Daniel, two Russian writers of fiction, in 1966.[147] However, Newcity's optimism towards copyright and his sense of its relative incorruptibility seem to lack a solid foundation. It is evident that Soviet writers and intellectuals lived and worked in an environment where law had come to be used as a powerful means of controlling expression. Creative expression, in particular, was vulnerable to quasi-legal challenges. It is important to recognise that copyright law was among the legal instruments that lent themselves to subversion by the Soviet government: authors' rights were turned against authors, and contributed to their persecution, rather than assuring their protection.

3. Russian Copyright Tradition

Principles such as freedom of translation and an abbreviated term of copyright

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[146]Times of London, March 27, 1973, 8, Column 1; quoted in Newcity (n 2) 152.

[147]Newcity (n 2) 157.

protection, which diverge substantially from international copyright practice, reflected Russia's different economic and social priorities as a less-developed jurisdiction. Similarly, its failure to adopt the explicit language of authors' "personal" rights until the 1960s may well be rooted in a long tradition of censorship and ideological control for political ends. Certain conceptual issues in Russian copyright law also suggest subtle doctrinal differences between Russian and international views of copyright, and should be identified.

Two streams of copyright doctrine in Russia are important, and should be noted. First among these is the idea of a *sui generis* copyright, which quickly took root in preference to a property-based understanding of these rights, and reflects both a fundamentally different approach to authorship from an ownership-based copyright, and a deeper understanding of the special nature of authorship than the concept of the author's proprietary interests in his own work emphasised in civilian systems. The *sui generis* copyright means that authors' economic and personal rights are closely intertwined, and that authorship enjoys a special and unique legal status. The practical implications of a *sui generis* copyright are similar to the German, Kantian approach to authors' rights, which signifies that these rights can only be licensed and never assigned in their entirety. Nevertheless, the explicit legislative recognition of a *sui generis* right is distinct from German practice, and should be recognised as such.[148]

A second respect in which Russian authors' rights may be doctrinally distinctive directly concerns personal, or "moral," rights. The Russian emphasis on moral rights closely resembles French tradition. As in French law, the author's personal right seems

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[148]See the interesting discussion of Kant's approach to authors' rights in Strowel (n 29) 98-99.

to occupy a place of prominence in Russian copyright theory, and in a sense, it is even at the origin of the economic rights. The attribution right is unusually broad, including the right to publish under a pseudonym, or anonymously. In keeping with French tradition, and somewhat differently from the international standard set by Article 6*bis* of the Berne Convention, the Russian integrity right is completely independent of the notion of damage to an author's reputation: it is a pure right to the "inviolability" of the work, in its own right. The right of disclosure, or first publication, is at the heart of Russian copyright law: copyright originates with the creation of the work, and all rights flow from the author's choices regarding how he will exercise his right of first publication. The overlay of Marxist theory and, later, Soviet ideological control, is only a patina obscuring this distinctive doctrinal foundation without destroying it.

These two aspects of Russian doctrine may pose additional difficulties in reconciling Russian copyright law with international norms that have increasingly moved towards the recognition and emphasis of a commercially-oriented, property-based copyright. They may have presented subtle obstacles to Russia's membership in international copyright agreements. It is interesting to note that doctrinal differences have recently placed France, as well, in a situation of difficulty with respect to international copyright.[149] The nature of the problems they pose must be distinguished as clearly as possible from issues of economic policy and political control: rather, they involve essentially different perspectives on authorship and raise the possibility of conceptual incompatibilities between Russian and international law. The point is

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[149]For example, see Fraser's discussion of the French position on "cultural industries" in international copyright agreements: S Fraser "Berne, CFTA, NAFTA & GATT: The Implications of Copyright *Droit Moral* And Cultural Exemptions in International Trade Law" (1996) 18 Hastings Comm & Ent LJ 287.

noteworthy in the Russian context because, throughout Russia's history, doctrinal issues concerning copyright have never really received serious consideration. The economic and political conflicts between Russia and the international community have been far too pressing to allow a systematic analysis of Russia's conceptual orientation towards authorship.

D. CONCLUSION: THE STATUS OF AUTHORS' MORAL RIGHTS IN THE SOVIET UNION

After an early period of revolutionary uncertainty, the concept of a legal regime for the protection of authors' rights came to be well-established in Soviet law. The Soviet system of authors' rights drew its inspiration from two sources, pre-Revolutionary copyright law in Russia, and Marxist ideology.

Through its links with earlier Russian law, Soviet law was influenced by the contemporary models from France and Germany that provided the basis for copyright protection in the landmark Russian statute of 1911.[150] Like Continental law, Soviet law recognised both the material and the personal interests of authors, and provided statutory protection for both. However, in different ways, socialist theory affected the development of both kinds of rights. Although the material interests of authors were protected, they were not acknowledged as interests in "intellectual property" *per se.*[151] As for personal rights, an inherent tension between individual rights and collective

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[150]N 18; the influence of the German law of 1901 is noted by Newcity (n 2) 8.

[151]According to Newcity (n 2) 83, the amendments to copyright law necessitated by Soviet accession to the Universal Copyright Convention in 1973 finally transformed the right into a property-style right, notwithstanding Soviet distaste for this terminology.

interests led to some difficulties in formulating them.[152]

As Soviet law matured, the recognition of the non-material interests of authors gained greater acceptance in Soviet jurisprudence. Remarkably, legislative amendments to copyright between 1928 and 1961 were few; but the development of legal scholarship and experience through the decades helped to solidify the status of moral rights.[153] This change of approach was reflected in the revised copyright legislation of the 1960s, which adopted a systematic approach to authors' moral rights for the first time.[154] The new provisions included protection for three moral rights: a right of disclosure, a right of attribution, which included the right to publish under a pseudonym or anonymously, and an unusually broad right to the integrity of the work, known as the right of "inviolability." In contrast to more limited international practice, the Soviet provisions on "inviolability" prohibited any mistreatment of the work, regardless of whether the reputation of the author was affected.[155]

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[152]Levitsky observes that, in the important copyright legislation of 1928, the "[Soviet] legislator still hesitated in calling 'personal' interests by their name": see Levitsky (n 20) 433.

[153]For example, see Levitsky's comments on the motivation behind copyright reform in the period from 1960 to 1964: SL Levitsky & WB Simons "Copyright in Russia and the USSR: A Selected Bibliography of Works Published in English, German, French and Russian: 1827-1983" (Manzsche Verlags- und Universitaetsbuchhandlung Wien 1985) 23-25.

[154]Moral rights were protected in the 1928 legislation, but in a more restrictive and oblique manner: see discussion in Chapter III *infra.*

[155]Compare with Article *6bis* (1) of the Berne Convention for the Protection of Literary and Artistic Works, which states: "Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, *which would be prejudicial to his honour or reputation* [my italics]." The Soviet right resembled French law of the time, which, as da Silva points out, "means that the artist has a right to preserve his work from any alteration or mutilation whatsoever": see Article 6, *Loi*

Given the existence of this legislative scheme, what was the reality of authors' rights, and particularly of moral rights, in the Soviet Union?

Soviet copyright law must be understood in the context of the Soviet system for publishing and disseminating creative works. Soviet authors functioned in a system where the publication and distribution of literature was monopolised by the state. The state publishing apparatus determined whether or not a work would appear, and if so, in what form. The exercise of authors' rights was the monopoly of a central agency, the All-Union Administration for the Protection of Copyrights (VOUAP), a branch of the Union of Soviet Writers.[156] Similarly, when the Soviet Union joined the Universal Copyright Convention, a new agency was created to administer the international copyright dealings of Soviet authors, the All-Union Agency of Copyrights (VAAP).

The extreme limitations on authors' rights within this framework of central control were already noted by Gsovski, as early as 1948:

> [T]he government monopoly of publishing and printing...has reduced the rights of the author provided for in the copyright laws of 1928 to the right not to publish his work and to the right to be paid if a government publishing office publishes his work, whether with or without his consent. But in order to be

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du 11 mars 1957 sur la propriété intellectuelle et artistique, JO 14 March 1957, p 2723 (am JO 19 April 1957, p 4131), and RJ DaSilva "Droit moral and the Amoral Copyright: A Comparison of Artists' Rights in France and the United States" (1980) 28 Bull Copyrt Socy 1, 31. The Soviet provisions on moral rights are set out in Article 98 of the Union-wide Fundamentals of Civil Legislation of 1961, Fundamentals of Civil Legislation of the USSR and the Republics, *VSND i VS SSSR,* 1991 No 26, Item 773; they appear in identical terms in Article 479 of the RSFSR Civil Code of 1964, *VVS RSFSR* 1964, No 24, at 406. These documents are available in English translation on the Russian legal database, Garant. However, a particularly readable English translation is also provided in Newcity (n 1) Appendix A, 181-87, and Appendix B, 188-99. For the convenience of the reader, I have preferred Newcity's translation, which is no different in meaning from the English text on Garant.

[156]Newcity (n 2) 126; he points out that, "[a] similar organisation was established in the Union of Soviet Artists."

> published, a literary work must... [contribute] directly to one or another goal set by the government...."Any preaching of absence of ideology and of keeping literature out of politics" is severely condemned. Lenin's motto that "every literature must be Party literature" is emphasised as the expression of the Soviet approach to literature....[It is] clear that the government monopoly of printing in the Soviet Union is in fact an essential limitation on the author's right and should be borne in mind in the perusal of the laws on copyright...[157]

In effect, of all the personal and economic rights protected in Soviet legislation, the right of disclosure, alone, was imbued with real substance and meaning for Soviet authors. However, this right, too, gradually came to be eroded, as the government demonstrated its willingness and ability to seize an author's unpublished works and use them for political purposes, a situation that had not yet become fully apparent in Gsovski's time.[158]

Unfortunately, few traces remain of any instances where moral rights were addressed by Soviet judges, and it is therefore necessary to rely almost entirely on statutory provisions in interpreting Soviet moral rights law. The absence of information on moral rights adjudication is due to a number of factors. In particular, two considerations should be emphasised. First, while it is generally true that case law is somewhat less significant in civil law jurisdictions than in the common-law world, socialist legal systems were characterised by the especially extreme predominance of statutory law over judicial decisions. Secondly, in keeping with civilian tradition and the restrictive, socialist approach to information, there does not appear to have been a tradition of publishing and circulating court rulings in Soviet Russia.

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[157]Gsovski (n 37) 616-17.

[158]For example, in the notorious Siniavskii-Daniel prosecution of 1966, Daniel's *unpublished* works were used as evidence against him: see Trial Transcript, published in English translation in Hayward (n 10) 110.

The concept of political limits on authors' rights is not unique to the Soviet copyright system. Indeed, Article 17 of the Berne Convention allows member countries to "permit, to control, or to prohibit, by legislation or regulation, the circulation, presentation, or exhibition of any work or production in regard to which the competent authority may find it necessary to exercise that right." This provision is widely understood as a censorship measure, though it is presumably not meant to be invoked readily, or without adequate justification.[159]

In spite of these factors, it should be noted that the Soviet regime for authors' rights does not appear to have been totally ineffective. Soviet law did have a developed tradition of copyright law. However, its applicability was limited to those writers who worked well within the limits of the ideologically permissible. The provisions on moral rights would have been sufficient to protect them from the misuse of their works, for example, by theatre companies and other users. Indeed, the occasional case concerning the "inviolability" of an author's work apparently did appear before the Soviet courts, though little record of moral rights jurisprudence remains.[160] The Soviet legal system was exceptionally focused on legislation as the primary source of law, and the development of meaningful legal precedents was therefore limited. Nevertheless, in these kinds of cases, the courts appear to have been prepared to uphold the author's claim.

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[159]See Ricketson (n 6).

[160]Karakis (n 33) 133 seems to emphasise the impossibility of an author suing a publisher: she observes, "in theory, the author could legally demand that all "mutilated" copies... be withdrawn from publication. However, not one single case dealing with such a claim has been reported in the Soviet system, in spite of the fact that, according to Olympiad Ioffe...'not infrequently the so-called editorial protection of creative works actually involved intentional distortion.'"

Inevitably, these considerations provide cold comfort in a general climate of disillusionment and despair. The question becomes whether imaginative literature can survive at all in such circumstances – whether the constraints imposed on freedom of thought by the politics of ideology leave any meaningful jurisdiction to the imagination. The substance of authors' personal rights, and what they truly signified in Soviet society, was to be tested conclusively in the 1966 show trial of Siniavskii and Daniel, and found disturbingly empty.

IV. LAW, IDEAL, AND REALITY: MORAL RIGHTS AND THE SINIAVSKII-DANIEL TRIAL

A consideration of authors' moral rights in Soviet legislation suggests that the rights of disclosure, attribution, and integrity enjoyed strong protection in Soviet law. These rights became subject to restrictions, as well as gaining additional protection, over the years, fluctuating in response to the ebb and flow of ideological currents in this ideology-based regime. However, the theme of protection for authors' personal rights remained a consistent feature of Russian and Soviet copyright legislation.

The Union-wide standard for the protection of the moral rights of authors was set out in Article 98 of the model Fundamentals of Civil Legislation of 1961, and it was reproduced in an identical form in the RSFSR Civil Code of 1964.[1] Article 98 states:

> An author shall have the right: to the publication, reproduction and dissemination of his work by all means permitted by law, under his own name, or under an assumed name (pseudonym), or without an indication of a name (anonymously); [and] to the inviolability of the work.[2]

It is readily apparent that moral rights in Soviet law closely resembled their counterparts in Continental legislation. Like moral rights in France and Germany, the Soviet provisions granted rights of publication and authorship; Soviet law resembled the French system most closely in the extensive right of integrity, or "inviolability," but, like the German provisions, it also provided explicit recognition of the right to create

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[1] *Fundamentals of Civil Legislation of the Union of Soviet Socialist Republics and the Union Republics,* c IV, *VVS SSSR,* 1961 No 50, Item 525; reprinted in English in *Legislative Acts of the USSR* (Progress Publishers Moscow 1981) 137; RSFSR Civil Code of 1964, *VVS RSFSR,* 1964 No 24; available in English translation on Russian legal database, Garant.

[2] As translated in MA Newcity *Copyright Law in the Soviet Union* (Praeger New York 1978), Appendix A, 182.

anonymously, or under a pseudonym.[3]

However, there are two striking contrasts with contemporary Western European law. Moral rights, like the other rights of authorship set out in section 98, are not granted to the author as "exclusive" rights. Earlier Soviet legislation had maintained that authors' rights were exclusive, but the language was amended in 1961 to reflect the real limitations on an author's ability to exercise his rights within the Soviet system.[4] It is also specified that authors may create and publicise their works "by all means permitted by law" – a caveat that is also part of international copyright law, through Article 17 of the Berne Convention, and is no doubt implicit in Western copyright legislation. However, the use of copyright for censorship purposes in democratic countries is usually balanced by legal and conventional guarantees of freedom of speech, safeguards that were alien to the Soviet political system.[5]

Indeed, the change of terminology provides a clue as to the real meaning of authors' rights in the Soviet Union. If the Soviet provisions generally resembled Continental law, the practical context in which Soviet moral rights would be exercised

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[3]*Loi du 11 mars 1957 sur la propriété intellectuelle et artistique* (n 6), Article 6; and *Urheberrechtsgesetz* (9 September 1965, as last am 16 July 1998), Articles 12-14; available online: WIPO Collection of Laws for Electronic Access <http://clea.wipo.int>.

[4]Newcity (n 2) 71 mentions the "debasement" of the principle of exclusive rights. See SL Levitsky "Continuity and Change in Soviet Copyright Law: A Legal Analysis" (1980) 6(4) Rev Soct L 425, 439-50 and SL Levitsky& WB Simons "Copyright in Russia and the USSR: A Selected Bibliography of Works Published in English, German, French and Russian: 1827-1983" (Manzsche Verlags- und Universitätsbuchhandlung Wien 1985) 23-25 on the changes to copyright in the 1961 revision.

[5]Of course, the impact of this provision would depend on the nature of the laws in question: if the government was expected to observe the law in its own conduct, it might strengthen the position of creators.

– legal, political, and cultural – was quite different from Western Europe. The real implications of moral rights law for Soviet authors were highly ambiguous. In Continental jurisdictions, moral rights were protected within a legal framework that emphasised the protection of citizens' rights and freedoms from the interference of the state – in itself, the product of a deeply-rooted political ethos. In contrast, the Soviet legal regime for authors' rights hung precariously in the balance against official cultural policy.

In its approach to creative expression, the Soviet state assumed an exceptionally interventionist stance. The official attitude towards literary and artistic creation had deep roots in the Russian Revolution, and it was an inevitable product of Communist political aspirations. There were three principal reasons behind the importance of culture for Soviet leaders. First, the ideological basis of state power, and, in particular, its own historical dependence on "propaganda," led the Communist Party to become interested in harnessing the imaginative power of literature and the arts for the dissemination of political ideas.[6] As Peter Kenez observes, "[i]n the eyes of the Bolshevik leaders,...[t]he book was the chief vehicle of culture, and the printed word an essential method of propaganda."[7]

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[6]The peculiar importance of propaganda in the Soviet state is emphasised by P Kenez *The Birth of the Propaganda State: Soviet Methods of Mass Mobilisation 1917-1929* (New York Cambridge University Press 1985) 13. He points out that "[t]he type of propaganda about the Bolsheviks carried out is absolutely central to our understanding of the nature of the regime that they had created. The regime could not have existed without special brand of propaganda, and only a communist system could have developed those methods of mass mobilisation that in fact existed...From the time of the birth of the regime, Soviet life has been permitted with propaganda to such an extent that it is difficult for an outsider to imagine."

[7]Kenez (n 6) 95. In his discussion, Kenez also observes that the Bolsheviks were initially interested in "spread[ing] enlightenment," rather than repression, a

Secondly, the traditionally authoritative position of the intelligentsia in Russian society meant that the control and manipulation of intellectuals was a key issue for the Soviet state in consolidating its power. Thirdly, due to the totalitarian aspirations of the Soviet leadership, psychological control of the Soviet population was an important political objective. Creative expression was among the only channels for effective resistance to this politicisation of the mind, and it therefore presented a standing challenge to Communism.[8]

What were the implications of this political climate for authors' rights? Not surprisingly, political restrictions made it extremely difficult for an author to exercise in practice the rights that he enjoyed in theory. An author could expect to vindicate his moral rights – provided, however, that his creative expression fell within the ideological limits tolerated by the state.[9] The significance of moral rights for authors whose works lent themselves to interpretive ambiguities was not as clear. If an author found himself outside the political boundaries drawn by the state, he could no longer expect to assert his legal rights.

In itself, the idea of conditional recognition for moral rights is not unique to the Soviet system. Moral rights in virtually all legal systems are subject to a variety of political limitations. Moral rights must be balanced against other rights and interests, and, in every legal regime, they can be suspended by the state for overriding concerns of

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situation that was to change with time. See Kenez (n 6) 98.

[8]See the discussion in G Hosking *A History of the Soviet Union 1917-1991,* Final Ed (Fontana Press London 1992) 408-13, who emphasises the role of literature in maintaining independent thought.

[9]Whatever moral rights cases that occurred in Soviet law appear to have been cases like these. See the discussion in Chapter III 131-32.

public policy.[10]

However, the limitations imposed on moral rights by the Soviet system were unique in one fundamental respect: the threshold at which they could be invoked was set at such a low level that they could easily be restricted by considerations of state policy. Moreover, once state action was triggered, the methods of interference were such that authors' rights were simply eviscerated. The intervention of the state was not subject to public justification, either on legal grounds, or on grounds of policy. Its power could be brought to bear arbitrarily; it could also be exercised in secret. These practices led to tremendous uncertainty for authors, first, about whether their works might lead to official sanction, and second, if so, about the form that punishment would take. The attitude of the Soviet state towards authorship was profoundly incompatible with democratic ideals of limited state power and government accountability. Indeed, a consideration of the practical limitations on moral rights in Soviet society points to the intriguing possibility that the standard of protection provided for these rights in practice, as distinct from their legislative status, may in fact be an accurate indicator of the tolerance for creative freedom in a given political regime.

The contrast between authors' legal rights and their real situation in Soviet Russia was brutally exposed in the watershed prosecution of two Russian writers, Andrei Siniavskii and Yuli Daniel, in the winter of 1966. The two writers had

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[10]For example, Peter Wright's right to publish unedited memoirs of his days in the British Secret Service was contested by the British government; not only did the book reveal information about the workings of the agency, but it also claimed to expose incompetence and illegality. The case was pursued in several jurisdictions; for the House of Lords decision, see *Attorney General* v *Guardian Newspapers (No. 2),* [1990] 1 AC 109 (HL).

published abroad a number of short fictional pieces, to great critical acclaim in the West. By publishing outside the Soviet Union, they made an attempt to evade the restrictive conditions of Soviet publishing. In doing so, they had not broken any law. However, the Soviet government felt that the true purpose of the publications was to inflame anti-Soviet sentiment. Accordingly, it brought criminal charges against the writers for writing and publishing anti-state "propaganda."[11]

Although the prosecution of Siniavskii and Daniel was based on Soviet criminal law, the trial was truly about authors' rights.[12] The activities of Siniavskii and Daniel were permitted and protected by the moral rights in section 98 of the Soviet Fundamentals of Civil Legislation: the right to publish works with freedom from objectionable editorial interference, and to publish under the name of one's choice. However, these rights were protected only as part of civil law, and had no bearing on the treatment of literary works by the state. This created a uniquely paradoxical situation in the Soviet Union. The state had a monopoly in the means of publishing and disseminating creative work, and an important hand in the exploitation of works, as well. Writers were legally entitled to protection from abuse of their works. However, writers could not exercise their rights against the state, which controlled virtually all the uses made of a work. Moral rights could only be vindicated against other private citizens, and therefore, as suggested by the limited Soviet jurisprudence on moral rights,

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[11]The charges were brought under Article 70 of the Soviet Criminal Code: the article is reproduced below, in the discussion of the trial.

[12]In fact, the government's recourse to Article 70 was almost accidental; in its search for legal provisions that lent themselves to exploitation in these circumstances, Article 70 appeared most suitable. However, supporting the charges proved to be legally onerous: see discussion of the trial below. In future prosecutions, the government attempted to avoid the article: see the discussion in Hosking (n 8) 422-23.

were applicable to a narrow range of situations. In effect, the intrusion of the state into the "private" sphere was so complete that the relevance of private rights, such as those of authorship, to real situations was severely limited.[13]

The trial of Siniavskii and Daniel illustrates the problems of authors' rights in a state-dominated society. Clearly, the existence of a well-defined private sphere, into which government cannot intrude except on the basis of well-established safeguards, is essential for the protection of personal rights. However, the situation of moral rights in the Soviet Union reveals something more: the fundamental incompatibility of moral rights with a society based on ideological control.

Moral rights are generally protected as part of the author's copyright: they are well-established in private law. However, the theory behind moral rights has broad implications for society, as a whole. Moral rights seek to protect the special relationship between a creator and his work.[14] They are also based on the idea of a special status for artists and works of art in society.[15] As part of copyright law, moral rights protect these important social interests against infringement by private individuals. Is it conceptually consistent to refuse to protect the same interests when

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[13]Danilenko & Burnham note the greatly circumscribed sphere of private law in Soviet society, due to the "influence of Communist ideas" and the virtually universal presence of the state. See GM Danilenko & W Burnham *Law and Legal System of the Russian Federation* (Parker School of Foreign and Comparative Law, Columbia University; Juris Publishing New York 1999) 281-83.

[14]This particular aspect of moral rights theory is considered in some detail, by MT Sundara Rajan "Moral Rights in the Digital Age: New Possibilities for the Democratisation of Culture" (2002) 16(2) Intl Rev Law Computers & Tech 187.

[15]This theme is explored in a seminal article by Martha Woodmansee, who traces the development of moral rights to Western Romanticism, and the rise of the concept of individual genius as the pre-eminent form of human creativity. M Woodmansee "The Genius and the Copyright: Economic and Legal Conditions of the Emergence of the 'Author'" (1984) 17 Eighteenth-Century Studies 425.

they are threatened by the state? The criteria for enforcing them may be different: the status of art, and the relationship between creators and works, are not sacrosanct, and there may be strong considerations of public policy that take precedence. But if the state is going to act against authors, in spite of the moral rights guaranteed by law, it must have a publicly-justifiable reason for disregarding the social values that they represent.

From the perspective of writers and artists, moral rights stand for their interests in fundamental ways, representing their right to be associated with their work, to have the freedom to determine how and when it should be presented to the public, and to protect it from harm. All of these interests are important for the preservation of the cultural heritage of the public, as well as being of personal value to the creators of works. The lesson to be drawn from the Siniavskii-Daniel trial, and from the number of other prosecutions of artists and intellectuals attempted by the Soviet government, is that authors' moral rights represent freedom to create. As such, they should be appropriately affirmed in the public sphere, as well as the private one, to protect society from the uninhibited censorship of creative expression.

It is not especially rare for writers and artists to be prosecuted for their work for reasons of public policy – for example, on grounds of obscenity or blasphemy – and the Siniavskii- Daniel trial falls into this general category. The Siniavskii-Daniel prosecution has parallels with well-known incidents in Western law. Examples include the trials of DH Lawrence's "Lady Chatterley's Lover" for obscenity, and recent attempts to prosecute writer Salman Rushdie for blasphemy in the United Kingdom.[16]

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[16]*R* v *Brodie* (1962), 32 DLR (2d) 507 (SCC); interestingly, the Supreme Court of Canada found that the novel was not an obscene work. An application to prosecute

It has also happened that journalistic expression leads to political prosecution for its anti-state implications. A recent illustration is the "Spycatcher" case; the British government objected to Peter Wright's book, not only because it revealed "secret information," but also, for its exposure of incompetence and illegality in Her Majesty's Secret Service.[17]

In the Siniavskii-Daniel prosecution, however, the element of political ideology was crucial. The illegal act of the writers lay in the imaginative content of their work, which seemed to reject and even satirise official propaganda, bringing the trial into the somewhat narrower category of a prosecution against "freedom of the imagination."[18] In this respect, the closest parallel may be found in the McCarthy trials of 1950s America.[19] At the height of the Cold War, writers and artists whose professional or personal lives suggested sympathies with Communism faced legal and political persecution at the hands of Senator McCarthy's commission. The astonishing irrationality of the proceedings led some observers to characterise it as a "witch-hunt,"

Rushdie under the common law offence of blasphemy was refused, on the grounds that the offence was applicable only to Christianity and not to Islam: see *R* v *Bow Street Magistrates ex p Choudhury,* [1991] 1 QB 429.

[17]N 10.

[18]Parallels can be drawn with seditious literature and blasphemy, but there is a significant time lag: these offences were part of the legal landscape in eighteenth-century England, as opposed to a twentieth-century Soviet Union. See the interesting discussion on "blasphemy and obscenity" in the English context, in LW Levy *Blasphemy: Verbal Offense Against the Sacred, from Moses to Salman Rushdie* (Alfred A Knopf New York 1993) 296-319.

[19]The parallel with McCarthyism is noted by Y Feofanov & D Barry ""The Siniavskii-Daniel Trial: A 13 Year Perspective" (1996) 22 (6) Rev Cent & E Eur L 603, 6 18-19. For a detailed treatment of McCarthyism, see MJ Heale *McCarthy's Americans: Red Scare Politics in State and Nation, 1935-1965* (Athens University of Georgia Press 1998).

and this was ultimately the allegory drawn by Arthur Miller in his play on the activities of the Commission, "The Crucible."[20]

Inside the Soviet Union, the Siniavskii-Daniel trial was one of a series of attempts by the Soviet government to re-establish control after the temporary loosening of restrictions under Khrushchev. The Soviet government did not cease to use violence and other kinds of brutality against writers – for example, committing at least one, Valery Tarsis, to a mental institution.[21] However, its actions were all marked by a degree of uncertainty about how to deal with the intellectual community in the post-Stalin era. The exploration of law and legality became an important part of post-Stalin reassessment. Unfortunately, the Soviet treatment of law quickly became exploitative.

Brodsky, Ginsburg and Galanskov, and others all faced persecution for literary activities through the Soviet court system. These cases resembled the Siniavskii-Daniel proceedings closely in their ambiguous treatment of law and legality. For example, Joseph Brodsky, a poet, was charged in 1964 with the offense of "parasitism," or, quite simply, living without working.[22] His offense was to write poetry without becoming a member of the Soviet Writers' Union. In Brodsky's case, because he was not a member of the Writers' Union, his literary work, including translations of poetry, was not deemed to be "work" in the Soviet sense. Turner suggests that "[t]he court refused to

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[20]Playwright Arthur Miller's experience of being interviewed by the commission inspired him to write "The Crucible," in which an allegory is implicitly drawn between the activities of the McCarthy commission and the Salem witch trials of the seventeenth century.

[21]Hosking (n 8) 412.

[22] The law could be traced back to 1957: see Hosking (n 8) 352, who compares it to the "vagrancy laws of sixteenth-century England," in their vagueness and catch-all character.

recognise that writing poetry was useful work," but Brodsky's aloofness from the Union was probably a troublesome issue, in its own right.[23] Alexander Ginsburg had also been imprisoned for his activities as a poet; in 1967, he faced trial and imprisonment with Yuri Galanskov, editor of an underground journal, for compiling a record of the proceedings in the Siniavskii-Daniel affair.[24]

It is apparent that the Siniavskii-Daniel trial represented a larger trend on the part of the Soviet government towards systematic abuse of the rights of authors, and in particular, for their moral rights. However, the Siniavskii-Daniel affair was also different from the other cases surrounding it. It was the first trial in which the texts written by the accused provided the basis of legal proceedings. It was also the most ambitious of the anti-intellectual prosecutions of the era. For this reason, the outcome of the Siniavskii-Daniel trial, more than any other event of the period, signified a lasting defeat for the briefly revived hopes surrounding the ideal of socialist legality.[25]

In order to understand the implications of the Siniavskii-Daniel trial for authors' moral rights, it is necessary to consider the trial in its complex historical context. The

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[23]JE Turner "Artists in Adversity: The Siniavskii-Daniel Case" in TL Becker (ed) *Political Trials* (Bobbs-Merrill New York 1971) 107, 112. Interestingly, after the Ginsburg-Galanskov trial, the Moscow branch of the Soviet Writers' Union issued a warning to those of its members who were involved in the protests: Hosking (n 8) 423. The Ginsburg-Galanskov trial is briefly discussed below.

[24]Hosking (n 8) 412-415. The journal was a *samizdat* publication: see n 35 *infra.*

[25]Hosking (n 8) 414; M Hayward *On Trial: The Soviet State Versus "Abram Tertz" and "Nikolai Arzhak"* (Harper & Row New York 1967) 24-26. The parallels and differences between the prosecutions of the 50s and 60s with those of the late 20s and 30s are also worth noting: the trials of the earlier era were "show" affairs, but the focus of the later attempts was on achieving legal justification for the actions of the government. The early cases involving literary and artistic people are summarised by R Service *A History of Twentieth-Century Russia* (Penguin Books London 1997) 200.

Soviet system of government had created a situation in which it was virtually impossible for creative writers to publish their work without first being subject to state scrutiny and censorship. However, the political instability of the Khrushchev era led many writers to experiment with techniques of carrying on their activities more independently than in the past. Some of these attempts met with success; but the writers were treading a dangerous line between the permissible and the forbidden, at a time when this border was, itself, in flux. The first part of this chapter will set the scene for the incidents of the Siniavskii-Daniel trial by identifying the characteristics of the creative professions in Soviet Russia and the changes that were set in motion by Stalin's death; the second part will undertake a detailed legal analysis of the proceedings; and the third will discuss specifically the implications of this trial on "propaganda" for moral rights.

A. THE CONTEXT

The prosecution of Siniavskii and Daniel occurred at a turning point in Soviet history. Following the death of Stalin in 1953, Soviet society experienced a sudden release from the crushing grip of this notorious dictator. Khrushchev's "secret speech" to a special session of the Communist Party in 1956 acknowledged, for the first time, the horrors of the personality cult.[26] A full exposure of the scale of suffering in Stalin's prison camps was to be revealed to the public at large a short time afterwards, with the appearance of

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[26]The circumstances surrounding the so-called "secret speech," as well as its content, are described by Hosking (n 8) 334-37. The speech dealt primarily with the impact of Stalin's repression on the Party elite, rather than the experience of the population at large. The speech was delivered before a special "closed session," following the Twentieth Communist Party Congress of 1956. Although it was not published in the Soviet Union, it immediately became known abroad because of the presence of foreign Communist leaders, who had been invited to the session by Khrushchev.

Alexander Solzhenitsyn's chronicle of "*zek*" life, *One Day in the Life of Ivan Denisovich,* in 1962.[27]

The "secret speech" triggered a period of great uncertainty in Soviet life. The unmasking of Stalinism generated the first opportunity in decades for reassessing the fundamental realities on which Soviet state and society were raised. Creative expression was deeply implicated in this transformation, through its earlier victimisation, and through its potential contribution to public atonement. Under Stalin, writers and artists had been subject to a unique form of repression, physical and psychological, personal and professional in nature. The loosening of political restrictions on expression after Stalin's death created an important opportunity to come to terms with their own sufferings.

1. The Creative Professions in Soviet Russia

It is well known that, in the political climate of Soviet Russia, the practice of the creative professions carried high risks. Intellectuals and creative artists were perpetually in danger of antagonising the Soviet leadership, with consequences ranging from the inconvenient to the deadly. Ironically, the prestige and authority traditionally attached to the intellectual and creative professions in Russia were partly to blame for this situation of intense tension. At the same time, the inherent incompatibility of freedom of the imagination with the aspirations of totalitarian power made it impossible to maintain a regime of true mutual tolerance between the state and creative people.

Conflict between the political leadership and intellectuals was a long-standing reality of Soviet society, and is aptly characterised by Sheila Fitzpatrick as a

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[27]A "*zek*" was an inmate of prison camp. Hosking (n 8) 412-13 discusses the public sensation caused by the appearance of Solzhenitsyn's work.

fundamental tension between "power" and "culture." The roots of this dichotomy can be traced to the tsarist era, which laid the deep foundations for the post-Revolutionary relationship between Soviet rulers and creators. The absolutism of the tsar precluded the development of a generally favourable climate for free creative expression. However, the contribution of writers and artists to the cause of Russian development was invaluable, and led to a degree of official tolerance towards them. In a sense, creative people served as the conscience of the tsarist state. This tradition of "alternative government," by writers in particular, would continue through Soviet times.[28]

In contrast to the tsar, the Bolsheviks held far more aggressive aspirations for social development. Their policies towards creative work were correspondingly more interventionist. The goal of the Bolshevik leadership was not to repress creative expression. On the contrary, the Soviet state sought actively to develop creative expression that would promote the political objectives of socialist government, and to manipulate the existing heritage in support of official policy. Both the Bolsheviks and the subsequent Soviet leadership hoped to forge an alliance with Soviet intellectuals and artists, who perhaps constituted the only alternative source of leadership in post-Revolutionary society, based on the creation and maintenance of a workable balance of power between the two. Accordingly, only in its policy towards non-conforming or incompatible expression could the attitude of the Soviet state be identified as overtly repressive. For authors who succeeded in gaining and holding the favour of the state, conditions of life were actually quite attractive, providing stability and support for

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[28]Hosking (n 8) 408 observes that the Russians had a long tradition of "alternative government" by writers.

authors that substantially exceeded the typical circumstances of artistic life in Western countries.

However, it is precisely the problem of artistic judgment – how to identify and punish the creation of a non-conformist work – that made Soviet cultural policy impractical. Quite simply, the difficulty arose because of a fundamental incompatibility between the creative needs of artists and intellectuals, and the political needs of the state. The Soviet state sought to enforce homogeneity and predictability; artists required freedom to explore and extend the boundaries of experience. Although state policy hinged on its ability to identify politically dangerous work, the state was exceptionally poorly equipped for this undertaking. Communist leaders were not in a position to judge effectively the political message that the public might derive, either from a particular work, or from the personality of a given artist. After all, the problem of assessing the value and significance of new works of art, and the new artistic language expressed in pioneering works, are issues that often lead even experienced critics into embarrassing errors of judgment.

As a result of this blind spot, the Soviet leadership was notoriously inconsistent in its dealings with creative work, leading to a situation of nightmarish uncertainty for creative artists. The successive waves of praise and condemnation endured by Shostakovich over the course of his career provide but one illustration.[29] With the

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[29]Shostakovich was the first composer trained in the Soviet system who came to international prominence as an important, new composer. At first, his success was embraced by the Soviet state, which used him as an illustration of the creative potential of the new society. Shostakovich's opera, "Lady Macbeth of the Mtsensk District," was widely performed in the Soviet Union by the leading opera companies of Leningrad and Moscow. However, after a Moscow performance in 1936, attended by Stalin, a devastating editorial was published in *Pravda*. Not only did the review "attack[... the] opera root and branch," as Sheila Fitzpatrick points out, but it also made use of the

passage of time, the Soviet state increasingly attempted to tighten its ideological control of creative expression by instituting effective bureaucratic measures. It developed a sophisticated mechanism of censorship, enforced by a complex bureaucracy that made it ever more difficult for non-conformist works to achieve publication, and through which, the law of authors' moral rights was filtered.

2. Censorship and Creative Expression

The effectiveness of Soviet censorship was due to its simultaneous impact at several levels of the creation and publication process. The need for comprehensive control of creative expression had its origins in the supremacy of the official political ideology, and the resulting need to control the proliferation of ideas in the artistic sphere. Soviet censorship operated in three ways. The state sought to bring the means of publishing and disseminating creative works as completely as possible within its control; it developed a system of cooperation with editors and, where necessary, of editorial coercion; and it exploited the ideological climate of repression to create a situation of perpetual doubt and fear in the minds of creative artists, themselves.

(a) State Censorship

The rationale behind state censorship of creative expression was to maintain the state's

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occasion for a wide-ranging attack on cultural innovation in the Soviet Union. Interestingly, the author of the unsigned editorial was believed to be Andrei Zhdanov, a member of the Politburo and close ally of Stalin. A detailed discussion of the Shostakovich case, and an analysis within the broader context of government control, manipulation and repression of the musical world, is provided by S Fitzpatrick *The Cultural Front: Power and Culture in Revolutionary Russia* (Cornell University Press Ithaca 1992) 183-215. Fitzpatrick, 213, points out that "his disgrace on each occasion proved temporary and his status as an acknowledged 'great Soviet composer' survived these debacles."

monopoly on ideas, in particular, political ideas, information, and ideology.[30] This was achieved by a gradual process of infiltrating the means of publishing and disseminating works. By the 1960s, the Soviet state controlled virtually the entire publishing apparatus through a system of licensing requirements for publishing bodies, established early in the post-Revolutionary period, and by the extension of these bureaucratic requirements to new technologies for disseminating works as they arose. The Soviet licensing system originated in a law of 1932, which provided that publishing licenses could only be issued to "governmental, public, or cooperative organisation[s]."[31] Gsovski, already in 1948, points out that "the government monopoly of printing in the Soviet Union is in fact an essential limitation on the author's right and should be borne in mind in the perusal of the laws on copyright[.]" Official control of the means of publication grew in strength over time, and provides an interesting illustration of how the "means of production" in the Soviet economy were generally monopolised by the state.

From the perspective of authors, it was virtually impossible to evade the system of state publishing. The alternative of private publishing was not available. As for the possibility of publishing abroad, it had somehow escaped from being banned as illegal,

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[30]For example, Gsovski quotes a 1946 Resolution of the Central Committee of the Communist Party: "' Any preaching of absence of ideology and of keeping literature out of politics' is severely condemned." The policy seems to arise out of "Lenin's motto that ' every literature must be Party literature'": see V Gsovski *Soviet Civil Law: Private Rights and Their Background under the Soviet Regime,* HE Yntema (ed) Michigan Legal Studies Series (University of Michigan Law School Ann Arbor 1948) 616; he cites the Resolution of the Central Committee of the Communist Party of August 14, 1946 (1946) Bolshevik (in Russian) No. 17/18, 13.

[31]See Gsovski (n 30) 614: RSFSR Laws 1932, text 288; Provisional Rules Issued by the Main Office of Police (Militsia) of the RSFSR of December 7, 1931, No 576957. See also Newcity (n 2) 71.

but it was certainly ill-advised, as the practical consequences of doing so could be severe. Paradoxically, the freedom to publish outside the country depended as much on the indulgence of the state as publishing within the Soviet system. In the 1920s, Zamyatin had been successful in avoiding Soviet censorship by publishing outside the Soviet Union, but this technique was not pursued by writers for decades after his time.[32] The tradition was revived, almost unintentionally, by Boris Pasternak, who published his "autobiographical" novel, *Dr Zhivago,* with Feltrinelli, an Italian publisher whose agent had obtained the manuscript on a visit to Moscow, in 1957. The professional and personal consequences for Pasternak proved to be disastrous. As Hosking points out, the affair "played a part in undermining his health and perhaps bringing about his death in May 1960."[33]

The state publishing bureaucracy was complemented by the establishment of a Union of Soviet Writers (VOUAP), whose official duty was to represent the interests of writers in the Soviet Union . The rights and privileges of writers, including the protection of their economic and personal rights, were channeled through the VOUAP. For non-conformist writers, however, the VOUAP could represent one more incarnation of the coercive power of the state over literary creation. The role of the Union was a much-contested issue at the time of Soviet accession to the Universal Copyright Convention. One dissident suggested that its name should be changed to the "All-Union Agency on the Expropriation of Copyrights"; Newcity points out that the "threat[... of] deprivation of Union membership" was one of the tools of repression

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[32]See Hosking (n 8) 411.

[33]The incident is described by Hosking (n 8) 411.

available to the Soviet state – a situation that was illustrated by the Brodsky case, where lack of Union membership deprived him of the right to claim that his literary activity was "productive work."[34]

(b) The Editorial Judgment of Publishers

Within the framework of state control over the publishing apparatus, the editors of publishing houses occupied an unusual position. In effect, they played the role of mediator between the state and the author. On the one hand, they acted as the state's representative to the author; it was their role to assess the suitability of a work for publication, and, in areas of doubt, to determine the nature and extent of the changes necessary to make the work politically acceptable. Editorial judgment involved, not only literary judgment, but also, a crucial element of political judgment. Moreover, the editor had to weigh the work against the political mood of the day. By publishing the work, the editor presented the author's work to the state, and his reputation as an effective publisher was also at stake in the project. The peculiar relationship between author and editor is described by Newcity:

> The essence of the author's right to publish his work is found in his freedom to decide when the work is ready for publication. After the author has decided to seek the publication of his work, his rights are not the subject of negotiation. They are carefully and strictly limited by Soviet statutes and regulations. If, during the course of preparing the work for publication, editorial recommendations are made as to changes in the work, the author may refuse to accept these changes; the publishing house may not publish a work with changes or additions not approved by the author. But, of course, if the author refuses to permit the suggested changes, his work may not be published. The author's right is confined to decision whether to publish the work or to leave it "in the drawer."[35]

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[34]Newcity (n 2) 152, 157.

