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COMMENTS

COPYRIGHT TRANSACTIONS WITH SOVIET AUTHORS: THE ROLE OF VAAP

After this Comment was completed, the Soviet government officially eliminated VAAP's monopoly as of January 1, 1991.

I. INTRODUCTION

In the current climate of intensified business and cultural contacts between the United States and the Soviet Union, and with the Soviet market rapidly opening to the West, there is a need for basic knowledge of the operation of the Soviet legal system. This Comment attempts to expand the American legal community's understanding of how business is conducted with the Soviet Union in the area of literary copyright acquisition and sale. This understanding requires a close look at the nature and function of VAAP, the All-Union Agency on Copyrights, or, in transliteration, Vsesouzhnoye Agenstvo po Avtorskim Pravam.

Although an American who desires to purchase rights to a book or to commission a screenplay by a Soviet writer may not be directly affected by the relationship between the author and his Soviet agent VAAP, an enhanced understanding of this relationship may enable an American party to conduct negotiations with greater ease, avoid surprises and achieve better results. International players in this arena need advice on how to avoid the pitfalls of having an executed contract voided by an organ of the Soviet government, or of having a coproduction deal suddenly come apart, or a purchased property snatched away by another buyer. Competent legal representation requires some knowledge of the customs of the Soviet legal system.

First, this Comment attempts to shed light on VAAP's place in the Soviet system of copyright laws, although a detailed analysis of Soviet copyright law is beyond the scope of this work. It focuses on the dual legal status of VAAP and the detrimental effect it has on Soviet authors. This negative impact is due, in large part, to the monopolistic character of VAAP's activities. The legal foundation of VAAP's monopoly which allows it to control creative forces in the country is examined in the second part of the Comment. VAAP's impact on the international client is a

subject of the third part of this work. Finally, the Comment focuses on the inevitable changes brought about by glasnost and perestroika. This Comment attempts to assess effects of the changing political climate on VAAP and to make some predictions for the future.

II. WHAT IS VAAP?

A. *Historical Background*

After the Revolution of 1917, the newly born Soviet government had many pressing concerns. Copyright protection was not among them. In fact, the first comprehensive Soviet Copyright Law was not enacted until 1925. This law was amended in 1928, in 1961 and again in 1973 after the USSR joined the Universal Copyright Convention.¹ While some of the earlier laws have been repealed, such as a law authorizing the nationalization of copyrights,² certain distinct features of the original Soviet copyright laws have been retained. Among them are the separation of property and non-property (*droit moral*)³ rights in an author's work,⁴ the normative character of an author's remuneration in the majority of cases,⁵ compulsory purchase of a work by the State,⁶ free uses and compulsory licenses.⁷ Of particular interest to the foreign reader is the legal requirement that most contracts conform to a model contract which imposes rather rigid terms on all the negotiating parties.⁸ As such, models often influence other contracts as well.⁹

1. See generally Levitsky, *Continuity in Soviet Copyright Law: A Legal Analysis*, VI REV. OF SOCIALIST LAW 425-64 (1980); *The Beginnings of Soviet Copyright Legislation 1917-1925*, THE LEGAL HIST. REV. L. 49-61 (1982).

2. See generally Levitsky, *supra* note 1 and accompanying text.

3. The term "*droit moral*" refers to certain unalienable "moral" rights of an author in his work. See generally M. NIMMER & P. GELLER, *INTERNATIONAL COPYRIGHT LAW AND PRACTICE* (1989). See also *Technological Alternations to Motion Pictures and Other Audiovisual Works: Implications for Creators, Copyright Owners, and Consumers*. Rep. of the Reg. of Copyrights, Mar. 1989 reprinted in 10 LOY. L. A. ENT. LAW J. 1 (1990).

4. FUNDAMENTALS OF CIVIL LEGISLATION OF THE UNION OF SOVIET SOCIALIST REPUBLICS AND THE UNION REPUBLICS, [FUNDAMENTALS] as amended up to Oct. 30, 1981, Ch. IV, Copyright, art. 98, reprinted in English in 3 COPYRIGHT LAWS AND TREATIES OF THE WORLD, Supp. 1981-1983, USSR: Item 1B.

5. *Id.*

6. *Id.* at art. 106 at 4.

