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Soviet and American Copyright Laws: Differential Impact on Publication Abroad by Foreign Nationals†

I. Introduction

Over the past several years three new developments in Soviet-American copyright relations have altered the status of the Soviet and American author's intellectual property interests in his literary creations.[1] On May 27, 1973, three

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[1]This paper is limited in scope to works of literature, although other types of scientific and artistic works may be copyrightable. Under the new copyright law of the United States, for example, many other items are copyrightable:

> Copyright protection subsists...in original works of authorship...Works of authorship include the following categories:
> (1) literary works;
> (2) musical works, including any accompanying works;
> (3) dramatic works, including any accompanying music;
> (4) pantomines and choreographic works;
> (5) pictorial, graphic, and sculptural works;
> (6) motion pictures and other audiovisual works; and
> (7) sound recordings

17 U.S.C. § 102(a) (Supp. 1976).

Soviet law includes a similar list of copyrightable items but leaves many possibilities subsumed in a succinct "etc." Principles of Civil Legislation of the U.S.S.R. and of the Union Republics, December 8, 1961, effective May 1, 1962 (official English translation in SOVIET CIVIL LEGISLATION AND PROCEDURE: OFFICIAL TEXTS AND COMMENTARIES (n.d.) art. 96 [hereinafter cited as 1961 Principles]. The law of the Russian Republic, however, is more exhaustive in its approach:

> The following may be subject of coyright:
> - oral works (speeches, lectures reports, etc.);
> - written works (literary, scientific, etc.);
> - dramatic and dramatico-musical works, and musical works, with or without words:
> - translations;
> - scenarios, synopses;
> - cinematographic or television films, as well as radiophonic or television transmissions;
> - choreographic works and pantomines, the acting form of which is fixed in writing or otherwise;
> - works of painting, sculpture, architecture, graphic or applied art, illustrations, drawings and sketches;

months after depositing its instrument of accession,[2] the Soviet Union abandoned its adamant isolationist policies with respect to international copyright[3] and became a party to the Universal Copyright Convention (U.C.C.),[4] already adhered to by the United States.

Some commentators on the Soviet change in attitude with respect to international copyright relations saw its accession to the U.C.C. as a progressive step; others saw it as a carefully planned excuse to amend internal Soviet law to make it more repressive.[5] On February 21, 1973, pursuant to Article X of the U.C.C.,[6] the Soviet Union amended its internal copyright laws[7] to bring them into conformity with the Convention.[8]

Following these two events, on October 19, 1976, the President of the United States signed into effect a general revision of American copyright law.[9] Most of the provisions of this new law do not take effect until January 1, 1978.[10]

The ramifications of these three recent changes undoubtedly will be felt by Soviet and American authors alike. This paper examines the effects of these changes in detail, using a comparative law approach. First, the differences be-

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- plans, sketches and models relating to science, techniques, or stage performances of dramatic or dramatico-musical works;
- geographical, geological or other maps;
- photographic works and works obtained by processes analogous to photography;
- phonographic discs and other types of technical recordings of works;
- and other works.

R.S.F.S.R. Civil Code art. 475 (1964) *reprinted in* Y. Matveev, *Copyright Protection in the U.S.S.R.*, 20 BULL. COPYRIGHT SOC'Y. 222 (1973).

[2]Universal Copyright Convention, Sept. 6, 1952, arts. VIII, IX, [1955] 3 U.S.T. 2731, T.I.A.S. No. 3324, 216 U.N.T.S. 132 (effective Sept. 16, 1955) [hereinafter cited as U.C.C.].

[3]N.Y. Times, May 28, 1973, at 6.

[4]U.C.C.

[5]*See* Note, *The Universal Copyright Convention As an Instrument of Repression: The Soviet Experiment*, 9 J. INT'L. L. & ECON. 285m.2&4 (1974); Maggs, *New Directions in US-USSR Copyright Relations*, 68 AM. J. INT'L. L. 391 n. 4 (1974)

[6]Article X of the U.C.C. provides:

1. Each State party to this Convention undertakes to adopt, in accordance with its Constitution, such measures as are necessary to ensure the application of the Convention.

2. It is understood, however, that at the time an instrument of ratification, acceptance or accession is deposited on behalf of any State, such State must be in a position under its domestic law to give effect to the terms of this Convention.

[7]Decree of the Praesidium of the Supreme Soviet of the U.S.S.R. No. 138, Feb. 21, 1973 (unofficial English translation in 9 COPYRIGHT 162 (1973)) [hereinafter cited as Decree 138].

[8]The Soviet Union's timing for adherence to the 1952 U.C.C. may have been due to a desire to sign the 1952 U.C.C. before the 1971 revisions to the U.C.C. became effective. Article IX, § 3, of the 1971 U.C.C. provides that "after coming into force... no State may accede solely to the 1952 Convention." Article IX, § 4, provides that "relations between States party to (the 1971) Convention and States that are party only to the 1952 Convention, shall be governed by the 1952 Convention." 2 UNESCO, COPYRIGHT LAWS AND TREATIES OF THE WORLD Item B-1, at 9 (Supp. 1971). *See also* Note, *Adherence of the U.S.S.R. to the Universal Copyright Convention: Defenses Under U.S. Law to Possible Soviet Attempts at Achieving International Censorship*, 8 CORNELL INT'L L. J. 76 n. 24 (1974).

[9]17 U.S.C. § 101 (Supp. 1976).

[10]17 U.S.C. § 301 (Supp. 1976).

tween the new internal copyright laws in the Soviet Union and the United States are examined. Next, relying heavily on the provisions of the U.C.C., the extraterritorial copyright protection afforded literary works of Soviet and American authors is discussed. Finally, this paper concludes that the extent of protection given intellectual property differs greatly under the Soviet and American legal systems.