[35]Newcity (n 2) 72. The Russian tradition of writing "for the desk drawer," or "self-publishing," known as *samizdat,* is discussed by Feofanov & Barry (n 19) 606 and

In a sense, editors enjoyed a position of somewhat greater independence than authors: they were one step removed from the act of literary creation, and they were also endowed with powers to control literary works that were far out of the reach of authors. While it was unlikely that a strongly non-conformist editor would survive, it was nevertheless possible for a more liberal editor to find his way to a position of responsibility. An example was the journal, *Novy Mir,* edited in the Khrushchev period by Alexander Tvardovsky and Konstantin Simonov.[36] During the post-Stalin period, the journal became a relatively liberal organ where non-conformist literature could appear. However, the limits of editorial independence, even at this period of unusual official tolerance, are clear in its refusal of the manuscript of *Dr. Zhivago,* which, prior to its publication abroad, Pasternak had hoped would appear in its pages.[37] Yevgeny Yevtushenko, who hoped to see his poem, "Stalin's Heirs," appear in *Novy Mir,* recalls the limits of Tvardovsky's power; Tvardovsky,

> "with the gloomy irony typical [of] him,... said to me: ' I am not [a] fool. If [I] publish this poem, they'll close my magazine immediately, so I give you good advice, boy: hide this poem as deep as you [can]; otherwise you'll [be] immediately accused of anti-Soviet activities.'"[38]

(c) Self-Censorship

The ultimate effect of the Soviet publishing regime, its bureaucratic apparatus and its

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Hosking (n 8) 412, 415. It is worth noting that the term is a parody of *Gosizdat,* the official name for state publishing. The formation of *Gosizdat,* an amalgamation of five earlier publishing houses, is described by Kenez (n 6) 100-04.

[36]The role of the editors, and the general contribution of the journal and others like it to greater intellectual openness, is discussed by Hosking (n 8) 410.

[37]Hosking (n 8) 411.

[38]Interview with Yevtushenko, "Red Spring (The Sixties) Episode 14," online: <http://www.gwu.edu~nsarchiv/coldwar/interviews/episode-14/yevtushenko1.html>.

infiltration of the editorial process, was to create a climate of fear and uncertainty in the creative professions. The doubts that they experienced were not confined to the practical problem, already grave enough, of whether they would be able to see their writings appear in print. Rather, from the moment a writer chose to release a manuscript outside his immediate personal circle, he was subject to discovery, abuse, and punishment. To release a manuscript was a dangerous act of trust in a regime where the cumulative effect of state policy had been to undermine and destroy trust systematically . Moreover, the editorial treatment of creative work took the form of a moral judgment on the writer and his work. For these reasons, the ideological censorship of creative works introduced a crippling element of self-doubt into the mind of the writer.

Contemporary accounts suggest that the psychological impact of official censorship was tremendous. One writer describes the internalisation of the state censorship mechanism, the presence of an "internal censor" within his mind. His decision to write and edit a *samizdat*, "self-published," journal was largely a therapeutic affair, an attempt to escape from this state-imposed mental restriction.[39] The role of the "internal censor" was not confined to the assessment of whether a work would be acceptable for absorption into the publishing bureaucracy. Rather, the mind of the writer also became clouded with uncertainty about his own ability to make artistic, and even ethical judgments. The ideological manipulation of the Soviet state took many guises, and included the exploitation of patriotism and national duty, profoundly moving themes for Russians. Perhaps this explains why creative people were at times

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[39]See n 35.

led into doubting their own integrity. As Hosking points out:

> Both Marxism and Russian nationalism were raided to produce a crude, reductionist and paranoid view of the world, which was made obligatory for every artist, scientist and scholar, indeed for anyone who wished to get into print. Yet, like all paranoid visions, it had its own internal consistency and its own compelling logic.[40]

Hosking goes on to quote from Vasily Aksenov, a dissident novelist, who describes, alongside the admiration of his generation for banned writers like Akhmatova and Zoshchenko, a profound distrust of their own literary judgment:

> "[E]ven then deep down – yes, deep down – we were convinced of the normality of Zhdanov's world and of the abnormality, sickliness and shamefulness of Zoshchenko's."[41]

If the tight bureaucratic control of creative expression affected the ability of writers to publish works of literary and social value, the psychological effects of the censorship regime were still more pronounced. Writers could attempt to escape from the publishing bureaucracy, if only by writing "for the desk drawer," or by publishing through *samizdat.* However, evading the internal censor was a more complex undertaking. The mind of the writer found itself in a zone of "unfreedom." Yet imagination is essentially a free process, with judgement and the elimination of unworkable ideas coming at a much later stage in the fashioning of a work. Internal censorship therefore threatens creativity with destruction at its very root. Indeed, there can be no doubt that this was the tacit aim of the Soviet censorship regime. The quest for ideological domination meant, above all, the complete elimination of competition in the realm of ideas. Yet – perhaps even in spite of themselves – writers, by the very

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[40]Hosking (n 8) 312.

[41]Hosking (n 8) 312-13.

nature of their profession, could hardly avoid infringing upon the state's monopoly of ideas.

(d) The Interpretation of Moral Rights

The pervasiveness of Soviet censorship translated into extensive practical limitations on the ability of authors to exercise their rights. Indeed, the norms of censorship were reflected in the interpretive principles governing moral rights. As often happened in Soviet law, these interpretive principles were not expressed openly in statutory provisions or other official instruments, but they were tacitly understood guidelines that imposed political limitations on authors' rights. Three such principles should be emphasised.

First, the Soviet right of attribution, which normally included the right to publish a work under a pseudonym or anonymously, was limited by a general understanding that it would be overruled if "concealing the author's true identity harms Soviet society."[42] However, the circumstances in which the author's identity may be revealed are not specified in the Fundamentals. Indeed, the right of attribution could easily be twisted to serve the interests of the state – for example, by linking an author to his work in order to incriminate him, rather than protecting his rights to recognition and reputation.[43]

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[42]Newcity (n 2) 73; he cites Baumgarten (1973).

[43]Freedom from accountability is the "dark side" of anonymity, and political accountability has historically been one of the reasons behind the need to identify authors. This question is addressed in an interesting analysis by M Foucault "What Is an Author?" in P Rabinow ed *The Foucault Reader* (Pantheon Books New York 1984) 101, 105-113. Foucault goes on to make the interesting point that, "[t]he author is the principle of thrift in the proliferation of meaning.... The author is...the ideological figure by which one marks the manner in which we fear the proliferation of meaning."

Second, the right of disclosure was restricted in practice by the government's exclusive control of the means of publishing and disseminating works. In effect, it was up to the Soviet publishing house, rather than the writer, to determine whether a work was fit to appear before the public. In contrast to publishing industries elsewhere, this determination was likely to be made on political grounds, and not according to the literary merits of the work. The author would have no alternative but to accept the decision of the publisher.

Third, and perhaps most significantly, the author's right to the inviolability of the work was restricted by the practical limitations of the publishing and distribution landscape in the Soviet Union. Although the inviolability right appears as an unusually powerful right in Soviet legislation, the author could only exercise this right effectively against other Soviet citizens who misused his work. He could not expect to invoke his right of integrity against the abuses of publishers or distributors, where earlier legislation had recognised that it might be most needed, since their activities were carried out on behalf of the state.[44]

3. The "Thaw" and the Ideal of "Socialist Legality"

The moral collapse of the Soviet leadership after Stalin's death led to a period of unexpected and unprecedented political freedoms for the public. The government had become highly ambivalent about the consequences of continuing to repress knowledge, particularly in view of the difficult historical realities with which the nation somehow had to come to terms. Not least among its concerns were fears about the consequences

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[44]For example, the right of integrity in section 18 of the 1928 copyright statute was specifically a right against the publisher: USSR Laws 1928, no 246 (16 May 1928). An English translation appears in JN Hazard *Materials on Soviet Law* (Columbia University New York 1947) 35-37. See the discussion in Chapter III.

of terror for the political elite, which, in its own way, had been as much a victim of Stalin's paranoia as any part of Soviet society.

Creative expression benefited greatly from the lifting of restrictions. While there were still limits on what could be published, and how, as demonstrated by the fiasco surrounding the publication abroad of Pasternak's *Dr. Zhivago,*[45] a number of controversial works nevertheless appeared. This period came to be known as "The Thaw," after a novel by Ilya Ehrenburg. Andrei Siniavskii and Yuli Daniel were among the writers and intellectuals who were caught in the shock wave following Khrushchev's revelations. Both of them wrote and published literary pieces that reflected the complex spirit of the times, although, due to their continuing uncertainty about the acceptability of the works to Soviet publishers, they appeared in foreign publications.

The loosening of political restrictions reflected the Communist Party's tottering legitimacy in the wake of Stalin's death. Ideology no longer seemed to provide an adequate justification for the sufferings of the Soviet population under Stalin's rule, much less a basis for the continued political domination of the Party. In its search for ways to renew its leadership of Soviet society, the government turned towards law and legality. Law presented a potentially powerful means of supporting the legitimacy of Party authority after Stalin, and it offered the seductive possibility of restoring a degree of stability, or "normality," to Soviet life.[46]

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[45]The incident is described by Hosking (n 8) 410-11.

[46]Hosking (n 8) 350-53 discusses Khrushchev's progress towards a new idea of "socialist legality," as well as the conflict between legality in party control that was to lead to enduring "tensions and ambiguities in the legal reforms."

The goal of re-establishing a semblance of legality in Soviet life featured prominently in political discourse of the Khrushchev period. The government was especially keen to demonstrate that legality and the rule of law could be compatible with socialist ideology. "Socialist legality," as Soviet leaders styled the new politics, was to provide a viable basis for the rational development of Soviet society after Stalin. Among the political benefits of socialist legality was the crucial possibility of reopening dialogue between the Soviet state and literary authors, by helping to clarify the boundaries of the future relationship between the two. The new administration was keen to regain the tolerance, if not the political and ideological support, of writers and intellectuals.

Ironically, it was the national sensation generated by the publication of Solzhenitsyn's *Ivan Denisovich,* widely exposing the realities of Stalinist repression to the Russian public from the personal and intimate perspective of a single victim's point of view, that aroused the party's fears about the deeper consequences of ideological liberalisation. As it became apparent that the maintenance of political control depended anew on the imposition of order, the Soviet leadership attempted, once again, to tighten its restrictions on creative expression. However, it proved to be difficult for the government to retrace its steps on the path of greater accountability. Rather, the Soviet leadership confronted the difficult challenge of re-establishing control while appearing to maintain consistency with its own discourse of renewed legality over the course of the previous decade.

The contradictory requirements of a commitment to "socialist legality," on the one hand, and renewed control of creative freedom, on the other, experienced a headlong collision in the prosecution of Siniavskii and Daniel. The trial was designed

to showcase the principles of socialist legality, while clarifying the limits of free expression in post-Stalin society. However, both principles could not survive the impact. The trial revealed that the conflict between legality and Soviet socialism was, in truth, irreconcilable. It also established, once and for all, that literature, as the supreme profession of ideas in Soviet Russia, inevitably had a political role to play in giving voice to dissent – or, as the dissidents themselves may have said, in making possible "other-thinking."[47]

B. THE TRIAL

1. Facts of the Case

Andrei Siniavskii and Yuli Daniel were Russian writers of fiction. Siniavskii was the more established author of the two, having built a solid literary reputation by the early 1960s. Siniavskii was not only a writer of fiction, but he was also a literary scholar and critic whose name had come to be closely associated with the works of Boris Pasternak, the celebrated Russian writer, poet, and dissident.[48]

The writings of Daniel were not as widely circulated among the Soviet public; Max Hayward points out that, "[u]nlike Siniavsky, Daniel – until his trial – had scarcely any public reputation in the Soviet Union."[49] Daniel's literary activities were more specialised, and included translations of poetry from Yiddish and other Eastern

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[47]Service (n 25) points out that the dissidents referred to themselves as *"inakomyshlyashchie,"* "other-thinkers." He observes: "This was a neat term which encapsulated the origin of their predicament: namely that they disagreed with the postulates of the ruling ideology."

[48]Interestingly, both writers were pall-bearers at Pasternak's funeral. Hosking (n 8) 412 draws attention to the fact that their participation was one form of protest against the persecution he endured.

[49]See Hayward (n 25) 14.

European languages into Russian.[50]

Siniavskii had published extensively in the Soviet Union during the 1950s. Like other Soviet intellectuals, however, his belief in the Communist system was severely shaken by the revelations of Stalinist oppression following Khrushchev's "secret speech."[51] In the late 1950s and early 1960s, he began to publish his writings abroad under the pseudonym of "Abram Tertz." The works which Siniavskii published abroad were substantially different in character from those that he had published earlier in the Soviet Union. While his earlier writings could not be characterised as aggressively anti-Soviet, he had progressed towards an increasingly critical view of the Soviet state and society. No doubt, the change in Siniavskii's style reflects the inevitable progression of his ideas and ideals after 1956; it also makes the body of his work appear internally inconsistent.[52]

The charges against Siniavskii were based on three works published abroad under the pseudonym of "Abram Tertz": "On Socialist Realism," an essay; "The Trial Begins," a short story; and a novel, "The Makepeace Experiment (Lyubimov)." In the course of the proceedings, the prosecution also brought a number of other works as evidence against Siniavskii. They included at least one unfinished and unpublished

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[50]Hayward (n 25) 5-7, 14. Daniel was of Jewish origin.

[51]See Turner: he calls Siniavskii "a revisionist critic who was influenced by the revelations about the Stalin era." See also Hayward (n 25) 3-8 on the evolution of Siniavskii's attitudes towards the Soviet state. Helene Peltier-Zamoyska, a long-standing friend of Siniavskii and the person who arranged for the manuscripts to leave the Soviet Union, comments that Siniavskii had close personal ties with the Revolution, as his father had apparently been a "militant revolutionary" (reproduced in Hayward n 25, 4-5).

[52]Feofanov emphasises this point: see Feofanov & Barry (n 19) 616.

essay.[53]

Daniel, the co-defendant, had attempted to publish only one original work through the Soviet publishing system, a short story that was never publicly released.[54] However, four of his short stories, submitted under the pseudonym of "Nikolai Arzhak," were printed by foreign publishers and received great critical acclaim outside the Soviet Union. These four stories constituted the main part of the evidence against Daniel.[55] Two of them had appeared in English translation – entitled, "This is Moscow Speaking" and "Hands" – while the others were printed in the original Russian.[56]

These works of fiction had a strong satirical flavour, and indeed, they easily lent themselves to interpretation as works of political allegory. Of Daniel's writing, in particular, Hayward points out that it is in essence "sharp political satire."[57] Apart from their literary merits, it is hardly surprising that these kinds of works appealed to foreign publishers and critics of the Cold War era. The writers' work offered rare insights into a society that was remote and inaccessible, but terribly important to the West. They also struck a chord with Western values in the strongly anti-Soviet spirit of the times. For example, *Time* magazine did not hesitate to refer to Siniavskii as "a bitter opponent of Communism."[58]

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[53]Trial Transcript, reproduced in English translation in Hayward (n 25), 110.

[54]This information is mentioned in Turner (n 23) 115.

[55]Hayward (n 25) 15.

[56]One would assume that the Russian-only publications were directed at the Russian-speaking Soviet emigré population, and at scholars of the Soviet Union.

[57]Hayward (n 25) 16.

[58]Cited in Feofanov & Barry (n 19) 612.

Although both Siniavskii and Daniel employed techniques of satire, their artistic personalities were quite different. Siniavskii's main literary preoccupation was how to develop a creative style that would be adequate to describe the contradictions and absurdities of contemporary Soviet society in the wake of Stalinism. To resolve this problem, he adopted a "fantastic" style, which he believed would allow him to shed light on Soviet reality and make it easier for the reader to digest through imaginative extravagance and absurdity. Hayward calls this Siniavskii's "literary technique of 'fantastic realism.'"[59] In his essay, "On Socialist Realism," Siniavskii himself defines the artistic need of the times in terms of a

> phantasmagoric art with hypotheses instead of a Purpose, an art in which the grotesque will replace realistic descriptions of ordinary life. Such art would correspond best to the spirit of our time. May the fantastic imagery of Hofmann and Dostoevsky, of Goya, Chagall, and Mayakovsky (the most socialist realist of all), and many other realists and non-realists teach us how to be truthful with the aid of the absurd and the fantastic.[60]

While he had evidently been influenced by the writing of Siniavskii, Daniel's satirical writing was harsher and more direct. His story, "This is Moscow Speaking," develops around the declaration of a "Public Murder Day" by the Soviet government, during which all adult Soviet citizens will have the right to kill anyone, with the sole proviso that the intended victim must not fall into certain prohibited social categories. A passage in which the hero contemplates murdering the architects of Stalin's purge of 1937 was frequently cited by the prosecution as evidence that the true purpose of the piece was to incite readers to violence against Soviet leaders. The subtlety of the hero's expression of outrage against the event, already subject to official condemnation by

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[59]Hayward (n 25) 15.

[60]Quoted in Hayward (n 25) 10.

Khrushchev, seems to have escaped the prosecution. Ironically, the conclusion of the passage, in which the hero has nightmare visions of the violence he witnessed as a soldier, is a whole-hearted condemnation of violence, even when it appears to serve justifiable ends.[61] The tension between means and ends, especially in circumstances where change is strongly desired, is in itself an established theme of Russian literature, featuring prominently, for example, in Dostoevsky's writing.[62]

Whatever the literary merit of their works might be, Siniavskii and Daniel could rightfully claim their place within the long and distinguished tradition of social criticism through imaginative literature in Russia. The authors' preoccupations with the social problems of Soviet Russia, and their innovative approach to literary structure and style, situated them firmly within established literary tradition. Not only did the two writers exploit the possibilities of satire, a style typical of Russian literary expression in both tsarist and Communist times, but they also employed the literary techniques developed by classic Russian writers. For example, Siniavskii and Daniel wrote extensively in "*skaz,*" where a story is told in the first person by a fictional narrator whose personality is distinct from the author's.[63] *Skaz* is described by Reeve, an

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[61]The story is described and analysed by Hayward (n 25) 16, and the controversial passage is reproduced in Hayward 17-18.

[62]The influence of Dostoevsky, whose work was pre-occupied with this question, on Siniavskii is mentioned in Peltier-Zamoyska's comments, cited in Hayward (n 25) 3.

[63]Mikhail Bakhtin, a Russian literary critic, has explored some of the implications of *skaz.* His terminology has been borrowed by English critics, as well – for example, to describe some of the ingenious psychological effects of DH Lawrence's writing: see NH Reeve "Introduction" in D Mehl & C Jansohn (edd), DH Lawrence *The Woman Who Rode Away and Other Stories* (Cambridge UP Cambridge 1995 – First Published 1928) xxvii.

English critic, as "a colloquial, mimicking manner of narration derived from oral traditions."[64] Dostoyevsky, again, was famous for his use of *skaz,* and it was probably this characteristic feature of style, above all, that led some foreign critics to compare the writers with their great predecessor.[65] *Skaz* has the interesting implication that opinions expressed by the narrator of the story do not necessarily represent the author's opinions and, indeed, may not correspond to his personal views at all – a literary subtlety that was disregarded by the prosecution in the Siniavskii-Daniel trial.

2. <u>The Charges</u>

After some initial hesitation about the appropriate legal basis for the trial, the Soviet government decided to charge Siniavskii and Daniel with writing and disseminating "anti-Soviet propaganda" under Article 70 of the Soviet Criminal Code. Article 70 states:

> Agitation or propaganda carried out with the purpose of subverting or weakening the Soviet regime or in order to commit particularly dangerous crimes against the state, the dissemination for the said purposes of slanderous inventions defamatory to the Soviet political and social system, as well as the dissemination or production or harbouring for the said purposes of literature of similar content, are punishable by imprisonment for a period of ... six months to seven years and with exile from two to five years, or without exile, or by exile from two to five years.[66]

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[64]Reeve (n 63) xxvii.

[65]See exchange between Prosecutor and Daniel in the Trial Transcript, Hayward (n 25) 59-62, and Siniavskii's discussion of his own artistic debt to Dostoevsky in Hayward 97-98.

[66]*Law of the RSFSR on the Issuance of the Criminal Code of the RSFSR, VVS RSFSR,* 1960 No 40, Item 591 (October 27, 1960); see also *Law of the RSFSR on the Issuance of the Code of Criminal Procedure of the RSFSR, VVS RSFSR,* 1960 No 40, Item 592. The translation of Article 70 appears in Hayward (n 25) 21; a translation that is somewhat differently worded may be found in Feofanov & Barry (n 19) 611-12.

Article 70 is poorly and rhetorically worded. Nevertheless, bringing a successful legal charge depended on the satisfaction of the criteria set out in the Article, and an attempt at clarification must be made.

It is clear that the offence of involvement in "agitation or propaganda" under Article 70 includes an essential element of intent. The "purpose" of the "propaganda" must be to "subvert[...] or weaken[...] the Soviet regime." The language of the section does not appear to allow prosecution for the unintentional or unexpected use of an author's works for anti-Soviet purposes.[67]

Notwithstanding the importance of propaganda, it is noteworthy that this section does not provided a detailed definition of precisely what is meant by the term. Something like a definition is suggested by the assertion that "the dissemination for the said purposes of *slanderous inventions defamatory to the Soviet political and social*

Hayward clarifies the meaning of exile, *ssylka:* it refers to the period of "enforced residence in a designated area after the completion of the term of imprisonment, or as an alternative to it." In other words, exile could either supplement or replace punishment by imprisonment. An English translation of the entire RSFSR Criminal Code of 1960, including Article 70, may be found in H Berman *Soviet Criminal Law and Procedure: The RSFSR Codes,* trans H Berman & JW Spindler, Russian Research Centre Studies 50 (1st edn Harvard University Press Cambridge 1966).

[67]Interestingly, this happened in the case of *Shostakovich* v *20th Century-Fox:* the music of Shostakovich, Prokofiev, Khachaturian, and Miaskovsky was used in the soundtrack for a film on Soviet espionage activities in Canada, "The Iron Curtain." Not surprisingly, the Soviet government felt that the film was anti-Soviet, and sued on behalf of the composers, claiming that their moral right of integrity had been violated. The Soviet government lost the case in the United States, but won in France. See *Dmitry Shostakovich et al* v *20th Century-Fox Film Corp,* (1948) 80 NYS 2d 575; *Société le Chant du Monde* v *Société Fox Europe et Fox Americaine 20th Century,* [1953] 1 Gaz Pal 191. The case is also discussed in RJ DaSilva "Droit moral and the Amoral Copyright: A Comparison of Artists' Rights in France and the United States" (1980) 28 Bull Copyrt Socy 1, 1-2.

system [my italics]" is an offence under this section. References to "weakening the Soviet regime," or the "[commission of] particularly dangerous crimes against the state" suggest that the writing should be clearly and strongly anti-state, and it should be anticipated to lead to dangerous political consequences.

Finally, on conviction, the punishment, not only for writing and disseminating, but also, for "harbouring... literature of similar content," is extremely heavy: it includes years of service in prison camps and, possibly, an additional period of exile.

Article 70 provides for the prosecution of grave crimes against state and society, requiring intentional wrongdoing on the part of the accused, and leading to serious, even life-threatening punishment for the convicted. However, a number of key procedural points about the application of Article 70 remain unclear. What is the standard of proof that applies to these charges? What is the appropriate role of the prosecutor in a case of such seriousness? And what was the extent of the judge's power in the case? Would he have the discretion to lighten the sentence?

In fact, in 1958, the Soviet Union had issued a new version of the Fundamental Principles dealing with criminal law, whose standards were enacted in a new RSFSR Criminal Code and Code of Criminal Procedure in 1960. As Harold Berman points out, the Codes were in large measure a reaction against the abuse of criminal law in the Stalinist period.[68] They affirmed a number of principles that were closely related to concepts of criminal justice in Western countries, particularly in the civil law countries of Western Europe.

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[68]Berman (n 66) 23-25.

At the time of the Siniavskii-Daniel prosecution, Soviet criminal law provided a number of safeguards against arbitrary conviction. The standard of proof required in criminal cases was very high: the presumption of innocence was so strong that even a confession by the accused, on its own, might not be sufficient to guarantee a conviction, depending on what the overall evidence in the case supported.[69] The prosecutor was supposed to present evidence to the court, but he was required to respect the presumption of innocence while doing so. As for the judge, his role, as in other civilian countries, was to arrive at the conclusion based on his "inner conviction" as to what would constitute justice in the case. However, he was obliged to reach this conclusion in the light of his consideration of the evidence presented at trial.

The criminal legislation of 1960 did not provided for these rules to be waived in the case of political crimes such as those described by Article 70, or for special rules to apply. In the late Bolshevik period, before Stalin, accepted doctrines of criminal justice tended to be disregarded in relation to "counterrevolutionary crimes"; as Berman points out

> Although Soviet legal writings of the time did not so state, the theory was apparently held that in such cases the accusation itself was a sufficient basis for conviction, and in addition, the confession of the accused was adequate proof of guilt, since (it was said) nobody would confess to such crimes if he were not guilty![70]

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[69]Berman (n 66) 82, 80-87. Berman's general discussion of the burden of proof and the "presumption of innocence" is illuminating. In particular, he points out that the terminology of a "presumption" has a strength in the Russian language that is not present in English or other Western European languages. However, on his analysis, the concept of "innocent until proven guilty" seems very much in keeping with the spirit of the criminal reforms.

[70]Berman (n 66) 80.

However, this was not a tradition that post-Stalin reformers would have wanted to emulate. Rather, it would seem that the reforms of 1960 were specifically designed to correct excesses of this kind.

Proving the charges against Siniavskii and Daniel under Article 70 presented the prosecution with serious legal difficulties. The prosecution had to establish, first, that the works of fiction written by Siniavskii and Daniel were, in truth, works of "propaganda," whose aim was to "subvert[...] the Soviet regime," or perhaps, "[to] defame[...] the Soviet political and social system." Secondly, they had to show that Siniavskii and Daniel intended to write and disseminate propaganda. However, the writings of Siniavskii and Daniel were not works of propaganda in either sense: it was not their *raison d'etre* to create disorder. Disorder may have been an unforeseen consequence of the publication of works like these, but the immediate purpose of the writers, as is apparent from their own statements, was to create works that had artistic integrity, by portraying inner truths about the society in which they lived.

The fact that the writings were published abroad also weakened the prosecution's case. Since they were published outside the Soviet Union, it was unlikely that they would reach *en masse* the Soviet public, among whom the writers were alleged to stir up unrest. Of course, there was the possibility that the works would reach some of the Russian public from outside the country – for example, by radio broadcasts via "Radio Liberty," or through the activities of anti-Soviet, Russian *émigrés*.[71] The fact that most of the writings appeared in the original Russian, and not primarily in

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[71]For example, see Turner (n 55) 115-16: he mentions "Russian emigré organisations and Radio Liberty in Munich" as avenues of concern to the Soviet government.

translated versions, lent some credence to this possibility. However, it could equally well be said that the works were primarily intended to be accessible to a Russian-speaking audience abroad, including both *émigrés* and interested foreigners. In any case, even if the works could theoretically find their way back into the Soviet Union through unofficial channels, the writers' intent was still not fundamentally political in nature. Rather, they had sought, above all, to avoid the impact of official censorship on their works; Siniavskii emphasised that the essential purpose of sending his writing abroad was to "preserve [... his work] as literature."[72]

Hayward summarises these basic contradictions in the charge under Article 70; although his assessment may not be legally rigorous, he captures the essence of the problem:

> Clearly, everything hinges here on proof of intent.... The prosecution of the trial based their case on the allegation that the defendants' work was consciously intended by the authors to subvert and [*sic*] weaken the Soviet system. In other words, their literary work had to be equated with seditious leaflets or proclamations, even though their work was not available to the Soviet public, not distributed inside the country and could hence scarcely be shown to subvert an audience it did not reach.[73]

The difficulties of the prosecution in satisfying the requirements of Article 70 largely arose from the fact that the writers had not committed a clearly identifiable illegal act. From a political point of view, the content of the writings was highly incompatible with the official ideology of the state, and the proceedings against the writers are easy to understand. However, the nature of the prosecution undertaken by the state transformed the trial from a political to an ostensibly legal undertaking. The

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[72]Noted in Turner (n 55) 114-15

[73]Hayward (n 25) 21.

prosecution had to provide legally adequate proof that the writings were propaganda, and their intended purpose was subversion.

In fact, the right of authors to publish and disseminate their work was clearly protected by Article 98 of the Soviet civil legislation. Article 98 of the Soviet Fundamentals of Civil Legislation granted to a literary author "the right...to the publication, reproduction, and dissemination of his work *by all means permitted by law* [my italics]." This provision was incorporated verbatim into Article 479 of the RSFSR Civil Code.[74] What, then, was the illegal act of Siniavskii and Daniel that deprived them of their legal rights of authorship, and led to their prosecution under the Soviet Criminal Code?

In spite of its legal importance, the question of the illegality of the writers' actions was never addressed directly in the trial. Interestingly, the government did not consider the fact of publishing abroad to be an illegal act. The fact that the works had been printed by foreign publishers was strongly disapproved by the government, and it served as evidence that the writings must somehow be illegal. However, the prosecution never suggested that the act of publishing abroad would automatically deprive the authors of their rights.

The conduct of the prosecution implied a quite different and surprising approach to the problem of illegality. It appears that the criminal charges against the writers were directly based on the literary content of their works, including the richness of literary and political interpretations which they offered to critics, both in Russia and abroad. The ideological flavour of the proceedings is striking. The writers were not condemned

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[74]As translated in Newcity (n 2) Appendix A, 182; and see Appendix B, 189.

for publishing the works *per se;* rather, their crime was, fundamentally, to *imagine* such works at all.

Hayward emphasises the highly unusual character of the prosecution, and suggests that the trial was a veritable "trial of literature." He argues:

> Sinyavsky and Daniel forced the Soviet state into the strange position of being the first in the world to put literature as such on trial. It is as if one of the more unpleasant characters in a satire by Saltykov-Schedrin, reincarnated in the person of Counselor of Justice (Third Class) O.P. Tyomushkin, had come to life in order to condemn and pronounce judgment on the whole of Russian literature.[75]

3. The Conduct of the Prosecution

In the face of growing domestic and international pressure to abandon the prosecution of the writers, the Soviet government tried to distance itself from the political character of the trial. Instead, it attempted to create an appearance of legality in the proceedings. As Feofanov observes:

> [N]ot all moves by the state were... blatantly lawless. The authorities also used the machinery of the legal system to achieve their prime objective of thorough political and social control.[76]

Why did the Soviet leadership decided to pursue the Siniavskii-Daniel affair through legal action? In the Stalinist era, dissenting writers had routinely been persecuted without recourse to the law.[77] In circumstances similar to the Siniavskii-Daniel case, the Soviet government had systematically persecuted and defamed writers in the past, including such celebrated names as Boris Pasternak, Anna Akhmatova,

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[75]Hayward (n 25) 35. See Turner (n 23); Tyomushkin was Assistant Prosecutor-General of the USSR, and the chief prosecutor in the Siniavskii-Daniel case.

[76]Feofanov & Barry (n 19) 605.

[77]See the discussion of the Brodsky case, above and n 22-24.

Osip Mandelstam, and Evgeny Zamyatin. However, their actions had never been said to constitute crimes *per se.* When trials were conducted, they were invariably affairs for show.[78] In contrast, court proceedings against authors and intellectuals became a hallmark of the late Khrushchev and early Brezhnev period, and they were deliberately legalistic in nature.[79]

In an interesting essay on the Siniavskii-Daniel case, Turner suggests that the Soviet leadership had originally intended to conduct the case as a show trial in the Stalinist tradition, without any real concessions to the concept of legality. According to his analysis, the main reason why the affair eventually came to be dealt with as a legalistic matter was the satisfaction of international public opinion, which stood strongly behind the writers.[80] However, the concern of the post-Stalin leadership with "normalising" Soviet society was undoubtedly an important factor behind the trial, as well. For the Soviet leadership, the trial most likely represented, not only an opportunity to clarify the political limits of free expression in Soviet society, but also a chance to explore the parameters of "socialist legality." In both cases, the proceedings were doomed to failure.

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[78]See Service (n 25) 175-200, for a discussion of some of the Stalinist "legal proceedings"; writers and artists were involved, but there were far from being the only victims.

[79]See the discussion of this period, including the Siniavskii-Daniel affair, in Y Feofanov & D Barry *Politics and Justice in Russia: Major Trials of the Post-Stalin Era* (ME Sharpe Armonk 1996) 15-49.

[80]See Turner (n 23) 116-19.

The trial began on February 10, 1966, approximately six months after the two writers had been arrested.[81] It was conducted over four days. Even before the commencement of the trial, any appearance of fairness was quickly destroyed by an aggressive pretrial press campaign, which included the publication of articles by journalists and literary critics that attempted to inflame public opinion against the writers.[82] The slanderous tone of pretrial publications persisted throughout the conduct of the trial. The prosecution carried out its role with barely a cursory attempt to maintain an appearance of due process. The prosecutors made some heavy-handed efforts to deprive the defendants of an adequate defence, including the exclusion of all but one defence witness from the proceedings.[83] An early attempt to conduct the trial as a closed proceeding failed when Alexander Ginsburg demanded to be admitted, on the grounds that members of the public were legally entitled to be present. This success later allowed him to compile and circulate the *White Book,* a complete record of the proceedings.[84]

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[81]Hayward (n 25) 20.

[82]Two noteworthy examples were an article called "The Turncoats," by Dmitri Eremin, a journalist, that appeared in the January 13, 1966 issue of *Izvestia;* and a critical article by Zoya Kedrina, a literary critic, published in the January 22, 1966 edition of the *Literary Gazette.* The two pieces are discussed in detail by Hayward (n 25) 20-24.

[83]See Hayward (n 25) 25, 257 and Hosking (n 8).

[84]Ginsburg's role in recording the events of the trial is described by Hosking (n 8) 415. The following year, he, too, was arrested for his involvement in the affair, and eventually, stood trial. See Hosking 415-18.

In its effort to control the trial, the prosecution also resorted to subtler weapons. Its approach to evidence was to make selective use of quotations from the writers' works: the passages were taken out of context, and accordingly, their meaning was altered. The prosecution avoided aspects of literary theory and tradition which may have lent support to the authors' stand, and cast doubt on both the artistic and legal legitimacy of the proceedings.[85] Accepted criminal procedures were ignored. The prosecution did not feel any obligation to meet a rigorous standard of proof, while the crucial question of proving the writers' intent was simply disregarded. The judge was complicit in this situation; his role in the proceedings was also highly interventionist. While the active involvement of the judge in the proceedings is a standard feature of civil law systems, the aggressive partisanship of the Soviet judge's comments destroyed any hope the writers and their supporters might have held of an impartial assessment of the evidence before the court.[86]

4. <u>The Defence</u>

The court generally refused to allow witnesses to appear for the defence, and it also excluded written depositions on behalf of the defendants. Lawyers for the defence therefore had great difficulty in responding to the charges brought by the prosecution.

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[85]Hosking (n 8) 414 refers to the "flat-footed literalness" of the prosecution's dealings with the stories.

[86]Some of the most controversial comments of the judge are reproduced in English translation by Turner (n 23) 122, and included accusations of "slander on the Russian people" and "blasphem[y]," based on extracts from the literary works in question.

The examination of Siniavskii and Daniel by the prosecution shows that the defendants essentially undertook their own defence from the witness box, with great courage and brilliance, by persistently attempting to draw the prosecution into issues of literary creativity.[87]

The prosecution quoted from the defendants' works in a selective and manipulative manner, citing excerpts out of context, and arguing that passages which represented a "negative" attitude towards Soviet life expressed the "true" views of the authors. In their response to questioning, the defendants attempted to strike at these basic allegations of the prosecution. The writers emphasised their use of literary techniques, such as satire, fantasy, and the creation of a fictional narrator whose views are expressed independently of the author's.[88] Fundamentally, both defendants insisted that literary creation and political propaganda are inherently incompatible. In the Russian context, in particular, the idea of propaganda was historically linked to the goal of political indoctrination and the manipulation of public opinion *en masse.* The spirit behind literary creation was quite different. These distinctions of purpose and quality were surely what Siniavskii had in mind, when he stated:

> I am not a political writer. No writer expresses his political views through his writings. An artistic work does not express political views.... My works reflect my feelings about the world, not politics.[89]

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[87]Hayward (n 25) 35, draws attention to "the masterly defense which [the writers]...conducted on their own behalf."

[88]For example, see the examination of Daniel, in Hayward (n 25) 56-60, and the examination of Siniavskii in Hayward 95-102.

[89]Examination of Siniavskii in Hayward (n 25) 94.

5. The Verdict

The court pronounced the expected verdict against the two writers, finding them guilty of Article 70 crimes. The judge sentenced Siniavskii to seven years of "deprivation of freedom," and Daniel to five years of the same. The Soviet system did not provide for the possibility of an appeal in cases like these. Because of the seriousness of their case, Siniavskii and Daniel had been tried before the RSFSR Supreme Court at first instance, and there was no higher court to reconsider the conviction.[90]

The severity of the sentences was shocking even to some members of the press and public who had not supported the two writers during the trial. It implied years of hardship in a labour camp for two men who were neither in the prime of health nor used to physical rigours.[91] Friends of the writers wrote letters of protest against the sentences, but they did not succeed in obtaining clemency for them. Ultimately, Daniel served his sentence fully, while Siniavskii served six of his seven years and emigrated to France in 1973 to become a professor at the Sorbonne.[92]

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[90]Berman (n 66) 87-88 points out, "decisions in cases tried by the Supreme Court of the RSFSR, which was given original jurisdiction in 'cases of exceptional importance' (Article 449), were not subject to appeal, since there was no higher RSFSR court." The judgment could have been "protested" – that is, brought for review by the procuracy or court officials – but the procedure was impractical. Indeed, the procedures are far from clear: it appears that, in such a case, the Supreme Courts of the RSFSR and USSR would have to review their own decisions. In keeping with the federal system of the Soviet Union, the USSR Supreme Court could review rulings that "contradicted all-union law," and it could "'protest' such decisions to the Presidium of the Central Executive Committee of the USSR." See the discussion in Berman 88-90.

[91]See Feofanov & Barry (n 19) 618. Lidia Chukovskaya, in her objections to the trial, emphasised the inordinate cruelty of the sentence against the writers: her protest, in the form of an open letter to Sholkhov, a rare conservative in the Soviet literary community, is reproduced in Hayward (n 25) 290.

[92] These details are mentioned by Feofanov (n 25).

In 1991, the verdict against the two writers was rescinded by the Supreme Court of the Russian Federation.[93] Siniavskii was able to return to Russia. For Daniel, however, the reprieve came too late: he died in 1988.

6. <u>The Aftermath</u>

The conduct of the Siniavskii-Daniel trial made a travesty of Soviet justice, and of the post-Stalin attempt to revive the concept of "socialist legality." By exposing the fundamental incompatibility between Soviet control of creative expression and the principle of the rule of law, it marked a turning point in Russia's history. The idea of a society based on "socialist legality," which Khrushchev had offered as an antidote to the shocking excesses of Stalin's rule, was shown to be inherently contradictory. Adherence to the rule of law could not be exercised selectively: it had to serve as a universal guide for the conduct of Soviet life, ultimately defining and limiting the powers of the state itself. These discoveries of the early Brezhnev years contributed greatly to the growth and development of the dissident movement, particularly among Soviet writers and artists.[94]

C. <u>THE VEILED FOCUS OF PROSECUTION AND DEFENCE – NOT PROPAGANDA, BUT AUTHORSHIP</u>

The conduct of the Siniavskii-Daniel prosecution reveals that the true purpose of the trial was not to satisfy the legal requirements of a propaganda charge under Article 70, but the far more ambitious goal of imposing fresh restrictions on creative expression

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[93]The rehabilitation was issued by decree of the Supreme Court of the Russian Federation – the successor to the RSFSR Supreme Court.

[94]Hosking (n 8) 413-15 examines these consequences of the trial.

after the brief respite of the Thaw. The trial was an illustration of the age-old truth that authoritarianism and free creative expression will always be at odds.[95] It demonstrated that the precarious situation of creative expression arises out of its role in generating a diversity of ideas and, fundamentally, in its natural tendency to encourage the development of idealism as a way of thought and life. Although it remains an open question whether a procedurally-correct approach to the legal issues in the Siniavskii-Daniel trial could have supported the development of "socialist legality," it is apparent that, in any state based on ideological domination, the leadership could never truly achieve a sustainable balance of power with creative authors.

If the Siniavskii-Daniel trial were truly limited to the issue of propaganda, the prosecution should have concentrated on proving the intent of the authors to create works of anti-Soviet propaganda. The language of Article 70 admits no doubt as to the legal importance of intent. Propaganda must be "carried out with the purpose of subverting... the Soviet regime"; the dissemination of propagandistic literature must be "for the said purposes."

The proof of intent is, legally and procedurally, a complex matter; pushed to the limit, it can also present a difficult moral issue. For Russians, propaganda is, by tradition, writing aimed at political indoctrination.[96] The intention to create propaganda

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[95]As Pyotr Chaadeyev said, "The government is doing its job; let us do ours." Quoted in GA Hosking "The Institutionalisation of Soviet Literature" in GA Hosking & GF Cushing (edd) *Perspectives on Literature and Society in Eastern and Western Europe* (Macmillan Press, School of Slavonic and East European Studies University of London 1989) 55, 55.

[96]The distinctive connotations of political propaganda in the Soviet Union are described by Kenez (n 6) 1-15 – in particular, the Russian perception of propaganda as a necessary part of political leadership. Kenez compares Bolshevik propaganda with the "propaganda" of the Catholic Church, an ironic, but altogether apt comparison of early Communist ideology with religion.

against the state is a political crime for which the author of the work is clearly liable. However, if an author creates a work that is subsequently used for purposes of propaganda that were not originally intended, it is doubtful whether he can be held responsible for the unexpected and unauthorised interpretation and use of his work. The state can allege that the author could have, or should have, known that the work would come to serve as anti-state propaganda, but this test of reasonableness in criminal proceedings is quite dubious. To the extent that the prosecution in the Siniavskii-Daniel case dealt with intent at all, it was only in this last guise.[97]

The very wide interpretation of intent pursued by the prosecution can only be reconciled with a highly politicised view of literature. The characterisation of all literary expression as political expression was a feature of Soviet culture, and originated in the importance of ideology and propaganda in the construction of the Soviet state.[98] Ironically, however, it also had its roots in an older, pre-Revolutionary tradition that assigned literature a role of social prominence and prestige, in part,

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[97]Daniel withdrew his partial admission of guilt in a letter sent to *Izvestia* from prison. See Turner (n 23) 121: Daniel stated that, during the period following his arrest, Soviet authorities had tried "to convince him that his and Siniavsky's writings had been used *only* by Soviet enemies, and that, in the absence of objective information about the impact of their work, the assertions of the investigators and court officials had had an influence upon him." Moreover, it insinuated that the work of Siniavskii and Daniel had been used by Western critics to shame Soviet society, rather than the state *per se*. Confronted with this appeal to nationalism, Daniel actually expressed his regret about the purposes, largely unknown to himself, which his writing had come to serve; but he subsequently retracted his apology.

[98]Lenin affirmed that "every literature is political literature": see Gsovski (n 30) 616-17.

because of its capacity to educate and refine a society that was in deep need of cultural progress.[99]

The idea that literature inevitably deals with politics is not merely a totalitarian aberration: it does contain a grain of truth. However, this truth resides, not primarily in the content of literary works, which is always subject to interpretation and reinterpretation, but in political values. Creative expression is a product of the free imagination; the mind of the author creates a world that is unique, and, as such, literary work is ultimately an expression of ideological diversity. Indeed, it is the role of creative expression in affirming free thought and an alternative world-view that is perhaps its most valuable contribution to political life. It is this feature of imaginative expression that makes it so dangerous to authoritarian states, and which, in democratic societies, should entitle authors and creative works to special protection against political repression. Respect for the rights of authors should be a hallmark of societies that value freedom of thought.