7. *Id.* at arts. 103, 104 at 3.

8. CIVIL CODE OF THE RUSSIAN SOVIET SOCIALIST REPUBLIC, [CIV. CODE] Fourth Section, Copyright, art. 506, reprinted in English in COPYRIGHT LAWS AND TREATIES OF THE WORLD, Supp. 1977, USSR: Item 4.

9. This influence stems from the Soviet legal community's understanding of the purposes served by adopting a model contract: "[m]odel contracts are not simply departmental acts. Their purpose is to show both parties the most correct format of a contract and its most correct content, which would serve the interests of the society, and the interests of the au-

Because of the above-mentioned characteristics, Soviet copyright law, in general, appears in many respects to be much more restrictive of an author's interests than its Western counterparts. It is against this background that a Western party interested in the acquisition or sale of a literary copyright in the Soviet Union must attempt to negotiate a mutually beneficial agreement. Before 1973, the responsibility for administering Soviet copyright laws was delegated among various artistic trade unions.¹⁰ Since 1973, the date of the Soviet Union's accession to the Universal Copyright Convention ("UCC"), the principal Soviet negotiating partner has been VAAP, the All-Union Agency on Copyrights.

B. Formation and Functions of VAAP

VAAP was formed to meet the new need to protect the rights of Soviet authors in the West, as well as the rights of foreign authors and artists in the USSR. Until joining the UCC, the USSR paid no royalties for use of Western copyrights nor expected to receive any for the use of Soviet copyrights.¹¹ VAAP's functions, as outlined in a Decree of the USSR Council of Ministers No. 588,¹² and reiterated by the VAAP's Statute,¹³ include, but are not limited to, the following: acting as an intermediary in the conclusion of agreements between Soviet publishers and foreign artists and Soviet artists and foreign publishers; receiving and paying royalties due to Soviet authors from the use of their works abroad and paying to foreign authors the royalties earned by the use of their works in the USSR; collecting and paying royalties to Soviet authors for

thors." E. P. Gavrilov, *Legal Enforcement of Authors' Contracts*, 6 PRAVOVEDENIE at 42, 44 (1981). The mentality which assumes that there is a "most correct" format or content for a contract inevitably spills into the area of licensing agreements, even if the latter type does not have to conform to the models. This subject is discussed in greater detail further in this Comment, see *infra* Part IV(c).

10. M. NEWCITY, *COPYRIGHT LAW IN THE SOVIET UNION* at 126, (Praeger Publishers 1978).

11. For the historical background on the Soviet Union's accession to the UCC, see generally Levin, *Soviet International Copyright: Dream or Nightmare?* 31 J. COPYRIGHT SOC'Y U.S.A. 127 (Dec. 1983).

12. The Decree of the USSR Council of Ministers No. 588, as of Aug. 16, 1973, entitled "On the All-Union Agency on Copyrights." This decree has never been published in its entirety. Excerpts were published by the newspaper *Izvestia*, Dec. 26, 1973. The author of this Comment was able to obtain a fuller text of the decree, available in Russian in the author's files. However, even this fuller text contains a number of references to deleted paragraphs, designated "Not for publication." Under the Decree No. 588, the State Committee for Cinematography, the State Committee for Radio and Television and the Press Agency "Novosty," retained the right to sell and buy copyrights, but were obligated to register their transactions with VAAP.

13. Statute of the Copyright Agency of the USSR, VAAP, endorsed by the Conference of Sponsors of the Copyright Agency of the USSR on Sept. 20, 1973.

the use of their works in the USSR; taking necessary steps to protect the rights of Soviet authors and their successors in title; maintaining a list of works by Soviet authors and the occasions of their use; formulating and recommending modifications of Soviet copyright law; participating in international copyright conferences; and concluding treaties.¹⁴

This list is interesting not only for what it contains, but also for what it omits. In particular, the decree does not indicate that VAAP is in fact responsible for collecting state tax on all payments received by Soviet authors from abroad, one of the most controversial functions of the agency.¹⁵

By design, VAAP must function in a dual capacity, representing both the State and the author. As a State organ, it collects taxes and promulgates regulations. However, VAAP also acts as the author's representative like a Western literary agent by procuring, negotiating and enforcing contracts for its clients. Seemingly, VAAP does not see the two functions as incompatible, nor did VAAP's creators perceive any inherent conflict of interest. However, many current problems which plague VAAP's operations today, and which may well lead to its undoing, stem from the agency's dual nature.