II. Internal Copyright Protection Compared

The underlying purposes of the Soviet and American copyright laws belie similar approaches. The basic goal of Soviet copyright law has changed over time. The current law, which dates from December 8, 1961,[11] was amended just prior to the Soviet Union's accession to the U.C.C.,[12] but many of the provisions of the 1961 law originated with the previous Soviet copyright statute of 1928[13] or even the prerevolution provisions of the Czarist statute of a century earlier.[14] The avowed purpose of the current Soviet copyright law is said to be twofold:

> . . . to protect to the maximum the personal and property interests of the author, and to assure the widest distribution of works of literature, science and the arts among the broad masses of the toilers.[15]

As will be seen, although literal interpretation of Soviet law supports such a purpose, in practice the Soviet author has few rights.

The basic American copyright law in existence since 1909[16] has been replaced by the revised law of 1976.[17] Although the law itself has changed, the purpose of the law did not, since the United States Constitution grants Congress power to pass copyright laws only for one purpose:

> To 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.[18]

American copyright law, both in theory and practice, must fulfill this stated purpose.

There are several similarities between Soviet and American copyright law. Under both systems, copyright is a property interest distinct from the material

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[11]1961 Principles.

[12]Decree 138; *See* note 6 *supra*.

[13]Basic Principles of Copyright, Joint Resolution of the U.S.S.R. Central Executive Committee and the Council of People's Commissars of May 16, 1928 in V. GSOVSKI, 1 SOVIET CIVIL LAW 398-409 (1949) (hereinafter cited as GSOVSKI].

[14]Statute on Censorship of 1828, arts. 135-39, and the Statute on the Rights of Authors appended thereto. Summary in Gsovski 606-07.

[15]Woltman, *The Author and the State: An Analysis of Soviet Copyright Law*, 14 ASCAP COPYRIGHT L. SYMP. 1 (1966) [hereinafter cited as Woltman].

[16]17 U.S.C. § 1 (1970).

[17]17 U.S.C. § 101 (Supp. 1976).

[18]U.S. CONST. art. I, § 8, cl. 8.

property itself.[19] The copyrightable work must be original[20] and expressed in a tangible form.[21] A mere idea cannot sustain a copyright. Soviet copyright, like its American counterpart, applies to published and unpublished works.[22] Here the similarities end.

Under the new American copyright law a notice of copyright has to be put on published works.[23] Registration of such copyrighted material is a prerequisite only to an infringement suit.[24] A copyright lasts for the author's life plus fifty years after the author's death with respect to works created after 1977.[25] For works created earlier, a grandfather clause in the new law makes special provisions.[26] During the period of the copyright an author has the explicit right to publish, reproduce, and circulate his copyrighted work, to prepare derivative works, and to sell such creations or rights therein.[27] There are, however, several limitations placed on an author's exclusive rights,[28] the most important of which is the doctrine of fair use.[29]

Under Soviet copyright law, there is no requirement for notice or registration of copyrights. An author's copyright lasts for his life plus twenty-five years after his death (measured from January 1 of the year following death) and is inheritable.[30] The federated republics, however, can determine "which of the author's rights may not be transmitted by inheritance."[31] Typical of such limitations is the one found in the Russian republic which states, "The right of the author is his name and the right to the inviolability of his work shall not be transferred by inheritance."[32]

Soviet law does not contain a specific grant of exclusive rights of publication, reproduction, or circulation for the holder of a copyright. In fact, this

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[19]IOFFE & TOLSTOI, BASIC PRINCIPLES OF SOVIET CIVIL LEGISLATION 173 (1962). *See generally* J. BAUMGARTEN, US-USSR RELATIONS UNDER THE UNIVERSAL COPYRIGHT CONVENTION (1973).

[20]IOFFE & TOLSTOI, *supra* note 19, at 174; 17 U.S.C. § 102(a) (Supp. 1976).

[21]1961 Principles art. 96(2); 17 U.S.C. § 102(a) (Supp. 1976).

[22]1961 Principles art. 96(2); 17 U.S.C. § 104(a) (Supp. 1976).

[23]17 U.S.C. § 401 (Supp. 1976).

[24]17 U.S.C. §§ 408-412 (Supp. 1976).

[25]17 U.S.C. §§ 302, 303 (Supp. 1976).

[26]17 U.S.C. § 304 (Supp. 1976).

[27]17 U.S.C. § 106 (Supp. 1976).

[28]17 U.S.C. §§ 107-112 (Supp. 1976).

[29]17 U.S.C. § 107 (Supp. 1976); M. NIMMER, 1 COPYRIGHT § 105 (1972) [hereinafter cited as NIMMER].

[30]1961 Principles art. 105 *as amended by* Decree 138 part I.6.

[31]*Loc. Cit.*

[32]R.S.F.S.R. Civil Code art. 496 (1964) *as amended by* Decree of the Presidium of the Supreme Soviet of the R.S.F.S.R. No. 286, March 1, 1974 (unofficial English translation in 11 COPYRIGHT 151 (1975) [hereinafter cited as Decree 286].