Given its fundamentally idealistic character, literature should transcend political justification. As Lidia Chukovskaya argues:

> Why do I protest? Because Siniavsky's and Daniel's committal to trial was in itself illegal. Because a book, a piece of fiction, a story, a novel – in brief, a work of literature – whether good or bad, talented or untalented, truthful or untruthful, cannot be tried in any court, criminal, military or civil. It can only be tried in the court of literature....Literature does not come under the jurisdiction of the criminal court. Ideas should be fought with ideas, not with camps and prisons.[100]

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[99]Hosking provides an interesting discussion of this issue in tsarist Russia: see G Hosking *Russia: People and Empire* (Harvard University Press Cambridge 1997) 286-311. His focus is on the political and cultural role of literature in Russia.

[100]Reproduced in Hayward (n 25) 286-91.

In preference to the key legal issue of intent, the prosecution in the Siniavskii-Daniel trial pursued two other issues, both of which were of limited legal relevance to the proceedings. First, the prosecutor sought to establish authorship of the pseudonymous works – although the authors readily acknowledged authorship. As Feofanov describes:

> Sitting on the government side were the prosecutor, State Legal Counsellor Third Class and aide to the USSR Procurator General, O.P. Tyomushkin, as well as the public accusers... Several experts also participated in the trial. Their job was to establish authorship of these writings that were so densely filled with anti-Soviet statements, although the accused did not deny authorship.[101]

Secondly, the prosecution systematically undertook to attack the reputations of the writers, in both professional and personal terms. The prosecutor – and, on occasion, the judge – consistently attempted to devalue the writings of Siniavskii and Daniel, adopting a tone of mockery and contempt towards the favourable criticism which they had received, especially from foreign critics.[102] Moreover, the prosecution sought to show that neither writer observed standards of personal morality. For example, one of the most strident pretrial press publications, written by a Soviet literary critic, calls the writers "heirs of Smerdyakov," a reference to the almost sub-human degenerate depicted by Dostoevsky in *The Brothers Karamazov.*

The conduct of the prosecution reveals that the case was fundamentally about the political role of creative authorship. The real questions at stake in the proceedings were dealt with indirectly, and revolved around the problem of whether the two writers had the right to write what they chose, or to publish these writings in the manner which

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[101]Feofanov & Barry (n 19) 611.

[102]Hayward (n 25) 24.

they believed to be most appropriate. The underlying theme of the proceedings is the problem of free creative expression, and whether it can survive in a totalitarian regime.

For Soviet intellectuals, the Siniavskii-Daniel trial provided a conclusive answer to this dilemma: creative expression could never be reconciled with socialist rule. The trial caused an irremediable rupture between the state and creative people and, by forcing intellectuals to choose between literature and the state, greatly strengthened the dissident movement. Interestingly, the abuse of law in the trial actually affirmed the dissidents' belief in the importance of the rule of law. After the trial, law and legality, which the Soviet state had tried to appropriate, became a rallying-cry of the dissidents.[103] Commitment to the rule of law unified writers and the entire range of diverse, anti-Soviet interests against repression.

D. THE MORAL RIGHTS OF SINIAVSKII AND DANIEL

Despite the unprecedented interest in law and legality in the Soviet administration after Stalin, the conduct of the Siniavskii-Daniel trial shows that the government was engaged in a flirtation with new forms of authority, rather than undertaking a genuine commitment to liberalisation. The crude lawlessness of the proceedings within the very terms of Soviet law is a striking feature of the Siniavskii-Daniel affair. In particular, the prosecution violated the protections for authors' rights outlined in the Soviet Principles of Fundamental Legislation and the Russian Civil Code – without, however, providing a legal justification for its interference with these rights. The activities that gave rise to the prosecution represented the attempt of the two writers to protect their personal interests in disclosing their work, choosing the conditions in which it should be attributed to them, and maintaining its artistic integrity. All of these interests were

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[103]This process is described by Hosking (n 8) 414-26.

protected as rights of authorship in Soviet civil law. However, in the political and bureaucratic climate of the Soviet Union, it was impossible for the writers to exercise their rights. Even if their actions fell strictly within the letter of the law, they were incompatible with the political requirements of the state.

1. <u>Prerogatives of Authorship</u>

The two writers had published works under assumed names, an accepted literary practice which was protected as one aspect of the author's moral right of attribution under Article 98 of the Fundamentals. However, one of the basic concerns of the prosecution was to establish authorship of the works. Neither Siniavskii nor Daniel denied authorship; rather, the prosecution's emphasis on authorship was part of an overall strategy aimed at identifying the political views of the authors, and associating them indelibly, as individuals and as writers, with those views. This task was made especially difficult by the complex artistic character of the writings in question, some of which were developed in a literary style that precluded the identification of the author with the views expressed in the narratives: *skaz*.

The prosecution also had a second objective, which was to destroy the credibility of the writers. Particularly in its treatment of Siniavskii, the prosecution attempted to draw attention to the differences in character between earlier works which he had published under his own name, and the pseudonymous works which he published abroad. Presumably, the tactics of the prosecution could be justified because of the "danger to Soviet society" potentially posed by the writings. Given the fact that these writings were likely to remain generally inaccessible to much of the Soviet public, however, the dangers they posed involved as much a loss of prestige in foreign

eyes, as disorder within the Soviet Union.[104] The authors' moral right of attribution was therefore subject to the most obvious dictates of political expediency.

2. <u>Inviolability</u>

Under Soviet law, the integrity of the writers' works was protected in very strong terms, as "inviolability." Any changes or additions at all would have to be approved by the author of the work, including even the addition of "explanatory material" to the text.[105] While this provision apparently protected Soviet authors from the interference of other Soviet citizens with their work, moral rights in the 1961 legislation, in sharp contrast to the earlier rule, were not intended to protect the author from the inappropriate use or mistreatment of his work by publishers, broadcasters, or other agencies for the dissemination of creative works.[106] Due to the dominance of these industries by the state, through the system of publishing licenses, authors were subject to the editorial treatment and approval of their work by the Soviet publishing bureaucracy as a prerequisite for publication. In effect, the author's moral right of integrity was directly limited by state censorship, which could alter a work to suit the political requirements of the day.

It was precisely in order to escape from this cycle of censorship, potentially leading to undesirable personal consequences, that Siniavskii and Daniel decided to send their works for publication abroad. The two writers wanted their works to appear in unabridged, unaltered form, so that the full effect of their vision and literary skills

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[104]For example, see the exchange between Siniavskii and the judge in the Trial Transcript, Hayward (n 25) 96-99.

[105]Newcity (n 2) 73.

[106]See Article 18 of the 1928 copyright statute (n 44).

would be felt by readers and critics alike. Although Soviet law granted them a strong right to maintain the "inviolability" of their work, the maintenance of artistic integrity within the Soviet publishing complex was a virtually unattainable goal.

It is worth noting that Soviet policy had the effect of making writers "politically responsible" for what they wrote – what Foucault might consider an appropriate burden of responsibility on writers, artists, and intellectuals "as authors."[107] However, the position of the defendants in the Siniavskii-Daniel prosecution raises the question of what, exactly, is the nature of the author's responsibility for his work. In the context of the trial, the writers and their supporters uniformly recognised and accepted a sense of the moral responsibility arising out of authorship. However, the nature of the creative author's responsibility, whether political, social, or personal, is a complex matter. It is certainly controversial to suggest that the state should ultimately impose, or confer, responsibility on authors, whose political role, after all, is to provide an alternative source of ideas and ideology. From this perspective, the contribution of authorship to democracy is easily identifiable, and is clearly apparent in the historical role of writers in anti-Soviet dissent.

3. <u>Disclosure</u>

Soviet copyright law recognised the author's right to determine the circumstances in which his work would be disclosed to the public. Like the right of integrity, however, the right of disclosure, or first publication, was profoundly affected by the realities of the Soviet literary establishment: it was greatly weakened by the conditions of Soviet publishing, since publication depended on the approval of manuscripts by official "editors" who effectively acted as censors on behalf of the state. These practical

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[107]See n 43 and accompanying text.

restrictions on the right to publish were the main reason why Siniavskii and Daniel sent their works abroad. Publishing abroad had become a matter of professional necessity for both authors, though the need was acutely felt by Daniel, who had been consistently unsuccessful in publishing his original works within the Soviet Union.[108] Sending creative works abroad for publication was not prohibited by Soviet law, but it became a justification for the prosecution to vilify the writers in the trial as traitors to Soviet nationalism.[109]

There is another aspect to the right of publication: the "negative" right to refrain from publishing a work. Newcity draws attention to this element of the publication right as one which is generally less vulnerable to Soviet publishing structures, in this case, as they relate to "specified free uses, compulsory licenses, and compulsory purchases of a work."[110] In other words, unless the government were to purchase an author's right to his unpublished work, as was possible under Soviet compulsory license and provisions, this right would remain with the author.[111]

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[108]See Hayward (n 25) 14.

[109]See Hayward (n 25) 20. Of course, this had also occurred in the past, but not through legal proceedings – for example, in the case of Pasternak, who published *Dr. Zhivago* abroad.

[110]Under Article 106 of the Fundamentals (n 1), the government could purchase an author's rights in an unpublished work, even "compulsorily": see Newcity (n 2) 72. However, he points out that "resort to this provision is exceedingly rare."

[111]Article 106 of the Fundamentals (n 1) provides that "a work may be compulsorily repurchased by the state from the author or his heirs, in the manner provided for by the legislation of the union republics." Articles 501 and 502 of the Russian Civil Code make provision for the purchase of copyright by the state, or for a declaration that works in the public domain have become state property. The issue is discussed in detail by SL Levitsky "The State As a Subject of Copyright in Soviet Law" (1980) 1(2) J Media L & Prac 137.

However, the issue of an author's rights and interests in his unpublished work also arose in the Siniavskii-Daniel prosecution, showing that this right, too, was subject to political limitations. The prosecution attempted to use an unpublished work by Siniavskii, an "Essay in Self-Analysis,"[112] to support its allegations about Siniavskii's anti-Soviet and anti-socialist views. Siniavskii protested that an author's unfinished drafts cannot be held to be representative of his views, and he pointed out that the essay had been shown to no-one, including Daniel.[113] Indeed, the judge was moved to state that, "[t]his manuscript... throws light on [Siniavskii's] personality and nothing more."

The issues surrounding this unpublished essay suggest that the moral right of publication bears some relation to a right of privacy. Unless there is an important interest in the publication of a work which weighs against the invasion of the author's privacy by confiscating it, the author's moral right to choose whether or not a work appears in the public eye is an important creative right.[114] At the very least, the appearance of an unpublished work against the author's will should be acknowledged as such. Under Soviet law, the publication right was strong enough to encompass these possibilities in its legislative expression, but the privacy considerations in the right of publication were basically incompatible with social norms in the Soviet Union.

Certain jurisdictions recognise a moral right to withdraw from circulation a work that has been published, usually, on the grounds that it has ceased to represent an

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[112]Trial Transcript, Hayward (n 25) 110.

[113]Trial Transcript, Hayward (n 25) 109-11.

[114]The celebrated *Whistler* case stands for this principle: see the discussion in A Strowel *Droit d'auteur et copyright: Divergences et convergences – Etude de droit comparé,* Préface de Louis van Bunnen (Bruylant Bruxelles 1993).

author's views.[115] The author must usually compensate the publisher for any losses which he may incur as a result of the decision. Although it only enjoys limited international recognition, the right of withdrawal is, in a sense, a natural conceptual counterpart to the right of disclosure. This right was not explicitly protected in Soviet copyright legislation. However, given the unusual emphasis of Soviet copyright on the right of publication, it is interesting to consider what might have been the fate of an author's right of withdrawal in Soviet law.

An important theme of the prosecution in the Siniavskii-Daniel case was the inconsistency of the writers' opinions. The prosecution argued that consistency and continuity of views and the absence of contradictions in a writer's *oeuvre* are basic indications of aesthetic and moral quality. Siniavskii, in particular, fell foul of this theory. An apparent change of heart seems to distinguish his later writings, published abroad under the pseudonym "Tertz," from his earlier works, published under his own name in the Soviet Union. It is interesting to rediscover this theme in the article published by Feofanov on the Siniavskii-Daniel prosecution, thirty years after he initially commented on the events of the trial as a contemporary analyst. He says:

> The fact was that Daniel and Siniavskii were not among those dissidents who openly challenged the regime. Andrei Siniavskii wrote works for Soviet publications that were fully loyal, articles about socialist realism, about the role of Lenin and Gorky in the development of literature on patriotic themes, etc. And in foreign editions, under the pseudonym Abram Tertz, he wrote directly contradictory things. All of this was brought forth in court. Could I morally justify that? No. And I still cannot.[116]

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[115]For example, see Article L121-4 on the *droit de repentir,* in the *Code de la Propriété intellectuelle du 1er juillet 1992, Journal officiel de la République française, 3 juillet 1992, Titre 2, Chapitre 1, Article L 121-1;* available online: <http://www.adminet.com/code> (last modified: 26 December 2001).

[116]Feofanov & Barry (n 19) 610.

Feofanov's observations may be correct; but do they justify the condemnation that Siniavskii faced on these grounds at the hands of the prosecution? Siniavskii could not be immune to the historical forces that were afoot in the Soviet Union of his time, and which affected many Soviet intellectuals profoundly. No doubt, the revelations of 1956 made an impact on his work. However, his position with respect to the Soviet regime had long been ambiguous and difficult to categorise. Most importantly, both he and Daniel had been associated with Pasternak, serving as pall-bearers at his funeral.[117] Hayward comments, "[t]here could have been no clearer public confession of faith."[118] Siniavskii was deeply involved in the writings of Pasternak and became one of his most important interpreters and advocates in post-Stalin Russia.

It is interesting to consider the ways in which Siniavskii's intellectual development appears to mirror Pasternak's own growth as chronicled in *Dr. Zhivago.*[119] Pasternak's early enthusiasm for the Revolution, which he believed would bring greater social justice to Russia, was gradually destroyed by the mind- numbing impact of socialist ideology on private life and independent thought. In his testimony at the trial, Siniavskii, too, seems to have been torn between idealism and disillusionment, and his work is doubtless informed by this inner conflict.

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[117]Hayward (n 25) 5, Hosking (n 8) 411.

[118]Hayward (n 25) 5.

[119]See Hayward (n 25) 5: "Siniavsky freely avowed his belief in an un-Marxist Communism at the trial, and particularly in his final plea when he said that he wrote from an "idealist" (in the philosophical sense) point of view.... In his general philosophy Siniavsky accepts roughly the same scale of values as Pasternak; he never concealed his attachment to these values, which was symbolised by the fact that he (with Daniel) was one of the pallbearers at Pasternak's funeral."

Seen in this historical light, it becomes more difficult to condemn the "inconsistencies" in Siniavskii's work. The moral right of an author to withdraw his work from public circulation due to a change of opinion is based on a recognition that diverse factors can cause an author's thought to evolve, perhaps in radically new ways, possibly leading him to repudiate views which he embraced in earlier writings. In Siniavskii's case, he was caught in the current of epoch-making events – the death of Stalin, and the revelations about his leadership that followed his death. The legal recognition of a right of withdrawal is based on the understanding that a writer should be held accountable for the consistency of his *oeuvre* only if he has the possibility of ensuring its continuity – provided, of course, that maintaining the consistency of his views, in his own mind, is worthwhile.[120]

E. MORAL RIGHTS: A *DROIT DE CRÉER*

A close study of the Siniavskii-Daniel trial shows that authors' moral rights are fundamentally incompatible with political repression. This incompatibility is apparent on two distinct levels. First, there is a legal incongruity: state interference with authors' moral rights should be subject to legal justification. Even in periods of relative liberalisation, however, the willingness of a repressive state to accept legal restrictions on its own power is, of course, limited. The state may temporarily appear to respect law and legality; but its acceptance of these principles is given arbitrarily, and may arbitrarily be taken away.

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[120]Withdrawal is not without cost to the author: he must normally compensate the publisher for economic losses sustained on the copies withdrawn. For example, see *Code de la propriete intellectuelle et artistique* (n 115), Article L121-4: the French law also provides that an author subsequently decides to publish his work, he must allow the publisher who was originally chosen the option of publishing it.

Secondly, this legal tension is mirrored by an underlying, conceptual incompatibility between the doctrine of moral rights and political constraints. Moral rights are premised on the importance of individual creativity; they assume that artistic creation gives rise to a unique relationship between an author and his creation, one that is entitled to recognition and protection in law. Moral rights express the special privileges and responsibilities that arise out of the artist's individuality – creation through the free exercise of the imagination. However, the benefits of moral rights are not intended for authors alone. Rather, they reflect the esteem in which society holds authors. Society stands to benefit from the contribution of authors to creativity and culture. In this sense, moral rights lead to important social benefits.

At the heart of moral rights doctrine lies a humanistic vision of creativity and culture. Moral rights have much in common with human rights, in particular, those that protect intellectual freedoms. In contrast to general rights of free expression, however, moral rights are concerned with a more specific issue: the human rights interests involved in literary and artistic creation. In legalistic parlance, creative work may be characterised as a special class of "free expression," one with unique characteristics and, therefore, a need for special legal recognition.[121]

Notwithstanding its humanistic basis, moral rights doctrine typically finds expression in copyright law, a branch of commercial regulation. In Russia, and later, the Soviet Union, copyright law was one aspect of civil law – so-called "private" law

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[121]The idea of categories of "socially-important" speech that should be entitled to special protection under freedom of expression provisions is a feature of the approach to free speech in the United States Supreme Court. The jurisprudence of the court touching this issue is discussed by S Fraser "The Conflict between the First Amendment and Copyright Law and Its Impact on the Internet" (1998) 16 Cardozo Arts & Ent LJ 1, 4-14.

that could theoretically restrain Soviet citizens from interference with authors' personal interests, but whose applicability to the actions of the state was limited. A consideration of the impact of censorship on moral rights, apparent in the Siniavskii-Daniel trial, raises the question of whether the disparate treatment of moral rights in the public and private spheres is consistent with the doctrine. Legal consistency seems to demand that the protection of moral rights be accomplished in the spheres of both private and public law. Neither threat to creativity should be disregarded.

An approach to moral rights doctrine that recognises equally its grounding in private and public law may be found in the idea of a *droit de créer* – a "right to create." The term, *droit de créer*, is usually used by copyright scholars to signify the freedom to create works in the future; it acts as a potential limitation on contractual agreements relating to works that are, as yet, uncreated.[122] However, the principle behind this right can be extended beyond the issue of contracts for future works, to more general questions of authors' rights.

The specific ensemble of moral rights varies considerably among different jurisdictions, but all of these rights originate in a common concept: original authorship, leading to a special relationship between creative authors and their work. Moreover, in jurisdictions where moral rights are protected, the activities of authors are believed to provide important social benefits, whether in their concrete contribution to the creation of culture, or in their subtler role in the development of a creative ethos. *Droit de créer* is an apt term for the fundamental right at the root of the doctrine. The terminology of "freedom of the imagination," or "freedom of creativity," might be favoured by post-

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[122]For example, see the discussion in S Strömholm "Droit Moral – The International and Comparative Scene from a Scandinavian Viewpoint" (1983) 14(1) IIC 1, 16-22.

Soviet jurists, and is somewhat more descriptive of what this fundamental right involves.[123]

In the Siniavskii-Daniel trial, the treatment of the two writers by the prosecution raises the disturbing question of the extent to which the defendants were free to exercise their profession as writers within the Soviet regime. The prosecution attacked the personal and professional reputations of the writers by quoting passages from their work, and these excerpts constituted the principal evidence against Siniavskii and Daniel. Apart from a few minor exceptions, the great majority of quotations were from works of fiction – the words of characters, their reminiscences and fantasies, events that featured in invented narratives. The two writers were held accountable for the opinions of their characters, and for imagining particular events. They attempted to defend themselves by pointing out that they had employed accepted literary techniques to fashion their narratives and explore their themes, techniques which ultimately acted to separate the writer from the views expressed in the story. These arguments were not accepted by the judge or the prosecution. They did not prevent prosecution lawyers from persistently citing passages out of context, and in such a way that they presented the views and intentions of the author in a deliberately anti-social light.

In its handling of this "evidentiary" material, the prosecution was striking at the core of the literary profession. Creative writing can be distinguished from every other manifestation of the written word by this one characteristic: its fundamental reliance on the imagination. A work of creative literature cannot come into being without this

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[123]A Rakhmilovich "The Constitutional Court of the Russian Federation: Recent Cases on Protecting the Freedom of Thought and Speech and Related Matters" (1996) 22(2) Rev Central & East Eur L 129, 133 introduced this writer to the term; Rakhmilovich is elucidating a decision on freedom of expression by the Russian Constitutional Court.

essential ingredient, the imaginative transformation of the writer's thoughts into the form and substance of a work of art.[124] Not only did the prosecution object to the content of the works on trial, but it refused to accept that the literary techniques employed by the writers were a valid expression of their craft.[125]

The strategy of the prosecution suggests that it would be extremely difficult for an independent-minded writer of fiction to exercise his profession in a Soviet-style regime. Indeed, many Soviet writers were compelled to follow the "genre of silence" in the worst periods of repression.[126] The damage that repression works on a writer is not only external and practical, but it is also internal and psychological: the "internal censor" constantly monitors the writer's thoughts, and, like Blake's worm at the heart of the rose, insidiously destroys his creative freedom from within.[127] In a society where freedom of expression was recognised and protected in law, the writer of fiction would enjoy the generally available freedom to practice his profession. Even here, however, his work might become subject to social censure on the grounds of "public morality," obscenity, and, possibly, political subversion. By the very nature of his activity, the creative writer is especially exposed to professional condemnation, and vulnerable to the more serious consequences of censorship, including its impact on his ability to

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[124]For example, TS Eliot describes the creative process in terms of the synthesis and authentic recreation of the entire history of literature in the psyche of the poet: see TS Eliot "Tradition and the Individual Talent" in *Selected Essays* (New Edn Harcourt, Brace & World New York 1964) 3.

[125]Trial Transcript, Hayward (n 25) 93-94, 96.

[126]For example, see Hosking's discussion of the Brodsky case: Hosking (n 8) 352.

[127]Medvedev, quoted in Hosking (n 8) 409. Blake's poem, "The Sick Rose," is usually interpreted as a metaphor for the difficulties of earthly love; but the comparison with creative freedom seems apt.

work. Freedom of the imagination is the very essence of the literary professions. Writers should therefore be subject to different standards of review for determining the social acceptability of their work, and a higher threshold should be set for interference with, or censorship of, them.

In his comparative study of moral rights, Strömholm is quite sceptical about the idea of a *droit de créer* that would be broadly applicable to the problems of creative authorship; he suggests that this right does not lend itself naturally to wider interpretation.[128] He argues that the legal recognition of a "right to create" would not help to clarify issues of freedom of expression, and he is hesitant about bringing rules "of [the] public-law type" into copyright:

> [W]hen the work is presented for publication it will obviously be evaluated in the light of... legal rules which apply to public utterances and public behavior as a whole. But this is nonspecific to *protected works;* from the point of view of freedom of the press it is a matter of indifference whether or not an utterance reaches up to the "threshold" of a work, an *oeuvre.* From the point of view of systematic clarity it is no advantage to bring in these sort of rules – mainly of public-law type and applicable to all sorts of heterogeneous activities – among the copyright rules on *droit moral.*

Nevertheless, Strömholm recognises that the *droit de créer* may help to strengthen the position of the author in certain practical respects, such as the negotiation of professional contracts for the creation of works. However, he feels that the application of the *droit de créer* might introduce an unmanageable degree of uncertainty into publication agreements. He observes:

> [I]t would certainly be doing no service either to culture, to *droit moral* or to authors, if the validity of every agreement concerning one or more future works was to be questioned.[129]

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[128]See Strömholm (n 122).

[129]Strömholm (n 128) 19.

Having raised these issues, Strömholm concludes that adequate means of addressing the concerns of the *droit de créer* are already in existence. They are to be found, he argues, within the principles of contract law, and in the form of proven judicial sympathy for "the special nature and the psychological circumstances of individual creativity."[130]

Strömholm's objections to the *droit de créer*, and, in particular, his view that creative freedom is already adequately protected by custom, are not entirely convincing. He does not enter into a much-needed analysis of the relationship between public-law principles governing freedom of expression and moral rights doctrine. Strömholm is hesitant to deal with the "public-law type" elements of moral rights, although it is widely understood that authors' rights are a hybrid of private and public-law concerns, reflecting the individualistic and social faces of authorship, itself. Since Strömholm prefers to avoid the intersection between freedom of expression and moral rights, he is not in a position to assess the possibilities for improving the general effectiveness of measures on freedom of expression through the development of a "moral right to create," nor does he consider the possibly enhanced, practical application of public-law principles to the specific problems of authorship.

Strömholm's treatment of the *droit de créer* is restricted by his assumption that "[t]he author enjoys the general freedom of action prevailing in the community." On the contrary, the author's profession, by its very nature, requires a different level of freedom, and makes him especially vulnerable to repression. Strömholm is not

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[130]Strömholm (n 128) 21.

concerned with repression and its effects on authors and their works, or, more generally, on the social phenomenon of creativity. However, the prosecution of Siniavskii and Daniel shows clearly the precise, specific, and distinctive qualities of literary expression as a special form of "speech." Strömholm's somewhat rigid classification of moral rights within the confines of private law is called into question when we consider the historical circumstances of socialist regimes, where repression was systematically directed at creative artists, leading them into an intense struggle for personal and professional survival. His views are also challenged implicitly by the instability and ambivalence that increasingly affect the notion of an author's moral right in international copyright law. While Strömholm's arguments present an interesting point of departure, his position on the *droit de créer* needs reconsideration. The *droit de créer* should be re-examined in the light of a deeper understanding of the relationship between moral rights and creative freedom.[131]

F. CONCLUSION

The history of authors' rights in the Soviet Union confronts copyright scholars with a strange anomaly. On the one hand, Soviet law showed a clear commitment to the protection of authors' moral rights. On the other hand, state persecution of authors in the legal arena, culminating in the Siniavskii-Daniel prosecution of 1966, demonstrated that authors were unable to exercise their legal rights in this politically repressive regime.

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[131]Rakhmilovich (n 123) 133.

To a great extent, authors were prevented from asserting their moral rights by the all-embracing character of state involvement in Soviet society. The Soviet state infiltrated virtually every means of publishing and disseminating creative works, industries that are usually the prerogative of non-state corporations and individuals in democratic societies, and where competition and diversity are important values.

At a deeper level, the ineffectiveness of protections for writers in Soviet law reflected intense conceptual unease about authors' rights. Moral rights doctrine affirms the social importance of creativity, the individual rights of creative authors, and the independent value of creative work. These ideals were inherently incompatible with a regime based on ideological control, whose main aspiration in the cultural sphere was to exploit creative expression for its own political ends. By a fitting irony, the Soviet government's attempts to control authorship ultimately had the opposite effect, affirming the independence of authors and their undeniable contribution to freedom of thought, historical truth, and ideological diversity in Soviet-ruled territories. Mandelstam's dictum about the life-and-death importance of poetry in Russia was proven time and again by Soviet policy.[132]

The extent of repression to come was by no means self-evident in the revolutionary changes of 1917. Many contemporary observers, in Russia and throughout the world, believed that the Revolution heralded a new age of freedom for

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[132]"Only in this country is poetry respected – people are killed for it." Mandelstam's comment, to his wife, is quoted in Hosking (n 8) 408.

the Russian people.[133] In retrospect, it is perhaps most accurate to say that Soviet legal provisions for the moral rights of authors reflected the optimistic spirit of early socialism. The framework for the protection of moral rights would ultimately become integrated into a legal culture based on "doublethink," a perpetual state of psychological confusion apparent, among other ways, in the chasm between the letter of the law and its practical significance. The tragedy of Soviet authors, caught between the ideological politics of the state and the moral obligations of creative freedom, is reflected in the legal treatment of authorship under Soviet rule. The presence of moral rights in Soviet law may have been a product of the best socialist ideals; but, as the Siniavskii-Daniel prosecution illustrates, they eventually fell victim to the shameful excesses of Soviet power. The Soviet approach to creativity negated the law of moral rights. The post-Soviet era is therefore in need of a new model of moral rights – one that recognises and attempts to address the dangers of repression and its aftermath for creative freedom.

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[133]The optimism of the time is reflected in a celebrated poem, entitled "The New Russia," by Indian National Poet, CS Bharati. Not surprisingly, the poem has been translated into Russian.

V. MORAL RIGHTS AND THE BREAKDOWN OF COMMUNISM

After the turmoil that marked the mid-point of Russia's twentieth century, Soviet society of the 1970s and 80s was falling ever more deeply into the lethargy of stagnation. Frustration permeated every sphere of Soviet life, whether economic, political, cultural, or personal. The crippling effects of decades of bureaucratic control over the economy were becoming apparent. In a deeper sense, the situation also represented a stalemate in the ancient contest of party and intelligentsia – the post-Revolutionary conflict, as expressed by Sheila Fitzgerald, between "power" and "culture."[1] Government based on ideological pronouncements could only intensify the hostility between society's "rulers" and its "creators" over the years; it inevitably became a characteristic feature of the system. In retrospect, it is evident that this tension was, by nature, impossible to resolve within the established parameters of Soviet politics. The situation is described with precision by Geoffrey Hosking:

> Wherever we look,... we see the shell of the totalitarian structure still in place, but usually masking a reality which is in important respects divergent from the image. Yet, whenever attempts are made to change it, the shell proves remarkably tough....
>
> The totalitarian system – perhaps today the term "post-totalitarian" would characterise it better – has in fact settled down and assumed the shape of a rather stable society. Three generations after the 1917 revolution it is perhaps natural that this should be so. The party's monopoly position has enabled a new ruling class to form and to consolidate....Its members now see advantages in the revival of certain aspects of the rule of law, of private morality, of economic diversity, of genuine culture, science and scholarship, because these things promote the social stability which enables them to enjoy their power in peace. At the same time, they cannot permit the genuine rule of law, authentic freedom of conscience, the full flowering of scientific inquiry or cultural creativity, or of legalised economic free enterprise,

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[1]S Fitzpatrick *The Cultural Front: Power and Culture in Revolutionary Russia* (Cornell University Press Ithaca 1992) 1-15.

> for any of those things could prove a real impediment to their monopoly of power. So they cling tightly to the bare structure of their system, while intermittently conceding the substance.[2]

With the promotion of Mikhail Gorbachev to the position of party General Secretary in 1986, the possibility of adopting liberalisation measures to improve the Soviet situation became a reality. Not surprisingly, it appears that several streams of thinking existed among party leaders of different generations and convictions about how to confront the situation of deepening difficulty and, indeed, crisis that was looming on the horizon. The fact that Gorbachev had been in charge of agriculture, a deeply problematic area in which liberalisation overwhelmingly appeared as the best solution for long-standing mismanagement, may have played a role in his own political development.[3] Hosking's assessment of the turning point which the Soviet Union was approaching seems quite prescient:

> Writing in summer 1984, it looks as if we are approaching a critical stage, when vital decisions will have to be taken, as in 1921, 1928-9, 1953-6. There is no consensus in the West about what tendencies exist in the Soviet leadership, and it would be hazardous to speculate... The persistence of schemes for decentralising and freeing the economy, particularly in agriculture, suggests that the opposite tendency also has its convinced supporters. But there is absolutely no way of knowing which current is likely to prevail in the coming years. However, because the features of "post-totalitarian" society are so closely interdependent, change,

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[2]G Hosking *A History of the Soviet Union* (1st edn Fontana Press/Collins London 1985) 463-64.

[3]See Hosking (n 2) 449 and 464 on the influence of liberalising theories in agricultural reform. Hosking specifically mentions Gorbachev's "experiments with the 'link' system in agriculture..., even as it was being abandoned elsewhere because the [party] apparatus feared it would lead to the break-up of collective farms": see G Hosking *A History of the Soviet Union 1917-1991* (Final Edn Fontana Press 1992).

when it does come, will probably be rapid and far-reaching.[4]

In the "post-totalitarian" society described by Hosking, change from within, aiming at a subtle re-calibration of the balance of power among different state and social interests, while preserving the fundamental integrity of the system, seemed both like the natural path of reform, and the one most likely to bring about necessary change without unleashing chaos.[5] Managed change was the initial aim of Gorbachev's program of *perestroika,* reconstruction, and *glasnost,* openness.[6] Indeed, Gorbachev's inherently conservative approach to change is clearly apparent in his contemporary book on *perestroika,* as are his reasons for fearing the loss of political control. He observes:

> There are different interpretations of perestroika [from those of the Communist Party] in the West, including the United States. There is the view that it has been necessitated by the disastrous state of the Soviet economy and that it signifies disenchantment with socialism and a crisis for its ideals and ultimate goals. Nothing could be further from the truth than such interpretations, whatever the motives behind them.[7]

Notwithstanding Gorbachev's early caution, the momentum of change, once it had

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[4]Hosking (n 2) 464.

[5]China has faced a similar dilemma, but the country's leaders have so far rejected radical change along the lines of what happened in the Soviet Union. For example, see the brief discussion of the problems involved in Chinese liberalisation, in C Neigel "Piracy in Russia and China: A Different US Reaction" (2000) 63 L & Contemp Probs 179, 191-93.

[6]It is unclear whether it is preferable to translate *perestroika,* from a Russian root meaning "to build," into English as "restructuring" or "reconstruction." For example, see the Oxford Colour Russian Dictionary (Oxford University Press, 1998), which gives as English equivalents, "reconstruction," "reorganisation," and "retuning." I have preferred to use "reconstruction," as it seems to reflect the reality of Gorbachev's policies most fully.

[7]M Gorbachev *Perestroika: New Thinking for Our Country and the World* (Harper & Row New York 1987) 10.

begun, proved unstoppable. The destruction of the Berlin Wall, the flashpoint of East-West hostilities for half a century, ignited independence movements across Eastern Europe, among the satellite states of the Soviet empire. With the constriction of its sphere of influence and widespread condemnation of its ideological *raison d'etre,* demonstrated on an unprecedented scale by international popular protest, the Soviet Union could not maintain its internal cohesion. The country was officially dissolved in 1992, bringing an end, not only to the military power of the Soviet leaders, but to their ideological influence, as well. However, after a decade of post-Soviet consolidation, it must be noted that the Russian Federation, the last remaining ember of the Soviet empire,[8] has yet to escape from the spiral of post-Imperial crisis. The situation of continuing collapse is apparent in the political and economic crises of the past decade and, of course, in the ongoing war of secession in the Federated Republic of Chechnya.

A. *PERESTROIKA* AND LEGAL CHANGE

From the outset, legal reform was an important part of managed change in Gorbachev's Soviet Union. In pragmatic terms, law reform could help to facilitate development and liberalisation, while providing a stable context within which change could progress without becoming unduly dangerous.[9] In particular, by assimilating rapid social change into new legal norms, law reform provided the hope of maintaining a basic degree of stability in spite of the increasing fluidity of the political and economic situation in the Soviet Union.

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[8]Hosking (n 3) 501 does not hesitate to call the Russian Federation a "bleeding hulk torn from the carcass of the USSR."

[9]For example, see Gorbachev's comments on law: Gorbachev (n 7) 105-10.

At the same time, the idea of building a culture that understood and respected legality in its own right raised new hopes for reconciliation among the disparate elements of this deeply fractured society. The idea of legality brought a new, ethical force to the movement out of Communism.[10] Over the past decade, Russian law reform, and, indeed, legal reform in other post-socialist jurisdictions, has continued its attempt to fulfil a dual function as society's practical and moral anchor, inherited from the Gorbachev era, with understandably mixed results.

Entin's comments on the nature of the legal transition initiated by Gorbachev's reforms are enlightening:

> The introduction with the aid of laws of concepts which for many years have been subjected to ostracism for ideological considerations is a manifestation of glasnost in law-creation. The public putting of the problem in the form of publishing a federal law without a specific decision confers upon law an uncharacteristic currentness. This phenomenon is a distinctive feature of the transition period....
>
> One may therefore conclude that modern Soviet law needs glasnost for its legitimation. Open discussion of the virtues and shortcomings of draft laws being voted upon and public proclamation of the intention to fully renew legislative material sharply reduce respect for prevailing law. Arguments are frequently heard on the part of local authorities that the law is wrong and therefore we shall refrain from enforcing it on our territory.[11]

Legal reform in the era of *perestroika* also responded to the Soviet government's new sensitivity to international influences. *Glasnost,* the second branch of Gorbachev's new style of socialism, not only meant greater openness of the state towards the Soviet

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[10]See Hosking (n 3) 456-58, 460-61, on the importance of law, especially during the second phase of *perestroika.* The specific issue of freedom of the press, and its importance for *glasnost,* is examined in detail by VL Entin "Law and Glasnost" in WE Butler (ed) *Perestroika and the Rule of Law: Anglo-American and Soviet Perspectives* (IB Tauris London 1991) 110-15.

[11]Entin (n 10) 102-03.

public, but a spirit of international openness and cooperation that would hopefully lead, among other things, to improved political and economic relations with the West. After the dissolution of the Soviet Union and the end of the Communist Party's monopoly of power, the need for international openness became pronounced, and the influence of foreign models on Russian reforms grew to extreme proportions.

The twin themes of reconstruction and openness made the *perestroika* period an active time of change in Russia's intellectual property regime. On the one hand, the ideological *timbre* of Soviet intellectual property law, inherited from the period of "socialist legality" and "socialist realism," was perceived to impede economic and social development. On the other hand, the failure to protect works of foreign authorship was a growing area of contention in the Soviet Union's international relations.

Reforms to Soviet intellectual property law were driven by three specific considerations. First, there was the concern of the Soviet administration, all too well-founded in fact, that the country was becoming increasingly backward and isolated in relation to international technological developments.[12] Restrictive state policy towards information was an important factor contributing to this problem.[13] Deficient regulation, developed with reference to the outdated ideological and technical concepts of the 1960s,

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[12]The issue arose particularly in relation to the information revolution; for a discussion, see C Prins "The Role of Law in the Development of the Russian Information Society" in G Ginsburgs, DD Barry & WB Simons (eds) *The Revival of Private Law in Central Eastern Europe: Essays in Honour of FJM Feldbrugge* (Kluwer Law International The Hague 1996) 391, 391-94. The equally serious issue of the mismanagement of technology that was available in the Soviet Union is discussed by Hosking (n 3) 457-58, with particular reference to the tragic events of 1986 in Chernobyl.

[13]See Prins (n 12) 392-94.

mirrored government policy in this area. The impact of technological backwardness on Soviet society threatened to be tremendous, and the Soviet government somehow had to confront this difficult reality.

Secondly, international pressure on the Soviet Union to grant adequate protection to works of foreign authorship had become intense. Foremost among the countries concerned was the United States. The role of American industries at the forefront of the computer revolution made adequate protection of intellectual property a pressing issue for the United States, while Soviet eagerness to benefit from access to American technology made improved protection for American intellectual products a legislative priority.[14]

A third consideration arose in a somewhat different vein, and involved an attempt on the part of the Soviet administration to revisit its long-standing policy of manipulation and repression towards creative authorship. Greater freedom of expression was the very essence of reconstruction and openness in Gorbachev's new society.[15] In keeping with Russian, and Soviet, tradition, the creative and socially-important expression of writers and other artists had a special importance for Gorbachev. Like other rulers over the centuries of Russian history, Gorbachev perceived literary expression as a vehicle for political and social change. To a greater extent than any previous leader, perhaps, Gorbachev hoped to convince intellectuals and creative people to contribute to the renewal of socialist ideals in

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[14]For example, see the discussion on American software companies, and their influence in Russia over the 1990s, in A Yakovlev "Legal Protection of Computer Programs in Russia" (1996) 18(5) EIPR 292, 293-94.

[15]Hosking (n 3) 458 comments on the new role assumed by writers under *perestroika,* at Gorbachev's urging.

a liberalised Soviet Union. The parallels between Gorbachev and Khrushchev, between *perestroika* and the "Thaw," are striking. However, Gorbachev's programme of change, coming long after the ambivalent attempts at liberalisation in the 1950s and 60s, was far-reaching and comprehensive by nature, and therefore, much less predictable than Khrushchev's reforms.[16]

Gorbachev's growing sense of the crisis confronting the Soviet Union led to an increasing desire to establish a basis for real cooperation between the government and the dissident community. Indeed, Hosking identifies the hope of help from intellectuals as a crucial feature of *perestroika*'s "second phase." Hosking observes:

> Symbolic of the new movement was the release of Academician Sakharov from exile in Gorky in December 1986. The letter which he had written to Brezhnev in 1970... may be said to contain the first sketch of what was now emerging as Gorbachev's Perestroika Mark 2, at the centre of which was the notion of an alliance between the party leadership and the country's scientific and cultural intelligentsia, including those who had hitherto been execrated as "dissidents".[17]

Nevertheless, the situation of mutual suspicion between the government and the intellectuals was deeply entrenched, and resisted resolution through Gorbachev's initiatives. Julie Curtis suggests that, "Gorbachev himself still clearly [thought] of literature in largely utilitarian, conventionally Soviet terms.... In 1988,... Gorbachev was

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[16]This line of discussion is not intended to underplay Khrushchev's denunciation of Stalin and the personality cult, a watershed moment in Soviet history. However, clear limits on both the acknowledgment of official responsibility and the direction of future change were apparent even in Khrushchev's "Secret Speech" to a special closed session of the 20th Communist Party Congress in 1956: see Hosking (n 3) 334-38.

[17]Hosking (n 3) 458-59.

still defining glasnost' in terms highly reminiscent of Socialist Realism."[18] In fairness to Gorbachev, however, it is important to remember the intense pressure that he confronted from less liberal factions of the Communist Party. No doubt, it was partly for their benefit that he couched his desire for change in careful language, as when he affirmed:

> We are for glasnost' without reservation or limitations, but for glasnost' in the interests of socialism. To the question of whether glasnost', criticism and democracy have limits we answer firmly: if glasnost', criticism and democracy are in the interests of socialism and the interests of the people they have no limits! This is our criterion.[19]

The desire to restore some level of status to Soviet authors necessarily implied a need to reconsider the political environment in which authors functioned, including the legal framework that institutionalised this environment. Authors' rights, as expressed in copyright law, would need to be reassessed. As *perestroika* progressed, ultimately transcending even Gorbachev's imagination, the right of intellectuals to express themselves creatively, independent of government policy, became a feature of social change for the first time in Soviet, or Russian, history.

Changes to the Soviet intellectual property regime during the late 1980s and early 1990s reflected the wider concerns of the *perestroika* period. Legislative reform that was initiated during this first period of change would greatly intensify after the disintegration of the Soviet empire in 1992. The political developments of the 1990s would also upset the

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[18]See J Curtis "Literature under Gorbachev – A Second Thaw?" in C Merridale & C Ward (eds) *Perestroika: The Historical Perspective* (Edward Arnold London 1991) 168, 177.

[19]Gorbachev's speech to journalists, *Pravda,* 13 January 1988, quoted by M Dejevsky in "'*Glasnost'* and the Soviet Press," *Culture and the Media,* 39; quoted in Curtis (n 18) 177.

equilibrium among the diverse interests across the spectrum of intellectual property matters, bringing a new and different degree of prioritisation to each. As the Soviet Union was transformed into the Russian Federation and a number of independent republics, and as *perestroika* metamorphosed into a "transition" out of Communism and into democracy, technology, internationalisation, and authorship all acquired new connotations.

B. MORAL RIGHTS AND RUSSIAN LAW REFORM

The first changes to Russian intellectual property law occurred as part of the reform of Russian civil legislation undertaken in the late 1980s. After some delay, revisions to the Fundamentals of Civil Legislation were finally adopted on May 31, 1991, and they included a revised Chapter IV on copyright and moral rights.[20] The Soviet administration had been intending to draft a new Civil Code since 1986, and copyright reform was among the areas of priority.[21] The government initially hoped to develop specialised legislation on copyright that would be independent of the Civil Code, but this plan was abandoned as too time-consuming in the first round of revisions to the law.[22] A specialist Copyright Act was eventually adopted in 1993; with the amendments of 1995, it is the primary copyright

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[20]Fundamentals of Civil Legislation of the USSR and the Republics, *VSND i VS SSSR*, 1991 No 26, Item 773; available in English translation on Garant.

[21]See C Prins "Emile Zola Receives an Answer: The Soviet Union Is to Join the Berne Convention" (1991) 13(7) EIPR 238, 238.

[22]See Prins (n 21) 242. The distinction between the Fundamentals and the Civil Code should be noted: the Fundamentals were guidelines intended to provide a framework for legislation in all the republics of the Soviet Union, while the Civil Code was the actual legislation at the level of the republics – in the case of the RSFSR, very closely derived from the Fundamentals.

legislation in the Russian Federation today.[23]

In the early stages of law reform relating to intellectual property, a number of difficulties surfaced that would later become identifiable as characteristic problems of post-Communist reform. Among these were the inherently ambiguous nature of law reform, which was especially pronounced in the complex field of intellectual property regulation; the lack of stability and, indeed, the persistent intransigence of legal norms, whose substantive content was subject to constant fluctuations in the unstable Soviet and post-Soviet legal infrastructure; and the ambiguities flowing from the mingling of international legal models and advice with Soviet and, later, Russian legal thinking. Due to these difficulties, Russia's intellectual property regime continues to suffer from persistent structural confusion.

1. The Ambiguities of Law Reform

(a) Transitional vs Long-Term Reform

Law reform in the *perestroika* and post-Soviet eras was a self-contradictory process. It sought to fulfil two objectives that were potentially in strong conflict with each other. On

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[23]Russian Federation Law on Copyright and Neighbouring Rights *(Zakon Rossiiskoi Federatsii Ob avtorskom prave i smezhnykh pravakh), VSND i VS RF,* 1993 No 32, Item 1242; *Rossiiskaia gazeta* 3 Aug 1993 (as am by Federal Law of the Russian Federation of 19 July 1995, *Rossiiskaia gazeta* 26 July 1995). Available online: Law No 5351-I of July 9, 1993, Russian Patent & Trademark Office, <http://www.rupto.ru/ruptoen/law/intel.htm>. A number of amendments are currently pending before the Duma. These have been introduced in response to the WIPO "Internet Treaties" and the EC Copyright in the Information Society Directive of 2001. Changes include an extension of the copyright term from 50 to 70 years after the death of the author, and are summarized by I Motsnyi "Russia: Russia is About to Amend its Copyright Laws" Mondaq Business Briefing, online: <http://www.mondaq.com>. However, none of the proposed changes will have a direct impact on moral rights.

the one hand, there was an urgent necessity for up-to-date legislation that would allow the administration to undertake modernising measures in politics and economics. On the other hand, there was a greater need for comprehensive legislation establishing a viable legal infrastructure for the post-Soviet political entity, whatever the precise shape the country might eventually assume, that would serve society effectively over the long-term. This problem of different legal needs in the short and long term is another aspect of the temporal problem of "transitional" law discussed by Ruti Teitel. Teitel is particularly concerned with the legal response to authoritarianism, and the simultaneously backward and forward-looking orientation of laws whose purpose is to enable and legitimise a conclusive break from authoritarian government.[24] However, the problem of how to reconcile immediate requirements in a situation of social transformation with the management of long-term stability must also be recognised as a typically "transitional" legal problem.

(b) The Changing Functions of Reform

The difficulty faced by reformers in judging appropriate short and long-term goals was complicated by the fact that the functions of law reform in the Soviet Union and post-Communist Russia were changing constantly. As a result, Soviet and Russian reformers did not have a constant point of reference to help them gauge the progress and effects of legal reform, either from a purely legal or a policy point of view. Initially, in the *perestroika* period, the objective of law reform was to facilitate managed change within the Soviet Union, in order to prevent political and social stability from becoming endangered.

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[24]For example, see RG Teitel *Transitional Justice* (Oxford University Press New York 2000) 4-6.

When the Soviet Union collapsed, however, law reform unexpectedly had to provide a new framework for democratisation and the rapid development of a market economy.

This change of function had profound implications for intellectual property law. By the early 1990s, technology was increasingly perceived as the key to rapid economic growth in countries at various stages of development around the world, and, accurately or inaccurately, intellectual property law was widely accepted as the key to enabling the investment necessary for technology-based development.[25] The changing role of law was also reflected in the radically different role played by foreign assistance and expertise at each stage of reform. In the first instance, foreign advice remained relatively discreet and disinterested; when the Soviet Union collapsed, foreign expertise was suddenly confronted with the much larger task of bringing Western law to the post-Soviet Russian Federation, a contribution that would require extensive direct involvement on the part of foreign legal experts.

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[25]In theory, both copyright and, especially, patent protection are important for the growth of technological industries: they protect costly investment in software development and other technological innovations. However, the actual effectiveness of intellectual property rights in promoting economic development remains a poorly-researched question, particularly in the context of chronically underdeveloped countries. Indeed, the promotion of intellectual property rights in developing countries has often been perceived to reflect a political agenda, further undermining the credibility of the claims. For example, see the interesting discussion of the "traditional rationales" supporting patent protection, with an assessment of their validity for developing countries, in E Henderson "TRIPs and the Third World: the Example of Pharmaceutical Patents in India" (1997) 19(11) EIPR 651, 654-57; see also AS Oddi "The International Patent System and Third World Development: Reality or Myth" (1987) 5 Duke LJ 831. A relatively rare, empirical study of this issue may be found in RT Rapp & RP Rozek "Benefits and Costs of IP Protection in Developing Countries" (1990) 24(5) J World Trade L 75. See also H Hansmann & M Santilli "Authors and Artists' Moral Rights: A Comparative Legal and Economic Analysis" (1997) 26 J Legal Stud 325.

2. The Hierarchy of Laws

Russian reformers ultimately dealt with these problems by making a conscious decision that the 1991 civil legislation would be adopted expressly with a view to accommodating the problems of the Soviet/Russian transitional period, and gradually be superseded by more suitable legislation as the political situation of the country was clarified. Shortly after the break-up of the Soviet Union, officially affirmed on December 8, 1991, the Russian Federation announced that the Soviet Fundamentals of Civil Legislation would nevertheless enter into force in the Russian Federation, and see the policy changes of the transitional period through to their implementation. As Michael Elst observes:

> This sudden move of the Supreme Soviet [of the Russian Federation] seems to have been inspired by the need for a legal framework for the radical politics of change. It is only a temporary measure: the Fundamentals will not be applied when a new Civil Code of the Russian Federation is adopted. As to the copyright provisions of the Fundamentals, it is clear that they will fairly soon be replaced by an autonomous Russian Copyright Law, of which several drafts are circulating at the moment.[26]

In practice, however, the conceptual decision to allow the Fundamentals to act as interim legislation was somewhat imperfectly realised. In lieu of allowing new legislation to supersede pre-existing norms, reformers instead created a hierarchy of simultaneously-existing rules, where not only the Fundamentals, but the old Russian Civil Code of 1964, continue to be effective in many respects. This situation has two major, continuing implications for Russian law. First, earlier rules remain valid if they do not conflict with revised rules, so that current law is an accumulation of historical and present norms on which current legal claims may rely. Secondly, the prioritisation of the Constitution, along

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[26]M Elst "New Developments in the Copyright Legislation of the Russian Federation: Part 1" (1993) 15(3) EIPR 95, 95-96.

with all laws adopted after June 12, 1990, seems to create a situation where rules of lower priority may potentially displace higher levels of law for reasons of chronology. This arrangement effectively disrupts the idea of a hierarchy of different kinds of rules based on their relative legal importance. It does not overstate the situation to say that the current legal hierarchy of Soviet rules is based primarily on chronological factors, and does not reflect a coherent legal infrastructure.

Elst comments on these problems:

> As a result [of these measures], a kind of hierarchy is established, with the Civil Code [of the RSFSR] at the bottom, the new Fundamentals of Civil Legislation in the middle, and the Constitution and all legislative act adopted after 12 June 1990 (such as the Press Law and the Law on Property) at the top. Norms of a lower level remain valid as long as they do not contradict norms of a higher level. Thus, provisions of the Civil Code which contradict the Fundamentals no longer apply. This vague criterion will inevitably lead, on a case-by-case basis, to a diversity of interpretations.[27]

The coexistence of legislative norms from different moments in Soviet and Russian history means that the present state of the law can be difficult to determine, while the ambivalence towards displacing old laws does not generally bode well for the development of a sound legal infrastructure. Since Elst's 1993 analysis, the situation of copyright has been improved by the enactment of a Law on Copyright and Neighbouring Rights in 1993, amended in 1995, which was accompanied on its adoption by a separate declaration that the copyright-related provisions of the Fundamentals would no longer be valid.

Nevertheless, the question remains as to how, if at all, the current copyright

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[27]Elst (n 26) 99.

provisions interact with the other layers of transitional and post-Soviet legislation.[28] Problems are presented by the interaction of the Copyright Act with the 1964 RSFSR Civil Code, which has yet to be replaced by a new Civil Code, the Constitution, and a number of other laws adopted after June 1990, such as laws on the mass media and privacy, related to the subject-matter of copyright.[29] Of these laws, the 1964 Civil Code contains an elaborate section dealing directly with copyright, and is most likely to present difficulties. If the provisions of the earlier legislation are inconsistent with the Copyright Act of 1993, as amended in 1995, they will not be applicable. Otherwise, the Russian Civil Code remains a primary source of law on authors' rights.

3. International Models of Reform

International factors have exercised an important influence on Soviet copyright reform from the earliest stages. At first, this was due to a perceived need for greater Soviet openness and involvement in the international arena. The Soviet Union was struggling to overcome a tradition of isolation in relation to both technology and culture. Copyright, especially in its international aspects, acquired a correspondingly heightened significance.

With the collapse of the Soviet Union, the international dimension of post-Soviet

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[28]The word "transitional," itself, has a dual connotation. Over the past decade, it has come to refer to the overall movement of the Russian Federation of Communism and towards democratic government. However, it is used here in its narrow sense of the period from about 1988 to 1992, when it had become obvious that the Soviet Union could not continue to exist in its present form, but where the dissolution of the Union had not yet become a reality.

[29]For example, see the Federal Law of the Russian Federation "On Information, Informatisation, and the Protection of Information," 20 February 1995, *SZRF* 1995 No 8 item 609; and the Federal Law of the Russian Federation "On Mass Media," 27 December 1991, *VSND i VS RF,* 1992 No 7 item 300.

copyright reform assumed a novel character. Concerns about the inadequacy of Soviet and Russian copyright in relation to internationally-accepted standards had long been among the complex forces driving reform. However, international influences came to dominate the development of Russian law in this field by the mid-1990s, and rapidly overwhelmed other policy concerns.

The structure of the Russian legal system allows international norms to be incorporated directly into current law reform. Where inconsistencies might arise between international and domestic principles, it is Russia's tradition that international norms to which the country has adhered automatically supersede domestic legislation. This principle has now been explicitly enshrined in Article 3 of the 1993 Law on Copyright and Neighbouring Rights, which states that, "[w]here an international treaty to which the Russian Federation is party contains rules different from those specified in this Law, the provisions of the international treaty shall be applicable." In Russian copyright law, therefore, international norms, such as those of the TRIPs Agreement, will ultimately stand at the apex of the Russian legal system.[30] However, the implementation of international norms cannot be assured by simply incorporating them into the Russian legal system by

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[30]A general provision to this effect may also be found in the Russian Constitution of 1993; Article 15.4 provides, "[i]f and international treaty or agreement of the Russian Federation fixes other rules than those envisaged by law, the rules of the international agreement shall be applied." See *Constitution of the Russian Federation,* December 12, 1993, *Rossiiskoi gazeta* 25 December 1993, Garant Internet, online: <http://www.constitution.ru/en/10003000-01.htm>. Should Russia join the WTO, of course, the provisions of the TRIPs Agreement would become paramount in the field of copyright: see CL Broadbent & AM McMillian "Russia and the World Trade Organisation: Will TRIPs Be a Stumbling Block to Accession?" (1998) 8 Duke J Comp & Intl L 519, 534.

default: Russia may still lack the infrastructure and enforcement mechanisms to bring them into effect.[31] For this reason, the harmonisation of Russian copyright law with international norms has remained a major international priority.

The internationalisation of Russian copyright reform can be traced by looking at how conformity with different international agreements has been pursued as a legislative priority at different stages of the reform effort. Russia's tentative entry into the international copyright arena occurred through the Universal Copyright Convention, joined by the Soviet Union in 1973.[32] In the *perestroika* years, it plunged into the full depth of international copyright relations, as part of the liberalisation process under Gorbachev, through the Berne Convention. Its post-Communist period is increasingly coloured by the influence of the World Trade Organisation and the European Union, while the strength of WIPO's influence and the importance of the latest copyright treaties issued by WIPO – the "Internet Treaties" – [33] for future copyright reform in Russia remain open questions.

(a) The United States and the Berne Convention

The United States was a powerful presence in Soviet intellectual property reform from an early date, and in many ways, American proposals opened the door onto international

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[31]For example, see the discussion in Broadbent & McMillian (n 30) 534, 544-62.

[32]The process of UCC accession is discussed in Chapter III 117-29.

[33]WIPO Copyright Treaty and WIPO Performances and Phonograms Treaty, adopted by the WIPO Diplomatic Conference on Certain Copyright and Neighbouring Rights Questions in Geneva; on December 20, 1996. Both treaties are available in the WIPO Collection of Laws for Electronic Access, online: <http://clea.wipo.int>. The Copyright Treaty and the Performances and Phonograms Treaty are known collectively as the WIPO "Internet Treaties," though their scope is broader than the term suggests.

copyright relations for the Soviet Union. In its early stages, the American influence had a strongly persuasive effect on Soviet decisions in the field of copyright. In 1990, the United States and the Soviet Union had concluded an Agreement on Trade Relations, in which the Soviet Union agreed to improve intellectual property protection.[34] Soviet changes were to be enacted with a view to providing copyright protection for computer programs, and appropriate forms of intellectual property protection for other kinds of new and developing technologies.[35]

Interestingly, the American influence on Soviet copyright legislation in the *perestroika* era primarily appeared in the guise of lobbying for Soviet membership in the Berne Convention.[36] In this respect, US involvement parallelled its earlier role in securing the accession of the USSR to the Universal Copyright Convention, despite international concerns about the potentially negative impact of Soviet participation, in 1973. In exchange for membership in Berne, the United States would grant the Soviet Union the highly coveted trade status of "most-favoured nation" under the GATT.

Soviet accession to the Berne Convention was significant for authors' moral rights, though mainly from the symbolic, rather than the practical, point of view. A comparison of the United States experience with Berne reveals an interesting contrast. The American decision to join the Berne Convention at the rather late date of 1989 had to be reconciled

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[34]USSR-US: Agreement on Trade Relations (1 June 1990), 29 ILM 946: see Neigel (n 5) 185-86. The Soviet commitment to enacting new laws on intellectual property was affirmed in a side letter attached to the Agreement: see Prins (n 21) 242.

[35]See Neigel (n 5) 185-88.

[36]This point is emphasised by Neigel (n 5) 185-88.

with its long-standing ambivalence towards the protection of moral rights, as required by Article 6*bis* of the Convention. In the case of the Soviet Union, the treatment of moral rights was also reviewed as part of the accession process. Indeed, the legislative preparation for Russia's accession to the Convention in 1995 was quite arduous, dating back to the early 1990s when copyright became a highly prioritised area of civil law reform.

As had previously been the case in the United States, the conformity of Soviet law with Article 6*bis* of the Berne Convention was somewhat problematic. However, the United States had to reconcile copyright legislation that was economically-oriented with an essentially different legal tradition emphasising the protection of authors' personal rights. Soviet legislation did not confront such a fundamental challenge.[37] In one form or another, moral rights have consistently been protected in Soviet and pre-Soviet legislation, and the 1961 Fundamentals of Civil Legislation made provision for moral rights. Rather, the difficulties that arose were a product of the sometimes casual method of expressing moral rights in Soviet legislation. One point of definite conflict occurred in relation to the question of duration, which had never been clearly specified for moral rights in Soviet law. Prior to Berne accession, in keeping with Article 6*bis*(2) of the Berne convention, perpetual

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[37]The American approach to moral rights as part of the process of acceding to the Berne Convention was highly controversial: it initially argued that common-law protections available under American law were sufficient to meet the requirements of Article 6*bis,* but later enacted special legislation to protect the moral rights of visual artists (Visual Artists Rights Act 1990). The issue is dealt with in detail by D Nimmer "Conventional Copyright: A Morality Play" (1992) 3 Ent L Rev 94.

protection for paternity and integrity rights was introduced into Soviet law.[38]

(b) The WTO and the TRIPs Agreement

American membership in the Berne Union was both a prelude to, and preparation for, the greatly intensified involvement of the United States in international copyright matters in the early 1990s. American initiatives would eventually lead to the adoption of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs Agreement) as one of the founding instruments of the World Trade Organisation (WTO).[39] The TRIPs Agreement incorporates most of the substantive standards in the Berne Convention on copyright law.[40] In contrast to Berne, however, TRIPs is at heart a system based on the ability to penalise the inadequate enforcement of intellectual property rights through trade sanctions.[41] The orientation of TRIPs towards enforcement is apparent in the structural

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[38]1991 Fundamentals (n 20) Article 137.3. See Prins (n 21) 246.

[39]The WTO was established by the *Marrakesh Agreement Establishing the World Trade Organisation,* 15 April 1994 (entered into force 1 January 1995); *Agreement on Trade-Related Aspects of Intellectual Property Rights,* Annex 1C to the *Agreement Establishing the World Trade Organisation,* 15 April 1994, 33 ILM 1197 (entered into force 1 January 1996), WTO Homepage (Legal Texts) online: <http://www.wto.org/wto/legal/finalact.htm> (entered into force 1 January 1995) [TRIPs Agreement].

[40]See Article 9.1 of the TRIPs Agreement (n 39), on "Relation to the Berne Convention": TRIPs incorporates articles 1-21 of the Berne Convention, and the Appendix on Special Provisions Regarding Developing Countries.

[41]WTO terminology on trade sanctions is, "the suspension of trade concessions." Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), Annex 2 to the *Agreement Establishing the World Trade Organisation* (n 39), Article 2.

connection between intellectual property rights and WTO dispute settlement at its core.[42] Accordingly, the TRIPs Agreement represents a new kind of intellectual property regime with unprecedented economic power and international reach, and, while its standards on copyright protection are based on the Berne Convention, it has superseded the Berne Union as the dominant international framework for copyright.

The marriage of convenience between intellectual property rights and international trade in the TRIPs Agreement has profoundly influenced the development of copyright law throughout the world. The impact of TRIPs has been especially strong in developing countries, whose intellectual property systems have traditionally offered different or lesser protections for intellectual work than Western law, a situation that, to some extent, was tolerated by the Berne Convention.[43] For similar reasons, the TRIPs Agreement has also

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[42]This is identified by Dreyfuss & Lowenfeld as a "breakthrough" achievement of the WTO system: see RC Dreyfuss & AF Lowenfeld "Two Achievements of the Uruguay Round: Putting TRIPs and Dispute Settlement Together" (1997) Va J Intl L 275, 276-78.

[43]One of WIPO's important functions was to offer legal assistance to developing countries so that they could bring their intellectual property systems into closer alignment with Western and international practice. WIPO's activities were aimed at building greater international consensus on intellectual property rights, though progress was by no means smooth: see, for example, Ricketson's discussion of the circumstances surrounding the adoption of the Stockholm Protocol on special provisions for developing countries, in S Ricketson *The Berne Convention for the Protection of Literary and Artistic Works: 1886-1986* (Centre for Commercial Law Studies, Queen Mary College Kluwer London 1987) paras 11.1-11.48. The consensus-based character of the WIPO system is emphasised by RL Gana "Has Creativity Died in the Third World? Some Implications of the Internationalisation of Intellectual Property" (1995) 24 Denv J Intl L & Pol'y 109, 121. However, Dreyfuss & Lowenfeld (n 42) 294-95 point out that the position of developing countries was strengthened by the UN-style voting procedures of WIPO. TRIPs also makes provision for assistance to, and cooperation with, developing countries – in Article 68 on the Council for TRIPs, and Article 69 on international co-operation – but the environment of the Agreement essentially remains competitive rather than collaborative.

made an indelible mark on post-Communist copyright reform in Russia, as well as most other countries of Central and Eastern Europe. As Adolf Dietz comments:

> [T]he international importance of intellectual property has been strongly underlined by the creation of the Agreement on Trade-Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods (TRIPs Agreement), forming an annex to the Agreement Establishing the World Trade Organisation. This and other new developments represent an additional challenge for the ex-socialist countries. If they only had to deal with the socialisation in the sense of transition from a centrally planned economy to market economy and intellectual property field as well, a relatively restricted number of legislative changes would probably have been sufficient. The task of the reformers in those countries was rendered much more difficult than that, however, since at the same time they were exposed to unprecedented dynamic changes in the whole field of intellectual property, of which the new obligations under the TRIPs Agreement are only one important international aspect.[44]

The TRIPs Agreement not only includes the substantive norms of the Berne Convention, but it also involves a special commitment to making intellectual property rights effective in practice, and on terms that are acceptable to Western interests. The focus of TRIPs on effective implementation reflects problems that have arisen in relation to key American – and sometimes, Western European – industries, such as the protection of computer software from "piracy," the regulation of broadcasting and communication via the Internet, and the international distribution of motion pictures.[45] In essence, the

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[44]A Dietz "Intellectual Property and Desocialisation in Eastern Europe" (1995) 26(6) IIC 851, 852. Dietz seems to feel that the TRIPs Agreement is a manifestation of even larger changes in the international approach to intellectual property.

[45]For example, along with China, the Russian Federation has been one of the world's most notorious sites of software and music piracy. The different responses of the United States to the situation in these two countries are assessed by Neigel (n 5), 179, 196-98. However, it is worth noting that differences have arisen over the treatment of these industries in the TRIPs Agreement, not only between industrialised and developing countries, but also, among industrialised countries. For example, see Stephen Fraser's interesting analysis of the conflict between the United States and France (with support from

requirements of the TRIPs Agreement in relation to copyright have set the standard by which the development of copyright norms, and procedures for their implementation and enforcement, are measured in Russia.

The transition from the Berne Convention to the TRIPs Agreement has had mixed implications for moral rights. In contrast to most other provisions of the Berne Convention, Article 6*bis* is not incorporated into the TRIPs Agreement. Article 9.1 of the Agreement specifies that, "Members shall not have rights or obligations under this Agreement in respect of the rights conferred under Article 6*bis* of [the Berne]... Convention or of the rights derived therefrom." However, members of the TRIPs Agreement "shall comply with Articles 1 through 21 of the Berne Convention." In theory, the TRIPs Agreement therefore establishes a certain minimum standard for the protection of moral rights that no member country should disregard – though the style of implementation and the level of enforcement required remain open questions.

Implications of the TRIPs formula for moral rights are far from clear. On the one hand, by specifically excluding them from the general dispute-settlement and enforcement regime of the WTO, the Agreement may signal a loss of prestige and status for these rights at the international level, leading to the trivialisation of authors' moral interests in member countries. On the other hand, the non-standardised approach to moral rights may present certain practical advantages for countries who are especially concerned about cultural policy. It may allow them to use moral rights as a relatively flexible instrument of

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Canada) in relation to the film industry: S Fraser "Berne, CFTA, NAFTA & GATT: The Implications of Copyright *Droit Moral* And Cultural Exemptions in International Trade Law" (1996) 18 Hastings Comm & Ent LJ 287, 305-20.

domestic policy, and to escape the coercive constraints of international trade requirements.[46]

Current developments suggest that the reference to Article 6*bis* of the Berne Convention in the TRIPs Agreement may have encouraged at least some jurisdictions to think more seriously about protecting authors' moral rights. The adoption of moral rights in the United Kingdom in 1989, in anticipation of copyright internationalisation to come in the 1990s, may be taken as one illustration. More recent cases include the adoption of comprehensive moral rights legislation in Australia, in the year 2000, and rumours of an attempt to harmonise moral rights in the European Union.[47] Given the growing importance of international standardisation in copyright law, the exclusion of moral rights from the TRIPs Agreement may eventually become an awkward anomaly, and a situation that is not viable in the long-term.[48]

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[46]Member countries of the TRIPs Agreement are required to join the Berne Convention and, therefore, to implement the minimum standards of moral rights protection in Article 6*bis*. Of course, it is not clear what the international copyright community can do to persuade countries to adopt them – membership in the Berne Convention is assumed to be undertaken on good faith – and this is precisely the reason why moral rights were excluded from the enforcement measures of the TRIPs Agreement.

[47]The Australian amendments are discussed by E Adeney "Defining The Shape of Australia's Moral Rights: a Review of The New Laws" (2001) 4 IPQ 291.

[48]The TRIPs Agreement has inaugurated an active period of international standardisation. The most important international processes, which are developing in parallel with the TRIPs Agreement, are probably the continued elaboration of international copyright in the WIPO Internet Treaties, and the copyright harmonisation directives of the European Union, which released its most ambitious directive to date, on Copyright in the Information Society, in 2001. See J Reinbothe & S von Lewinski "The WIPO Treaties 1996: Ready to Come Into Force" (2002) 24(4) EIPR 199, for an attempt to assess the likely impact of the treaties, and the Directive 2001/29/EEC of the European Parliament under the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and

The ambiguous attitude towards moral rights in the TRIPs Agreement is symptomatic of a much larger phenomenon, a fundamental shift in the character of international copyright law. Copyright is a hybrid sphere of law, combining private and public law concepts, individual and social interests, and commercial and cultural dimensions. The precise equilibrium achieved among these diverse interests in different copyright instruments is a reflection of the special policy concerns that are predominant in each jurisdiction. For example, moral rights have been protected in unique formulations that exceed the scope of Article 6*bis* of the Berne Convention in countries as diverse as France, Germany, India, and Mali.[49] However, the TRIPs Agreement does not favour regulatory subtlety, preferring, instead, to aim at the achievement of standard and

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related rights in the information society (22/06/2001), OJ L167/10, available online through the EU database of Community Legislation in Force, Eur-Lex: <http://http://europa.eu.int/eur-lex>.

[49]See the *Code de la propriété intellectuelle du 1er juillet 1992,* JO, 3 juillet 1992, Titre 2, Chapitre 1, Article L 121-1; available online: <http://www.adminet.com/code>. The CPI is a codified version of two earlier laws, the *Loi no 57-298 du 11 mars 1957 sur la propriété littéraire et artistique* , JO, 14 March, p 2723 (as am JO, 19 April 1957, p 4131) and the *Loi No 85-660 du 3 juillet 1985 relative aux droits d'auteur et aux droits des artistes-interprètes, des producteurs de phonogrammes et de vidéogrammes et des entreprises de communication audiovisuelle,* JO, 4 juillet 1985, p 7495. S 57 of the *Indian Copyright Act 1957,* Act 14 of 1957, as amended, available online: The Institute of Intellectual Property Research and Practice, Haryana, India <http://www.naukri.com/lls/copyright/section12.htm>. Article 29 of Mali's *Copyright Statute,* under "Nature of the Rights," provides that, "Copyright includes attributes of an intellectual, moral and economic nature." Article 30 goes on to define " attributes of an intellectual and moral nature" as being "imprescriptible and inalienable." See *Copyright Statute: Ordinance Concerning Literary and Artistic Property* (No. 77-46CMLN), July 12, 1977 in Copyright Laws of the World Supplement 1979-1980 [date of entry into force, July 15, 1977]. The official French text is published in the *Journal Officiel de la République du Mali,* No. 525, of August 1, 1977.

consistent protections for copyright throughout the world.[50]

It is relatively simple to account for this trend. Economic growth and prosperity, particularly in the industrialised world, are increasingly dependent on technological innovation, and copyright has become the dominant legal mechanism for the regulation of new technologies. Culture has also acquired a new importance in this environment, since cultural pursuits provide much of the "raw material" for the "Information Society." Cultural industries – film, publishing, and recording, among others – seem to have become more important in modern societies, economically and socially, than ever before. The implications of these developments for culture are quite ambivalent. While artists and creators of many kinds have much to gain from the opportunities presented by the "Digital Age,"[51] their works, and through them, culture as a whole, are vulnerable to exploitation, potentially becoming mere tools for the achievement of commercial ends.

(c) European Copyright Harmonisation: An Alternative View?

A rival process of development in international copyright law at the European Union may help to achieve greater equity in the long term between the commercial and the cultural faces of copyright. To date, the European Union has issued six copyright harmonisation

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[50]See Article 1.1 of the TRIPs Agreement: it is technically possible to enact standards of moral rights protection that exceed the minimum standards specified in TRIPs. However, in the process of law reform in developing and transitional jurisdictions, the international community, particularly the United States, has consistently advised these countries against the adoption of extensive moral rights protection. Moral rights are a special case: concerning most aspects of copyright protection, meeting TRIPs minima is, in itself, a challenge for less-developed jurisdictions.

[51]For example, see the discussion in MT Sundara Rajan "Moral Rights in the Digital Age: New Possibilities for the Democratisation of Culture" (2002) 16(2) International Review of Law, Computers & Technology 187.

directives.[52] Through them, the EU has attempted, not only to implement the minimum standards of protection required by the Berne Convention and the TRIPs Agreement, but also, to shape European copyright law creatively. The harmonisation directives try to anticipate the direction of future technological growth, and to reconcile the diverse legal and cultural traditions of EU members.

In addition to the WTO and the TRIPs Agreement, the EU has also had a strong impact on copyright developments in Russia. Since Russia's legal traditions are closely patterned on the civil law cultures of Western Europe, particularly France and Germany, European Union law has been a natural source of guidance for Russian reform. While Russia's long-standing tradition of studying Western European models has made the assimilation of European thinking on copyright relatively easy, a tendency towards greater recognition of copyright's cultural side at the EU has also encouraged Russia to consider the implications of its copyright reforms for cultural issues. As Michael Elst observes:

> With regard to the transition to a market-economy, the RF Copyright Law tries to reconcile two seemingly contradictory objectives. Copyright is, on the one

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[52]Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs (17/05/1991), OJ L122/42; Council Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (27/11/1992), OJ L346/61; Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission (06/10/1993), OJ L248/15; Council Directive 93/98/EEC of 29 October 1993 harmonising the term of protection of copyright and certain related rights (24/11/1993), OJ L290/9; (Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases (27/03/1996), OJ L77/20, and Directive 2001/29/EEC of the European Parliament under the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (22/06/2001), OJ L167/10. The directives are available online through the EU database of Community Legislation in Force, Eur-Lex: <http://http://europa.eu.int/eur-lex>.

> hand, a legal mechanism to stimulate the creation and dissemination of works of art and literature *in the market.* Indeed, each exclusive right to an original work constitutes an intangible, marketable asset in the hands of the author, separate from and additional to the author's property rights in the material object in which the work has been incorporated. On the other hand, the legislature recognises that the author is confronted in this market with financially strong publishers, film producers, etc. who are keen to exploit the author's work at as low a cost as possible (with the author himself being one of the cost factors the company tries to minimise). In such a context, copyright legislation has to fulfill a social function as well, trying to protect the author in his weak economic position *against the market.*[53]

However, it is difficult to assess the overall impact of EU law on Russia and other countries involved in intellectual property reform. Circumstances impose two serious limitations on the international viability of EU models. The first is a pragmatic consideration: although the EU is developing a legislative framework for copyright in the era of digital technology, its international influence remains somewhat secondary to that of the WTO. Indeed, it is difficult to assess the relationship between EU and WTO copyright initiatives at the international level. EU law appears to develop as much in parallel to the WTO as in overlapping directions. However, the EU model of harmonisation falls short of presenting a viable international alternative to the WTO system. This leads to a second consideration, that EU harmonisation has failed to produce comprehensive models of authors' rights for the international arena. Moral rights, in particular, remain an area of continuing controversy in the EU, as in the TRIPs system, and are very far from being integrated into the harmonisation scheme.[54] Nevertheless, EU models may ultimately be

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[53]M Elst "The Interaction of European Community and Russian Copyright Law: A Matter of Partnership Incorporation" 15(3) (1996) Rev Cent & E Eur L 267, 272.

[54]Harmonisation of moral rights has not yet been attempted, in spite of the EU's long-standing concerns about this area and the dangers of leaving it outside the

used to improve the standards of protection in Berne and TRIPs, especially in selected areas related to technology and culture, and provide guidance for post-socialist countries beyond what is available through the wider international system.

In the case of Russia, as in most developing and transitional countries, WTO membership has been an overwhelming economic priority of the 1990s.[55] Copyright reform, above all, has been a means to this intensely desired end.[56] The EU is one of only two international organisms – possibly in addition to WIPO – that may have sufficient clout to make an alternative view of copyright available to the international community and, in particular, to countries actively engaged in copyright reform. It remains to be seen whether the European approach will counterbalance the commercialism of the TRIPs Agreement in the long term, and if so, how this philosophical shift in the international copyright arena will play itself out in law reform.

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harmonisation process. For example, see the discussion in Commission of the European Communities *Green Paper on Copyright and Related Rights in the Information Society* (19.07.1995), COM (95) 382 final, VII. However, it is to be expected that another attempt may soon be made.

[55]For example, see the comments on Russia's desire and prospects for WTO accession in "Vladimir Putin's long, hard haul" Special Report in The Economist, May 18th-24th 2002, 24, 25. The article points out that Russia is unlikely to succeed in its bid for WTO membership "before the middle of the decade."

[56]The only possible exceptions to this situation might be the post-socialist countries which have been hoping to join the EU, for whom conformity with European legislation is an equal priority. For example, see the discussion of the EU influence on transitional countries in S von Lewinski "Copyright in Central and Eastern Europe: An Intellectual Property Metamorphosis" (1997) 8 Fordham Intell Prop Media & Ent LJ 39, 45-51. Nevertheless, the prospect of EU accession has at times seemed chimeric to Central and Eastern European countries, as accession paradoxically seems to grow more elusive with the passage of time.

(d) A Renewed Role for WIPO: The Internet Treaties

The adoption of the TRIPs Agreement signalled the movement of intellectual property rights out of the United Nations framework and into the international trade arena. International intellectual property matters would now be dealt with by the World Trade Organisation. The future role of the World Intellectual Property Organisation (WIPO), a specialist agency of UNESCO that had previously administered international conventions on intellectual property rights, was thrown into doubt by these new arrangements. Provision was made for cooperation between WIPO and the WTO, which stood to benefit from WIPO's unparalleled expertise in international intellectual property legislation and practice.[57] The structure of the TRIPs Agreement, which operates by incorporating the relevant substantive provisions of the WIPO conventions, suggested that WIPO would be relegated to a definite secondary role after TRIPs came into effect – perhaps in the provision of advice to developing and other countries in need of help with law reform.

It has been interesting to observe WIPO's success in reinventing itself as a force for the development of international copyright law alongside the TRIPs Agreement. WIPO's focus initially seemed to shift to alternative ways of developing copyright, rather than attempting to build international rules exclusively through treaties.[58] Nevertheless, WIPO

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[57]For example, see Article 68 of the TRIPs Agreement (n 39).

[58]WIPO's focus on bringing greater simplicity to international intellectual property regulation is apparent in the discussion of its mandate on its website: <http://www.wipo.org/about-wipo/en/index.html?wipo_content_frame=/about-wipo/en/gib.htm>.

has developed two highly influential copyright treaties since the TRIPs Agreement entered into force, the Copyright Treaty and the Performances and Phonograms Treaty of 1996.

The two instruments are known together as the WIPO Internet Treaties, because of their innovative approach to the treatment of reproduction rights in the age of Internet communication.[59] However, as Jorg Reinbothe and Silke von Lewinski point out,

> [C]alling the WCT and the WPPT 'Internet treaties' is an understatement: examples such as the right of distribution or rental rights demonstrate that the Treaties are equally relevant, and even crucial, for the traditional environment of exploitation of copyright and neighbouring rights. In particular, provisions which govern new territory – notably on the right of making available, the protection of technological measures, on the protection of rights management information – clearly constitute highlights of future-oriented international law-making.[60]

The Performances and Phonograms Treaty is also unique among international copyright instruments in introducing a valuable innovation in the area of moral rights: it creates, for the first time, an international moral right for performers.[61] Article 5 of the Treaty extends the moral rights recognised in Article 6*bis* of the Berne Convention to performers. The right is well adapted to the somewhat different character of performances, as opposed to other works, in the sense that the performer's moral right applies both to recorded and "live aural" performances; fixation *per se* is not required. However, it should be noted that the provisions of Article 5 of the WPPT do not apply to audiovisual works: not surprisingly, given the history of moral rights and films, particularly in the United States, performers' moral rights are excluded from films.

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[59]For example, see Article 8 of the WIPO Copyright Treaty (n 33).

[60]Reinbothe & von Lewinski (n 48) 208.

[61]Reinbothe & von Lewinski (n 48).

Both treaties have come into effect recently – the Copyright Treaty on March 6, 2002, and the Performances and Phonograms Treaty on May 20, 2002. The decision to extend moral rights to performers is a clear departure from the TRIPs approach to moral rights. If the Internet treaties prove to be as influential as some commentators believe they will be, the Performances and Phonograms Treaty, at least, may act as a counterweight to the mistrust of moral rights in the TRIPs Agreement.

Interestingly, a number of post-socialist jurisdictions have ratified the Internet Treaties.[62] The Russian Federation is not yet among them, but it has included moral rights for performers in its copyright law, suggesting that membership in the future is a serious possibility.[63]

C. THE CURRENT STATUS OF MORAL RIGHTS IN RUSSIAN COPYRIGHT LAW

Moral rights in the transitional years immediately preceding the dissolution of the Soviet Union reflected the liberalising trends of Gorbachev's administration. As the *perestroika* era was succeeded by the crisis and collapse of the Soviet Union, Soviet legal measures, including, to some extent, those adopted by the *perestroika* leadership, were thrown into disrepute. Not only was Soviet law unsuited to the changed political circumstances of the ex-Soviet Union, but it was also believed to stand for radically inappropriate social

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[62]For example, members of the Internet Treaties include the Czech Republic, Bulgaria, and Hungary; CIS members are Belarus, Kyrgyzstan, Ukraine, and the Republic of Moldova. A list of contracting parties to the two treaties may be found on the WIPO website: <http://www.wipo.org/treaties/documents/english/word/s-wct.doc>, and <http://www.wipo.org/treaties/documents/english/word/s-wppt.doc>.

[63]See the WIPO website (n 33).

concepts. A separate reason behind the discrediting of Soviet law was the unprecedented involvement of international experts, who were contemptuous of the Soviet legal legacy, in consolidating a post-Soviet legal infrastructure – a trend that would only intensify over the first decade of Russian democracy. Copyright law, and intellectual property rights in general, were among the first areas of economic and commercial law that reformers deemed to be in need of change after the dissolution of the Soviet Union.

For all of these reasons, the copyright provisions of the 1991 USSR Fundamentals of Civil Legislation, although they were extensive and represented significant modernisation over the previous law, were regarded as strictly temporary measures. They remained in effect until special legislation on copyright was prepared and adopted in 1993. However, the treatment of moral rights was not necessarily improved in the Copyright Act of 1993. Rather, the Copyright Act effects a subtle shift in the focus of moral rights provisions, which may be attributed in large part to the importance of accession to the TRIPs/WTO intellectual property regime for Russia. For these reasons, it is important to consider the approach of the 1991 Fundamentals to moral rights, before looking at how the treatment of moral rights evolved and changed in the 1993 Copyright Act.

1. The 1991 USSR Fundamentals of Civil Legislation[64]

A consideration of authors' rights in Section IV of the Fundamentals of 1991 shows that moral rights provisions were greatly expanded in scope over the Soviet legislation of

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[64]N 20 .

1961.[65] Article 135 on the "Authors'' Rights" provides for the author to exercise exclusive rights over his work, including the moral right of authorship, "the right to his or her name," a right to the integrity of the work, a right of publication, and a right of use with an important "moral" dimension. It was the first time the exclusive nature of authorship rights had been recognised in Soviet legislation since 1928.[66]

In relation to all of these moral rights, the 1991 legislation either introduced new protections or significantly improved upon existing ones. The right of authorship and the right to one's name are new rights; they respond to characteristic problems confronted by authors in Soviet times, such as the appropriation of works and manuscripts, and the systematic defamation and destruction of authors' reputations for political reasons.[67] The right of publication is also identified explicitly, in contrast to the Soviet legislation. Open recognition of this right is especially meaningful in a country where political obstacles to publication imposed silence on generations of writers.

The integrity right is defined in precise and unusually strong terms in the 1991 Fundamentals, as the right of the author "to keep his or her work intact." This right seems to be even more far-reaching than the idea of a right to the "inviolability" of a work under Soviet law. Inviolability, though strong, seems a more general concept; on the other hand,

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[65]Fundamentals of Civil Legislation of the USSR and the Republics, *VVS SSSR,* 1961 No 50, Item 525; available in English translation on Garant; an English version also appears in Appendix A of MA Newcity *Copyright Law in the Soviet Union* (Praeger Special Studies New York 1978) 181.

[66]USSR Laws 1928, no 246 (16 May 1928), Section 7.

[67]For example, see the interesting discussion of the repeated condemnation and return to official favour experienced by Shostakovich, in Fitzpatrick (n 1) 183-215.

keeping a work "intact" is an utterly unambiguous indication that any alteration of the work without the author's consent, even if it is undertaken by a publishing house, is prohibited. The omission of "prejudice to honour or reputation," an important departure from Article 6*bis* of the Berne Convention, is retained from the Soviet legislation, but given new life in the 1991 Fundamentals. This formula for the right of integrity responds fundamentally to censorship under the Soviet regime and, as such, seems even more significant than in jurisdictions with traditionally strong moral rights protection, such as France.

As for the right of use, it includes the right of the author to produce translations and revised editions. The right of use stands in contrast to both the long-standing principle of freedom of translation that dominated early Russian copyright, and the idea of government control that became the accepted norm after Soviet accession to the Universal Copyright Convention in 1973.

The Fundamentals of 1991 are generous to the author in their treatment of the inalienability and inheritability of moral rights. Article 135.6 provides that the author's right to the integrity of the work, as well as his right of publication, shall be inherited by his "successors." In view of the following provision that restricts the rights of the "other successors" to inheriting a right of use only, it is clear that the moral rights, in keeping with their "personal" character, can descend only to the author's heirs, rather than his successors in title.[68]

For the first time in Russian or Soviet copyright law, Article 137 sets out a specific

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[68]The moral right of the author, in contrast to the property rights, is considered to be vested in the author, rather than the work; it is for this reason that his personal heirs can inherit the right, but not his successors in title.

duration for authors' moral rights. Article 137.3 provides that the rights of authorship, name, and integrity "shall be protected permanently." In this respect, the transitional legislation follows the tradition of protection in strong moral rights jurisdictions, especially France.[69] Presumably, since the moral rights are inherited by the author's heirs, it is their prerogative to enforce them after the author's death. However, Section IV of the Fundamentals does not address specifically the methods of enforcing moral rights *post mortem auctoris.*[70]

Finally, the Fundamentals take the unusual step of protecting the moral rights of performers. Article 141.1 provides that performers, actors, stage managers, and conductors shall have a right to the protection of their name, as well as a right to the protection of their "performance or rendition" from distortion. Performers have traditionally been viewed as "disseminators" of the works of composers, rather than creators and authors in their own right. The decision to protect performers' moral rights carried the Soviet Union forward into the vanguard of a new development in moral rights doctrine. The idea of a moral right for performers was not introduced into international copyright law until the adoption of the WIPO Treaty on Performances and Phonograms, and then, only for aural performances and not audio-visual ones.[71]

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[69]See Article L 121-1 of the *Code de la propriété intellectuelle* (n 49).