The copyright law of the Russian Republic is often used by commentators as the prototype of republican legislation in the Union. While the other republics have generally followed the Russian Code, particular differences may exist between the codes of the various republics. *See* J. BAUMGARTEN, *supra* note 19, at 66. Note, however, that the Russian Republic forms the bulk of the U.S.S.R.

omission conforms to the reality of Soviet practice. All publishing and printing facilities in the Soviet Union are government-owned and they are the only legitimate means available to a Soviet author to publish his works.[33] Given these realities, the Soviet author's copyright is transformed into a right not to publish his work and the right to be paid if a publishing house does publish it, with or without his consent.[34] As one commentator has aptly observed, the effect of these practical realities is to cause Soviet copyright to lack the characteristics normally associated with a property interest.[35]

The Soviet copyright system is particularly coercive in other respects. An author's works are published pursuant to a standard publishing contract which the copyright holder enters into with a state publishing house.[36] The federated republics are required to establish such contracts and no deviation from their terms is permitted.[37] Publishing houses cannot permanently acquire rights of publication,[38] but rather, under the standard contract, a copyright holder assigns such rights to a publishing house for a limited period of time in exchange for the publisher's promise to publish his work and take all "necessary steps within his power" to distribute it.[39] Should an author be reluctant to enter into such a contract, Soviet law grants the state the right to "compulsorily purchase" the publication, performance, and other rights of an author[40] or his heirs.[41]

Soviet law provides for royalty payments to authors, but there are many adaptive uses of an author's work for which no royalties need be paid.[42] Under

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[33]All publishing houses are owned and controlled by the State, but illegal circulation of literary works does occur. This will be discussed pp. 390-393 *infra*.

[34]GSOVSKI 616.

[35]K. GRZYBOWSKI, SOVIET LEGAL INSTITUTIONS—DOCTRINES AND SOCIAL FUNCTIONS 164 (1962)

[36]GORDON, SOVIET COPYRIGHT LAW 131 (1955). These contracts provide for royalty payments in accord with predetermined schedules as discussed in text accompanying notes 42-46 *infra*.

[37]1961 Principles art. 101; Woltman at 17.

[38]K. GRZYBOWSKI, *supra* note 35, at 160.

[39]P. ROMASHKIN, FUNDAMENTALS OF SOVIET LAW 229 (1962).

The maximum duration of such contracts is prescribed by the law of the various federated republics. In Russia the law sets a four-year maximum, while in the Ukraine such a contract can be made for the duration of the copyright. Woltman at 28.

[40]1961 Principles art. 106. Note that certain rights are not acquired by compulsory purchase since they belong only to the author. These so-called moral rights are so personal to the author that they cease to exist upon his death. Included among these rights are the right to authorship, the right to be known as the author of his works, and the right to the integrity of the work. The latter right has been substantially impaired by the many ways a published work may be used without payment of royalties. *See* note 42 *infra* and accompanying text.

[41]In fact the right to purchase compulsorily an author's work has been used infrequently. This is perhaps because authors do not let themselves get into the position of having to deal with the government in this manner.

The right to purchase a copyright compulsorily is used mainly to purchase inherited interests for small sums, thereby preventing heirs from leading "unproductive," "parasitic" lives. *See* Woltman at 20; Note, *supra* note 5, at 299.

[42]1961 Principles art. 103. *See also* Y. Matveev, COPYRIGHT PROTECTION IN THE U.S.S.R., 20 BULL. COPYRIGHT SOC'Y 226 (1973). Although the 1961 Principles establish many uses for which no royalties need be paid, much of the regulation in this area is left to the federated republics.

the law, the federated republics are instructed to establish royalty schedules.[43] Royalties are paid under these schedules to authors in accordance with the principle: "From each according to his ability, to each according to his work."[44] The precise sum an author receives is, for the most part, set ar-

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Under the 1961 Principles no royalty need be paid if the copyrighted work is used to produce a new, creatively independent work (except making a play or movie from a book, and vice versa, and making a movie from a play, and vice versa), is used to give information in the press or on screen, is a news report or speech and is reproduced, or is on display in a public place and is reproduced without mechanical contact methods. In addition, there are uses for which royalties need to be paid, but which do not require the consent of the author. These include public performance where a fee is charged, making recordings on film, tape or records, setting a work to music, and use of a work on manufactured articles. 1961 Principles art. 104 *reprinted in* Woltman at 26.

The right to use works on manufactured articles also includes the provision: "in such cases mention of the author's name is not compulsory." 1961 Principles art. 104. "A question arises. . . as to the real value of the author's personal nonproperty rights, particularly the right to 'the integrity of his work,' in the light of the freedom typified by that granted to manufacturers to use. . . works. . . without limitations as to the kinds of articles on which the works may be used." Woltman at 27. *See* note 40 *supra*.

The law in the Russian Republic with respect to uses for which no royalty need be paid is typical:

> The following acts shall be lawful without the consent of the author and without payment of royalties, but subject to the requirement that the name of the author of the work utilized and the source of the borrowing are indicated:
>
> (1) the utilization of another person's published work for the making of a new and original creative work, except for the adaptation of a narrative work into a dramatic work or into a scenario, and conversely, as well as the adaptation of a dramatic work into a scenario, and conversely;
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> (2) the reproduction, in scientific and critical works, scholastic publications and those serving political education, of scientific literary or artistic works, published separately, or of extracts from such works, reproduction in the form of quotations being authorized so far as the purpose of the publication requires, and reproduction in any form, including reproduction in collections, being authorized unless such reproduction exceeds a total of one author's sheet (40,000 symbols) from the works of one author.
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> (3) information in the periodical press, the cinema, radio or television, concerning published literary, scientific or artistic works, including annotations, abstracts, reviews and other forms of documentation and information;
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> (4) the reproduction by cinema, by radio or television of publicly-uttered speeches and lectures, as well as published literary, scientific or artistic works. Direct broadcasting by radio or television, from the actual place of performance of works which are publicly performed shall be also considered as reproduction;
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> (5) the reproduction in newspapers of publicly-uttered speeches and lectures, as well as published literary, scientific or artistic works in the original or in translation;
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> (6) the reproduction in any manner, except reproduction made by means of a mechanical contact copying, of works of plastic art located in places that are accessible to the public, other than in exhibitions and museums;
>
> (7) the reprographic reproduction on a non-profit-making basis of printed works for scientific, educational and instructional purposes.