[70]It should be noted that article 135.6 provides for the author's heirs to inherit the moral rights of integrity and publication, but it does not mention the author's right to his name. Given the general framework of protection, it seems consistent with the logic of the legislation to infer that the right to a name is also inherited by the author's heirs, and falls to them to be protected after his death.

[71]N 33 .

The extensive treatment of moral rights in the 1991 Fundamentals points to the perception of Gorbachev's administration that the government needed to make amends for the oppressive treatment of authors and artists under the earlier Soviet regime. Due to the collapse of the Soviet Union as a political entity in 1992, the Fundamentals came to serve as transitional legislation, and were effectively replaced by the Copyright Act of 1993. In the two intervening years, Soviet law reform moved rapidly into a new universe, where democratisation, market economics, and conformity with "private" international law became the primary forces driving copyright reform. In this radically changed environment, how did the moral rights provisions of 1991 fare? Were they retained in the Copyright Act, and if so, in what form?

2. The Copyright Act of 1993

Moral rights continued to enjoy substantial protection in the Copyright Act of 1993. However, the flavour of the Act is quite different from that of the 1991 Fundamentals. The choice of a specialised legislative act dealing with copyright matters in itself represents a major change: it removes copyright from the ambit of the Civil Code. The decision to make this basic structural change, after a long-standing commitment to including copyright in Russian civil legislation, may well reflect American aversion to the idea. In particular, many provisions of the RSFSR Civil Code of 1964 continue to be in force, and a close study of the Draft Civil Code provisions on copyright that are currently circulating suggests that the old Civil Code has influenced the current legislation, particularly at the structural

level.[72] The Americans appear to be quite concerned that the socialist-era provisions serve as a poor foundation for compliance with TRIPs. For example, the International Intellectual Property Alliance (IIPA), a special interest organisation that works closely with the US Trade Representative, observed in its Special 301 Recommendations of February 24, 1997:

> There is a dangerous development brewing in several C.I.S. countries, including the Russian Federation. A comprehensive reform of the Civil Code of these nations is underway. Efforts to revise the civil code to include copyright provisions in these codes should be opposed. For example, in the case of Russia, previous drafts of the civil code reforms included IPR provisions which were completely incompatible with the bilateral Trade Agreement, the Berne Convention and TRIPs.... Each CIS country should enact separate copyright laws rather than build on the foundation of the Soviet-era civil codes.[73]

The moral rights provisions in the new Act reveal a strong Western influence, in terms of both structure and content. Article 6*bis* of the Berne Convention is the model on which moral rights protection is based. The distinctiveness of earlier expressions of moral rights in Russian laws has largely been abandoned. A general reduction in their legal standing is evident and can probably be attributed to the secondary importance of moral

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[72]The structure and content of particular provisions on authors' rights in the Draft Civil Code closely resemble the 1964 provisions; for example, see the definition of the integrity right. The provisions of the draft code are discussed in detail below.

[73]The IIPA report is available online: <http://www.iipa.com/rbc/1997/rbc_c.i.s._301_97.html>. The "Special 301" measures of the American *Omnibus Trade Act* may be adopted by the United States to take unilateral action against a country that is not maintaining adequate intellectual property standards; whether or not these actions would be consistent with international trade practice is a separate question. The provisions are assessed by Henderson (n 22) 652. Russia continues to be on the Priority Watch List in 2002: see the IIPA recommendations, available online: <http://www.iipa.com/special301_TOCs/2002_SPEC301_TOC.html>. General information about the IIPA may also be found online: <http://www.iipa.com/aboutiipa.html>.

rights, as opposed to economic rights, in the international copyright regime as represented by TRIPs.

For the first time in the history of Russian copyright law, the Act of 1993 introduces a clear separation between the moral and economic rights of authors. The two areas are dealt with in two separate articles. Article 16 on "Economic Rights," like the Fundamentals of 1991, affirms the exclusive nature of the author's right in his works. Article 15 on "Moral Rights" provides for the "enjoy[ment]" of five moral rights. These include a "right of authorship," which protects the right of the author to be acknowledged as the author of his own work; a "right to be named," which allows the author to exploit his work, not only in his own name, but also, under a pseudonym, or anonymously;[74] a "right of disclosure," which allows the author to determine the circumstances of first publication, and also includes a right to "disavow or withdraw" the work from circulation; and, finally, a "right to the protection of the author's reputation" that replaces the right of integrity, and allows the author to protect his work from any distortion or derogatory act that is "liable to prejudice his honour or dignity."[75] It is interesting to note that the right of withdrawal receives extensive treatment: Article 15.2 provides a detailed description of the circumstances in which the right may be exercised, including the author's obligation to compensate the user of the work for any damages resulting from the decision to withdraw.

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[74]Clearly, the right to exploit the work under a pseudonym, or anonymously, is the crux of the distinction between this right and the preceding right to be acknowledged as the work.

[75]See I Pozhitkov "Copyright and Neighbouring Rights Protection in the Russian Federation" (1994) 20(1) Rev Cent & E Eur L 53, 62-63.

Two noteworthy changes have occurred in the spectrum of rights protected since 1991. First, the broad and extensive list of rights in the Fundamentals, which is inclusive and not limited to the rights listed in Article 135.2, has been replaced by an apparently "closed" list of moral rights in Article 15 of the Copyright Act. Article 15 provides, simply that "[t]he author shall enjoy the following moral rights in relation to his work." The combining of moral and economic rights in one section on the author's rights emphasises the overlapping implications of moral and economic interests arising from the creation and use of creative works – for example, in relation to translations – a perspective that has been lost in the 1993 Act.

Secondly, the recasting of the integrity right as a right of reputation in the Copyright Act is striking. The right of reputation clearly shows the imprint of the right of integrity in Article 6*bis* of the Berne Convention, which prohibits only those acts that would negatively affect an author's "honour or reputation" through their dealings with the work. However, the provisions of Article 15 actually seem somewhat weaker than Article 6*bis*. Article 6*bis* prohibits "any distortion, mutilation or other modification of, or other derogatory action in relation to, the... work"; Article 15 prohibits only "any distortion or other derogatory act." The language seems sufficiently precise to imply an intentional restriction on the scope of Article 6*bis,* but much will depend here on the interpretation of the Russian courts. Although Article 15 protects a right of "reputation," it does not explicitly provide for recourse in the case of damage to an author's reputation; it is only concerned with the possibility of prejudice to his "honour or dignity." However, it does seem to allow a flexible standard of proof, since the derogatory act need only be likely – "liable" – to cause

damage. If, indeed, Article 15 does not meet the standard of protection required by Article 6*bis,* the exclusion of moral rights from the TRIPs Agreement means that the Russian Federation does not face any overwhelming international pressure to improve the protection of the integrity right.

On the new right of integrity, Pozhitkov's comments seem apt:

> The right to integrity was rescinded and substituted by the right to protection of an author's reputation [in the 1993 Copyright Act] which permits him to object to any distortion of a work or any derogatory action in relation thereto [that is "liable to prejudice his honour or dignity"]. It remains to be seen how broadly the courts will interpret this provision.[76]

When viewed in the context of Russian copyright history, the narrowness of the integrity right in the Copyright Act is surprising. The right to the "inviolability" of the work is a long tradition in Russian copyright law, and, even in Soviet times, it was given lip-service in copyright jurisprudence. The 1991 Fundamentals reflected this tradition, and arguably strengthened it by assuring authors that they had the right to keep their work "intact." It is quite probable that the change, once again, reflects the American influence on Russian law reform: the integrity right is generally acknowledged to be the most powerful moral right of the author, and the American film industry, which has already faced moral rights problems in France, may well fear the implications of a strong Russian

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[76]Pozhitkov (n 75) 63. However, he goes on to observe: "Since in the past there was no concept of monetary compensation for moral damage, authors did not usually submit the issues of violations of their moral rights to courts." This analysis of why moral rights claims did not find their way into the Soviet courtrooms is slightly surprising, both from the perspective of moral rights doctrine, and in view of the generally altruistic reputation of the Soviet dissident community.

right of integrity for their exports to Russia.[77] In contrast to the integrity right, however, the rights of authorship and name have been retained in Article 15 of the Copyright Act, perhaps out of sensitivity to the Soviet-era treatment of authorship.

Article 15 also specifies that moral rights are independent of economic rights, and may continue to be exercised by the author even after he has relinquished his economic rights. The suggestion of inalienability in this provision is not further clarified by provisions on the possibility of waiving moral rights.[78] However, Article 27 on the Term of Copyright goes on to deal with the issue of the duration of moral rights. Article 27.1 provides that the right of authorship, and the author's right to his name and the protection of his reputation, "shall be protected without limitation in time." While moral rights have generally been acknowledged in Soviet jurisprudence to be protected in perpetuity,[79] the Copyright Act of 1993 followed the 1991 Fundamentals in providing explicitly for the perpetual protection of the moral rights recognised in the Act.

The related question of whether moral rights may be inherited receives a detailed

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[77]See the *Huston* case, where the colorisation of *The Asphalt Jungle* was prohibited by French courts as a violation of the directors right of integrity: *Angelica Huston* c *Turner Entertainment,* CA (Court of Appeals) Versailles, ch réunies, Dec 19, 1994, 164 RIDA 389 (1995), on remand from Cass 1e civ, May 28, 1991, 149 RIDA 197 (1991). It is of course likely that moral rights issues may be of concern to other US copyright industries as well.

[78]For example, the widespread availability of waivers is considered to weaken substantially the moral rights provisions in the United Kingdom *Copyright, Designs and Patents Act* of 1988: see WR Cornish "Moral Rights under the 1988 Act" (1989) 11(12) EIPR 449.

[79]See B Karakis "Moral Rights: French, United States and Soviet Compliance with Article 6bis of the Berne Convention" (1994) 5 Touro Intl L Rev 105, 133-34. Her assertion follows the interpretation of the well-known Soviet legal scholar, Serge Levitsky.

treatment in Article 29 on the "Transfer of Copyright by Succession." Like the Fundamentals, the Act refers to "succession" in the specific sense of succession in title. In keeping with their "personal" character, the three principal moral rights of authorship, name, and reputation cannot be transferred by succession; they can only be inherited by the heirs of the author.

The Copyright Act takes the laudable step of addressing the potentially problematic issue of who is to enforce an author's moral rights after his death. This problem was beyond the scope of the transitional copyright provisions in the Fundamentals of 1991. Article 27.2 of the Copyright Act provides that the right to be named as the author of one's own works and the author's right to the protection of his reputation can be enforced by an executor appointed for this purpose by the author, or, in the absence of such an appointment, by the author's own heirs or by "an agency of the Russian Federation especially empowered to do so" after his death. It is interesting to note the implied legislative preference for an "executor of moral rights." Practical problems may well arise from entrusting them to the author's heirs, particularly where the author's descendants are motivated by personal considerations or prevented by insufficient knowledge to assert moral rights for the benefit of the author's interests.[80] However, a state agency for administering moral rights *post mortem auctoris* does not yet appear to have been created.[81]

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[80]This issue is discussed in M Sundara Rajan "Moral Rights in the Public Domain: Copyright Matters in the Works of Indian National Poet C Subramania Bharati" (2001) SJLS 161, 177-80.

[81]Writing in 1993, Elst mentions the Russian Agency for Intellectual Property that may have been the natural agency to exercise these rights: see Elst (n 26) 103. However, the Agency was abolished by an Edict of October 7, 1993, and a "new" authors' society –

Even if a state agency responsible for moral rights existed, entrusting moral rights protection to the state at some point in their life-cycle may, in contrast to countries such as France and Germany, present problems in the Russian Federation. After all, Russia does not have a tradition of respecting press freedom, and creative writers have historically paid a very high price for exercising their profession in this restrictive political environment. It now seems incongruous for the post-Soviet state to become responsible for safeguarding authors' moral rights. Moreover, in the past, the Union of Soviet Writers was charged with the implementation of authors' rights; at the time of Soviet accession to the UCC, the Writers' Union was revamped to deal with the enforcement of Soviet copyrights abroad. However, the history of the Union was one of antagonism to the dissident community, and indeed, it often became an instrument of repression against its own members.[82]

More generally, the Russian Copyright Act of 1993 is quite original in addressing the vulnerability of authors' moral rights in the public domain. The importance of moral rights does not evaporate when copyright in creative works expires and they enter the public domain. Rather, moral rights in public domain works assume a broader significance

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what Pozhitkov calls "an independent public organisation" – was established. However, as Pozhitkov points out, the society actually reflects the structure and leadership of both the Agency and the earlier VAAP. See Pozhitkov (n 75) 82-83.

[82]See the discussion of the role played by the Union of Soviet Writers (VOUAP) in maintaining ideological conformity between its members and the Communist Party, in Hosking (n 3) 222-25. The functions of VOUAP are described in Newcity (n 65) 25-26, and suggest an outstanding level of state support through the agency for the activities of writers favoured by the state. A generally positive view of the agency, in its later incarnation as the Copyright Agency of the USSR (VAAP), may be found in an article written shortly after its establishment, from within the Soviet Union: NS Roudakov & IA Gringolts "L'agence de l'URSS pour les droits d'auteur (VAAP)" (1974) RIDA 3.

for cultural heritage. In a country like the Soviet Union, where the integrity of works as well as the integrity of authorship, attribution, and reputation were vulnerable to attack by the state, the continued protection of moral rights in the public domain may have considerable value. Article 28.2 states that the three main moral rights of authorship, name, and reputation, must be respected when using works in the public domain. Article 28.3 sets up a *domaine public payant* scheme for collecting a special royalty from public domain works to be paid into "an authors' professional fund or to an organisation for the collective administration of the economic rights of authors." The scheme could contribute to the welfare of the post-Soviet creative community; it also has the symbolic value of representing a benefit flowing from the repression of past writers to future generations of authors. However, details of the plan, including who will receive the funds and how they will be spent, still need to be worked out in greater detail.[83]

One more aspect of the protection of moral rights *post mortem auctoris* is noteworthy: Article 27.5 provides for the protection of copyright and moral rights in the case of an author who has been "rehabilitated posthumously after having been the subject of repressive measures." In effect, this provision attempts to compensate authors for the lack of enjoyment of the rights during their lifetime by beginning to run the copyright term from January 1 of the year following the rehabilitation decree. Since the repression of authors, leading to the denial of their legal rights, was widespread during Soviet rule, this

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[83]An interesting discussion of a *domaine public payant* scheme recently proposed in Germany may be found in A Dietz "Term of Protection in Copyright Law and Paying Public Domain: A New German Initiative" (2000) 22(11) EIPR 506, 508-11. See also the related discussion of *domaine public payant* in Sundara Rajan (n 80) 183-85.

provision is an important gesture of reconciliation, and may also have practical implications for authors' descendants, and for their reputations.

The Copyright Act follows the innovative approach of the Fundamentals to performers' rights, including its provisions recognising the performer's right to be named, and to ensure the protection of his performance "against any distortion or other derogatory act liable to prejudice his honour or dignity." These protections may be found in Article 27 of the Copyright Act on the "Rights of the Performer." However, this moral right in the Copyright Act is applicable only to the performer, and, unlike the 1991 Fundamentals, does not offer protection to actors or stage managers. Here, too, the influence of the international standard is apparent, including the concerns of the American film industry about the consequences of allowing actors to claim moral rights. Moreover, Russia, too, may have wanted to protect its historically important film industry from complications arising out of moral rights.

The Copyright Act contains a number of general provisions that support the regime for authors' moral rights. As Article 9.1 affirms, copyright continues to be an automatic right, arising out of the "mere fact of [the] creation" of a "scientific, literary or artistic work." The provisions of Article 12 on translations and other derivative works ensure that the authors' rights, including moral rights, will be protected by those who translate or adapt a work.[84] In particular, Article 12.1 includes translations, adaptations, arrangements, or other "transformations" of the work, making the moral right particularly well-suited to the

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[84]The provision will be familiar to UK lawyers; similar measures may be found in Article 21 of the UK Copyright, Designs and Patents Act 1988, c 48.

ever-changing forms of creative work in today's environment of digital technology.

As the most specialised and up-to-date legislation in the field, the Copyright Act is the primary legislation currently dealing with copyright in the Russian Federation. In contrast to certain other areas of law, the Copyright Act specifically displaces the provisions of the Fundamentals of 1991 on authors' rights. However, the Act does not explicitly replace the provisions of the 1964 RSFSR Civil Code on copyright. Rather, if the provisions of the old Civil Code are in conflict with those of the Copyright Act, the Copyright Act will prevail. Since Section IV of the Civil Code officially continues to be in force, the theoretical possibility of applying additional or complementary provisions arises.[85] In the light of this situation, does the Civil Code have any practical implications for the protection of authors' moral rights in Russia?

3. The 1964 RSFSR Civil Code

The provisions of the 1964 RSFSR Civil Code on moral rights adhere closely to the USSR

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[85]But see Pozhitkov (n 75) 54-55. Pozhitkov points out that, after the dissolution of the Soviet Union, "[t]here was a period when the law governing relations in the field of copyright protection was a strange mixture of the old 'Civil Code' and new 1991 Fundamentals." However, he believes that "[t]he new Law [of 1993] replaces the copyright legislation of the former USSR, and the RSFSR as well as the 1991 Fundamentals." He does not cite any authority for this conclusion, which seems to be based, understandably, on the common sense view that the old provisions are sure to be inconsistent with the new ones and, therefore, replaced by them. He does not seem to be concerned with the technicalities of the official position. Nevertheless, the RSFSR Civil Code provisions on copyright continue to be presented as valid in at least one important legal source, the Russian electronic legal database, Garant. Since the scope of this study is comprehensive, I have preferred to deal with the possible implications of the Civil Code for current Russian copyright, rather than risk presenting an incomplete picture of the current state of the law.

model legislation in this area, the 1961 Fundamentals of Civil Legislation.[86] There are many areas in which the moral rights provisions of the Civil Code diverge from the current Copyright Act. In some instances, the differences arise out of philosophical, rather than technical, inconsistencies. In this case, it should probably be assumed that the old provisions have ceased to apply, though no specific provision to this effect can be found in the Copyright Act.[87] In other cases, however, there is no obvious legal or conceptual inconsistency with the new law. Rather, the provisions of the RSFSR Code are more extensive than those in the Copyright Act.[88] In effect, a higher level of protection seems to have been maintained surreptitiously. One wonders if this is intentional – and, if so, whether it is one of the reasons for American disapproval of codified copyright provisions in Russian law.

In keeping with Soviet legal tradition, the Civil Code recognises a broad moral right of integrity. Article 479 protects the author's right "to retain his work intact" – a strong

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[86]N 65.

[87]N 23: Article 2 of the Copyright Act on Legislation of the Russian Federation on Copyright Neighbouring Rights, lists a number of sources of Russian copyright law, including "other legislative texts of the Russian Federation that are enacted pursuant to this Law." Although the section makes no mention of the RSFSR Civil Code, none of its provisions on copyright has been annulled.

[88]Indeed, it is the usual international practice to allow protection that exceeds the baseline standard described in international instruments: for example, see Article 1.1 of the TRIPs Agreement, which provides that "Members may, but shall not be obliged to, implement and therefore more extensive protection than is required by this Agreement, provided that such protection does not contravene the provisions of this Agreement." The caveat in the last part of the article is interesting; but, even if moral rights appear somewhat incompatible with the logic of the Agreement, it cannot be said that they contravene its provisions.

provision that was originally retained in the 1991 Fundamentals, but which has now been diluted in Article 15 of the Copyright Act to the relatively narrow right of reputation. Article 480 of the Civil Code substantially elaborates the right of integrity. It generally prohibits "any changes [to] the work" without the consent of the author, and it goes on to prohibit specifically the addition of illustrations, forewords, afterwards, commentaries or "any explanations." The scope of the integrity right in the Civil Code substantially exceeds the protection in Article 15 of the Copyright Act. At the same time, it would be difficult to claim that the spirit of the provisions is inconsistent with the policies of the Copyright Act, which is, presumably ,supposed to improve the situation of authors' rights in post-Soviet society. How can these different approaches to the right of integrity be reconciled? The clearest legal interpretation seems to be that, in case of need, the old law can supplement the current Article 15.

The RSFSR Civil Code also deals specifically with the infringement of moral rights, in Article 499 on the "Protection of an Author's Personal Non-Property Rights." The author or, after his death, the executor of his moral rights, whether it is an appointed person, an heir, or a copyright organisation, may assert the right of integrity or any other moral right, and demand its reinstatement. For example, the claimant may request "the restoration of the right infringed (introduction of appropriate corrections, publication in the press or [elsewhere]...of said infringement), the prohibition of the publication of the work, or the cessation of its dissemination."[89]

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[89]It should be noted that, under Article 500 of the RSFSR Civil Code provisions, damages can only be claimed if the infringement of copyright "has caused material damage to the author or his successors."

In contrast, the Copyright Act does not address the specific question of moral rights infringement, and the remedies and damages that would be available to an author in these circumstances. Rather, the issue of copyright infringement is addressed more generally under Title V of the Act on "Sanctions for the Protection of Copyright and Neighbouring Rights." Article 49 sets out a number of remedies that are available in the case of copyright infringement. However, the Article is clearly framed to accommodate the infringement of economic rights as a priority, and seems to exclude moral rights by implication. For example, Article 49.1 states that the "*owner* of *exclusive* rights, whether copyright or neighbouring rights" [my italics] may demand redress from someone who infringes his rights. Since moral and economic rights are split between two articles, only the economic rights are specifically designated as "exclusive" rights. Moreover, moral rights are, normally speaking, non-transferable. The ability of an *owner* to claim infringement, in lieu of the author – though the author and the owner may be one person – also seems to inhibit the recognition of a moral rights infringement. For these reasons, the provisions of the Civil Code on moral rights infringement actually represent an improvement to the enforceability of the moral rights scheme in the Copyright Act, and can help to strengthen the position of authors.

Finally, the RSFSR Civil Code contains a number of provisions on the compulsory purchase of authors' copyrights. These provisions proved to be quite controversial at the time of Soviet accession to the UCC. Nevertheless, a comparison of the provisions shows that they were not amended as part of the accession process, and parallel provisions

continue to be present in Articles 501 and 502 of the RSFSR Civil Code.[90] Article 501 allows the state to purchase works on a compulsory basis from either a living author or his heirs.[91] Article 502 allows the state to acquire the copyright in public domain works, by declaring them state property.

Provisions on the acquisition of copyright by the state have a long pedigree in Soviet and Russian law; it is probably correct to trace them back, at least in spirit, to the programme of expropriations undertaken by the Bolsheviks in the early years of the Soviet Union. It may be argued that expropriations are strongly incompatible with both the market-oriented spirit of the current copyright regime, and the more author-oriented law of the Berne Union. In particular, the validity of Article 501 might be questioned on these grounds. But what is the situation with respect to Article 502? Is the purchase of public domain works by the state, and the potential restriction of public access to these works through state ownership, equally incompatible with a market-oriented copyright system? For example, state ownership can restrict the ability of industry and individuals to reproduce and work with classic or controversial works. On the other hand, are there policy reasons why state ownership of the public domain might be a good thing, such as undertaking active measures for the protection of cultural heritage, or protecting classic works from excessive or careless exploitation by private publishers? Should the state in a

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[90]Newcity (n 65) 181-87 provides a chart comparing pre-1973 and post-1973 provisions on copyright in the 1961 USSR Fundamentals of Civil Legislation. He discusses the issue in detail at 153-54.

[91]According to Soviet jurisprudence, a purchase could be effected by a lump-sum payment to the author or his heirs: see SL Levitsky "The State As a Subject of Copyright in Soviet Law" (1980) 1(2) J Media L & Prac 137, 141-43

post-authoritarian society be entrusted with such tasks, or is the very idea of state ownership inimical to freedom of culture?

4. Conclusions

The Russian Federation has successfully enacted a regime for the protection of authors' moral rights in its Law on Copyright and Neighbouring Rights of 1993. Article 15 of the 1993 copyright law closely mirrors Article 6*bis* of the Berne Convention. Five moral rights are protected in Russian law: a right of authorship, or attribution; a "right to be named"; the right of disclosure; a right of withdrawal; and a right "to the protection of the author's reputation." In addition, certain provisions of the RSFSR Civil Code of 1964 related to copyright may continue to operate, with some benefit to the moral rights of authors. Notably, the Civil Code provides for the protection of an extensive right of integrity, and it creates a specific action for the infringement of the author's moral right.

However, the Russian scheme remains incomplete. Russian copyright suffers from a number of legislative and procedural shortcomings. The political instability of the country and its economic crises over the past decade are partly to blame, as they have led to the hasty adoption of laws without proper policy development. However, Russia has also faced overwhelming international pressure to bring its treatment of copyright into conformity with Western norms, particularly as these are expressed in the TRIPs Agreement. It is clear that the pressure on Russia to internationalise its copyright standards has interfered with Russian legal developments in many ways and, indeed, has inhibited the development of Russian legal thinking on authorship, creativity, and innovation.

In relation to moral rights, international pressure appears to be at the heart of

Russia's decision to scale back the standard of protection in its copyright law. Russia has retained rights of authorship, attribution, disclosure, and even withdrawal; but the right of integrity, the most powerful international moral right and the most prominent author's right in Russian history, is greatly reduced in scope. Moreover, the practical implications of this moral rights regime for authors have yet to be tested in cases before the Russian courts. It remains to be seen whether post-Soviet judges will bow to American pressure to restrict moral rights, or if they will choose, instead, to be guided by the jurisprudence of countries like France, which have historically favoured moral rights and persist in maintaining their importance in spite of American disapproval.[92]

The Russian administration has apparently hoped that improvements in copyright law and enforcement will automatically bring technology into Russia by encouraging foreign investment – a process that has yet to prove, as in other developing countries, its practical significance for Russian growth.[93] At the same time, the commercialism of international copyright law and its impact on Russian law reform has generally translated into a profound neglect of domestic policy issues. In particular, Russian reform has not made a serious attempt to achieve an appropriate balance between commercial and cultural interests in Russian law. The issue of Russian technological development through domestic entrepreneurship, on the one hand, and of the treatment of creative authors, on the

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[92]The controversy between the United States and France over moral rights is one of the themes of the interesting analysis in Fraser (n 45).

[93]The arguments surrounding the issue of whether patent protection, in particular, encourages useful foreign investment in developing countries are considered by Henderson (n 25) 256.

other, receive inadequate treatment in the current law. The additional questions raised by the interaction of the technological and cultural spheres, an area of growing interest in the international community, remains completely unexplored. The reform of copyright in Russia is an ongoing process, and it remains to be seen whether a change of focus will become possible as both the reform effort and international expectations of Russian copyright law mature.

D. THE FUTURE OF MORAL RIGHTS IN RUSSIA

Moral rights, and copyright law as a whole, continue to be an active area of reform in Russia. There is substantial scope for improving the protection of authors' rights in future reform efforts. Those who are involved in ongoing revisions to moral rights in Russian copyright law should be able to draw some benefit from the extensive experience of the past decade in this area, both its successes and the occasional pitfalls into which attempts at reform have fallen.

As other areas of Russian copyright law move towards closer conformity with the international standards set by the TRIPs Agreement, it is to be hoped that Russia will be able to pay closer attention to the situation of moral rights. This will depend on the initiative and determination of Russian reformers. They must confront the challenge of developing a concept of moral rights protection independently of the international copyright arena, whose current commercial focus, somewhat in contrast to the Berne Union, inhibits moral rights. The difficulty of accomplishing this philosophical shift in the orientation of Russian copyright reform should not be underestimated. The neglect suffered by moral rights in the international arena is not only a product of the subject-

matter of these rights, which deal with personal and non-commercial concerns; it also reflects fears about the economic consequences of these "personal" rights.[94] Reform that attempts to enlarge the scope of moral rights protection is almost certain to confront powerful opposition from copyright industries – international and, possibly, domestic – [95] whose general perception is that they have much to lose from the legal protection of authors' personal interests. Depending on the political power of these industries and government backing for them, enforcement problems may come to plague the moral rights regime for Russian authors.[96]

1. <u>The Civil Code Project</u>

The long-term goal of Russian reformers is to bring copyright and moral rights into a new Civil Code. It is interesting to note that the idea of incorporating copyright protection in post-socialist countries into Civil Code reform seems to be unpopular with the American agencies contributing to development in the region.[97] However, it is not clear whether they

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[94]For example, a powerful film industry lobby has contributed to the negative American view of moral rights: see Nimmer (n 37).

[95]Particularly in the area of film; as Russia becomes increasingly involved in the technology sector, moral rights may also present problems. The solution may be to exempt technological products from moral rights, as the United Kingdom has done in some cases. However, the implications of moral rights for technology are poorly understood, and this approach may lead to other problems in the long term. See UK Copyright, Designs and Patents Act 1988 (n 84) s 79 (2).

[96]In India, the courts have deliberately dissociated themselves from the economic and political power of the Indian film industry – which apparently has ties with organised crime, as well – and expressed their determination to protect the moral rights of authors. *Smt Mannu Bhandari* v *Kala Vikas Pictures* (1986), 1987 AIR (Delhi 13).

[97]See IIPA report (n 73).

are opposed in principle to Civil Code protection, or to the idea of attempting to reform outdated Civil Code provisions.[98] In any case, Russian legal tradition shows that incorporating copyright into the Civil Code is a legitimate option for legal reform. Indeed, Russian copyright before the Revolution toyed with codification as part of the process of refinement, and this cycle has now reappeared in the present round of reform.

The codification of Russian civil law is the responsibility of a Private Law Research Centre, composed of a distinguished body of Russian legal scholars who are responsible directly to the office of Russian President, Vladimir Putin. The body includes long-established academic specialists on Soviet copyright law.[99] It has also received some input on the copyright provisions from foreign lawyers, although, for bureaucratic reasons, the Centre's access to leading international expertise in the specialised field of intellectual property rights may be limited. Indeed, obtaining international legal assistance for copyright reform is a complex matter. Assistance often assumes the form of financial aid that is administered by international bodies – for example, the World Bank, and foreign international development agencies in Western countries – which typically seem to be slow to react, and careless about awarding funds for appropriate and viable projects.[100]

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[98]IIPA report (n 73).

[99]Members of the Centre who have written about current legal developments in Russia include AL Makovskii, MI Braginskii, SS Alekseev, and OM Kozyr; a complete list of members may be found on the Centre's website: Issledovatel'skii Tsentr Chastnogo Prava <http://www.user.cityline.ru/ ~rcpl/rcpl.htm> (in Russian only).

[100]For example, confusion about the role played by different Canadian groups working in Russia has led to difficulties for some Canadian legal specialists in obtaining funding from the Canadian International Development Agency.

The Private Law Research Centre has also become involved in a power struggle of sorts with the Russian Patent and Trademark Agency, Rospatent. Rospatent is the direct successor to the Soviet patent agency, Gospatent. Its competence apparently extended to patents and trademarks only, in the first instance, and has now grown to include copyright, as well. Rospatent issues regulations on intellectual property matters, and it also administers a dispute-settlement mechanism for dealing with certain types of intellectual property disputes, the Patent Appeals Chamber and an appellate body, the Supreme Patent Chamber. Decisions of these specialist bodies may be appealed to the courts of general commercial jurisdiction, known as the *arbitrazh* courts.[101] However, the status of legislation issued by Rospatent is not clear, particularly the question of whether and how Rospatent regulations will be included in the Civil Code reforms of intellectual property law.

(a) Moral Rights in the Draft Civil Code

A draft version of the proposed Civil Code provisions on intellectual property rights, updated through November 30, 2001, is currently in international circulation.[102] While it is virtually certain that the draft will be subject to further changes before it is adopted as law – something that may happen at any point during the next several years – this document gives an indication of the probable form of future moral rights protection in Russia.[103]

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[101]The term *arbitrazh* simply refers to commercial courts; the courts are not involved in "arbitration" functions as they are usually understood.

[102]The following discussion is based on a version of the Draft Civil Code which has been translated into English by OM Kozyr and EV Luchits. See Chapter III, n 13.

[103]For example, Gainan Avilov of the Private Law Research Centre suggests that the revised Civil Code could be adopted at any point over the next decade: Avilov in private conversation.

There can be no doubt that the protection of moral rights in the Russian Civil Code will depart substantially from the formula adopted in the 1993 Copyright Act. The draft provisions of the new Civil Code differ significantly in structure and scope from all previous legislation. A degree of conceptual continuity between the Draft and the 1991 Fundamentals can be identified; but this sense of legislative continuity is clearly lacking between the Draft Civil Code and the Copyright Act of 1993.

Intellectual property rights are protected in Part Four, Division VII of the Draft Civil Code.[104] The Division opens with Chapter 69, containing General Provisions relating to intellectual property rights. Chapter 70 deals specifically with copyright, and Chapter 71, with "Copyright Neighbouring Rights." All three chapters contain provisions on moral rights.

(i) General Provisions

The purpose of Chapter 69 appears to be the elaboration of the general philosophy of intellectual property rights in the Code, as well as principles to guide the interpretation of the specific provisions in subsequent chapters. Moral rights are set out in Article 1228, which defines an author as, "[a] citizen... whose creative efforts have produced a result of intellectual activity (a work of science, literature or art, a result of performing activity, invention, a new plant or animal variety, and others)." Article 1228.2 provides for the protection of an author's "personal non-property rights," specifically including the "right of name." All of the author's personal rights, including the rights of authorship and name are inalienable and non-transferable, and they cannot be waived. These rights are protected in perpetuity – "without limit" – and, after the death of the

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[104]The Division is entitled, "Rights in Results of Intellectual Activity and Means of Individualisation (Intellectual Property)."

author, they may be asserted by "any interested person," on his behalf. This expression is interesting: how will the courts interpret it? Would a member of the general public qualify as an "interested person" in relation to moral rights issues? Alternatively, would it be restricted to people who had personal or business dealings with the author, or would it extend to the artistic community in which he was involved? In any case, Article 1228.2 represents a substantial commitment to the protection of works in the public domain, their integrity and historical accuracy; it achieves this protection, however, by opening the door onto a greatly augmented possibility of moral rights disputes arising out of alterations to the works of deceased authors. It seems likely that this provision will not be viewed in an entirely positive light by publishers and other arts-industry groups, including, potentially, the Russian government.

The Draft Civil Code also deals with several aspects of the problem of implementing and enforcing moral rights effectively. Article 1245, on the protection of authors' rights and liability for their infringement, deals specifically with moral rights in subsection 8. Article 1245.8 provides that a number of specific remedies will be available for the "violation of [the] personal non-property rights of the author." These include the cessation of infringing activities, compensation for "moral harm" – a new concept in post-Soviet civil law, though it is well-known to the civil law of Western Europe – [105] and, in general, an attempt to restore "the situation that existed prior to the violation of the right." Among the remedies available is "publication of a court decision on the committed infringement," a usual remedy against infringement in

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[105]See the discussion of indemnification for moral harm in transitional and post-Soviet law, in MI Braginskii "The General Part of Civil Codification in Russia" in Ginsburgs, Barry & Simons (eds) (n 12) 99, 109-10.

civilian jurisdictions. Publication of decisions has several implications for moral rights. It allows precedents to develop, which not only have some legal value, but also, in this civil law system, even greater practical value to the injured parties who may wish to make a claim. The reformers who have prepared the Draft may also intend to emphasise the importance of publicising infringement of authors' rights, especially through the legal process, as a remedy for the secrecy and persecution previously endured by Russian intellectuals.

Article 1228.1 provides that general courts will have jurisdiction over disputes involving authors' rights, while Article 1229 clarifies that the Civil Code is the primary source of law governing moral rights. Both articles are important from a procedural point of view: they may help to clarify persistent doubts about applicable law. Interestingly, the economic rights of authors continue to be derived from a variety of legal sources. However, economic rights are subject to clarification in the Draft Civil Code in another sense. Article 1225 identifies the property right of authors as being "exclusive," while Article 1227 provides that the exclusive right can be limited only by statute. Moreover, statutory limitations must be clear and precise, and they should not affect the "customary use" of works, or result in "unreasonabl[e] prejudice" to the right-holder. These provisions represent excellent safeguards for authors' economic rights, as they would presumably apply to interference by government bodies, as well.[106] The protection of moral rights would be greatly strengthened by similar measures.

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[106]The question of equality of relationships under civil law is slightly confusing; presumably, the provisions deal with situations where the government is, in effect, acting as a "private" party. Some related issues are discussed in the helpful article by MI Braginskii (n 105) 103-05, 107-10.

In contrast to the current Copyright Act, the draft Civil Code deals directly with the issue of moral rights infringement. Article 1245 is concerned with "Protection of Exclusive Rights and Liability for Their Infringement"; however, Article 1245.8 addresses the "violation of personal non-property rights of the author." The remedies provided in subsection 8 include, but do not appear to be limited to, "recognition of the right, restoration of the situation that existed prior to the violation of the right, stopping effects that are infringing the right or creating the threat of its infringement, compensation for moral harm, [and] publication of a court decision on the committed infringement." Indeed, there is a slight ambiguity in Article 1245 about the extent of exclusive rights, as a right-holder may claim the "recognition of the right – against a person who or which denies or otherwise refuses to recognise the right" – a provision that looks very much like a right of attribution, except that it is the right-holder, rather than the author, who is granted the right.[107]

Finally, it is worth noting that moral rights in "complex objects" are also recognised. Article 1239.3 provides for the recognition of rights of authorship, name, and inviolability in relation to multi-faceted works such as motion pictures and dramatic productions. However, the Draft does not specify who should be considered the author of the work, in either of the sections where this information should logically fall, Article 1239, itself, or Article 1228 on authorship. This issue is partially addressed in Chapter 70 of the Code on copyright. Article 1250 on co-authorship provides that, in the case of films, the "director, author of scenario, and author of the [original] music

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[107]The provision may also signify a declaratory remedy.

[for the film]" may be deemed its co-authors.[108] This issue should receive further clarification in relation to complex works which may give rise to competing claims in the absence of adequate legal measures for designating authorship.

(ii) Copyright

Chapter 70 of the Draft Civil Code, on copyright, reunites the economic and personal rights of the author in a single section. Under the heading, "Copyright," Article 1255 provides simply that "the author of a work shall have the following rights." The Article lists a series of moral rights, and it provides for an "exclusive right," which, by implication both in this section and within the broader context of the Chapter, is clearly economic in nature. The "exclusive" right in the current Copyright Act also means the economic right of the author.

Article 1255 protects four moral rights: authorship, name, inviolability of the work, and right to publish an unpublished work. Although the Draft Civil Code has eliminated the right of withdrawal, the separate status and detailed treatment given to the right of publication nevertheless seems to strengthen it. At the same time, the restrictions on the integrity right which transform it into a "right of reputation" in the current Copyright Act have been completely lifted. The right of inviolability offers very strong protection for the integrity of creative works, especially during the lifetime of the author. The right is in keeping with Russian legislative tradition, and it exceeds the standard set by Article 6*bis* of the Berne Convention. At the same time, the provision could be internationally controversial, as it may allow foreign authors to claim moral rights protection in the Russian Federation that exceeds what they can

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[108]See Article 1249, on who is the author of a work.

expect in their home countries, leading to situations like the *Huston* and *Shostakovich* cases.[109]

The four moral rights are given a detailed treatment in three separate articles; the right of authorship and the right of name, being especially closely related, are dealt with together in Article 1256. Article 1256 provides that the right of name includes the right to work under a pseudonym, or anonymously. If the author does not choose to identify himself by name as the author of his works, the publisher is charged with protecting his interests as the author's representative. In keeping with the general part of the intellectual property provisions, Article 1256 confirms that the rights of authorship and name are inalienable and non-transferable, even if the "exclusive," economic right is transferred to another person.

Article 1257 deals with the right of inviolability of the work: it is restored to all of the dimensions it officially enjoyed under pre-Soviet and Soviet copyright law. In effect, however, the right is actually split into two parts, an outstandingly strong right of inviolability for living authors, and a strong right of reputation after the author's death. During the lifetime of the author, alterations, abridgments, editions, illustrations, forewords or afterwords, commentaries, and "[any] other explanations whatsoever" are only permitted with the consent of the author. However, after the author's death, previously prohibited changes will be allowed, provided that the author has not expressly indicated that changes to the work should not be undertaken after his death, or

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[109]In the *Shostakovich* case, the Soviet government sued the producers of a film for using the music of Shostakovich and a number of other Russian composers in an anti-Soviet film. It lost the case in the United States, but won in France. The case is discussed in detail below. As for the *Huston* case (n 77) , the work of the deceased American director enjoyed protection against colorisation in France that would not have been available in America.

should the alterations somehow "distort the conception of the author...[or] derange the integrity of [the audience's] perception of the work." The provision goes beyond the current Copyright Act in allowing "any interested person" to assert the deceased author's moral right of inviolability on his behalf – depending on what is meant by an "interested person," a potentially valuable measure for the protection of cultural heritage, and for involving the public in culture.[110] Interestingly, Article 1257.3 also makes it possible for an author to protect the inviolability of his work as one element of his "business reputation" under the appropriate provisions of the Civil Code. The purpose of the provision is probably to clarify that "reputation" will refer to the professional standing of the author, while "honour" and "dignity" may well apply to his personal reputation.[111]

The right of publication is set out in Article 1258. These detailed provisions seem to respond directly to the pressures faced by Soviet writers and dissidents in relation to publication. Article 1258.1 protects the author's right to decide "independently" whether or not his work should be published. Article 1258.3 provides for the publication of posthumous works, which is permissible unless the author has

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[110]The relevant provision of the current Copyright Act is article 27.2, on measures to protect the author's moral rights after his death; a person chosen by the author, his heirs, or the government agency are charged with the responsibility. On the policy advantages of allowing the general public to make such claims, see Sundara Rajan (n 80) 180-85.

[111]Under this provision, the author is entitled to seek the protection of his "honour" or "dignity," as well. The idea is reminiscent of an interesting moral rights case from India, where the author of a novel sued a filmmaker for distorting her story; in finding for the author, the judge specifically made mention of the damage to her reputation that might result from her association with the commercial film industry. See (n 96) 18.

expressly provided otherwise elsewhere in his writings – whether published or unpublished, public or private – or in his will.

The term of moral rights protection is explicitly provided for in Article 1260: according to Article 1260.3, the rights of authorship, name, and integrity are protected perpetually, "without limit of time."[112] The treatment of works in the public domain is dealt with in Article 1287. As in the current Copyright Act, the use of public domain works must continue to preserve the author's rights of authorship, name, and inviolability. According to Article 1287.4, the author's moral rights in a work that has fallen into the public domain may be asserted by "any interested person." Finally, according to Article 1252.3, it should be noted that translations, compilations, or derivative works must be created while respecting the rights of the original author.

(iii) Neighbouring Rights

Like the 1993 Copyright Act, Chapter 71 on "copyright neighbouring rights" of the Draft Civil Code provides for the protection of the moral rights of performers. Article 1294.1 protects the performer's right of attribution – his name or pseudonym must be associated with the performance – as well as his right to protect the performance against "distortion" when it is recorded, reproduced, or broadcast. It is not clear whether the Russian provisions, like the WIPO Copyright Treaty, exclude protection for performers' moral rights in audiovisual recordings: Article 1294.1 provides for a right of attribution in relation to "copies of recordings,... [and] wireless or cable broadcasting thereof"; the term "recording" seems to encompass audiovisual "recordings, as well." However,

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[112]The protection of the "exclusive" right is also extended to the life of the author and 70 years after his death, bringing it into line with the current international standard; for example, see the EU Term Directive (n 52), Art 1(1).

Article 1294.2 provides that the exercise of performers' rights, including the personal rights, is subject to the protection of the rights of the original composers of the works performed.

(iv) Patents

Interestingly, the Draft Civil Code includes an unusual moral right in patents. In Chapter 72 on Patents Law, Article 1343 protects the "right of authorship" of plant or animal breeders. The article is entitled, "Author of New Plant or Animal Variety." Subsection 1 provides for the person who, through his "creative activity," has "created, bred or discovered a new plant or animal variety" to be recognised as its author. Subsection 2 allows that the author of the new variety can "determine[...] its denomination," subject to statutory requirements, and the approval of the federal agency for the protection of new plant and animal varieties.

2. Continuing Improvements to Russia's Moral Rights Regime

While moral rights in the Copyright Act of 1993 leave much to be desired in the protection of authors' personal interests, the moral rights provisions of the Draft Civil Code set a significantly higher standard of protection. The proposed law is strongly oriented towards creative authorship and the protection of culture. Its provisions on moral rights reflect concerns about the status of authors and their work in a society that has long suffered the consequences of the political oppression of dissent. At the same time, it recognises that moral rights have a contribution to make to the protection and preservation of cultural heritage: their importance is not restricted to the protection of individual authors and works. Russian reformers have made a laudable attempt to realise the cultural potential inherent in moral rights doctrine – for example, by making

the protection of moral rights in public domain works the legal prerogative of every "interested person."

Further refinement of the proposed moral rights regime is possible at several levels. First, in purely legislative terms, the Draft Civil Code has abandoned certain provisions that were favourable to authors in the Copyright Act of 1993. For example, the 1993 Act defines the moral right of publication as a double-edged right: it not only allows the author to determine the circumstances in which his work will be disclosed, but it also allows him to withdraw his work from circulation. The right is elegantly framed, and one wonders why it has been removed from the draft provisions. Given the extensive protection offered to moral rights, it seems unlikely that the right of withdrawal would have been abandoned because of fears about the uncertainty, economic or otherwise, that it might create. Secondly, the idea of a *domaine public payant* appears to have been abandoned in the Draft Civil Code provisions. This kind of scheme for raising funds to support the cultural sphere is quite popular in both developed and developing jurisdictions.[113] Has it been found to be unsuitable for the Russian Federation by reformers, and if so, why? A consideration of the Russian scheme for moral rights protection actually suggests that a *domaine public payant* scheme, which attempts to harness the cultural wealth of the past for the benefit of present authors, would be ideally suited to Russia's situation: it would help today's

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[113]Germany's approach to the *domaine public payant* in Dietz (n 83) is illustrative of the benefit industrialised countries may see in these schemes. Specifically, Dietz's article deals with a proposal by the German Writers' Union to create a "community right of authors and performers"; it will allow funds to be collected from public domain works and performances, and given to living artists in support of their work. The proposal has a long pedigree, dating back to the German government proposals of 1962 in this field.

authors to navigate the uncertainties of Russian life after Communism, while also allowing some larger benefit to flow from the sufferings of the writers and artists of the past.

A number of questions about the implementation and enforcement of authors' moral rights also remained unanswered in the Draft Civil Code provisions. For example, Article 1228.1 of the Draft Civil Code provides that "a court" shall deal with copyright claims, including the assertion of moral rights. However, Russia's court system is complex, and it is not immediately apparent which forum will be most appropriate for dealing with authors' moral rights. Copyright matters are usually dealt with in the *arbitrazh* courts, the branch of the Russian judicial system concerned with copyright matters. It is true that moral rights have important commercial implications; nevertheless, their main purpose is personal and non-commercial, and commercial courts may therefore not be the best forum for adjudication. If not, who should make decisions on moral rights? Would a specialist tribunal dealing with intellectual property rights – such as the Supreme Patent Chamber, for example – be the ideal forum? Or would the Constitutional Court, which should be building expertise on the protection of individual rights, ultimately be more suited to dealing with authors' personal interests?

The role of government in copyright matters is also far from clear. Both the Copyright Act of 1993 and the Draft Civil Code make provision for the active involvement of government agencies in protecting authors' moral rights. But how will it be possible to entrust the Russian government with the protection of authors' rights when it has been the main instrument of their oppression in the past? A similar question arises in relation to the role of writers' or artists' unions in Russia's new

copyright system. How can the collective administration of rights be made into a viable proposition in a country where the writers' union was essentially a tool of government oppression, rather than an authentic mouthpiece for writers' needs?

Another area of concern is the question of how moral rights relate to technology. The Copyright Act and the Draft Civil Code both make provision for the copyright protection of computer programs and other technological works. In contrast to international instruments, these kinds of works are protected as "works of science," a distinct category of works treated on par with the protection of "literature" and "art."[114] The expression does not seem analogous to the provision in the American Constitution on the promotion of "Science and useful Arts," an archaism referring to works of knowledge.[115] At the same time, a broader range of works appears to be encompassed by the term than what is included in the "scientia" in Article 2 (1) of the Berne Convention. Since moral rights are available to works of literature and art, the structure of the provisions implies that they must be available for works of science, as well.[116] What are the implications of moral rights for works of science? When is the right of integrity in a computer program infringed? When can the author claim a right of attribution? For example, if an author produces a computer program and this work is used by insurance companies to collect personal data about health-related matters, can the author object that the use is against his principles, and therefore, violates his honour

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[114]See Draft Civil Code (n 102), Article 1248.

[115]The Constitution of the United States, Article I, Section 8, Clause 8.

[116]Yakovlev points out additionally that the protection of computer programs in two separate laws, the Copyright Act and the Law on Legal Protection of Computer Programs and Databases of 1992, emphasises that computer programs may be "watered down," and not protected on an equal footing with other protected works, whether literary or artistic. See Yakovlev (n 14) 293-94.

and his right to the integrity of his work? The application of moral rights raises serious concerns about the ability of information technology to develop, and to be used to its full potential. For this reason, India, with its dynamic information technology industry, specifically provides that moral rights will not be available in computer programs.[117] At the same time, the separation of technology from moral responsibility is a dangerous social trend. Should moral rights support it?

A number of difficult questions concerning moral rights also arise in relation to works of art whose creation has been made possible by technology. For example, in a computer-generated artwork, where the only creative activity of the author is to write the computer program, should moral rights be available? Indeed, who is the true "author" of the work, the programmer or the program? What happens in the case of a multimedia work that is composed of images, sound, and text from a variety of sources which have now been compiled and reworked in an innovative way through digital technology? For artists and creative people, the question of how digital technology will affect their creative potential lies at the very heart of the Information Age. Yet questions like these are not dealt with in the development of moral rights in current and ongoing Russian legislation.

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[117]The idea was developed in *Statart Software Pvt Ltd* v *Karan Khanna, cited in* P Anand "The Concept of Moral Rights under Indian Copyright Law" (1993) 27 Copyright World 35, 35-36, and later, became the subject of a legislative amendment. See s 20 of the *Copyright (Amendment) Act 1994,* Act No 38 of 1994, which provides that, under the new s 57, "the author shall not have any right to restraint or claim damages in respect of any adaptation of the computer program to which clause (*aa*) of sub-section (1) of section 52 applies." Clause (*aa*) was added to s. 52 to allow copies or adaptations of computer programs to be made for certain purposes: see s 17 of the *Copyright (Amendment) Act 1994.*

3. Judicial Interpretation of Moral Rights

Russian courts will have an important role to play in clarifying the legislation on moral rights, and in determining how the law will be applied to the real problems of Russian authors and artists. In jurisdictions where moral rights are well-established, such as France, judicial decision-making has traditionally been a driving force behind the development of the doctrine.[118] However, Russian judges are in a uniquely difficult position. They are inexperienced in dealing with authors' moral rights, and, for several reasons, they cannot look to cases from either the pre-Soviet or Soviet era. Current law departs substantially from pre-Soviet provisions; as for Soviet precedents, they are inadequate in terms of both quantity and quality. In dealing with the rare moral rights complaint, Soviet judges were not guided by sound legal principles; moreover, interpreting the spirit of the law in post-Soviet times calls for a new approach.

In view of this situation, it seems likely that Russian courts will find themselves looking to the treatment of moral rights in other jurisdictions for guidance. French decisions, coming out of the heartland of moral rights doctrine and representing the most comprehensive body of case law in this area in the world, should certainly be of interest to the Russians. Among Western countries, France has probably shown the greatest commitment to the protection of authors' moral rights. Since respect for authors' rights should be a legal priority in post-Soviet Russia, French decisions may represent a helpful philosophical perspective on these rights. Russian judges may also want to expand their horizons by exploring the development of moral rights in more

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[118]In fact, the doctrine originated in judicial decisions, and was later crystallised in legislation: see the discussion in A Strowel *Droit d'auteur et copyright: Divergences et convergences, Etude de droit comparé* (Bruylant Bruxelles 1993) 481.

unusual environments. Notably, they may be curious to look at the treatment of moral rights in those developing jurisdictions where moral rights are highly regarded, as the policy concerns addressed by judges in developing countries may be familiar issues in Russia, as well.

A consideration of Article 15 of the Russian Copyright Act, on Moral Rights, shows that French law has exercised an important influence on the Russian legislator. Article 15 of the Russian law closely resembles the French *Code de propriété intellectuelle et artistique,* which, itself, incorporates the earlier provisions of the Law of 11 March 1957 on moral rights.[119] Indeed, some of the safeguards in Article 15 appear to respond directly to interpretive issues confronted by the French. Accordingly, French decisions on different aspects of the author's moral right may be highly relevant to the decision-making process of Russian judges.

Russian law follows the French model in providing for the explicit recognition of the right of disclosure. In French law, the right of disclosure is an extremely strong right, an approach that should be favoured in Russia, as well. Since the right of disclosure was practically the only moral right that an author could hope to exercise in Soviet times, the right has great significance for the independence of authors.[120]

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[119]Article 6, *Loi du 11 mars 1957 sur la propriété intellectuelle et artistique* (n 49).

[120]Given the reality of Soviet publishing structures, it is probably more accurate to say that artists and authors enjoyed a moral right "not to disclose" their work. However, Soviet copyright law included provisions on compulsory purchase, notwithstanding Boguslavskii's assertion that the government could never take over an author's right to release his work to the public. See SL Levitsky "The State as a Subject of Copyright in Soviet Law" (1980) 1(2) J Media L & Prac 137, 137, 147. Levitsky observes, "Boguslavskii's statement [that... the acquisition of rights to specific uses of a work, whether under contract or compulsory..., did *not* amount to an expropriation of the author's copyright]... was obviously meant to reassure Western publishers that...

The power of the French *droit de divulgation* is illustrated by the classic case of *Whistler:* a painting of an English noblewoman was completed by the artist, but he was dissatisfied with the final product, and preferred not to release it to Sir William Eden, the person who had commissioned it.[121] His right to withhold the work from public release, in spite of the contract between himself and its commissioner, was upheld by the French court; the artist had to pay damages to Eden, but he was under no obligation to release the work. DaSilva observes,

> The *Whistler* case reflects the French view that an artist is the absolute master of the decision to disclose his work, even when the right of disclosure would seem to impair contractual obligations.[122]

Given this, rather absolutist, approach to the right of disclosure, it is hardly surprising that French law also protects an artist's right to withdraw his work from circulation. The right is highly controversial: allowing an author to destroy his work after it has been released into public circulation could have serious consequences for the publisher and distributor of the work. For this reason, a number of practical limitations on the right of withdrawal have come to be accepted in French jurisprudence. Some of these have been incorporated into the legislation; for example, if an artist chooses to withdraw his work from circulation, he must reimburse the publisher.

[upon Soviet and adherence to the UCC] no 'local laws' have been enacted in the USSR conferring upon the State ownership of copyright in any dissident's work."

[121]He painted over the face, so that it was no longer immediately identifiable as a portrait of Lady Eden. It is worth mentioning that the dispute between Sir Eden and the painter actually arose over payment for the portrait. Although the case stands for a strong principle of moral right, it is not clear that the painter was motivated purely by artistic concerns. See Strowel's discussion of the case (n 118) 483-85.

[122]RJ DaSilva "Droit moral and the Amoral Copyright: A Comparison of Artists' Rights in France and the United States" (1980) 28 Bull Copyrt. Socy 1, 18.

However, other limitations on the right have also arisen. For example, DaSilva argues that the right can only apply to works that have not yet been released to the public; the court supports his point of view in its discussion of the *Vlaminck* case. In that case, the painter removed his signature from a painting, on the grounds that it was a forgery. The court stated that, if the painting was a forgery, the painter had no right to deface someone else's property; if it was not a forgery, "Vlaminck's moral right did not permit him to exercise a right of withdrawal after having sold the canvas."[123]

From a practical point of view, DaSilva's line of reasoning is appealing. However, two criticisms must be raised. The first is to do with the structure of the French provisions. In fact, the French legislation recognises two distinct aspects of the right of withdrawal: a *droit de repentir,* and a *droit de retrait.* One study distinguishes them on the basis that the right of *repentir* is a right to modify the work, whereas the right of *retrait* allows the author to "cease to pursue the exploitation of the work."[124] The second of these two rights, at least, seems to require logically that the work has been released to the public. Secondly, as DaSilva himself points out, "when we observe the extensive limitations on the two rights, we can only wonder what is left of them at all."[125] If we accept this limitation on the right, it would appear to be complementary to the right of disclosure, allowing an artist to escape from contractual obligations to

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[123]Sarraute "Current Theory on the Moral Right of Authors and Artists under French Law" (1968) 16 AJCL 465, 477; quoted in DaSilva (n 122) 25.

[124]J-M Pontier, J-C Ricci & J Bourdon *Droit de la culture* (2e ed Dalloz Paris 1996) 264-65.

[125]DaSilva (n 122) 26.

release a work to the publisher, but having no further reach.[126] If we consider the right of withdrawal in this light, an especially close relationship between disclosure and withdrawal becomes apparent. Indeed, the *Whistler* case could then be interpreted as much as a case on the right of withdrawal, as the right of disclosure.

Identical provisions are included in the Russian legislation, raising the question of how Russian judges will interpret the provisions on the right of withdrawal, in practice. It is especially interesting to note that, in Article 15.2 of the Russian law, the legislator seems to reject explicitly the limitation on the right suggested by *Vlaminck.* Article 15.2 provides that "[t]he author shall have the right to renounce the decision taken earlier to disclose the work." Will Russian judges eventually succumb to French limitations on the right? Or must the right be considered so close to freedom of opinion, that, regardless of practical consequences, it must be upheld on principle?

French case law on the integrity right is extensive, and, somewhat in contrast to the right of withdrawal, is likely to be of great interest to Russian judges. The integrity right in the Russian law is based on the formula in Article 6*bis* of the Berne Convention: it is considered a "right to the protection of the author's reputation," and is not open-ended as in French law. In view of the rich history of the integrity right in Russian law, combined with the generally extensive Russian provisions on moral rights, this change seems peculiar. The reasons behind the restrictive Russian right may be related to pressure from the United States to limit the scope of moral rights. If this is in fact the case, judicial decision-making may provide a window of opportunity for judges

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[126]"Ce droit à repentir ou à retrait constitue donc une cause légale d'inexécution des obligations conventionnelles." Pontier (n 124) 264. If the author does eventually decide to publish the work, he must first offer the possibility of publication to the original publisher.

to define this right in more comprehensive terms. Judges may seek to be guided by generous French principles in this area, while developing their own, perhaps subjective rather than objective, tests related to reputation.[127]

French cases in this area stand for a number of useful principles. The famous case of Bernard Buffet, where the painted panels of a refrigerator could not be separated and sold, established the idea of artistic unity. The *Shostakovich* case, although it was brought by the Soviet government against the anti-Soviet use of the music of four eminent composers, represents the idea that political manipulation of artistic works will amount to a violation of the integrity right. The importance of this principle in post-Soviet Russia cannot be emphasised too strongly, and, based on Article 15 of the Copyright Act, Russian judges today should be guided by the French approach, rather than the American one, in deciding similar issues.[128]

In the *Huston* case, descendants of the American director, John Huston, alleged that his moral right of integrity was infringed by the broadcast of a colourised version of his classic film, *The Asphalt Jungle.* The French *Cour de cassation* found in favour of the director's moral right; interestingly, in the much earlier case of *Shostakovich,* the French court protected the moral right of the composers, although the same claim failed in the United States.[129] The *Huston* case was a particularly important opportunity for French courts to affirm their commitment to the moral right of integrity, and, no doubt,

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[127]In other words, if the author feels that his reputation has been violated, that would be sufficient for the court.

[128]A comprehensive discussion of French cases on the integrity right may be found in Strowel (n 118) 487-90.

[129]See Strowel's interesting discussion of the *Huston* case, featuring a comparison between the American and French positions on colorisation and the integrity right: Strowel (n 118) 58-70.

to stand firm against the globalisation of copyright which has been threatening to overwhelm moral rights interests since the late 1980s. From the point of view of Russian jurists, the value of the case will lie, not only in its affirmation of the integrity right, but also, in its explicit rejection of the Americanisation of moral rights. The issue is an important one for Russia, as its ability to stand firm on moral rights, to some extent, will depend on justifying its position to the United States.

As for the right of attribution, French courts generally will not allow any restriction of this right – not even if the author has attempted to waive it through a contractual agreement.[130] For Russia, given the attempts of the Soviet government to falsify historical information, the right of attribution is especially important. Russian courts would therefore be well advised to follow the strong, French view of this right.

While French jurisprudence is helpful in clarifying moral rights doctrine, the social context of French case law is very different from post-Soviet Russia. Notably, French moral rights are part of a stable economic and political life, and reflect well-established measures for the protection of culture. In contrast, Russia, in terms of both politics and economics, is a developing society. At the same time, its cultural heritage, due to the legacy of suppressed information and political oppression, is in a state of vulnerability and flux. How can authors' moral rights adapt to this situation?

It may be helpful for Russian judges to consider the treatment of moral rights in developing countries, which share some of these difficulties. Notably, Indian judges have probably developed the most extensive case law on moral rights in the developing world. What is interesting about this body of law is the judges' open avowal of

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[130]See the discussion in DaSilva (n122) 26-30.

commitment to the protection of authorship and other cultural values – even, where necessary, against the state.[131] The case of *Amar Nath Sehgal,* where a work by this leading Indian sculptor was purchased by the government and, later, destroyed through its negligence, is a case in point. The government was held to be under a duty to protect works of art and culture in its custody; a similar emphasis on government accountability would not be at all inappropriate to Russia's situation.

Indian judges have also been prepared to protect authors against exploitation by commercial interests. This has even led them to extend the moral right of integrity to the film adaptations – India's commercial film industry is an economically and politically powerful force, and one that is also associated with criminality – in contrast to the relative reluctance of French courts to apply the right against adaptations.[132] Since India is a common-law country, it is no doubt easier for judges to take the initiative in moral rights cases like these. However, the submissive judicial culture of the Soviet era is part of an oppressive legacy that must be overcome. Russian judges should therefore be encouraged by the example of judges in the common-law world, and accept the role that they may have to play in establishing the rule of law in post-Soviet society.

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[131] *Amar Nath Sehgal* v *Union of India,* (1992), Suit No 2074 (Delhi H.C.),(1994) 19 Indl Prop L Rep 160. The case is discussed in M Sundara Rajan "Moral Rights and the Protection of Cultural Heritage: *Amar Nath Sehgal v. Union of India"* (2001) 10(1) Intl J Cult Prop 79; available online: <http://www3.oup.co.uk/intjcp/current/100079.sgm.abs.html>.

[132] DaSilva (n 122) 34-37.

E. CONCLUSION: THE CASE FOR AN EXPANSIVE MODEL OF MORAL RIGHTS

The trend towards greater protection of moral rights in Russia should be viewed in a strongly positive light. It is to be hoped that an expansive approach to the protection of moral rights will make a strong contribution to respect for creative expression, and freedoms of thought and speech in Russia. Moral rights can contribute to creative freedom at both the doctrinal and practical levels. While the doctrine reflects a vision of the special nature and value of creative expression, it should also work in combination with other legal and cultural developments to create an environment where intellectual freedom can be enjoyed. Freedom of thought and conscience, freedom of information, and a free press are all related to the values underlying the doctrine of moral rights. Developing the principles of rule of law, government accountability, and judicial independence are part of the same process of cultivating a legal culture that cherishes intellectual liberty.

All of these discoveries about moral rights point to a very close relationship between the moral right of the author and human rights. Indeed, the Soviet and post-Soviet experience of moral rights in Russia suggests that these two kinds of law, which are ordinarily considered to differ widely from one another, actually share fundamental values. The Russian experience suggests that the protection of authors' moral rights is a human rights issue. However, the value of a human rights model of authors' moral rights is not restricted to Russia and other post-socialist countries. Rather, it may actually provide the key to resolving the long-standing international conflict and controversy surrounding this complex aspect of copyright law, by offering a means of modernising it to meet the legal and cultural challenges of the "Digital Age."

VI. MORAL RIGHTS AND HUMAN RIGHTS: THE POST-COMMUNIST EXPERIENCE AND A NEW INTERNATIONAL MODEL

The end of Communist rule brought the hope of freedom to a new generation of Russian writers and artists. The Soviet era had been characterised by the oppression of culture and creativity, and indeed, the earlier rule of the tsar had also led to clashes between official censorship and creative expression.[1] In a sense, post-Communist Russia confronted the possibility of creative expression that was free from political constraints for the first time in its history. This watershed moment also represented an opportunity to reassess the law of authors' rights in an environment of political freedom.

A crucial difference between the tsar's treatment of writers and the Communist approach was ideology. The power of the Communists was based on the propagation of the official ideology of the state throughout Soviet society. For this reason, creative expression, with its power to sway minds, represented a source of political power, one that the Communists would have liked to harness for their benefit. At the same time, the potential for ideological diversity arising out of creativity represented a fundamental challenge to the Soviet emphasis on homogeneity.

In its war against creative freedom, the Soviet government had many weapons in its arsenal, including detention, imprisonment, violence, and incarceration in psychiatric

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[1]For example, Pushkin's "blasphemous" poem, "The Gabrieliad," which he published anonymously, became the subject of a censorship inquiry. Pushkin eventually requested and received a personal pardon from the tsar. See M Hayward *On Trial: The Soviet State Versus "Abram Tertz" and "Nikolai Arzhak"* (New York: Harper & Row 1967) 31-32, and the discussion in Chapter III 74 and n 10

hospitals.[2] During the 1960s, the exploitation of law and legality became one of these techniques of repression. Writers, in particular, fell victim to criminal prosecution for their literary activities. Although a number of prosecutions were undertaken, the most notorious of these cases was certainly the 1966 trial of Andrei Siniavskii and Yuli Daniel. In the Siniavskii-Daniel affair, the Soviet government, for the first time, made the literary creations of the authors the basis for criminal charges alleging that the writers were involved in anti-Soviet activities.

Soviet law included a regime for the protection of authors' rights. However, copyright law was complicit in the repressive policies of the state. A consideration of the provisions on copyright and moral rights in the 1961 Soviet Fundamentals of Civil Legislation, reproduced in the Russian Civil Code of 1964, shows how the law was drafted to reflect the requirements of official censorship. Censorship had a direct impact on authors' moral rights, although it also had implications for their economic rights – for example, in the provisions on compulsory purchase of copyright by the state.[3] At the same time, to the extent that authors' rights were recognised in Soviet copyright legislation, they could not necessarily be enforced by the courts. Only if their work was politically correct could authors hope to protect it from misuse by publishers, performers, or translators, through moral rights. A work that transgressed official ideology would not give rise to legally-enforceable rights. Given that Soviet copyright law claimed to protect a number of moral interests – notably, the rights of disclosure,

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[2]The chilling use of psychiatry for political ends is described by G Hosking *A History of the Soviet Union 1917-1991* (Final Edn Fontana Press London 1992) 424-25.

[3]Fundamentals of Civil Legislation of the USSR and the Republics, *VVS SSSR,* 1961 No 50, Item 525 Article 106; 1964 RSFSR Civil Code, *VVS RSFSR,* 1964 No 24, Articles 501 and 502 (on the acquisition of works in the public domain by the state).

attribution, and integrity – this situation created a permanent incongruity between the letter of the law and its implementation.[4]

The uncertainty surrounding their rights led to great tension and instability for Soviet authors. Not surprisingly, the restrictive environment of Soviet publishing inhibited the circulation of culture and knowledge. When Communist rule ended, Russian society was flooded with works of literature from the Soviet era, such as Boris Pasternak's *Dr Zhivago*, certain poems of Anna Akhmatova, and Solzhenitsyn's *Gulag Archipelago* – works that, although they were several decades old, had never before been seen by the majority of the Russian public.[5] The repressive policies of the state also represented a profound threat to the creative process: the government was intent on imposing conformity of thought, and its policies aimed at the destruction of freedom of the imagination.

The fact that Soviet writers and artists continued to create throughout the seventy-year period of Communist rule, in spite of this situation, is a testament to their determination. No doubt, the yearning for freedom, what poet Yevgeny Yevtushenko calls the Russian *nostalgie* for freedom, inspired their work.[6] Ironically, though perhaps, not surprisingly, post-Soviet liberalisation initially seems to have led to a loss of direction in the arts. Yevtushenko observes that Russians "don't [yet] know

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[4]The especially broad range of the Soviet right of inviolability is worth noting: it allowed an author to protest "any" mistreatment of his work, whether or not his reputation was affected.

[5]Julie Curtis comments on this phenomenon: see J Curtis "Literature under Gorbachev – A Second Thaw?" in C Merridale & C Ward (eds) *Perestroika: The Historical Perspective* (Edward Arnold London 1991) 168, 171-74, 180.

[6]See the fascinating interview with Yevgeny Yevtushenko, Red Spring (The Sixties), Episode 14, online: <http://www.gwu.edu/~nsarchiv/coldwar/interviews/episode-14/yevtushenko1.html>.

what to do with freedom." It will be interesting to see what form the Russian *nostalgie* will assume in post-Soviet times, and how the poets of a newly democratic generation will give voice to this timeless Russian longing.

After the collapse of Communism, the new leadership was conscious of a need to re-examine the situation of writers and artists, and to attempt to make amends for the repression of the past. One important step forward was the rehabilitation of Soviet-era authors – given the nature of Soviet oppression, rehabilitation had to address personal as well as professional reputations, authors as well as their works. This has been accomplished by decree of the government of the Russian Federation and, where appropriate, by the Supreme Court of the Russian Federation. The need to correct the past repression of authors also influenced the redrafting of Russia's law on authors' rights, by encouraging the adoption of improved standards of protection. The 1991 Fundamentals of Civil Legislation on copyright and moral rights included greatly improved protection for moral rights as exclusive rights, while expanding both the range of rights that could be protected, and the type of protection available under each right.

However, the trend towards greater protection for moral rights did not continue in the years following the collapse of the Soviet Union. Rather, the development of authors' rights was inhibited by international pressure to conform to a more limited approach. In particular, the United States was concerned that Russian copyright reform should reflect the commercial and trade orientation of international copyright law in the 1990s. The influence of American advisors is clearly apparent in the Russian Copyright Act of 1993, which significantly scaled back the protection of authors' moral rights

from the status they enjoyed in the 1991 Fundamentals.[7] In doing so, Russian copyright law has lost its earlier focus on the implications of its Communist legacy; what is of equal importance is that the new law does not reflect coherent policy development for Russia's future.[8]

The changes to moral rights proposed in the Draft Civil Code of November 2001 represent another change of direction – an attempt to return to more comprehensive protection for moral rights in line with the 1991 Fundamentals. It is apparent that the Civil Code provisions represent a more serious attempt at policy development than any other piece of post-Communist copyright legislation in Russia, to date. Not only do they grant substantially greater protection to moral rights than the current law, but the provisions are also reasonably well-adapted to Russia's "transitional" problem: they attempt to address both the repression of creative authorship in the past, and the need to encourage creativity for the future. However, the Civil Code provisions have yet to be adopted as law, and they must overcome political hurdles, both international and domestic, before they can be accepted.[9] If the Civil Code measures on moral rights eventually become law, they will represent a new and

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[7]A rare and interesting critique of American involvement in law reform in the post-Communist world and elsewhere, may be found in J DeLisle "Lex Americana?: United States Legal Assistance, American Legal Models, and Legal Change in the Post-Communist World and Beyond" (1999) 20 U Penn J Intl Econ L 179, 255-308.

[8]Copyright reform has addressed one aspect of Russia's future: its need to participate in the international economy to further economic growth. However, the relationship of the law to creativity and culture remains to be investigated.

[9]For example, see the strongly negative comments of the International Intellectual Property Alliance on incorporating intellectual property law into post-Communist civil codes: IIPA report, online: <http://www.iipa.com/rbc/1997/rbc_c.i.s._301_97.html>. The issue is discussed in detail in Chapter V 241.

more favourable point of departure for the development of the moral rights of Russian authors in the future.

Notwithstanding its positive approach to moral rights, it is interesting to consider how the framework offered by the Draft Civil Code provisions can be further refined. Some points of criticism arise in relation to specific measures, such as the decision to eliminate the author's moral right of withdrawal, and to abandon the *domaine public payant* scheme set out in the 1993 Copyright Act.[10] At a more general level, two interesting and important questions arise. The first is primarily a procedural issue: the Draft Civil Code does not make clear and adequate provision for the implementation and enforcement of authors' moral rights. The second problem is a conceptual one, though it may provide the key to resolving lack of procedural clarity: where do moral rights fit in the overall hierarchy of Russian law? According to the new revisions, separate copyright legislation would no longer exist; unlike the current situation of the 1964 RSFSR Civil Code, the Copyright Act would presumably be repealed and replaced, and moral rights would be part of the revised Civil Code. But how, if at all, would moral rights relate to freedoms of thought and expression in the new Russian Constitution?[11] How are Russian courts supposed to interpret moral rights against practices of censorship, whether they arise in the public or in the private

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[10]Russian Federation Law on Copyright and Neighboring Rights *(Zakon Rossiiskoi Federatsii Ob avtorskom prave i smezhnykh pravakh), VSND i VS RF,* 1993 No 32, Item 1242; *Rossiiskaia gazeta* 3 Aug 1993 (as am by Federal Law of the Russian Federation of 19 July 1995, *Rossiiskaia gazeta* 26 July 1995). Available online: Law No 5351-I of July 9, 1993, Russian Patent & Trademark Office, <http://www.rupto.ru/ruptoen/law/intel.htm>. See the analysis in Chapter V 248.

[11]*Constitution of the Russian Federation,* December 12, 1993, *Rossiiskoi gazeta* 25 December 1993, Garant Internet, online: <http://www.constitution.ru/en/10003000-01.htm>.

sector?[12] Is there some way of expressing in legislation the connection between authors' moral rights and their rights of expression, as revealed by the Communist experience?

Of course, lack of clarity in these areas is not unique to Russia. On the contrary, many countries have moral rights provisions in their copyright laws without specifying a constitutional dimension, or clarifying their relationship with censorship issues. Interestingly, two countries that directly address the relationship between moral rights and constitutional rights in their legislation, the United States and Germany, have arrived at opposing interpretations of them. In the United States, the Constitution specifies that the purpose of copyright is to improve public access to knowledge; moral rights are therefore widely considered by American experts to contradict the policy behind copyright law identified in the Constitution.[13] In contrast, Germany includes protection for free creative expression in its Constitution, and this is in keeping with its traditionally respectful attitude towards moral rights.[14]

It is important to note that the question of how moral rights relate to fundamental freedoms is quite different in the post-Soviet era from what it was after World War II, when the German Constitution was adopted, or in the historically remote

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[12]Censorship can be a function of economic or criminal power in "private" hands, as much as state power. Given the present situation in Russia, which is characterised by widespread lawlessness, it seems likely that Russian authors may suffer the effects of "private" censorship.

[13]The issue receives a detailed treatment in S Fraser "The Conflict between the First Amendment and Copyright Law and its Impact on the Internet" (1998) 16 Cardozo A & E LJ 1, 12.

[14]Article 5 of the German "Basic Law" *(Grundgesetz),* on freedom of expression, provides, in subsection (3): "Art and science, research and teaching are free."

time of the American Constitution.[15] The post-Soviet dimensions of the problem resemble the post-War era, in the sense that both periods of law reform followed experiences of totalitarianism and overwhelming human rights abuses, and were therefore coloured by these realities. However, an additional dimension in post-Soviet legislative reform is the ongoing revolution in communications technology, which has radically altered the conditions of creative expression throughout the world. Indeed, it is likely that most of the implications of the Digital Revolution for culture and the arts have not yet become clear. It is apparent only that technology will have both a direct and an indirect effect on culture, through its impact on the creative process and on the forms of artistic expression, and in its role in the globalisation of trade and economic growth.

The difficulties of moral rights reform in post-Communist Russia suggest that there is a need for a new approach, and, what is equally important, that the international community must find a way of accepting different ways of looking at moral rights. The experience of Russian authors and artists in the Soviet period shows that the protection of authors' rights in Russian law is a serious human rights issue – a reality that should not be ignored because authors' rights traditionally fall within the ambit of private, rather than public, law.

In the past, Russian authors were inadequately protected against state censorship; since state control over expression extended into the private sphere, copyright law had little practical significance for authors' rights. In the present and

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[15]It should be noted that the West German "Basic Law," adopted in 1949, provided the legal basis for East German states to join the federation upon reunification, and remains the Constitution of reunified Germany. It will continue to be valid until it is replaced by a new Constitution, adopted by unified Germany as a whole.

future, Russian authors confront several human rights-related problems. The Russian government continues to deal with culture, knowledge, and information with a restrictive attitude, rather than one of openness, and creative authors need to be protected against this situation. As time goes on, it is likely that authorship will be vulnerable to other kinds of problems – the domination of Russian society by large enterprises and organised crime, and the growing international commercialisation of culture, with a view to feeding global arts, entertainment, and knowledge industries. The question confronting Russian reformers is, therefore, how to develop a legislative model of moral rights that will defend authors from public and private repression, while protecting culture from the negative consequences, on the one hand, of international commercialisation, and on the other, domestic impoverishment.[16]

In the light of these concerns, this chapter will propose a "new" conceptual model of moral rights – one that is based on the connection between authors' rights and human rights. The value of a human rights model lies in its ability to change traditional perceptions of authors' moral rights. Rather than seeing these rights as a matter of commercial law, a human rights perspective will allow us to consider the special vulnerability of authors to restrictions on free thought and expression, and,

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[16]Of course, international commercialisation could have benefits for culture, as well – for example, by encouraging the dissemination of Russian art and culture abroad. However, the tendency for individual authors and artists to lose their influence in a global market for culture is a real danger. Moreover, domestic poverty encourages the movement – to a great extent, illegal – of cultural property from poor to rich countries, and this phenomenon has been a part of the post-socialist experience. The general issues involved are outlined by L.V. Prott & P.J. O'Keefe, *Law and the Cultural Heritage,* Vol 3, *Movement* (Professional Books Oxford 1984) 11-14; in Central and Eastern Europe, the impoverishment of cultural heritage in this way has a number of causes, including political instability, crime, and war. See A Milrad "Artful Ownership," The Stolen Property Series, Pt 1, Limits on Ownership, Art Cellar Exchange online: <http://www.artcellarexchange.com/artlaw1/html>.

consequently, their greater need for protection in this area. It will also help to clarify the special needs of authors in the new, global culture. In practical terms, a human rights model can provide the basis for extending rights of authorship into the public sphere, and affording them protection against state exploitation and censorship. At the same time, a human rights analysis can help to clarify the purpose of moral rights protection, thereby leading to greater legislative and structural clarity in drafting these rights, and improved procedural effectiveness in their implementation.[17]

The interest of a human rights model of moral rights is not restricted to Russia, or, more generally, to countries emerging from periods of political oppression. Rather, a human rights approach can make an important contribution to the understanding of moral rights in the international arena. In many ways, moral rights appear to have reached an international stalemate. They are excluded from the WTO; harmonisation efforts in Europe and at WIPO have not clarified the conceptual bases for an international moral right. The common law countries, though many of them have now adopted moral rights legislation, remain extremely reluctant to implement strong moral rights regimes: they have uniformly preferred a limited legislative framework.[18] Moral

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[17]For example, if the right to inviolability is a constitutionally protected right, the Constitutional Court of the Russian Federation would be charged with the adjudication of disputes. At the same time, the Constitutional Court is a "new" court whose specific purpose is to bring legal legitimacy to the post-Soviet government. Given its political pedigree, it may actually be the court that is best suited to dealing with moral rights issues. The activities of the court are discussed in A Rakhmilovich "The Constitutional Court of the Russian Federation: Recent Cases on Protecting the Freedom of Thought and Speech and Related Matters" (1996) 22(2) Rev Central & East Eur L 129.

[18]For example, the UK Copyright, Designs & Patents Act introduced moral rights into UK copyright law for the first time in history; however, ss 79 and 81 set out such extensive exceptions to the rights of attribution and integrity that their practical effectiveness is greatly limited. See Copyright Designs & Patents Act 1988, c 48.

rights in common-law countries are further restricted by conventions governing authors' contracts, and by restrictive judicial interpretation.[19] All of these factors suggest that a new model of moral rights may be of value to the international community, especially in the context of cultural globalisation.

If moral rights are to be protected as part of a human rights regime, what are the legal and conceptual bases for such a model? This chapter examines a number of policy arguments for linking authors' moral rights with human rights, and the legal framework within which this connection can be attempted.

1. Intellectual Property and Human Rights

It is possible to identify a number of intuitive connections between intellectual property rights and human rights. The criminal prosecution of writers and artists by the Soviet regime for their creative activities, including the watershed trial of Siniavskii and Daniel, suggests one such intuitive link, between the moral rights of authors and their right to freedom of expression. The intuitive relationship between these two technically divergent areas can provide a basis for bridging the conceptual distance between them, and, ultimately, developing an effective legal framework for moral rights that reflects this understanding.

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[19]The position of common-law countries on waivers is discussed by G Dworkin "The Moral Right of the Author: Moral Rights and the Common Law Countries" (1995) Colum-VLA J L & Arts 229, 244-66. This is the case even in some civil-law jurisdictions: Germany allows waivers of moral rights, a point that is noted by S Fraser "Berne, CFTA, NAFTA & GATT: The Implications of Copyright *Droit Moral* And Cultural Exemptions in International Trade Law" (1996) 18 Hastings Comm. & Ent. LJ 287, 293-93. The position of France is far more strict, as moral rights cannot in principle be alienated, although, in practice, partial alienation of these rights through contractual provisions might be possible. See the interesting discussion in A Strowel *Droit d'auteur et copyright: Divergences et convergences, Etude de droit comparé* (Bruylant Bruxelles 1993) 497-99.

The connections between intellectual property and human rights may manifest themselves in a direct or an indirect relationship. The two may be directly connected, in the sense that intellectual property rights and human rights offer themselves as two different kinds of language and analytical framework for describing the same concept. This situation arises in relation to the right of publication, which can be seen as an issue of freedom of expression, on the one hand, and as a moral right of the author, on the other.

An indirect relationship between the two domains means that a single situation may give rise to both human rights and intellectual property concerns. An example that has been much in the public eye in recent times is the issue of patents for medications in developing countries, for example, in relation to the spread of AIDS. Many activists have become concerned that the high price of patented medications has effectively led to the denial of treatment for third-world patients suffering from this disease, and indeed, their efforts have led to a reduction in the cost of AIDS drugs in the developing world.[20] This is clearly a human rights issue. On the other hand, the rights of pharmaceutical companies to recover their investment in the development of drugs is an intellectual property issue that clashes with human rights.

Another problem involving medical knowledge arises in relation to the appropriation of the traditional knowledge of aboriginal peoples to create patented drugs. The use of their knowledge, generally without the consent of the people

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[20]The issue is discussed in "Hope for the best. Prepare for the worst" The Economist, Jul 11th 2002. The Economist article mentions "tiered pricing," relatively cheaper drugs for Third World countries, as part of progress in the treatment of the disease, though even inexpensive drugs may be beyond the reach of poor populations.

involved, is perceived to be a violation of their human rights.[21] Here, however, the prospect of these groups being able to use intellectual property rights to protect their own knowledge is one that supports their human rights interests.[22]

If we consider copyright essentially as an author's right, the direct connection between copyright law and human rights becomes apparent. In practice, the role of copyright in protecting the individual rights of authors may be obscured by the fact that copyright law does not focus exclusively on the protection of the author. Rather, copyright law protects the "owner" of the copyright in a work – the person who has acquired the right to reproduce and disseminate the work by purchasing it from the author. The owner of copyright may or may not be the same person as the author; in practice, it is most often the publisher. The idea of copyright ownership is fundamentally built into the common-law model of copyright law – originating in England and prevailing in all former British colonies, including the United States – although rights of ownership are less prominent in the author-centred copyright legislation of Continental Europe.[23] However, international copyright law, especially in

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[21]See the discussion in P Drahos "Intellectual Property and Human Rights" [1999] IPQ 349, 364 on the protection of "traditional resources," including "biological resources."

[22]This is a theme of the interesting article by J Tunney "E.U., I.P., Indigenous People and the Digital Age: Intersecting Circles?" (1998) 20(9) EIPR 335.

[23]The philosophical differences between the common law and civil law concepts are evident in the terminology: "copyright" is a right to "copy" or reproduce works, while European systems are known as the law of "authors' rights" – *droit d'auteur* or *Urheberrecht,* to cite the French and German examples. A consideration of the relevant provisions in France – for example, Chapter III of the *Loi no 57-298 du 11 mars 1957 sur la propriété littéraire et artistique* , JO, 14 March, p 2723 (as am JO, 19 April 1957, p 4131) later incorporated into the *Code de la propriété intellectuelle du 1er juillet 1992,* JO, 3 juillet 1992, suggests that the terminology of ownership has not really found its way into French law.

the TRIPs Agreement, is based on the protection of the copyright-owner, who occupies a position that is at least as important as that of the author.[24]

The tension between "authors" and "owners" in copyright law may lead to the ironic situation where authors actually become the victims of copyright legislation that is supposed to protect their rights. Indeed, an awareness of the potentially conflicting interests of author and publisher informed Russian law from the earliest times. It was a feature of Russia's first modern copyright legislation, the Copyright Act of 1911, and this principle was retained in the primary legislation on copyright under the Bolsheviks, the Law of 1928.[25] According to the Russian provisions, the author's right to the integrity of his work was intended to protect him from the activities of his publisher. The range of activities prohibited by the right was therefore very broad, but it could only be asserted against the publisher.[26]

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[24]The substantive provisions on copyright in the Agreement refer to the "right holder": for example, see Article 8.2 on "Principles," or Article 13 on "Limitations and Exceptions." The personal right of the author is the only aspect of copyright law that is excluded from the dispute-settlement and enforcement measures of TRIPs: see Article 9.1 of the TRIPs Agreement, which provides that the rights in Article 6*bis* of the Berne Convention cannot be enforced under the TRIPs Agreement. Interestingly, Article 14*ter* of the Berne Convention, on the visual artist's *droit de suite* is not excluded from the TRIPs Agreement: in part, this may be due to the weak status of the right even in the Berne Convention. See Ricketson's discussion of the *droit de suite* in Berne; he concludes that "there is no obligation on member states to accord...protection [to it]." S Ricketson *The Berne Convention for the Protection of Literary and Artistic Works: 1886-1986* (Centre for Commercial Law Studies, Queen Mary College Kluwer London 1987) paras 8.49-8.60, para 8.55.