R.S.F.S.R. Civil code art. 491 (1964) *as amended by* Decree 286, part I.1. *See also* Matveev, *supra*, at 227.

Obviously, the legislation in the republics mimics the federal law.

The large number of uses for which a work may be employed without royalties being paid has led to a surprisingly large number of infringement suits within the Soviet Union. Soviet courts are loathe to reward damages, but they will order the payment of royalties when due. Woltman at 25, 29, & 36-43.

[43]1961 Principles art. 100.

[44]U.S.S.R. CONST. art. 12.

bitrarily.[45] Basically it depends on several factors: the genre of the work, its volume or length, the size and number of the edition, and the "quality" of the work, as determined (subjectively) by the publisher.[46]

The author is represented in dealings with the state publishing houses by the Writers' Union. This organization contracts for publication and production of an author's works and also initiates infringement suits on behalf of a copyright holder.[47] The Writers' Union, in effect, removes the author from decisions regarding the worth of his works.

In its totality, although the Soviet system appears to vest substantial rights in an author, it actually puts him in the unenviable position of a compelled licensor, who, by the grace of the state, receives a fee, often arbitrarily set.[48] The system results in nationalization of a Soviet author's literary creations, published or unpublished.[49] It also leads to tight controls on what is printed. As one commentator has stated:

> . . . the "bourgeois" author does in fact exercise far more control over the use of his works than the Soviet author, who cannot prevent either their compulsory purchase and publication by the state if unpublished, or, if published, their public performance . . . or adaption in other media.[50]

III. Extraterritorial Copyright Protection

Prior to the Soviet Union's accession to the U.C.C., Soviet copyright was available only to unpublished works located within the U.S.S.R., works first published in the U.S.S.R.,[51] and certain works covered under bilateral treaties.[52] Accordingly, works of American authors were generally unprotected in the Soviet Union. Many American and other foreign works were republished in the Soviet Union without any compensation to their authors. Perhaps the most famous of such cases involved the works of Sir Arthur Conan Doyle.[53]

Few American authors took the necessary steps to gain Soviet copyrights. To have done so it would have been necessary to first publish their works in the

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[45]Woltman at 33.

The royalty schedules place a premium on length and, intentionally or not, lead Soviet authors to write long works. For example, the royalties for a poem depend on the number of lines of poetry. *See* Matveev, *supra* note 42, at 229.

[46]Woltman at 30.

[47]K. GRZYBOWSKI, *supra* note 35, at 164.

[48]Woltman at 49.

[49]C. Benjamin, *Some Observations on Certain Consequences of the Soviet Union's Accession to the UCC,* 20 BULL. COPYRIGHT SOC'Y 396 (1973).

[50]Woltman at 49.

[51]1961 Principles art. 97.

[52]Before Soviet accession to the U.C.C., such treaties existed with Bulgaria and Hungary. *See* 8 COPYRIGHT 163 (1972) and 3 COPYRIGHT 63 (1967), respectively, for unofficial English translations of these treaties.

[53]Estates of Arthur Conan Doyle v. Ministry of Culture of the U.S.S.R. (Sup. Ct. R.S.F.S.R. 1959), *reported in* 7 BULL. COPYRIGHT SOC'Y 246 (1960). *See also* Berman, *Sherlock Holmes in Moscow,* 8 LAWYER 53 (1965).

Soviet Union to gain Soviet copyright and also to comply with the existing United States regulations to prevent forfeiture of American copyright in such situations.[54] (Frequently, when Americans published articles in Soviet periodicals, manufacturing requirements made forfeiture of American copyright an unavoidable occurrence.[55]) In addition, first publication in the Soviet Union would have negated any copyright protection an author would have gained had he first published in a country adhering to any of the international copyright agreements.[56]

If protection of American authors in the Soviet Union was poor, Soviet authors received equally spotty protection in the United States. Of course, the number of Soviet authors whose works were copied in the United States was much lower than the number of American authors whose works were copied in the Soviet Union.

Only Soviet works which were first published in a U.C.C. country or which remained unpublished were eligible for American copyright protection. American copyright law protected *unpublished* works regardless of the nationality or domicile of the author.[57] With respect to *published* Soviet works, no American copyright generally attached since such protection was afforded only to domiciliaries of the United States,[58] and even if that requirement were met, the American formalities still had to be complied with.[59] If a Soviet author managed to have his work first published in a U.C.C. country, under the Convention,[60] the United States granted it copyright protection, provided the work bore the notice of copyright required by the U.C.C.[61]

Soviet adherence to the U.C.C. changed all of this. Article II of the U.C.C. provides, in relevant part:

> 1. Published works of nationals of any Contracting State and works first published in that State shall enjoy in each other Contracting State the same protection as that other State accords to works of its nationals first published in its own territory.
> 2. Unpublished works of nationals of each Contracting State shall enjoy in each other Contracting State the same protection as that other State accords to unpublished works of its own nationals.[62]

Thus, works of Americans, Soviets, and nationals of other U.C.C. countries are protected in all U.C.C. countries (e.g., the United States and the Soviet

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[54]37 C.F.R. § 202.2(a)(3) (1972). *But cf.* 1 NIMMER § 89.41. *See also* Rembar, *Xenophilia in Congress: Ad Interim Copyright and the Manufacturing Clause*, 69 COL. L. REV. 770 (1969).

[55]*Cf.* J. Baumgarten, *supra* note 19, at 11.

[56]Note, *Soviet Accession to the Universal Copyright Convention: Possible Implications for Future Foreign Publication of Dissidents' Works,* 4 GA. J. INT'L & COMP. L. 407 (1974).

[57]1 NIMMER § 65.1

[58]17 U.S.C. § 9(a) (1970).

[59]17 U.S.C. §§ 10, 13, 16, 17, 19, 20 (1970).

[60]U.C.C. art. I(1).

[61]*Id.*; 17 U.S.C. § 9(c). *See* text accompanying note 62 *infra*.

[62]U.C.C. art. I(1), (2).

Union) under the terms of the Convention if such works are unpublished, regardless of their location, or if first published in a U.C.C. country. Within each U.C.C. country, a U.C.C. author is given the same protection afforded citizens of that country. The internal copyright laws of both the United States[63] and the Soviet Union[64] specifically conform to the provisions of the U.C.C.

The notice provisions of the U.C.C. deserve special mention. They abolish the need to conform to strict internal requirements for notice and registration[65] prerequisite to copyright protection within any U.C.C. country other than the country of first publication. As a condition for exemption from such requirements, however, from the time of first publication, all copies of a protected work under the U.C.C. must:

> . . . bear the symbol © accompanied by the name of the copyright proprietor and the year of first publication placed in such a manner and location as to give reasonable notice of claim of copyright.[66]

Shortly after the Soviet Union decided to become a party to the U.C.C. it established the All-Union Copyright Agency (VAAP)[67] to handle the flow of literary works to and from the Soviet Union. One of All-Union's major functions is licensing of publication rights abroad for Soviet works. All Soviet authors are expected to distribute their works abroad through this agency, although there are no criminal sanctions for failure to do so.[68] All-Union also represents the Soviet publishing houses in negotiations with foreign authors. One commentator suggests that with respect to All-Union, "we may expect some combination of the hard-bargaining attitude typical of Soviet foreign trade organizations and the generosity of Soviet information agencies."[69]

Clearly, given the realities of the Soviet copyright system,[70] the American author has less to gain by Soviet adherence to the U.C.C. than does the Soviet author. Although an American author must now be paid for Soviet publication of his works, he is still subject to the coercive aspects of the Soviet copyright system. He can negotiate with only one agency (VAAP) on a take-it-or-leave it basis, and his only bargaining tool is his ability to refuse to publish in the Soviet Union. It is doubtful that the American author would be subject to compulsory purchase, but even that is possible.[71] On the other hand, All-

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[63]17 U.S.C. § 104(b)(2) (Supp. 1976).

[64]1961 Principles art. 97 *as amended by* Decree 138 part I.1.(c).

[65]U.C.C. art. III(1).

[66]*Id.*; *See* M. NIMMER, CASES AND MATERIALS ON COPYRIGHT AND OTHER ASPECTS OF LAW PERTAINING TO LITERARY, MUSICAL AND ARTISTIC WORKS 169 (1971).

[67]N.Y. Times, Sept. 21, 1973, at 3, col. 1.

[68]Maggs, *supra* note 5, at 401; *see* note 87 *infra*.

[69]*Ibid*, at 407.

[70]*See* pp. 384-387 *supra*.

[71]*See* discussion of the Act of State doctrine p. 393 *infra*. In this situation the Hickenlooper Amendment to the Foreign Assistance Act of 1964, 22 U.S.C. § 2370(e)(2) (1970), would apply.

Union can engage in competitve negotiations with many American publishers, especially if there is strong demand for an American edition of a copyrighted Soviet work.

By far the most interesting question in the area of extraterritorial copyright protection for American and Soviet authors involves the effect of the U.C.C. on works circulated illegally in the Soviet Union, and known as samizdat.[72] Assume that a Soviet dissident has circulated a manuscript in the Soviet Union by samizdat and that it now turns up in the hands of an American publisher,[73] anxious to print and sell it.[74] May he do so?

The important issue in solving such a hypothetical problem is whether samizdat circulation amounts to copyright publication. If samizdat circulation does amount to publication, then such works circulated before the Soviet Union became a party to the U.C.C. are not protected by American copyright,

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An American court would be able to set aside and unfair expropriation of an American's property and allow attachment of Soviet assets in this country to fulfill the judgment. *See* note 86 *infra.*

[72]If an author, whose views are labelled "anti-Soviet" by the authorities, wished to have his work circulated within the Soviet Union, he could do so via the peculiar Soviet institution of samizdat. Essentially, samizdat is an underground distribution network for dissident writers. Some of the best literature of the Soviet Union is circulated by samizdat. "Each year in the Soviet Union thousands of pieces of *samizdat* are printed on illegal presses, and are circulated from hand to hand within the intellectual communities. The government wages a continuing war on this small vestige of free press, but it never seems to completely shut them down." Note, *supra* note 56 at 411.

Not all samizdat works are printed on illegal presses. Some of these works are in manuscript form. Each reader reads the manuscript, copies it, and the circle of readers grows ever larger. Of course, one is careful to whom he distributes samizdat. One commentator described samizdat narrowly, for this reason, as typewritten copies passed among friends and acquaintances. BROWN, RUSSIAN LITERATURE SINCE THE REVOLUTION 307-12 (rev. ed. 1969).

Congressional investigation into intellectual repression in the Soviet Union yielded the following description of samizdat:

> [I]t often happens that writers wish to discuss topics, to use methods, to mention events which do not fall within the official calendar of the accepted and permitted. As a result they must make their compromises, fall silent, or, if the creative impulse is too strong, write, as the Russian expression has it, "for the drawer," to be filed away against the day when a possible change in circumstances may allow its publication. Both under the imperial regime as under the Soviets especially in recent years, there has also been the method of disseminaiton known as *samizdat* in which manuscripts of works which could not be published in the regular channels circulate from person to person, This is, of course, a procedure which requires that someone undertake the labor of making copies, which is not easy to do in a country where the authorities require registration of every mimeograph and duplicating machine and in which the typewriter is rather rare. In spite of this, such manuscripts are read by relatively large numbers of people and may, indeed, become well-known in that form.