[25]V Gsovski *Soviet Civil Law: Private Rights and their Background under the Soviet Regime,* HE Yntema (ed) Michigan Legal Studies Series (University of Michigan Law School Ann Arbor 1948) 610-11.

[26]Or theatre corporation: see s 18. The section does not allow "any additions, reductions or general changes during the author's life... without the author's consent," and includes a list of what these activities might involve.

The protection of authors may arouse hostility because of the apparent restriction it imposes on the right of the public to use knowledge and information freely. Indeed, the idea of balancing copyright privileges against rights of use and access is fundamental to American copyright law: the US Constitution provides that the policy objective supporting copyright protection is to "promote the Progress of Science and useful Arts."[27] On this view, many human rights interests are said to weigh in the balance against unduly high copyright standards, including the freedom of speech and expression of individual members of the public, as well as the general right of the public to have access to information.

These arguments should be treated with care: they may be based on a mistaken understanding of what is signified in practice by free expression and access to information. From a legal point of view, neither aspect of freedom can be absolute; nor can the rights of authors. However, in relation to creative work, it is also important to recognise that the public is not dealing with expression and information in abstract or generic terms: rather, the work emanates from a particular individual, in a particular form, and it represents the culmination of an individual, creative process. The work is specifically a product of the labour and, in the case of artworks, the personality of its author. It could not have been produced by anyone else. Without the author, it would remain completely unrealised, and unavailable to society, perhaps representing a significant loss to culture. Protection of the author's right in the work does restrict public access to information; but this right of access represents the interest of the public

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[27]The Constitution of the United States, Article I, Section 8, Clause 8.

in an intangible product whose existence is utterly dependent on the individual circumstances of its author.

The idea that copyright restricts free expression most likely reflects a certain lack of clarity about the role of creative authorship in society and, in particular, the social value of creative works. Cultural trends in the Western world – as contemporary artistic expression toys with "commodification, provocation, charlatanry, fickleness, and vulgarity"[28] – only intensify this confusion. Interestingly, in the American example, arguments in favour of free expression have helped to justify US caution in relation to the protection of authors' *moral* rights, but they appear to have had little impact on the *economic* aspects of copyright that protect the intellectual property of American copyright industries.[29]

Somewhat in contrast to the difficulty of recognising the human rights interests underlying certain aspects of intellectual property rights, the indirect impact of intellectual property rights on humanitarian issues has come to be widely acknowledged. These areas of concern often involve non-traditional human rights – rights such as literacy, education, and access to medication – known in international human rights parlance as "second-" or "third-generation" rights.[30] For example, high

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[28]E Dissanayake *Homo Aestheticus: Where Art Comes From and Why* (2d edn University of Washington Press Seattle 1995) xv.

[29]Attempts to restrict the power of these industries have occurred, rather, through competition law, but, in at least one prominent instance, the results of a judgment against anti-competitive behaviour has been mixed. See the discussion of the litigation involving Microsoft Corporation, in, "United they would stand" The Economist, Dec 13th 2001; and "Bill Gates, software saviour" The Economist, Apr 25th 2002.

[30]A useful discussion of the three "generations" of human rights may be found in C Wellman *The Proliferation of Rights: Moral Progress or Empty Rhetoric?* (Westview Press Boulder 1999) 13-38. These issues are explored in some detail in

standards of copyright protection may restrict the ability of poor countries to provide their populations with access to foreign books: very often, they do not have the resources and foreign currency to pay for them. At the same time, restrictions on translation may restrict access to knowledge among the populations of less-developed jurisdictions. Considerations like these have traditionally been behind the principle of freedom of translation favoured in Russian copyright law. Indeed, Russia did not grant rights to translators of foreign works until Soviet accession to the Universal Copyright Convention in 1973.

From the intellectual property lawyer's point of view, a number of interesting points can be noted about the intersection of intellectual property rights with human rights. First, the overlap is extensive: intellectual property issues penetrate to the furthest depth of our evolving understanding of human rights. Secondly, there is a danger that intellectual property rights may actually become the means by which human rights violations occur. Finally, when intellectual property rights become implicated in human rights problems, the entanglement of intellectual property issues with questions of knowledge and culture, as a legal matter, can become quite complex. For example, appropriating indigenous knowledge to make patented pharmaceuticals is not only an issue involving "scientific" knowledge; knowledge about medicinal plants may be intimately linked to a traditional way of life, and patenting it may amount to cultural appropriation, as well as violating the community's right of access to its own culture. For non-Western peoples, "scientific" knowledge may equally be considered a cultural

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Drahos (n 21) 361-65.

issue, although the law of patents is not normally considered to have anything much to do with culture.

In relation to moral rights, their potential impact on cultural diversity and the human rights interests involved in culture is a subtle issue, but it merits attention. Moral rights are traditionally associated with an individualistic view of authorship, derived from European Romanticism of the nineteenth century. How does this model relate to non-Western cultures? Is it an obstacle to the universal development of moral rights protection for authors?

A brief consideration of some approaches to authors' personal interests in non-Western cultures shows how moral rights can be problematic. Certain cultures do not emphasise the identification of the artist with his work, preferring, instead, to value artworks for their own sake, or for their social significance. In ancient India, a high value was apparently placed on the artist's decision to remain anonymous – a tradition that also has political implications.[31] A recent case involving a work of art by an aboriginal Australian artist illustrates the kind of dilemma that may arise between individual and community interests in another context. In *Yumbulul* v *Reserve Bank of Australia,*[32] the artist sued for the infringement of his copyright in an Australian court; among the problems that he faced was criticism from his community for allowing the sacred knowledge of the clan to be exposed in an inappropriate context. From the clan's point of view, the portrayal of Yumbulul's artwork on a commemorative

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[31]See S Pandit, *An Approach to the Indian Theory of Art and Aesthetics* (Sterling New Delhi 1977) 120, 134.

[32](1991) 21 IPR 481.

banknote issued by the Australian government was more an issue of community authorship, than of Yumbulul's personal right in the work as its creator.[33]

In socialist society, there was a potential tension between individual and social interests; indeed, the state justified its extensive interference with individual rights on the basis that it was acting in the collective interest of society.[34] However, Soviet Russia also included a number of traditional cultures that should be distinguished from the European-influenced culture of urban Russia – its own traditional folklore, as well as the diverse cultures of minorities, now represented in the CIS and in the countries of Eastern Europe, including Roma peoples and others. In many ways, these diverse cultures can be distinguished from Western cultural norms. Even the "European" pattern of urban Russia was superimposed onto a deeper, underlying culture. This point is famously illustrated by a scene from Tolstoy's *War and Peace,* where Natasha Rostova, the aristocratic heroine, shows her untaught ability to dance to traditional

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[33]The case is discussed by M Blakeney "The Protection of Traditional Knowledge under Intellectual Property Law" (2000) 22(6) EIPR 251, 253; an interesting perspective is also provided by WV Tuomi "Protecting Aboriginal Folklore: Copyrights and Charter Rights" (Apr 2000) 16(2) Can IP Rev 403, 411-12. It should be noted that Yumbulul sued for infringement of his copyright; the case was not dealt with as a moral rights problem, and indeed, Australia did not offer substantial protection for moral rights in its copyright legislation at the time. Australia has since adopted a comprehensive moral rights regime; for details, see E Adeney "Defining the Shape of Australia's Moral Rights: A Review of the New Laws" (2001) 4 IPQ 291.

[34]Of course, this is always the basis on which governments interfere with individual rights; but, in the case of socialist countries, the idea of the rights of the collective may be said to have had a hegemonic quality. Indeed, social, or "second-generation," human rights were much emphasised in the ideological rhetoric that socialist countries presented to the international community.

Russian folk-music, a part of Russian culture that she has inexplicably absorbed from her environment.[35]

Clearly, moral rights in a non-Western context must be reconciled with highly complex social and cultural systems. The establishment of a universal standard of moral rights protection that will apply to diverse countries and cultures may appear to threaten cultural interests with the very homogeneity that these rights should seek to avoid. Developing the intuitive link between the protection of authors' moral rights and human rights may entail both helpful and harmful consequences for cultural diversity, and the legal treatment of moral rights should reflect an adequate awareness of both the possibilities and the dangers of the doctrine.

2. Moral Rights in International Human Rights Law

The intuitive relationship between intellectual property rights and human rights is recognised in international human rights law. The International Bill of Rights, constituted by the Universal Declaration of Human Rights of 1948, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights of 1976, forms the core of international human rights law, and includes a number of intellectual interests.[36] International human rights law

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[35] *War and Peace* trans R Edmunds (Penguin London 1982) 604-05. Tolstoy asks, "Where, how and when could this young countess, who had a French *émigrée* for governess, have imbibed from the Russian air she breathed the spirit of that dance?...[T]he movements were... inimitable, unteachable, Russian..."

[36] Universal Declaration of Human Rights, December 10, 1948; GA Res 217A (III), UN Doc A/810 at 71; International Covenant on Economic, Social and Cultural Rights, 16 Dec 1966, GA Res 2200A (XXI), 21 UN GAOR Supp (No 16) at 49, UN Doc A/6316, 993 UNTS 3 (entered into force 3 Jan 1976); International Covenant on Civil and Political Rights, GA Res 2200A (XXI), 21 UN GAOR Supp (No 16) at 52, UN Doc A/6316 (1966), 999 UNTS 171, (entered into force Mar 23, 1976). For a discussion of the International Bill of Rights, and its place in international human rights

provided a valuable support for the Soviet dissident movement in the late 1960s. For example, they made Article 19 of the Declaration – which the Soviet Union had ratified – on freedom of expression, opinion, ideas, and information, their manifesto.[37] Indeed, the dissident movement came to known, quite simply, as the human rights movement, on the basis of its primary strategy of "urging the Soviet government to observe its own constitution."[38]

Provisions relating to the moral rights of authors are dealt with in two out of the three documents, the Universal Declaration of Human Rights and the International Covenant on Economic, Social and Cultural Rights.[39] In the Universal Declaration of Human Rights, Article 27 is concerned with intellectual property, although the interests it protects are not identified as intellectual property rights *per se.* It is perhaps most accurate to refer to them simply as "creative rights." Article 27(2) provides that an individual has "the right to the protection of the *moral* and material interests resulting

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law, see Drahos (n 21) 359.

[37]Hosking (n 2) points out that the first issue of an important *samizdat* journal, the Chronicle of Current Events, appeared in 1968 with Article 19 on its cover.

[38]Hosking (n 2) 419; see his interesting discussion at 419-22.

[39]Interestingly, provisions on intellectual property are not featured in other international human rights documents, including the European Convention on Human Rights, Strasbourg, 20 Jan 1966, and the African [Banjul] Charter on Human and Peoples' Rights, Jun 27 1981, OAU Doc CAB/LEG/67/3 rev 5, 21 ILM 58 (1982), entered into force 21 Oct 1986. The European Convention is highly focused on civil and political rights; in contrast, the African Charter explicitly rejects the distinction between civil and political rights, on the one hand, and economic, social and cultural rights, on the other. The African Charter includes a number of references to culture, including Article 17.2 on the right of "every individual...[to] take part in the cultural life of his community; Article 22 on the right of peoples to "cultural development with due regard to their freedom and identity and equal enjoyment of the common heritage of mankind"; and Article 20 on the right of states-parties to resist "foreign domination, be it political, economic or cultural." A right to "receive information" is protected in Article 9, though rights of creation are not protected at all.

from any scientific, literary or artistic production of which he is the author [my italics]."[40] Article 27(1) provides for a right "freely to participate in the cultural life of the community," including a right "to enjoy the arts."

The creative rights in the Declaration are restated in the International Covenant on Economic, Social and Cultural Rights (ICSECR). Article 15 of the ICESCR deals with rights relating to culture, creative expression, and intellectual property. Like the Declaration, Article 15.1 of the ICESCR provides for a right "to take part in cultural life," as well as a right "to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which [one] is the author." However, the ICESCR goes on to impose a number of duties on states parties to the Covenant. Article 15.2 provides that measures which are "necessary for the conservation, the development and the diffusion of science and culture" should be undertaken in order to ensure the protection of the rights in Article 15.1. Moreover, Article 15.3 imposes an obligation on member states to "undertake to respect the freedom indispensable for scientific research and creative activity."

The treatment of intellectual rights in these foundational documents of international human rights law, including the moral rights of authors, raises some interesting questions. In the first instance, both the Declaration and the Covenant protect the moral right of the author as an individual right. However, in both instruments, the individual right of the author is protected in conjunction with a right of the public, or of the community, in art and culture: the two rights are developed as subsections of a single article. In the Declaration, the right of the public in culture is

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[40]The Declaration states that "everyone" has this right.

actually framed as a right of the individual to "enjoy" and "share in" the fruits of intellectual endeavour, and, in relation to creative expression, it may be understood primarily as a right of access to creative work. Article 15.1 of the Covenant takes the same approach; however, in Article 15.2 of the Covenant, the scope of the right of access is somewhat expanded by introducing the idea of measures for the "conservation, development and diffusion" of culture as part of the creative right. Article 15.3 introduces a completely new connotation to creative rights, by requiring states to respect political freedom as a required pre-condition for creative expression.

The question of protection versus access to intellectual works in the human rights documents seems like a restatement of the classic intellectual property problem of balancing the potentially contradictory principles of creation and use – what Drahos expresses as, "the tension between rules that protect the creators of information and those that ensure the use and diffusion of information."[41] However, the idea of public rights in culture is something that is not usually included within the ambit of intellectual property law. Rather, "conservation, development and diffusion" – in other words, the preservation of cultural heritage, the development of cultural policy, and the dissemination of culture – are primarily dealt with through cultural property law, and related kinds of heritage regulation. The idea of freedom from state oppression is also not a typical component of intellectual property law; rather, international intellectual property law accepts the right of states to curtail intellectual property rights for political reasons, such as the maintenance of "public order" and "morality." Article 17 of the Berne Convention is the classic example: it provides that "[t]he provisions of this

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[41]Drahos (n 21 above) 358.

Convention cannot in any way affect the right of the Government of each country of the Union to permit, to control, or to prohibit... the circulation, presentation, or exhibition of any work." Ricketson points out that the purpose of the provision is to accommodate state censorship.[42] Remarkably, the provision has stood unchanged since the adoption of the Convention in 1886.[43]

The additional elements of intellectual property rights as they are framed in the human rights instruments demonstrate that, from a human rights perspective, the protection of authors' interests will involve much more than the relatively narrow issue of balancing the rights of authors and users to exploit works. Even within this particular issue, the approach of intellectual property law is traditionally quite restrictive. Copyright law deals largely with the use of works for commercial purposes; it also includes some provisions confronting the issue of reuse for creative, intellectual or personal purposes, but these are typically framed as exceptions to copyright protection.[44] Indeed, in common-law jurisdictions, it may often be left to judges to clarify the exceptions to copyright law, with the consequence that the policies behind

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[42]S Ricketson "The Boundaries of Copyright: Its Proper Limitations and Exceptions: International Conventions and Treaties" (1999) 1 IPQ 56, 73-76. For an interesting discussion of how the idea of Crown copyright has historically accomplished the same purpose in Britain and, later, Canada, see D Vaver *Intellectual Property Law and: Copyright, Patents, Trade-marks,* Essentials of Canadian Law Series (Irwin Law Toronto 1997) 58-60.

[43]Ricketson (n 42) 74.

[44]A well-known example is the "fair use" doctrine, which serves to limit the reach of copyright protection in the United States. Some of its implications are considered by PL Loughlan "Looking at the Matrix: Intellectual Property and Expressive Freedom" (2002) 24(1) EIPR 30, 36-38.

them may tend to remain unclear.[45] Copyright laws generally do not transcend this threshold determination, to develop a broader philosophy surrounding access to, and the use of, creative works.[46]

It is interesting to note that the hybrid quality of the rights and interests involved in creative authorship is nearly as problematic for international human rights law as it is for traditional views of copyright law. International human rights law has developed in stages, with early acceptance for "civil and political" rights, known as "first-generation" rights, standing in contrast to the much slower and more problematic development of economic and social rights, known as "second-" and "third-generation" rights.[47] The development of community-based "rights" has been highly controversial: they present a challenge, both to traditional ways of understanding rights in the individualistic and politicised terms of Western countries, and in the practical obstacles to their realisation. The formulation of creative rights in the International Bill of Rights shows that they simultaneously include elements of all three generations of rights, and call for the simultaneous realisation of all levels of protection – a situation that is likely to present conceptual and practical obstacles to their implementation.

Indeed, the absence of clarity and the difficulty of enforcement are general problems that have plagued international human rights norms for decades. The

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[45]The importance of exceptions to copyright is emphasised in Hart's article about European copyright harmonisation: he argues that the failure to harmonise exceptions to copyright law in the EU directives presents a serious impediment to the harmonisation process. See M Hart "The Proposed Directive for Copyright in the Information Society: Nice Rights, Shame about the Exceptions" 1998 20(5) EIPR 169.

[46]For example, Loughlan (n 44) considers the issue of why a defence to First Amendment copyright challenges has not really developed in American case law.

[47]See Drahos (n 21) 361: he refers to "classical" rights (negative), "welfare" rights and "peoples' rights or solidarity rights."

expansion of human rights language to include a great variety of interests and concerns – areas as diverse as a right to food, a right to development, and a right not to be subjected to torture – has been highly controversial. Some scholars feel that this "proliferation of rights" has weakened the concept of human rights tremendously, robbing it of its forcefulness, and even threatening its validity.[48] In view of these concerns, what does the presence of creative rights in international human rights law signify for the protection of authors' moral rights? In particular, can it contribute anything of value to the law of moral rights?

In keeping with the general tone of human rights instruments, the way in which authors' personal interests are dealt with in human rights law is general and rhetorical, rather than narrow and precise. In other words, the language of the human rights documents naturally tends to reflect the intuitive quality of the relationship between intellectual and human rights; it does not attempt to resolve the technical and practical issues of legislative drafting, implementation, and enforcement. As Peter Drahos observes, "[h]uman rights instruments tend to be drafted at the level of principle and in open textured ways. The precise content of these rights is difficult to formulate."[49]

However, the imprecise nature of international human rights norms does not necessarily create obstacles to their legal recognition and enforcement.[50] Rather, the

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[48]See P Alston "Conjuring Up New Human Rights: A Proposal for Quality Control" (1984) 78 AJIL 607. The issue is also addressed by Wellman (n 29) 1-11.

[49]Drahos (n 21) 361.

[50]This issue receives a detailed consideration in M-B Dembour "Human Rights Talk and Anthropological Ambivalence: The Particular Contexts of Universal Claims" in O Harris (ed) *Inside and Outside the Law: Anthropological Studies of Authority and Ambiguity,* European Association of Social Anthropologists Series (Routledge London 1996) 19, 32-33.

presence of moral rights in human rights documents raises the possibility of dealing with the personal interests of authors on some legal basis other than the commercial law framework into which copyright is usually placed. Understanding the moral rights of authors as human rights interests, rather than commercial or proprietary interests – indeed, as an afterthought to laws dealing with the property interests of authors – cannot fail to bring important new dimensions to the interpretation of moral rights. The answers to questions that typically arise in relation to moral rights, such as how to balance these rights against other social interests, will be different when considered from a human rights point of view.

Given the character of international human rights norms as general principles rather than legally-enforceable rights – what Drahos refers to as the "twilight zone of normativity known...as soft law"[51] – the value of international human rights as a source of law on authors' moral rights is limited. However, human rights law can make an invaluable contribution at the level of moral rights doctrine and its interpretation in the legal systems of the world. It can do so in at least three concrete ways.

First, a human rights perspective can enlarge the conceptual basis of moral rights doctrine, making it possible for the legal treatment of authors' personal interests to address a wide range of individual, community, and state interests implicated in moral rights. In particular, human rights law can provide an alternative to the prevailing, commercial-law model of copyright, into which moral rights inevitably fall, and which appears to be unable to accommodate many of their aspects. Secondly, human rights can provide criteria by which to implement and enforce moral rights for

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[51]Drahos (n 21) 361.

the greater benefit of authors and society. Human rights principles can help to determine how to balance the protection of moral rights with other aspects of authors' rights, and how they should interact with, or be balanced against, other individual rights and community interests. They can provide ways of assessing different aspects of moral rights protection against one another – for example, the relative importance or desirability of publication, attribution, and integrity interests in a given social context. Additionally, a human rights framework can assist in the administration of moral rights, for example, by making their enforcement a matter for specialised tribunals or constitutional courts. Thirdly and finally, expressing creative rights in human rights terms can contribute to the articulation of social aspirations: moral rights can help to express the desire to respect, recognise, and celebrate creativity and culture.

Notwithstanding the influence and inspiration of human rights language, the precise content of moral rights remains a complex legal question requiring distinctive solutions in different jurisdictions, and at the international level. However, it is clear that moral rights within a human rights framework are likely to differ substantially in form, content, and spirit from the narrow corner which they currently occupy in an international framework for copyright regulation dominated by commercial concerns. For example, a right of integrity that is based on human rights in creation and culture is likely to be broader than the formulation in the Berne Convention: it may apply to any potential alteration of work, without imposing a burden on the author to prove that his reputation has been adversely affected. A "human right of attribution" might provide explicit protection for anonymity, or the protection of pseudonyms, which, as in the Siniavskii-Daniel trial, a government might wish to lift in order to impose criminal sanctions on the creator. A human rights approach to moral interests might also mean

that, as in the Russian Draft Civil Code, any "interested person" should be able to assert moral rights after the death of the author. This provision seems to recognise that the protection of moral rights should be a social concern – although the criteria for determining who is an "interested person" will certainly have an impact on the implementation of this right.

3. Moral Rights Doctrine and Human Rights

The presence of authors' personal interests in international human rights discourse provides an opportunity to enrich the legal models for their protection. Due to formal limitations affecting both human rights law and intellectual property rights, this connection remains virtually unexplored. In relation to authors' personal interests, at least, a closer consideration of the nature and purpose of moral rights should make a degree of *rapprochement* possible. However, the effective development of a human rights model of authors' moral rights depends additionally on the clarification of a deeper issue: the conceptual compatibility of moral rights doctrine with the philosophy and rationale supporting human rights.

The edifice of international human rights law is constructed on two basic assumptions. The first is the "fundamental" nature of human rights; they are the epitome of "natural" rights, in the sense that they arise out of our "fundamental" human nature. The second premise flows naturally from the first: human rights, since they reflect our fundamental human nature, are "universally" applicable. Whatever the social context in which an individual may live, his fundamental human rights must be recognised and protected. At the same time, in order to qualify as a fundamental human right, one must be able to demonstrate that the right in question is linked to our

"fundamental" nature as human beings, and is therefore equally valid in a variety of diverse social contexts.

The development of international human rights law along these lines seems inevitable. Human rights law is part of a long-established tradition in Western thought that attempts to provide a philosophical foundation for the just treatment of individuals in society based on a deeper understanding of man's place in the universe. Thinkers as diverse as Rousseau, Hegel, and Locke have attempted to resolve the basic problem of what constitutes "human nature," and how it is both preserved and transformed through the socialisation of man.[52] Twentieth-century history exposed as never before the extent to which Western culture could become brutalised, and brought a new intensity to questions of human nature and human dignity.[53] It is for this reason that the modern concept of human rights, though it has a long philosophical pedigree, is truly a child of the post-World War II era. Its legal foundations can be traced to the post-War trials of German "war criminals" at Nuremberg, where, for the first time in international law, a

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[52]Rousseau's discourse on inequality is probably the most celebrated work of this kind: see J-J Rousseau *Discours sur l'origine et les fondements de l'inégalité parmi les hommes* ed J-L Lecercle (Editions sociales Paris 1983).

[53]In some respects, European colonialism – for example, as it was pursued in the lands of the aboriginal peoples of North and South America – was perhaps as brutal in its own way as the Holocaust. An interesting discussion of the legal implications of these resemblances may be found in B Kingsbury "Reconciling Five Competing Conceptual Structures of Indigenous Peoples' Claims in International And Comparative Law" (2001) 34 NYU J Intl L & Poly 189, 195. However, the treatment of the Jews has an immediacy for the European imagination unparalleled by any other historical event. This is hardly surprising, since the horrors of the Holocaust occurred on European soil, and in the heart of a society that was supposed to be the most advanced of its time.

state was held responsible for the mistreatment of its own citizens, and military personnel faced judgment for their conduct in the line of duty.[54]

While it is not difficult to understand how human rights law developed as the protection of "fundamental" and "universal" values, the language of universality has greatly impeded the subsequent development of human rights. It has led to inconsistencies and failures, both in theory and in practice. Two examples will serve to illustrate the gravity of these concerns.

A notable conceptual inconsistency arises under human rights law in the distinction between political and economic "rights." Civil rights and political freedoms are part of the "first generation" of human rights, and their protection forms the core of human rights statutes in the Western world. Economic rights are part of the second generation of "welfare" rights: the difficulty of guaranteeing the practical enforcement of these rights has interfered with their legal development in most Western countries. However, economic rights are clearly at least as "fundamental" as political rights: how can the right to food be less important than the right to freedom of speech?

When we consider the humanitarian law dealing with refugees, the differentiation of political and economic rights acquires sinister undertones. While a political refugee is generally entitled to seek asylum in a Western country, an economic refugee is not considered to be a refugee at all. It would hardly be an exaggeration to say that a person who seeks to migrate to another country for economic reasons is

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[54]War crimes trials were also held in Japan: see RH Minear *Victors' Justice: The Tokyo War Crimes Trial* (Ann Arbor Center for Japanese Studies, University Of Michigan 2001). The legal consequences of "victors' justice" for Japan are described by R Teitel "Transitional Jurisprudence: The Role of Law in Political Transformation" (1997) 106 Yale LJ 2009, 2063-65.

scorned by the international community, and has no recourse to international law to protect him from deportation.[55] Yet, if a person seeks to migrate to another country to improve the protection of his economic rights, is he not doing what is normal and natural, and indeed, according to international human rights principles, what he should be entitled to do?

The language of universality has led to practical failures to confront overt violations of human rights in the international community. Practices that almost certainly should be deemed contrary to international human rights law are tolerated on the grounds that they represent the cultural traditions of different countries, peoples or religions. In this kind of discourse, "culture" becomes the overriding value, and attempts to improve "cultural" behaviours on human rights grounds carry an unacceptable flavour of "Western imperialism." Yet, how can the international community tolerate, for example, the physical abuse and violent repression of women on the grounds of culture or religion?[56] And how can this all-accepting and uncritical

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[55]Economic necessity is not an accepted basis, either for immigration, or for granting refugee status. Note the recent proposals of some European countries, including Britain and Spain, to impose economic penalties on countries whose nationals migrate illegally to wealthier nations: see "Immigration tops EU summit agenda" June 20, 2002, CNN online: <http://europe.cnn.com/2002/WORLD/europe/06/20/spain.summit/?related>; and P Reynolds "Seville summit – what did it achieve?" BBC News online: <http://news/bbc/co/uk/hi/english/world/europe/newsid_2062000/2062661.stm>. Interestingly, in voicing its objections, French President Jacques Chirac's spokeswoman, Catherine Colonna, commented that "[e]xacerbating the economic situation of the country sanctioned would risk severely aggravating migratory flows and not diminish them. It would be particularly counterproductive": see CNN online. The "right to asylum" receives a detailed treatment in Wellman (n 30) 16-19.

[56]The controversy surrounding "female circumcision," a traditional practice in some African countries, is a case in point. For a discussion of this issue in the broader context of human rights violations against women, worldwide, see SP Subedi "Protection of Women Against Domestic Violence: the Response of International Law"

view of cultural traditions, itself, be healthy or desirable for cultural growth, particularly in underprivileged or politically oppressed regions? This situation suggests that there is something fundamentally wrong with the way we conceptualise and articulate human rights norms.

The problem of "fundamental" and "universal" values also presents an impediment to the recognition of authors' rights as human rights interests. In particular, the doctrine of moral rights is inconsistent with the language of universal rights in two important respects. First, in current historical scholarship, moral rights are generally associated with the birth of Western European Romanticism, and they are believed to be a product of the cultural and intellectual environment of nineteenth-century Europe.[57] In this sense, the concept of moral rights may be a culturally-specific doctrine, with limited applicability to new cultural contexts, especially those countries and cultures that differ widely from the Western European model, including those of Eastern Europe, the CIS, and Russia. Secondly, since moral rights deal with artistic creativity and culture, it will be difficult for them to claim a status as "fundamental" rights. After all, creativity and culture are "luxuries": it is usually assumed that they can only be pursued and enjoyed once the "basic" needs of human beings have been satisfied.

These conceptual arguments must be addressed by looking at the validity of the premises on which they are based. It is perhaps not surprising that the clues to resolving them may be found, not primarily in legal scholarship, but in anthropological

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(1997) 6 Eur Hum Rts LR 587, 592-93.

[57]Woodmansee's study attempts to show, in particular, how authors' rights developed in eighteenth- and nineteenth-century Germany: see M Woodmansee "The Genius and the Copyright: Economic and Legal Conditions of the Emergence of the 'Author'" (1984) 17 Eighteenth-Century Studies 425.

literature. In an illuminating discussion on the substantive content of human rights norms, Marie-Bénédicte Dembour points out:

> The expression "human rights" is...ambiguous with regard to the meaning of the term "right" which it contains. Although it sometimes refers to enforceable legal rights, it arguably refers more often to moral rights which have not found their way in[to] legally binding provisions, but hopefully will....
>
> In my view, human rights are (predominantly) extralegal not because they correspond to "natural" moral rights but because they serve to articulate political claims which make sense in a particular social context...[58]

Dembour contends that asserting the "universality" of human rights norms may not be the key to understanding what they actually signify. Indeed, as her discussion emphasises, there is something about the very concept of a "right" that distinguishes it both from the possibility of realisation outside a specific legal framework, and from the idea of "natural" law that exists apart from any specific legal framework. A "right" is a legal construct. What, then, is a human "right" that exists apart from law?

Dembour suggests that the language of human rights is, above all, a tool of empowerment. Indeed, in their search for a means to fight against repression, Soviet dissidents first turned to the language of the law for help. On Soviet "Constitution Day," December 5, 1965, Aleksandr Esenin-Volpin organised a demonstration in which he held up a placard declaiming, "Respect the Constitution."[59] Human rights law allows humanitarian interests to be expressed in such a way that an awareness of their importance is raised. Dembour cites the example of a "right to credit," which, in the

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[58]Dembour (n 50) 32-33. It should be noted that Dembour uses the expression "moral rights" in the general sense of non-legal or extralegal "entitlements" based on the universal characteristics of "human nature" – a line of inquiry that she finds deeply problematic.

[59]The incident, and the strategy behind it, are described by Hosking (n 2) 416-17. Esenin-Volpin was a mathematician, and son of the poet, Sergei Esenin.

context in which it is articulated, can be shown to represent humanitarian concerns. Moreover, she emphasises the aspirational aspect of human rights, which may in itself make an important contribution to the realisation of more humane conditions of life. She argues:

> What interests me... [about] the Grameen Bank [, a bank in Bangladesh which only lends to the poor,] is not so much the unusual conditions under which...[it] works... as the fact that the man behind it, Professor Muhammad Yunus, uses the language of human rights to describe the idea behind the successful project. He is quoted as saying that the Bank thinks that credit should not be the privilege of the fortunate few, and that it sees credit as a human right. Referring to human rights in this particular context makes sense....[H]uman rights are first and foremost political aspirations. They embody claims for a more egalitarian world, and these claims draw their strength and legitimacy precisely from the fact that they are cast in the language of "human rights".[60]

Dembour's ambivalence about human rights is at least partially a reflection of her anthropological background, which leads her to be deeply hesitant about the very idea of a fundamental "human nature" underlying a universalist approach to human rights.[61] From a legal point of view, while recognising the limitations of a universalist model of human rights, it may not be feasible to abandon altogether the hope of achieving a coherent conceptual rationale for human rights protection. This is not so much the case because legal thinking prefers to deal with precise issues rather than ambiguous ones, as because law inevitably involves an element of coercion. Human rights may represent the political language of self-assertion. When this language is ultimately translated into a legal norm, however, its significance is altered. It becomes

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[60]Dembour (n 50) 19. Dembour does not fail to note the "tautological" quality of this view of human rights – although, if anything, the circular nature of the arguments in support of human rights strongly seems to support her thesis about their context-specific and malleable nature.

[61]For example, see Dembour's discussion of scholarship on this issue: Dembour (n 50) 32-33.

a way of protecting one interest against infringement by another, and in doing so, it may have far-reaching consequences for society. Since legal norms involve coercion, there must be a sound policy justification for the legalisation of a human rights interest.

In relation to moral rights, the idea of creative authors making a political claim for the recognition of their rights on humanitarian grounds is easy to accept in terms of a struggle for the recognition of their "human rights." When we consider the cultural concepts built into the doctrine of moral rights, however, and it becomes apparent that the introduction of human rights-based protection for these rights along "universalist" lines may have unintended, negative consequences for cultural diversity. By offering legal status and protection to individual creation and creativity, moral rights may implicitly discourage other cultural patterns. The doctrine may be hostile to group or community involvement with the arts, and it may simply be unable to protect certain kinds of artistic or cultural works. For example, moral rights are not ordinarily applicable to anonymous works of folklore; however, these kinds of works may have a much greater importance in other cultures, including those of Russia, Eastern Europe, and the CIS, than they would in the West.[62] Indeed, they may be predominant features of minority cultures that, in any case, suffer from prejudice and neglect, such as those of Eastern European Romany people. In this case, moral rights can become an additional tool of repression.[63]

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[62]The difficulties of legal protection for folklore under Western legal models are discussed by CA Berryman "Toward More Universal Protection of Intangible Cultural Property" (1994) 1 JIPL 293, 309-33.

[63]This issue receives a detailed treatment in MT Sundara Rajan "The Implications of International Copyright Law for Cultural Diversity Policies" Research Position Paper 5 in T Bennett, *Differing diversities – Cultural policy and cultural diversity* (Cultural Policy and Action Department, Council of Europe Strasbourg 2001)

Similar problems may be posed by the concept of originality underlying moral rights doctrine. What would the strict application of Western criteria of originality mean in a culture where reusing or adapting pre-existing works may be central to the creative process? For example, William Alford's analysis of copyright law in the Chinese context suggests that the connotations of copying in China are totally different from what they are in the West.[64] India provides another example of a culture where tradition has seen the adaptation of literary works from one language to another as an important artistic activity, and, of course, an important source of cultural cohesion in this vast and diverse land.[65] In Russia, the importance of translation in building a common notion of Russian culture is reflected in the extreme reluctance of the Russian

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[64]See WP Alford "Don't Stop Thinking About... Yesterday: Why There Was No Indigenous Counterpart to Intellectual Property Law in Imperial China" (1993) 7:3 J Chinese L 3, 29-34. Alford shows that the Chinese attitude towards copying has much to do with the importance of the past as a source of knowledge, moral guidance and creative expression in Chinese culture. His ideas are developed further in a book-length study of Chinese copyright, WP Alford *To Steal a Book Is an Elegant Offense: Intellectual Property Law in Chinese Civilisation,* Studies in East Asian Law, Harvard University (Stanford University Press Stanford 1995).

[65]An example of the importance of translation and adaptation in Indian culture is provided by the Ramayana, one of two celebrated ancient epics in Sanskrit. It is ascribed to the authorship of the ancient sage, Valmiki; the original Sanskrit text has been adapted into most Indian languages by leading classical poets. These adaptations are not "mere" translations, but they actually attempt to recreate the story of Rama in the cultural and historical context of the region. Examples include the Ramayanam of Kamban in Tamil, and Tulsidas' Ramayan Manaćarita Manas in Hindi. The diffusion of the Ramayana throughout India was also associated with the *bhakti* movement, which represented a revolutionary new understanding of spirituality in terms of a direct relationship between the individual and the Divine Being. The ideal of *bhakti* was at the heart of a creative explosion in literature and the arts. The movement is described in detail by noted Indian historian, Romila Thapar: see R Thapar *A History of India* vol 1 (Penguin Books Baltimore 1966) 185-93, 304-10.

and, later, Soviet government to restrict translation rights.[66] Indeed, it is worth noting that modern concepts of originality, like authorship, are relatively new even to the Western world, which, as recently as the Renaissance, had a more flexible approach to creativity.

These arguments raise legitimate concerns about the justice of developing the author's moral right as a human right. However, a practical investigation of where moral rights stand internationally suggests that fears like these are largely unfounded. Of any aspect of copyright law, moral rights have undoubtedly achieved the widest international acceptance. In particular, they enjoy virtually universal recognition in developing countries, who have historically resisted Western copyright law on the grounds of culture and tradition. They were also recognised in the legislation of socialist countries, as a way of privileging authors over copyright owners, and have been retained in most post-socialist legislation.

Developing countries have seen moral rights as a way of bringing much-needed prestige and protection to national creativity, especially after colonial experiences.[67] Legislators and, especially, judges in developing countries have often developed innovative ways of dealing with moral rights, shaping their legal treatment to reflect different cultural needs and priorities. Moral rights have become applicable to works of

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[66]Freedom of translation was long a standard principle in Russian law; it came to be limited significantly only on Soviet accession to the Universal Copyright Convention in 1973. See the discussion in Chapter III 87-88; S Levitsky "Continuity and Change in Soviet Copyright Law: A Legal Analysis" (1980) 6 Rev Socialist L 425, 425 notes that this is an area of continuity from Russian to Soviet copyright law.

[67]See the discussion of the rationales supporting copyright in developing countries, in EW Ploman & LC Hamilton *Copyright: Intellectual Property and Information Age* (Routledge & Kegan Paul London 1980) 23-25.

folklore;[68] they can apply to any form of the mistreatment of a work, whether or not an author's reputation is damaged;[69] they can protect an artwork against destruction;[70] and they can be vindicated by members of the general public.[71] For socialist countries, acceptance of moral rights in developing countries, who share many of their economic and cultural concerns, may inspire their legislators and judges.

The question of whether creative expression represents a "fundamental" human value is one that is much more difficult to assess on the basis of empirical evidence. Any consideration of this issue must be undertaken in a spirit of humility: the complexity of legal regulation dealing with creative expression presents a most stark contrast with the limits on our knowledge about the phenomenon of creativity, itself. The creative process remains poorly understood, and it is difficult to define the meaning and importance of culture in human life and society.

The mystery of artistic creation lies at the heart of copyright protection. It may therefore be reasonable to turn to the true "experts" on creative matters, authors and

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[68]Tunisia was the first country to protect copyright and moral rights in folklore: Ploman & Hamilton (n 67) 129-31.

[69]Until recently, this was a feature of Indian law: see MT Sundara Rajan "Moral Rights in the Public Domain: Copyright Matters in the Poetical Works of Indian National Poet C. Subramania Bharati" (Jul 2001) Singapore Journal of Legal Studies 161, 175-76.

[70]This, too, was the case in Indian law: see MT Sundara Rajan "Moral Rights and the Protection of Cultural Heritage: *Amar Nath Sehgal* v *Union of India"* (2001) 10:1 Intl J Cult Prop 79, 84-87. Protection for the moral right of integrity that is not based on the protection of the author's reputation, or which acts to prohibit the outright destruction of a work, are not yet an accepted part of international copyright law. See the discussion in S Ricketson *The Law of Intellectual Property* (The Law Book Company Melbourne 1984) para 15.57, n 48.

[71]The proposed Draft Civil Code provision of the Russian Federation on copyright include a provision with this effect: see Draft Civil Code [OM Kozyr and EV Luchits (tr)], Nov 30 2001, Article 1287.4.

artists, and consider the nature of their involvement with their work. Why did creative writers continue to write under the oppressive Soviet regime? Was it out of a sense of duty to their oppressed societies, an extraordinary idea in itself? Was it out of personal need? Was their perception that they had no alternative, whether for professional or personal reasons? Whatever the answers to these questions may be, the fact remains that many writers were prepared to risk everything, including life itself, in order to continue writing. A letter to Stalin from Yevgeny Zamyatin, the Russian pioneer of satire, provides an extraordinarily moving illustration of what Baudelaire may have meant when he referred to a "besoin d'art," a "nécessité de poésie."[72] The incident is recounted by Hosking:

> In 1931 Zamyatin wrote directly to Stalin, declaring that for him being deprived of the opportunity to write was equivalent to "the death penalty". He admitted "that I have the very inconvenient habit of saying not what is expedient, but what seems to me the truth. In particular, I have never made a secret of my attitude towards literary servility, careerism and apostasy: I have always thought, and still think, that they are demeaning both for the writer and for the revolution." He asked to be allowed to emigrate in order to continue writing. Stalin granted him an exit visa.[73]

The attitudes of authors towards their own creative work suggests that, for them, there is something quite essential about their activity, and that its importance goes beyond purely professional considerations. A great deal has been written about the pros and cons of legal protection for authors' rights, but very little of this literature seems to look at the phenomenon of authorship from the author's perspective. An interesting addition to this line of discussion is developed in a fascinating study by Ellen

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[72]See Y Abe "Besoin d'art, necessite de poesie," Introduction to C Baudelaire *Les Fleurs du mal* (Orphee/La difference 1989). As Abe observes, the "besoin d'art" is envisioned as a "besoin fondamental" by the poet.

[73]Hosking (n 2) 181-82.

Dissanayake, which considers human creativity from the perspective of evolutionary biology. Dissanayake concludes that art, far from being a luxury, is a fundamental human need. Her contention is all the more striking in view of her tremendous scepticism about modern artistic trends. She argues:

> Yet acquaintance with the arts in other times and other places reminds us that they have been overwhelmingly integral to people's lives. Far from being peripheral, dysfunctional, trivial, or illusory, the arts have been part of human beings' most serious and vital concerns. If they are not so today, we should perhaps look for the reason not simply in some flawed metaphysical status of the concept of art but rather in the way we live.... I am convinced that contemporary art and contemporary life can best be regarded not from the perspective of philosophy, sociology, history, anthropology, psychology, or psychoanalysis – in their modern or postmodern forms – but within the long view of human biological evolution....
>
> My readers should note that I am not arguing that biological understanding automatically rules out the other perspectives I mentioned above. It does, however, precede these and provides a broader justification than other views for reclaiming the arts, humanising them, giving them once more the relevance they originally possessed in human existence.[74]

Though controversial, Dissanayke's thesis provides an invaluable perspective on the arts. The persistence of artistic creation even in the most adverse circumstances – or perhaps, especially then – suggests that human necessity is somehow at issue.

It is apparent that moral rights can lay claim to the protection of human interests that are, in all relevant respects, both universal and fundamental. What is equally important, they represent an aspiration towards more humane conditions of social life. Moral rights protect the creativity of authors and artists; they also signify a political and social commitment to the protection of culture. Indeed, it is hardly necessary to look at the historical situation of authoritarian regimes like Soviet Russia to understand the importance of articulating these aspirations. A consideration of more recently

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[74]See Dissanayake (n 28) xvi-xvii.

oppressive societies, whether in Nigeria, Afghanistan, or elsewhere, supports the same view. Moreover, though its government has embarked upon democratisation, the present situation of Russia still reveals anew the prospect of oppression in many forms – through organised crime, big business, and the globalisation of culture. These factors inevitably remind us of the precious fragility of creative freedom.