YAKOBSON & ALLEN, ASPECTS OF INTELLECTUAL FERMENT AND DISSENT IN THE SOVIET UNION, S. DOC. NO. 106, 90th Cong., 2d Sess. 40-1 (1968).

[73]This analysis applies equally well to a publisher in any U.C.C. country.

[74]It is a safe assumption that a work of a Russian dissident author sufficiently popular to attract the attention of an American publisher would have appeared in samizdat first. A. Schwartz, *The State of Publishing Censorship and Copyright in the Soviet Union,* 203 PUBLISHERS WEEKLY No. 3, Jan. 15, 1973, at 34. Many of Alexander Solzhenitsyn's works were plublished in samizdat, and it was the samizdat manuscripts that made their way to the West and were published. Such was the case with THE CANCER WARD AND THE FIRST CIRCLE as well as AUGUST 1914, discussed at p. 391 *infra.*

since American copyright protection, as noted above,[75] exists for non-domiciliaries—in the absence of a treaty—only as long as the work remains unpublished. Once such a work is published, it falls into the public domain. Even if the work is published in the United States after May 27, 1973, the result is the same, since the U.C.C. does not apply retroactively.[76] In other words, if a samizdat work were considered unpublished, an American publisher would not be free to print and distribute it.

With respect to samizdat works circulated after May 27, 1973, the important question is where the work was "first published." If samizdat circulation does not amount to publication, the work is eligible for American copyright protection either as an unpublished work or as a work first published in the United States. If samizdat circulation does amount to publication, the author has Soviet copyright protection[77] as well as American copyright protection under the U.C.C. if the U.C.C. notice requirements are met. In this case, unlike the case above, if a samizdat work is considered published, an American publisher would not be free to publish it. He would have to first buy the publication rights from the copyright holder. Of course, the Soviet Union could compulsorily purchase those rights from the Soviet author and then refuse to sell them abroad.[78] Even if the work is considered published, if the U.C.C. notice requirements are not met, no American protection would be afforded to it under the U.C.C. and an American publisher could publish the work without buying the publication rights or paying royalties. This result would be less satisfactory monetarily to the Soviet author, but it would permit his work to be published abroad without Soviet interference.

Only two courts have considered the question of whether samizdat circulation constitutes publication. In 1972 an unreported decision in the German case of *In Re Luchterhand Verlag GmbH. v. Albert Langen-Georg Muller Verlag GmbH.* held that samizdat circulation was not publication.[79] In the more famous English case of *The Bodley Head Ltd. v. Flegon*[80] the court reached the same result. The case involved Alexander Solzhenitsyn's novel *August 1914* which was first published in Paris after having been smuggled out of Russia in samizdat form. The novel had been widely circulated underground in Russia prior to 1973. The defendant in the case sold rights to publish a serialization and paperback version of the novel and was used by the holder of the copyright in the United Kingdom. The defendant claimed that the

[75]*See* text accompanying note 58 *supra.*
[76]U.C.C. art. VII
[77]1961 Principles art. 97.
[78]*See* pp. 384-387 *supra.*
[79]Although this decision was not reported, a discussion of it appears in D. Loeber, *Samizdat Under Soviet Law,* 2 INDEX No. 3 at 3 (1973).
[80][1972] 1 W.L.R. 680 (Ch.)

samizdat circulation was a publication of the work and that the novel was, therefore, in the public domain. The court disagreed, holding that clandestine circulation was not sufficient to constitute publication. The court did not decide whether samizdat circulation in general constitutes publication, since it found samizdat circulation had not been sufficiently proved. Indeed, it would be very difficult to prove such widespread circulation of illegal reading matter under most circumstances, and especially when proof of such facts might subject witnesses to recrimination by their government.

Although many commentators have considered the question of samizdat publication, there is, as yet, no definite answer.[81] The U.C.C. definition of publication is not very helpful.[82] It does appear, however, that the secretive nature of samizdat circulation would lend support to the conclusion that it is not a "general distribution to the public" under the U.C.C.[83]

Whether samizdat circulation is considered publication or not, the results are not altogether bad. If samizdat circulation is considered insufficient publication, as in *Flegon*, American publishers would lose free access to Soviet samizdat works circulated before May 27, 1973, but would stand to gain access to more current samizdat literature. If samizdat circulation is considered publication, the results would be bad for Soviet dissidents only monetarily. Samizdat works circulated before May 27, 1973, would be unprotected in the United States and, hence, freely publishable. More recent samizdat works, if Soviet authors were willing and clever enough to "forget" to place a copyright notice on them as required under the U.C.C., would likewise be unprotected in the United States.

Still another potential question arises when dealing with samizdat works. Assume that a work which was ciruclated by samizdat is considered published, that the copyright is compulsorily purchased from the Soviet author by the Soviet Union, and that the government then refuses to publish the work or sell publication rights to an American publisher. Suppose the Soviet author wants his work published and somehow gets a copy of the samizdat manuscript to an American publisher. If the work bore no copyright notice when it was first published, it is in the public domain under American law and an American publisher could make unrestricted use of it.

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[81]For a good discussion of some of the ideas in this area, see Note, *supra* note 5, at 311-19, Maggs, *supra* note 5, at 397.

[82]U.C.C. art. VI:

"Publication," as used in this Convention, means the reproduction in tangible form and the general distribution to the public of copies of a work from which it can be read or otherwise visually perceived.

[83]Note, *supra* note 5, at 317. A major commentator on the U.C.C. has analyzed this provision as requiring that anyone who wishes to obtain a copy of the work be able to do so, before publication under U.C.C. has occurred. A. BOGSCH, THE LAW OF COPYRIGHT UNDER THE UNIVERSAL COPYRIGHT CONVENTION 77 (3d ed. 1968).

The problem arises, however, if the samizdat work bore notice, or its absence could be rectified under the liberalized notice provisions of the new American copyright law.[84] In such a case, American law grants the copyright owner protection. If the American publisher publishes the work without paying royalties to the Soviet Union (which now has colorable claim to title), would an American court uphold the Soviet Union's infringement claim despite the compulsory purchase? Or would the court recognize the Soviet author as the true owner of the copyright?

Section 201(e) of the revised copyright law addresses this problem. It provides:

> (e) *Involuntary Transfer.*—When an individual author's ownership of a copyright, or of any of the exclusive rights under a copyright, has not previously been transferred voluntarily by that individual author, no action by any governmental body or other official or organization purporting to seize, expropriate, transfer, or exercise rights of ownership with respect to the copyright, or any of the exclusive rights under a copyright, shall be given effect under [American copyright law].[85]

Although the legislative history of this provision indicates it is "intended to foreclose U.S. courts from sanctioning an expropriation by a foreign government or governmental organization of an author's rights,"[86] it does not apply in our hypothetical case. This is so because the author has "voluntarily transferred" to the American publisher one of his exclusive rights—the right to reproduce his work.[87] An American court faced with this problem would have to rely on traditional doctrines if it were to overturn the Soviet Union's compulsory purchase.

Using such concepts, an American court could and probably would refrain from deciding the validity of the compulsory purchase under the Act of State doctrine first developed in *Underhill v. Herandez*[88] and reaffirmed in *Banco Nacional de Cuba v. Sabbatino:*

> [T]he Judicial Branch will not examine the validity of a taking or property within its own territory by a foreign sovereign government, extant and recogonized by this country at the time of the suit, in the absence of a treaty of other unambiguous agreement regarding controlling legal principles, even if the complaint alleges that the taking violates customary international law.[89]

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[84]17 U.S.C. § 405 (Supp. 1976).

[85]17 U.S.C. § 201(e) (Supp. 1976).

[86]*Copyright Law Revision: Hearings on H.R. 2223 Before the Subcomm. on Court, Civil Liberties, and the Administration of Justice,* 94th Cong., 1st Sess. 2053 (1975). *See also ibid.,* at 2078. By including section 201(e), Congress sought to eliminate any doubts raised by the case law that the Hickenlooper Amendment, *infra* note 87, did not apply to foreign-owned property confiscated in a foreign state.

[87]17 U.S.C § 106(1) (Supp. 1976).

[88]168 U.S. 250, 252 (1897).

[89]376 U.S. 398, 428 (1964). *See generally* the Note referred to in note 5, *supra* at 302-309. Note that the Hickenlooper Amendment to the Foreign Assistance Act of 1961, 22 U.S.C. § 2370(e)(2) (1970) would appear to mandate a decision in this case:

In other words, the Soviet author probably would not have his work published since the copyright of the Soviet Union would be upheld. The regrettable result of applying the Act of State doctrines is that the Soviet author is made the pawn of the Soviet Union in American courts. Even if American law recognized the Soviet author as the legitimate owner of copyright, assuming the work bore proper notice when first published, the U.C.C. would still provide the Soviet Union with an assertable claim to copyright. The question would then be which law governed, satute or treaty?[90]

Only if samizdat circulation did not amount to publication under American law or if our hypothetical American publisher obtained the work from someone without the author's authorization would section 20(e) apply. Still, it offers less than complete protection. Since the involuntary transfer provision of the new American law only governs within American territory,[91] the Soviet Union may still be able to prevent publication of the work outside the United States by asserting its copyright claim in foreign courts.[92] Assuming jurisdictional prerequisites existed, the Soviet Union could even maintain, and undoubtedly win, an infringement suit in a Soviet court against the American publisher of the work.[93] In any event, if the Soviet Union realizes that compulsory purchases no longer assure control over foreign publication of Soviet works, the Soviet legal system contains other remedies which could be used to

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(2)...[N]o court in the United States shall decline on the ground of the Federal Act of State Doctrine to the principles of internaitonal law in a case in which a claim of title or other right to property is asserted by any party including a foreign state (or a party claiming through such state) based upon (or traced through) a confiscation or other taking...by an act of that state in violation of the principles of international law, including the principles of compensation...

This amendment was passed partly in response to the *Sabbatino* case, *supra* note 83. The amendment, however, has been judicially limited to cases involving claims of title to American-owned property confiscated in a foreign state. Menendez v. Saks & Co., 485 F.2d 1355, 1372 (2d Cir. 1973); F. Palicio y Compania, S.A. v. Brush, 256 F. Supp. 481, 487 (S.D.N.Y. 1966), *aff'd*, 375 F.2d 1011 (2d Cir.), *cert. denied sub nom.*, Brush v. Republic of Cuba, 389 U.S. 830 (1976). *Cf.* Note, *International Law — Act of State Doctrine*, 49 WASH. L. REV. 213, 216-19 (1973); *see generally* Note, *supra* note 71.

[90]Although an argument might be made that treaty obligations are paramount to statutory law simply in their nature, Constitutionally they are on the same level, with the latter in time prevailing. It would be sounder to maintain, therefore, that internally the new American copyright law superseded contrary provisions in the U.C.C. with respect to the United States. And since the copyright law was passed later, Congress, presumably, took full account of its prior treaty obligations when enacting the contrary provision.

In addition, it is a far from frivolous argument that, in so far as the U.C.C. allows the Soviet Union to purchase compulsorily the copyrights of its citizens, it violates principles of international common law. Under this approach, certain aspects of the U.C.C. might themselves be impugned under international standards.

[91]W. FRIEDMAN, O. LISSITZYN & R. PUGH, INTERNATIONAL LAW: CASES AND MATERIALS 440 (1969).