4. Moral Rights and Cultural Heritage

Much scholarship on moral rights is concerned with their role in protecting the reputation of an author. This emphasis is a natural reflection of the way in which moral rights are typically drafted: the right of integrity is considered to be the moral right with greatest practical significance, and it is usually limited, as in the international model provided by Article 6*bis* of the Berne Convention, to actions that prejudice the "honor or reputation" of the author.

However, this interpretation of moral rights theory is unnecessarily narrow. The reputation of the author can as well be protected by defamation law – a point alluded to by Pierre Recht in his interesting, if rather unsympathetic, analysis of *droit moral*[75] – and does not really account for the development of a specialised doctrine of moral rights. Moreover, the fact that the most important moral right is directly concerned with the treatment of artworks – the effect of the treatment on the author's reputation acting as a legal device limiting the reach of the right – makes the emphasis on reputation seem slightly artificial.

On closer examination, it is clear that moral rights reflect social attitudes about creativity and creative work. The connection between an author and his work

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[75]P Recht *Le Droit d'Auteur, une nouvelle forme de propriété: histoire et théorie* (Editions J Duculot Gembloux 1969) 278.

represents a socially important relationship, and it has therefore come to enjoy protection through this specialised branch of law. Moral rights contribute, each in its own way, to the individual author, and to the status of his work. However, moral rights also make a larger contribution to culture, one that tends to pass unremarked. Moral rights contribute to a public interest in culture in at least three, important ways: they help to generate respect for creativity, which leads to the creation of culture and encourages the maintenance of cultural heritage; the preservation of the existing cultural patrimony; and respect for historical truth.[76] The public interest in culture that moral rights protect finds expression in the provisions of the Universal Declaration of Human Rights and the International Covenant on Economic, Social and Cultural Rights; they appear in the form of rights in culture, and public access to culture.[77]

The contribution of the right of integrity to culture is perhaps the most obvious of all the moral rights, and is worthy of close consideration. It is clear that the protection of the integrity of creative works contributes to the general status of the cultural domain. In many countries, works of individual authorship constitute an important part of the cultural heritage. By protecting existing works of art, the right of integrity can thereby help to maintain cultural heritage. Its contribution to maintaining the quality of the cultural domain, from which current authors who are presently active draw their knowledge and inspiration, also encourages creativity.

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[76]See the interesting discussion of a public interest in moral rights, with special attention to its significance for the common-law countries, in D Vaver "Moral Rights Yesterday, Today and Tomorrow" (1999) 7(3) Intl J Tech & L 270.

[77]See Article 27 of the Universal Declaration, and Article 15 of the ICESCR (n 36).

As it is recognised in international copyright law, however, the integrity right is subject to a number of limitations. In Article 6*bis* of the Berne Convention, the integrity right only allows an author to protest against changes to his work that may affect his "honour or reputation" – in other words, his personal or professional standing. This legal limitation may unduly restrict the reach of the right of integrity, since it would impose a burden on the author to prove that his reputation has been negatively affected, before the artwork could be protected. An integrity right that was independent of the author's reputation would place the burden of proof on the person dealing with the artwork to show that his actions were not damaging to culture. This kind of integrity right could have much broader repercussions for culture, and for this reason, it is favoured by a number of jurisdictions who are concerned about the status of their cultural heritage. These include developing countries as diverse as Mali and India.[78] This formulation of the integrity right was also historically favoured by Russia, which placed great importance on the "right of inviolability of the work," and Russian moral rights legislation has become significantly more conservative in preferring the Berne standard.[79]

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[78] Until recently, such a right existed in Indian law, where moral rights provisions were used successfully to impose a duty on the government to protect works of art in its possession. The case was *Amar Nath Sehgal* v *Union of India* (1992), Suit No 2074 (Delhi HC), (1994) 19 Indl Prop L Reps 160. Subsequent amendments to the Indian Copyright Act – a result of the government's fears about the consequences of the decision – have scaled the provisions back, bringing them within the limits established by Article 6*bis*. The case is discussed in P Anand "The Concept of Moral Rights under Indian Copyright Law" (1993) 27 Copyright World 35. See also Sundara Rajan (n 70).

[79]The right of inviolability can be traced back to the Russian copyright statute of 1911: Russian Copyright Law of 20 March 1911, *Polnoe Sobranie Zakonov Rossiiskoi Imperii* (Sob III) (Third Complete Collection of Laws of the Russian Empire), Sanktpeterburg 1914, Vol XXXI, Item No 34, 935. Incorporated into the Civil Code (*Svod Zakonov*) as ss 695(1)-695(15) of the Civil Laws (Volume X, Part 1, 1914 ed);

A second limitation on the right of integrity arises out of the fact that, in the formula of Article 6*bis,* it cannot protect a work of art from outright destruction. The logic of this restriction is that a work which no longer exists cannot affect its author's reputation negatively.[80] It is true that the destruction of a work may damage the author's reputation by reducing the quantity and quality of his body of work as a whole, but this argument has not been widely persuasive.[81] This, too, is a limitation that restricts the potential contribution of the right of integrity to culture.

The contribution of the attribution right to cultural heritage is subtler, but no less important. The right of attribution supports an accurate view of cultural history: by recognising the true author of a work, a truthful understanding of history becomes possible. A cultural environment that is correctly attuned to historical fact will be more compatible with creativity and development. The importance of the attribution right in preserving historical truth becomes clearly apparent when we consider the contribution of creative authors to the maintenance of truth and history in Soviet Russia. History must preserve a record of the writings of Soviet-era authors, which contain truths about history that, in a regime specialising in the creation of "memory holes," may not be available in any other, credible form.

Sobranie Uzakonenii i Rasporyazhenii Pravitel'stva, (Collection of Regulations and Government Decrees), 30 March 1911, No 61, Item 560. It was part of Russian legislation until the adoption of the Copyright Act of 1993 (n 10).

[80]See Ricketson (n 70) para 15.57, n 48.

[81]See Sundara Rajan (n 70) 84. Destruction, too, has been deemed to be forbidden by Indian moral rights provisions, though recent amendments to Indian copyright legislation make the present status of a moral right against the destruction of a work somewhat ambiguous.

Russian copyright history also serves to illustrate the importance of the right of disclosure for culture. Without the recognition of a right to publish, the development of culture could be utterly stifled. The outcry among Russian intellectuals surrounding membership in the UCC was a direct result of this concern: they feared that Russian literature would become unpublishable and unavailable worldwide as a result of Soviet membership in this international union. Their fears were due to provisions in Soviet copyright law that would allow the government to undertake a compulsory purchase of an author's work, giving the right to control copyright in the work and, since the state would be the owner of copyright, making it impossible in practice for the author to vindicate his moral right of first publication.[82] Respect for a creator's right to publish his work is an essential pre-condition for ensuring the availability of important works of culture to the public, and to the community of intellectuals whose ability to make a contribution to society depends on their own access to culture.

The exercise of these moral rights depends on the initiative of the author of the work, the person who may well have the strongest motivation to intervene on its behalf. However, it is not at all clear that the cultural interests protected by moral rights lose their value when the author dies. If anything, moral rights interests may actually acquire greater urgency when the author is no longer present to clarify doubts about his work, or to protect it from damage. The work endures beyond the author's time. The issue of protecting its integrity therefore persists, and becomes part of the general need to protect the integrity of cultural heritage. According to international legal convention,

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[82]Article 106 of the 1961 Fundamentals; Articles 501 & 502 of the RSFSR Civil Code (n 3). See the analysis of this problem in MA Newcity *Copyright Law in the Soviet Union* (Praeger New York 1978) 151-59, and the detailed discussion in Chapter III 122-29.

the integrity right may be considered to serve the primary purpose of protecting a living author's reputation, and offering protection to the integrity of his work as a purely secondary function. However, upon the death of the author, at the very least, this order of priorities should be reassessed.

In order to realise fully the cultural benefits to be gained from protecting authors' personal interests, the issue of what happens to moral rights after the death of the author must be considered. During the period of copyright protection *post mortem auctoris,* the author's heirs are usually charged with the responsibility of protecting his moral rights. However, the exercise of moral rights by the author's descendants may not always produce the most desirable results for culture. For example, descendants may wish to suppress knowledge about certain aspects of the author's life or work for a number of reasons, including privacy and, less sympathetically, propriety, or an intent to exploit the information later on. Solutions to these problems are suggested by the provisions in the Draft Civil Code of Russia: allowing the author to designate a person who will be responsible for exercising his moral rights after his death, or, more controversially, making them the responsibility of the state.

Moral rights in the public domain present a similar problem. Should the moral rights of the author continued to be protected in relation to works that have fallen into the public domain? This question leads to the additional difficulty of whether moral rights are relevant to works that automatically fall into the public domain, such as so-called works of "folklore," or cultural property.[83] In fact, moral rights, and the right of

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[83]Berryman is in support of widening the application of authors' moral rights to the public domain; she points out that "[t]he rights of paternity and integrity denote a collective cultural interest in preserving the work itself..." See Berryman (n 62) 318-20.

integrity, in particular, may make an important contribution to the preservation of cultural heritage that is part of the public domain. One solution to the integrity issue in public domain works is to create a moral right that can be vindicated by any "interested" member of the public on behalf of the author – whether he is known or unknown, an individual creator or a community. The definition of who will have *locus standi* to bring such claim must be broad enough to make the right meaningful in the eyes of the public, but narrow enough to prevent "busybodies" from embarking upon wasteful litigation.

Public domain measures involving moral rights can work in conjunction with other legal and administrative provisions for safeguarding culture. By entrusting "interested persons" to assert them, as in the Draft Civil Code provisions on copyright in the Russian Federation,[84] they may also further the broader cause of public education about culture. Moral rights in the public domain may be of special value in developing and oppressed societies, where the obstacles to respecting and valuing culture are, in a sense, at the very heart of development problems.[85] Unfortunately, many of these measures remain speculative, as they represent relatively unusual features of moral rights legislation, and are largely untested in court proceedings. However, recognition of this aspect of moral rights doctrine – the importance of protecting the personality interests of authors for culture and development, as a whole – helps to clarify why

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[84]See Draft Civil Code (n 71) Article 1287.4

[85]See LV Prott & PJ O'Keefe (n 16) 14: they point out that the commercialisation of cultural objects leads to a loss of respect for cultural values in source countries and, "in many cases,... engenders a contempt for one's own cultural traditions."

these rights should be understood as humanitarian interests, rather than exclusively individual or commercial concerns.

5. Moral Rights and Free Creative Expression

Having considered the complex issues at stake in a human rights model of moral rights, it now remains to deal with the problem in its narrowest, most fundamental, and final dimension: moral rights as a form of protection for the individual right of the author. A study of moral rights in Soviet Russia shows a clear incongruity at the intuitive level between the protection of authors' moral rights and the repression of creative expression. This intuitive malaise is borne out in moral rights theory, which is premised upon a privileged relationship between creator and work, and the social importance of maintaining the integrity of this relationship. If this relationship can be vindicated against private interests, potentially even curtailing the free expression of members of the public who use or exploit creative works, it would seem to be important enough to offer it an appropriate level of protection from the arbitrary interference of the state.

An initial approach to the relationship between moral rights and free expression immediately raises the spectre of an opposition between copyright and freedom of expression. As discussed above, moral rights may, indeed, have the effect of imposing restrictions on public access to information. Nevertheless, it is a mistake to suggest that they oppose freedom of speech values. Not only are moral rights compatible with freedom of speech, but, as this discussion will seek to demonstrate, they should actually be understood, in their own right, as a legal instrument for the recognition and protection of free expression.

In order to understand the close relationship between authors' moral rights and free expression, it is necessary to consider copyright from the perspective of the author. Indeed, in the debates surrounding copyright policy, the absence of individual authors is striking. Rather, copyright, as is generally the case in relation to intellectual property rights, has come to be perceived primarily as a property right that serves the interests of corporate owners. This is the case for two reasons. First, copyright has gained prominence as a form of legal protection for new communications and information technologies, whose creation and development is often associated with corporate investment and team labour. Secondly, the view of authorship as being composed of groups of people, possibly working in a business environment, rather than an independent, individual creator, probably reflects a growing social reality. At least in Western countries, the entertainment "industries" and, ultimately, the arts, often seem to be infiltrated by a corporate presence, at the level of funding and beyond. The widespread and growing understanding of copyright as a form of corporate property is also reflected in the relative neglect of moral rights in international copyright developments. Moral rights are, by definition, rights of personal authorship: as a rule, they cannot be exercised by corporations, bought by them, transferred or sold to them.[86]

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[86]It would be incorrect to present this as an absolute rule: rather, the moral right is an individual right of the author that can only be transferred in certain circumstances. The circumstances will vary among jurisdictions; in strong moral rights countries such as France, it would be difficult to transfer or waive moral rights, but it is much easier to do so in common law countries. On the inalienability of moral rights in French law, see Strowel (n 19) 497-99; the issue of waivers in, the countries is discussed by Dworkin (n 19) . A possible exception to this point that would be more general, is the recognition of joint authorship, but it is usually dealt with in copyright law as two individual copyrights in a single work. The phenomenon of corporate authorship is considered by P Jaszi, "On the Author Effect: Contemporary Copyright and Collective Creativity" (1992) 10 Cardozo Arts & Ent LJ 293, 294-99; he is primarily concerned with the potential incompatibility between copyright theory and what he terms "contemporary

In a regulatory environment that is defined by technology and corporate involvement, copyright is typically analysed from the perspective of social policy, rather than individual rights. Copyright is a form of protection for the investment of corporations into innovation; it also acts as the main system of incentives for innovative and creative activity. When individual-rights interests are discussed within a copyright context, it is usually to show how copyright acts to their detriment. As Jeremy Waldron observes:

> [I]n our legal culture, the defense of intellectual property is seldom cast in purely individualistic terms. Officially, the justification is supposed to have more to do with the social good than with the individual natural rights of authors. The U.S. Constitution empowers Congress "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive right to their respective Writings and Discoveries." The clause emphasises that copyright is purely a matter of positive law; it is to be a creature of statute, in contrast to the rights which are recognised in the Bill of Rights. Moreover the clause insists that the positive law of intellectual property is incipient to a specific policy goal: it is a means to an end...[87]

Concerning freedom of expression, in particular, the usual view is that it is limited by copyright, because copyright restricts what can be done with creative works. In particular, moral rights may limit how a creative work is displayed, used, or even criticised. Most obviously, moral rights may potentially clash with parody, an art form in its own right, but one that depends on using original material and satirising original works in ways that may not always find the approval of the author.

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polyvocal writing practice – which increasingly is collective, corporate, and collaborative."

[87]J Waldron "From Authors to Copiers: Individual Rights and Social Values in Intellectual Property" (1993) 68 Chicago-Kent L Rev 841, 848. Waldron is actually arguing that copyright should be considered more from the "copier's" point of view, but his analysis holds good for the argument developed here, as well.

However, the fact that moral rights may interfere with parody is not an especially strong reason to conclude that they interfere with free expression values, overall. For example, defamation law may also interfere with parody, and indeed, with the free expression of opinions in a much wider sense. Why is it acceptable to protect an individual through defamation law, potentially at the expense of free speech, while it is not acceptable to protect a creative work, or an author whose livelihood may be ruined if his reputation is destroyed? The real difficulty is not that authors' rights and free expression are incompatible: rather, there is a fundamental lack of clarity, both about what freedom of expression means, and about the purpose of legal protection for authors' rights. If a clearer understanding of the relationship between freedom of expression and authors' rights could be achieved, it might become possible to resolve collisions between these two domains. Guiding principles of public policy could help to determine which interests should prevail in different circumstances.

Freedom of expression is a very important value in democratic societies: the idea that an individual has the right to express his thoughts and opinions freely is at the heart of our political system. It is also the essence of our society and culture, making diversity of expression not only a reality of social life, but an ideal of what our culture aspires to be. However, freedom of expression does not mean that "anything" can, or should, be tolerated. Rather, even in the freest society, there is a sense of balancing different kinds of expression. The idea of socially-important expression – in contrast to the idea of socially-useful or socially-valuable expression – defines both what is allowed and what is prohibited in free societies. For example, in the United States, the

jurisprudence of the Supreme Court would define socially-important expression in terms of protected categories of speech.[88]

Authorship rights are designed to protect creative works, a socially-important form of expression. Moral rights protect creative works by preserving a special relationship between an author and his work that allows an author to undertake legal action for its protection, and on his own behalf, as its creator. He is legally entitled to seek the protection of the work from damage. Arguments that the right of the author interferes with freedom of expression are based on the false notion that creative work is by nature a "public good," freely available to all. Whatever theory of authorship one may choose to espouse, it remains a matter of fact that a work comes into existence only because of the author's existence, and his investment of himself, his labour and his life, into the work. When a member of the public "uses" the work, his actions constitute the treatment meted out to someone else's work – "free expression" that may have a profound, personal impact on the reputation, work, and psyche of the author.

On the other hand, authors, too, can potentially exercise their moral rights for less than noble motives of censorship – for example, in the case of works of parody, or in circumstances where he wants to avoid the appearance of unfavourable publicity. In circumstances like these, the author's moral right could actually harm cultural heritage, rather than protecting it. Rather than making this argument a reason to avoid exploring the benefits of moral rights for culture, it may be better to generate special legislative provisions dealing with parody, and to allow courts to mediate in the relationship

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[88]The approach of the United States Supreme Court to categories of speech and speech of "social importance" is discussed, among other characteristic features of copyright jurisprudence in the US, by Fraser (n 13) 4-19.

between author and parodist with a view to achieving an acceptable balance of social interests.

Moral rights protect the author's ability to see the creative process through to its desired end, by publishing the work, by putting his name to it, and by preserving it from distortions, mutilation, or modification. Without the substantial protection of these interests, the author will be unable to achieve the fulfilment of his need, as one who professes a creative vocation, to express himself and his best abilities to his society, through his work. In this way, the moral right of the author is closely associated with his need for, and right to, free creative expression. At the same time, the social importance of creative work must be recognised. The public has a strong and deeply-ingrained interest in the preservation and growth of culture. From the perspective of both the author and society, therefore, there is a clear basis on which creative work is entitled to protection as a socially-important type of human expression.

Of course, this does not mean that moral rights are entitled to absolute protection, any more than any other right in a free society. Insofar as they are associated with creative expression, however, they merit an adequate and appropriate standard of protection. This means that legislative protection should be granted to the basic rights of disclosure – including withdrawal – attribution, and integrity, and that judges should be empowered to use these rights to protect authors from both private and public censorship. At a minimum, the legal protection of moral rights in free societies should reflect an awareness of their importance for the human rights of authors and, through them, a recognition of their contribution to the creative and cultural rights of all human beings.

6. Political Constraints on Moral Rights

Considering the range of humanitarian concerns implicated in moral rights doctrine – issues involving both individual creative rights and the public interest in culture – it is apparent that recognition of moral rights will be an important part of the legal framework in societies that aspire to creative freedom. Indeed, the connection between moral rights and creative freedom is perhaps most clearly apparent when we look at the situation of moral rights in politically oppressive environments. A study of moral rights in the Soviet Union, which could once claim to be the world's most fully realised totalitarian society, shows that moral rights are fundamentally incompatible with ideological oppression. Respect for authors' rights to choose the conditions in which they release their work to the public, to maintain the attribution of their work to themselves by name – or to the protection of a pseudonym or anonymity – and to protect their work from harm, all imply a deep deference towards individual expression. In particular, respect for moral rights arises out of a deeper regard for free creative expression as a socially-important form of human speech. In a society that cannot tolerate ideological diversity and freedom of the imagination, moral rights will not be respected. They may be protected for those authors who successfully manage to walk the tightrope between political acceptance and dissent – and for those who do not try – but such severe limitations on the circumstances in which moral rights will be recognised, protected and enforced begs the question of whether such "rights" are, *de jure,* moral rights at all.

The moral right of the author should remain his personal prerogative, to avoid the danger, as in the *Shostakovich* case, of being pressured into asserting it for political reasons. After his death, it should fall to appropriate agencies to protect the moral right

of the author; the assertion of moral rights should perhaps not be entrusted exclusively to the personal heirs of the author, who may not be in the best position to vindicate these rights with the public interest in mind, but also, to "interest" members of the public, or appropriate cultural agencies.

Since moral rights are part of copyright law, they typically fall within the domain of private law, which is supposed to regulate relationships among private entities, and not public law that deals with the relationship between the state and individuals. However, copyright law is a hybrid area that includes both private and public elements, and these hybrid qualities are especially pronounced in the area of moral rights.

The protection of authors' moral rights involves the creation of a relationship of legal privilege between the author and his work: it may be protected against infringement even at the expense of other, important social interests, such as public access to knowledge and information. The legal protection of moral rights affirms the importance of this relationship, of the creative activity that it represents, and of the cultural sphere, to which it contributes. In view of these rationales underlying moral rights doctrine, it seems conceptually inconsistent to argue in favour of protecting authors' personal rights from infringement by private parties, while allowing the state to interfere with them on an indiscriminate or arbitrary basis. Of course, it is true that the state is charged with larger duties to the public which are not normally associated with private entities, and which might require it to undertake action for the protection of public security.[89] However, in relation to authors' moral rights, as with all rights that

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[89]A poignant illustration of this problem is the fate of privacy regulation in Western countries following the terrorist incidents of September 11, 2001.

are recognised in free societies, the action of the state must be constrained, by custom and by law. The threshold at which moral rights can be set aside by the state should be defined in careful legal terms, and it should not be set so low that the integrity of the doctrine is compromised. Quite simply, a meaningful framework for the protection of moral rights must be based on respect for fundamental human rights, and for the principle of the rule of law.

7. Conclusion

Despite the presence of moral rights in copyright law, an area of primarily commercial regulation, moral rights doctrine has far-reaching implications for creativity, culture, and freedom. These aspects of authors' moral rights transcend the conventional limits of copyright law, and should be recognised as involving important humanitarian interests. It is difficult to frame moral rights precisely in the language of human rights law. This limitation is as much a product of confusion and absence of clarity in the human rights arena – to some extent, an inevitable feature of human rights discourse – as a lack of vision about moral rights doctrine. However, it is possible to identify and analyse a number of aspects of moral rights doctrine that are concerned with human rights. Doing so leads to a deeper understanding of the conceptual basis of this doctrine and what it signifies in practice for the protection of the cultural sphere.

A human rights model of moral rights may raise nearly as many questions as it answers about the future of this personal and intimate doctrine in a global, technological society. Nevertheless, it points the way towards a more comprehensive and intellectually fulfilling vision of moral rights for the international legal community. The language of human rights has its limitations; but, if moral rights are enmeshed within this web of words, their contribution to restraining the abuse of human creativity

may be greatly enhanced. The revolutionary power of words should not be underestimated. It is an idea for which Russian writers and others like them have been prepared to make great and irrevocable sacrifices.

VII. CONCLUSION: MORAL RIGHTS AND AUTHORSHIP IN TRANSITION

An intense inner conflict is at the heart of moral rights reform in post-Communist Russia. A consideration of the provisions on moral rights in the Draft Civil Code, currently pending adoption, shows that reformers are interested in improving protection for moral rights beyond the present standard. Indeed, it is noteworthy that moral rights in the Copyright Act of 1993 are less ambitious than either the corresponding provisions of the Draft Civil Code, or the measures in the 1991 Fundamentals of Civil Legislation, the first post-Communist legislation on authors' rights. The pattern of Russian reform suggests that reformers have consistently wanted to set a high standard for the protection of moral rights. However, there are significant political obstacles to the adoption of a higher level of protection. While some of these arise out of Russia's domestic concerns, most of them are presented by the requirements of the international copyright arena.

Russian moral rights reform is torn between domestic and international pressures. In particular, the scaling back of moral rights protection between the 1991 Fundamentals and the 1993 Copyright Act reflects the pressure on Russia to conform to an internationally accepted standard of protection. The international position on moral rights is somewhat ambiguous: participation in the international copyright arena, which is now defined by membership in the TRIPs Agreement, requires countries to protect the moral rights of attribution and integrity, in conformity with Article 6*bis* of the Berne Convention. However, these rights are not subject to the dispute-settlement and enforcement measures in TRIPs, with the result that moral rights are effectively excluded from the TRIPs system. Article 9.1 of the TRIPs Agreement provides:

> Members shall comply with Articles 1 through 21 of the Berne Convention (1971)... However, Members shall not have rights or obligations under this Agreement in respect of the rights conferred under Article 6*bis* of that Convention or of the rights derived therefrom.

The reasons behind this, extremely cautious, approach to moral rights are most likely to be found in the copyright policy of the United States. In the negotiation and adoption of the TRIPs Agreement, the United States has assumed an unprecedented leadership role in international copyright matters.[1] American copyright industries – including, for example, film and computer software – have long been concerned about the implications of moral rights, whether at the domestic or international level. In contrast to other areas of copyright, where the United States has generally encouraged the improvement of standards, a weak standard of protection for moral rights has been preferred. In consequence, the US government has chosen to pursue a policy of limiting moral rights both at home and abroad.[2]

The restrictive international approach to moral rights, as reflected in the TRIPs Agreement, has translated into more limited protection than that initially envisioned by Russian reformers. It is likely that the intensive involvement of American experts in Russian copyright reform – intended, in part, to further Russia's bid for membership in

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[1]The American position is especially interesting in light of the fact that, at the time of the adoption of the Berne Convention, the United States was the leading nation of piracy in the world.

[2]For example, cases like those of *Huston* and *Shostakovich* – the first, involving the colourisation of the works of an American director, and the second, a claim for moral rights protection in the musical score for film – seem to indicate that moral rights could impose important restraints, whether domestically or internationally, on the U.S. film industry. The position of the American film industry on moral rights is discussed in detail by S Fraser "Berne, CFTA, NAFTA & GATT: The Implications of Copyright *Droit Moral* And Cultural Exemptions in International Trade Law" (1996) 18 Hastings Comm. & Ent LJ 287.

the WTO – has been an important factor limiting recognition of the moral rights of authors in Russian law. Indeed, a closer consideration of the state of Russian law, itself, brings even stronger support to the view that international pressure, especially from the Americans, has imposed unwanted limitations on moral rights in Russia's Copyright Act. In spite of its apparent willingness to lower its standard of protection, Russia appears to have maintained surreptitiously the possibility of greater protection for moral rights in its legal system. In its enactment of the 1993 Copyright Act, the Russian government repealed the provisions on copyright in the 1991 Fundamentals – but it did not simultaneously repeal the earlier provisions of the 1964 RSFSR Civil Code.[3] It is apparently to be inferred that these provisions, where they are in conflict with the new law, are, in effect, invalid.[4] Where the old provisions supplement the new ones, however, such a conflict does not necessarily arise. Therefore, a complete picture of Russian moral rights law can only be gained by looking at the interaction of the old and new provisions.

In fact, in at least two important instances, the RSFSR Civil Code provides additional protection for authors' moral rights. In the first case, Article 480 provides for a broad right of integrity that does not allow any changes to the work without the author's consent, in contrast to the relatively narrow "right to the protection of the author's reputation" in Article 15.1 of the Copyright Act. Secondly, Article 499 creates

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[3]RSFSR Civil Code of 1964, *VVS RSFSR,* 1964 No 24.

[4]But see I Pozhitkov "Copyright and Neighboring Rights Protection in the Russian Federation" (1994) 20(1) Rev Cent & E Eur L 53, 54-55; Chapter V 251. Pozhitkov believes that the RSFSR provisions have been replaced by new copyright legislation, but it is not clear that his conclusion is technically sound

a specific offence of infringement against moral rights, whereas infringement is only recognised against the author's economic rights under the Copyright Act.[5]

The importance of moral rights for Russian reformers almost certainly reflects their awareness of the difficult situation endured by authors in the Communist era. Both intuitively and logically, they are responding to Russia's "transitional" legal problem, of how to remedy past injustices through present-day reform. Analysis of the current copyright framework reveals provisions that are directly related to Communist persecution, such as the renewal of copyright term in the works of authors who were "rehabilitated" by post-Communist leaders, which are now protected for the full duration of copyright – the lifetime of the author and fifty years after his death – from January 1 of the year following the rehabilitation.[6] However, the general improvement of copyright standards, and, in particular, the importance placed on personal rights that were treated with a degree of suspicion by the Communists, is also an attempt to rehabilitate the concept of authors' rights from its degraded status in the Communist era..[7]

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[5]See Article 49.1 of the Copyright Act, and the discussion in Chapter V 253-54.

[6]Copyright Act, Article 27.5; see discussion in Chapter V 245-49. Current amendments will make the copyright term in Russian law life plus seventy years: see I Motsnyi "Russia: Russia is About to Amend its Copyright Laws" Mondaq Business Briefing, online: <http://www.mondaq.com>. Given the relatively brief period between the adoption of the 1993 Copyright Act and the amendments that have just been adopted, which make the 1993 standards appear to be "transitional" rather than permanent in nature, one wonders whether the extended term will be made retroactively applicable.

[7]For example, see S Levitsky "Continuity and Change in Soviet Copyright Law: A Legal Analysis" (1980) 6 Rev Socialist L 425, 433, on why it took decades for the terminology of "personal" rights to be employed openly in Soviet copyright law.

The intuition of Russian reformers about the importance of authors' moral rights in post-Communist society is also forward-looking: it is equivalent to a recognition of the contribution that moral rights can make to a newly democratic society. A consideration of the theory underlying moral rights and the rationales supporting human rights law shows that these two concepts of law are based on closely related ideals concerning freedom of thought and expression. The moral rights of authors reflect the special needs of a unique class of expression: creative work.

Freedom of expression is widely recognised as a fundamental human right – indeed, it is simply a form of freedom from fear of persecution, and as such, it is quite essential to a fully realised human existence. However, the significance of freedom of expression for authors and artists is special, and should be clearly distinguished from its meaning in ordinary life. For the creators of artistic and intellectual works, freedom of expression has profound professional and personal connotations. Without freedom to imagine and create literary or artistic works, it would be near-impossible for creators to exercise their profession. Judging from the observations of creative people, themselves, the inability to exercise their profession in freedom from fear of persecution leads to devastating personal, as well as professional, consequences. Inevitably, the loss is one that is felt by society as a whole: the creative individual whose main means of contributing to society is through his creative work may be unable to contribute anything else of equal value, leading to the waste of human and cultural potential.

The nature of the creative professions is such that the professional activities of writers and artists constantly subject them to the danger of persecution for what they have expressed in the form of a work of art. The expression of the thoughts and ideas of the creator is central to the practice of these professions – the mind of the author

provides the raw material for all literary and artistic work. At the same time, this expression is consistently subject to evaluation according to criteria of social acceptability. When these criteria become extremely restrictive, as in Soviet Russia, it becomes practically impossible for an author to create in freedom. For these reasons, it is especially important that censorship against creative expression be restrained by law and custom. Censorship should not become so powerful as to inhibit or prevent the exercise of the creative professions, or so invasive that the contribution of writers and artists to society remains unrealised.

The special importance of freedom of expression for authors and artists is not reflected in the law of human rights. Human rights instruments, including constitutional laws, provide broad, general protection for freedom of expression that is relevant to society at large. If we want to discover a source of specialised legal recognition for the interests of authors and artists, however, we must turn to copyright law, and the doctrine of moral rights. Moral rights protect an author's right to determine when he is ready to disclose a work to the public; to be associated with his work, or to dissociate his name from it; and to protect his work from harm. These interests reflect the intense, personal relationship of creators with their own work, and the especially high price that they stand to pay for interference with it. It is true that the protection of these special interests may at times result in the curtailment of other important social interests – for example, the freedom of expression of non-authors, as in the case of parodies or works of criticism. The author's moral right is not an absolute right. However, it must be granted its rightful place in the complex systems for balancing rights and interests represented by the legal systems of the world.

Thinking about the author's moral right as an "author's human right" brings a new dimension to our understanding of the doctrine. A human rights concept of the moral right may have practical implications of various kinds. It may entitle moral rights to a place in constitutional instruments, and it may mean that judicial interpretation of these rights should occur through constitutional courts. Moral rights principles may help to guide judges in disputes between creative authors and the state, providing guidelines about when and how the application of official censorship will be appropriate in a democratic society. A human rights model may generally help to guide judges towards stronger interpretations of moral rights in the case of disputes.

A human rights concept may also make a much-needed and very valuable contribution to moral rights in the international copyright arena. Moral rights are treated with tremendous suspicion and hesitation in international copyright law: in addition to their exclusion from the TRIPs Agreement, they have not been successfully included in any process of international copyright harmonisation, whether at the European Union, WIPO, or elsewhere. The only exception to this trend is the introduction of an international moral right for performers in the WIPO Performances and Phonograms Treaty, which has not helped, however, to resolve any of the general controversies in this area. The question of whether moral rights should be fully included in the international copyright system is a separate issue, and one that will be very complex to resolve. What is clear, however, is that the failure to harmonise moral rights at the international level is an unmistakable symptom of confusion – confusion at the conceptual level, about the purpose and meaning of these rights in modern copyright systems, and in practical terms, about the economic and social consequences of a powerful and widely enforceable moral right. A human rights perspective on moral

rights can help to clarify this situation: moral rights are intended to protect authors and society from the consequences of censorship, whatever form it may assume, and it is therefore important to make the social commitment required to uphold these rights.

A human rights model is also relevant to another issue that has not yet received adequate consideration from the international copyright community: the impact of the Information Revolution on creative authorship. The development of unprecedented new technologies for creating and disseminating works of the mind has profound implications for creativity and culture. In the world of digital technology, both phenomena, to an extent that has yet to be grasped, are in a state of transition and transformation. The meaning of time and distance has been altered fundamentally. Instantaneous communication of vast amounts of information is possible from the most remote corners of the globe. Literary works, digitised sound and images, broadcasts in unfamiliar languages, films and photographs, and, ultimately, an inexhaustible variety of undefinable, new forms of creative expression, are all the subjects of this global communication.

Human creativity in the era of information technology has entered a period of great uncertainty. As technology has become an important source of worldwide economic growth, intellectual work, which gives technology its *raison d'être,* has enjoyed a surge of recognition. However, writers and artists cannot fail to note the tendency for their work to be valued primarily as "raw material" in the Information Society's economic circuit, an outlook that is fundamentally at odds with their interests. In an interesting journalistic comment, Jack Ralite observes:

> [According to] Kant's dictum... "A book is not, for the author, a commodity to be bought and sold; it is the fruit of his labours, which he may lend to others but which he can never give away."

> This approach naturally conflicts with the interests of those who cannot escape the narrow confines of their economic, monetary and commercial view of life and culture and who want to treat copyright as an "author's right without authors".[8]

By its very nature, the Digital Age has paradoxical consequences for intellectual creation. The Internet brings authors and audiences an opportunity for extensive communication and contact. However, as "users" of creative works are able to intervene in them directly through the manipulation of digital technology, with or without the consent of the original author, this developing relationship falls inevitably under the shadow of latent hostility. While technology seems to threaten creativity by bringing new dimensions of vagueness and confusion to traditional concepts of authorship and the creative work, it also presents exciting possibilities for new kinds of creative expression.

This ambivalent situation relates to culture on a much larger scale. Technology presents a threat to culture worldwide by enforcing ever-greater homogeneity, as, for example, in the spread of the English language as the dominant language of the Internet. At the same time, it provides new ways of making the knowledge and expression of diverse cultures more widely accessible than ever before.[9] The growth of a global

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[8]J Ralite "Vers un droit d'auteur sans auteurs" (March 1998) *Le Monde diplomatique* 5, 6. An English version of the article is available: B Wilson (tr) "Are authors about to lose their rights?" Special issue on "The Dangers of the Multilateral Agreement on Investment", *Le Monde diplomatique* online: <http://mondediplo.com/1998/03/09maira>. M Ralite is Senator and Mayor of Aubervilliers, and President of the *Etats généraux de la culture.*

[9]For a consideration of the benefits that technology may bring to cultural diversity, see the discussion in MT Sundara Rajan "The Implications of International Copyright Law for Cultural Diversity Policies" in T Bennett *Differing Diversities: Cultural Policy and Cultural Diversity* (Council of Europe, Cultural Policy and Action Department Strasbourg 2001) 135. In one form or another, concerns like these are at the heart of the "anti-globalisation" movement. However, the contribution of

society, bound together by technology, raises fundamental questions about the role of art and culture in this new environment, and in particular, the changing status of the individual author or artist.

Moral rights are closely implicated in these technological, social, and cultural developments. They are traditionally associated with the culture of Western European Romanticism, and the doctrine closely reflects the concepts of the age: individual genius, the work as a self-contained literary, musical or artistic document, an indissoluble relationship between the author and his own work, and, equally important, a hierarchical relationship between the author and his public, mediated by the work.[10] In the Digital Age all of these premises, in one form or another, are called into question. The implementation and enforcement of authors' moral rights has become problematic; in addition, the validity of moral rights concepts, based on the idea of a personal and unbreakable connection between the author and his work, has also come into question. A distinct area of concern arises in relation to the application of copyright principles to works whose main purpose is technological rather than artistic, such as computer

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technology to creativity ia also real and, in many cases, it has yet to be explored to its full potential. One area that immediately comes to mind is the growing availability of multilingual materials on the Internet; many other possibilities for cultural education through technology must exist.

[10]Martha Woodmansee's study particularly emphasises the shift from a concept of genius based on divine inspiration, to one that reflected the idea of genius originating in an individual author. Her seminal interpretation is helpful, though not uncontroversial: see M Woodmansee "The Genius and the Copyright: Economic and Legal Conditions of the Emergence of the 'Author'" (1984) 17 Eighteenth-Century Studies 425. The breakdown of a long-established hierarchy of culture and its consequences are considered in MT Sundara Rajan "Moral Rights in the Digital Age: New Possibilities for the Democratisation of Culture"(2002) 16:2 International Review of Law, Computers & Technology (forthcoming).

programs, leading to the awkward question of what should be done about the moral rights that are ordinarily protected as part of copyright.

These difficulties have led some observers to argue that moral rights have become irrelevant in the new, digital environment. On the contrary, the recognition of authors' moral interests is in fact more important now than ever before. However, enforcement in the future will most likely depend, not on coercive power, but on the knowledge, understanding, and education of the public, and on its desire to support the integrity of its own cultural patrimony. This reality should not obscure the fact that authors in the Digital Age, an appropriate term of art that captures the essence of the technological revolution of the 1990s and early 2000s, are both privileged and uniquely vulnerable. Their rights and status are in need of clarification and affirmation, which the doctrine of moral rights can help to accomplish.

As these examples show, there are a number of reasons why the doctrine of moral rights deserves to be re-examined. A fresh approach to moral rights should attempt to clarify the purpose of these rights, the legal functions that they accomplish, and their practical importance, whether for authors and artists, or for cultural and technological industries. By a fitting irony, the international copyright arena may well be the most appropriate forum for beginning to resolve some of these basic, conceptual issues about the personal rights of authors.

The controversy surrounding moral rights in international copyright law reflects the contradictions inherent in the development of global copyright standards. It is difficult to reconcile the economic focus of international copyright regulation, emphasising trade in culture, with the characteristic qualities of creative expression, its non-commercial, local, and personal dimensions. Governments, in their eagerness to

promote the economics of culture, appear increasingly forgetful of what creative expression truly involves. Although the arts stand to benefit in many ways from the digital revolution, the circumstances of creative expression in the new international economy remain ambiguous.

International conflict about moral rights has been expressed in many forms, but invariably, it reflects a fundamental opposition between the commercial and the personal dimensions of authorship rights. A resolution will depend on the discovery of new ways of thinking about moral rights – neither as an impediment to the realisation of economic rights, nor as a secondary order of rights, a mere sideshow to the economic privileges created for authors and owners of creative works by copyright. These ways of perceiving moral rights cannot do justice to what the doctrine has to offer to authors and to society. It is the role of moral rights to affirm the importance of human creativity in a world that is increasingly driven by technology and commerce on a global and impersonal scale. This opportunity should be recognised to be of great value to the international community, and, in the rush to promote the globalisation of copyright industries, it should not be allowed to fall by the wayside.

The Digital Age has brought new technical possibilities to creative expression, and, not unlike other periods of technological development in human history, it has also generated opportunities for new forms of creative expression.[11] For example, technologies that have become as basic as digital recording have revolutionised the art

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[11]For example, although keyboard instruments had been known in the 17th century, the Industrial Revolution generated the modern piano. Of course, the impact of technology on creative expression can also be traced much further back, to early humanity; see the interesting discussion of the role of art in human developments in E Dissanayake *Homo Aestheticus: Where Art Comes From and Why* (2d edn University of Washington Press Seattle 1995) xi-xxii, 1-23.

of recorded music, while computer technologies have generated new kinds of "multimedia" works.[12] Information and communications technology also bring the arts to a larger audience than ever before – though it is not entirely clear that an audience which is larger in sheer numbers translates into a more substantial intellectual community.

Above all, the arts have come to renewed prominence in the Digital Age because creative expression, along with other forms of intangible knowledge, provides the basis for economic growth in this new era. Apart from its other roles, art has now become the "raw material," and artists, the "content providers," for the digital revolution. At some level, therefore, creative expression in the global economy is certain to find itself in an ambivalent situation. How compatible are the needs of the new economy with the values – whether aesthetic, intellectual, personal, or moral – that animate creative expression? How does the idea of art as "the lifelong construction of a state of wonder and serenity" fit with the rapid transfer and absorption of information in the digital world? To what extent does contemporary creativity continue to reflect this mysterious vision of the role of art in human life, or has it, in turn, been irrevocably transformed by the combined impact of new technology and social forces?[13]

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[12]In many cases, the arts have not yet been able to explore new technologies to their full advantage: even in the case of digital recording, many of the possibilities for creative interpretation and interaction between artists and audience remain unrealised. Yet they were foreseen as early as the 1970s by an outstanding artist, classical pianist Glenn Gould: see the discussion of Gould's ideas in G Payzant *Glenn Gould: Music & Mind* (1st edn Van Nostrand Reinhold Toronto 1978) 29-32, 42, 70.

[13]For example, Dissanayake discusses the impact of modern cultural developments on artistic consciousness, and argues that they have had a serious negative impact on current understandings and experiences of creative expression: Dissanayake (n 11) 194-225.

Global changes – technological, economic, and political in nature – have created a new environment for authors' personal interests in their work, the preservation of cultural heritage as a whole, and the legal protection of moral rights. If it is to remain an effective and vital area of law, moral rights doctrine must respond creatively to these developments, and renew its relevance. An important opportunity for the growth of this doctrine lies in its ability to affirm a non-commercial and humanistic vision of creativity and culture. The realisation of that potential, however, will require a close consideration of what moral rights represent in today's global environment for intellectual property rights. Can creative and personal authorship hold its own in the vast and impersonal universe of digital technology? And if so, can the moral rights of authors play a supporting role?

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Key to Russian Abbreviations:

VVS SSSR = Vedomosti Verkhovnogo Soveta SSSR (Register of the USSR Supreme Soviet)
VVS RSFSR = Vedomosti Verkhovnogo Soveta RSFSR (Register of the RSFSR Supreme Soviet)
VSND i VS SSSR = Vedemosti S'ezda narodnykh deputatov SSSR i Verkhovnogo Soveta SSSR (Register of the People's Representatives of the USSR) [continuation of *VVS SSSR]*
VSND i VS RSFSR/RF = Vedemosti S'ezda narodnykh deputatov RSFSR/RF i Verkhovnogo Soveta RSFSR ((Register of the People's Representatives of the RSFSR/RF) [continuation of *VVS RSFSR]*

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