[92]The present writer could find no other country with a provision like section 201(e). In addition, the different permutations of the problem here dealt with would not exist in most countries, including all U.C.C. countries other than the United States, since in those countries no notice requirements exist.

[93]*See* note 78, *supra*, and accompanying text.

discourage Soviet citizens from disseminating literature abroad.[94] The net effect of enacting section 201(e), therefore, may be that the Soviet Union will begin to employ these alternative measures more frequently.

Section 201(e) has a still more basic practical limitation. Unless a dissident author chooses to resist actively a compulsory purchase or other coercive type of transfer, how could an American court find such a transfer to be involuntary? With respect to the Soviet author, such resistance is very risky. Even if a dissident author transferred his work involuntarily, proving this could be ex-

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[94]The Soviet Union has a battery of weapons it can use to suppress dissident authors who distribute their works in ways other than through a government-owned publishing house.

The distribution of literary works by samizdat is not itself illegal, unless the material circulated is subversive. If the material could be viewed as subversive, the federated republics could impose criminal sanctions. The Criminal Code of Russia, for example, provides:

> Agitation or propaganda carried on for the purpose of subverting or weakening the Soviet regime or of committing particular, especially dangerous crimes against the state, or the circulation for the same purpose of slanderous fabrications which defame the Soviet state and social system, or the circulation or preparation or keeping for the same purpose, of literature of such content, shall be punished by deprivation of freedom for a term of six months to seven years, with or without additional exile of two to five years.

R.S.F.S.R. Crim. Code art. 70 (1962).

Soviet criminal law likewise imposes sanctions on transmitting literary works to foreign publishers, but a Soviet author can escape punishment under these laws by disclaiming that he authorized publication abroad. Law of Dec. 25, 1958, Law on Criminal Responsibility for State Crimes, art. 7.

Alternatively, an author who publishes his work in the West can be charged with violating the provisions of the Soviet Constitution and of the federated republics which grant the state a monopoly on foreign trade. U.S.S.R CONST. art. 14(h); R.S.F.S.R. Civil Code art. 45 (1964). Such a violation is a criminal offense punishable by from three to ten years in prison, confiscation of property, and the possibility of five years' exile. Until 1958 these activities were punishable under the criminal code. D. Loeber, *Samizdat Under Soviet Law,* 2 INDEX No. 3 at 3 (1973). The possibility of prosecutions under the laws granting the state a monopoly on foreign trade was underscored in the December, 1973, decree elaborating on the purpose of VAAP:

> A work of a Soviet author which has not been published on the territory of the U.S.S.R. and has not been published beyond its borders may be transferred by its author or his legal successor for use abroad only through the All-Union Copyright Agency
>
> Violation of the procedure established in this decree shall involve the recognition of the concluded transaction as invalid and also shall involve other responsibility in accordance with legislation in force. Maggs, *supra* note 5, at 394.

If royalties are contemplated in a transaction by a Soviet author with a foreign publisher, criminal violations of Soviet foreign exchange laws may be involved. *Loc. cit.*

It is reported that Soviet postal regulations prohibit carrying literary works across the Soviet border to bring them to a foreign publisher. The Soviet customs and postal regulations forbid transmitting work of an "anti-Soviet character." *Loc. cit.* In addition, dissident Soviet authors are subject to sanctions under the anti-parasite legislation for choosing to write dissident works instead of working for the people of the state. J. BERMAN, SOVIET CRIMINAL LAW AND PROCEDURE: THE RSFSR CODES 78 (2d ed. 1972).

Of course, the ultimate sanction, invoked against author Solzhenitsyn, exists: to strip the author of his citizenship.

It should be noted that all these sanctions prevent transfer of a dissident work abroad, but none go to transfer of the intellectual property rights therein. Conceivably a Soviet author could assign his copyright in his works to an American publisher in a written contract with a choice of law provision (specifying New York law would govern, for example). This would prevent the Soviet government from later trying to seize an author's copyright by compulsory purchase and would also prevent an infringement suit by VAAP. Of course, the Soviet author would also not gain the benefit of his copyright.

tremely difficult, especially in the case of a Soviet author. To testify against the state, orally or by affidavit, would hardly receive applause from Soviet authorities. These severe practical problems make section 201(e), in effect, a mere signal to dissident authors, in the Soviet Union and elsewhere, that the United States recognizes their rights and struggle. Somewhat surprisingly, the drafters of this legislative foray into the realm of dissidents' rights candidly concede the limitations of their approach:

> It may sometimes be difficult to ascertain whether a transfer of coyright is voluntary or is coerced by covert pressure. But subsection (e) would protect foreign authors against laws and decrees purporting to divest them of their rights under the United States copyright statute, and would protect authors within the foreign country who choose to resist such covert pressures.[95]

In essence, then, section 201(e) may be more form than substance.

IV. Conclusion

It is clear that internal Soviet and American copyright protection are, in practice, if not in theory, quite different. The Soviet Union, by retaining the right of compulsory purchase and control over royalties, has created a copyright system which is highly coercive. Recognizing that such a system probably violates international legal concepts of just compensation, American law no longer upholds some of the more unfair features of Soviet copyright law. Unfortunately, some coercive transactions may still escape American sanction under the traditional Act of State doctrine.

The Soviet accession to the U.C.C. will probably have very little effect on access abroad to works by Soviet dissidents. The exact parameters of this access depends on the ultimate resolution of the issue whether samizdat circulation is publication. Whatever the result of that inquiry, Soviet authors could still have their works published abroad, if, at worst, they were willing to sacrifice compensation. Even if subsequent developments permit publication abroad of samizdat works with or without compensation, the Soviet legal system has sanctions, outside its copyright laws, to discourage the flow of dissident literature abroad.

[95]H.R. REP. NO. 1476, 94th Cong. 2d Sess. 124 (1976).