C. *The Servant of Two Masters*

1. An Organ of Government or Authors' Agent?

According to its enabling statute, as well as the Decree No. 588,¹⁶ VAAP is a nongovernmental organization established by fourteen professional unions and governmental committees.¹⁷ VAAP's nongovernmen-

14. *Id.* at 4-7.

15. *See infra* text at Part III(B).

16. *See supra* note 12 and accompanying text.

17. These include:

1. The Union of Soviet Writers;
2. The Union of Soviet Artists;
3. The Union of Soviet Composers;
4. The Union of Soviet Journalists;
5. The Union of Soviet Cinematographers;
6. The Union of Soviet Architects;
7. The Academy of Sciences of the USSR;
8. The State Committee of the USSR Council of Ministers on Publishing Houses, Printing and the Book Trade;
9. The State Committee of the USSR Council of Ministers on Science and Technology;
10. The State Committee of the USSR Council of Ministers on Television and Radio Broadcasting;
11. The State Committee of the USSR Council of Ministers on Cinematography;
12. The Ministry of Culture of the USSR;
13. The Ministry of Foreign Trade of the USSR; and
14. The Novosti Press Agency.

tal character is set forth in its Statute.¹⁸ This proposition has been accepted by Soviet commentators.¹⁹ While some American writers appear to agree that "VAAP was established as an independent entity responsible to none of the government ministries,"²⁰ this position is contradicted by the fact that half of the agency's sponsors are, in fact, governmental committees and ministries. Moreover, even the rules which address the order and amounts of authors' compensation had been decreed by the USSR Council of Ministers before VAAP came into existence, but remained unpublished until much later. USSR Council of Ministers Decree No. 588, which established VAAP, was enacted only on August 16, 1973,²¹ while some of the rules for this then unborn entity were set forth in the prior USSR Council of Ministers Decree No. 574, adopted on August 14, 1973.²² This sequence of events is difficult to reconcile with the theory that VAAP is operating independently, under its Statute, which was not adopted by its sponsors until September 20, 1973.²³ Thus, the statement that the VAAP is a "nongovernmental organization created under Articles 125 and 126 of the Soviet Constitution, which recognize the right of citizens of the USSR 'to unite in public organizations'"²⁴ seems to be negated by the fact that the rules of this public organization were imposed on it by the government even before VAAP was created. To finally dispense with the fiction of VAAP's independence, the Council of Ministers adopted the Decree No. 231 on March 15, 1989,²⁵ which in effect, designated the agency as an equivalent of a governmental ministry.

The financial function and structure of VAAP also reflect its dual nature. Under the Decree No. 588,²⁶ VAAP is charged with the responsibility of withholding a certain percentage from royalties it collects

See VAAP's Statute, *supra* note 13 and accompanying text.

18. VAAP's Statute Part 1 § 1, *supra* note 13.

19. Boguslavsky, *The Soviet Union*, in INTERNATIONAL COPYRIGHT AND NEIGHBORING RIGHTS 525, *see also* Dozortsev, *VAAP in the Mechanism of the Copyright*, 11 SOVIET STATE AND THE LAW 97, 98 (1984).

20. M. NEWCITY, *supra* note 10 at 127.

21. *See supra* note 12 and accompanying text.

22. Another "secret" decree, it contains omissions designated "Not for publication." A Russian copy is available in the author's files. The Decree No. 574 finally appeared in a "Svod Zakonov" (Collected Laws) with the omissions designated as "Not published because contains norms not to be included into USSR collected laws."

23. *See supra* note 17 and accompanying text.

24. M. NEWCITY, *supra* note 10 at 126-27.

25. Decree No. 231 of the Central Committee of CP USSR and USSR Counsel of Ministers, which reduced budgets for Governmental Ministries and agencies, including VAAP, *see* 22 SP SSSR (Collected Decrees of the Government of the USSR), Part One, 1989.

26. *See supra* note 12 and accompanying text.

which is then distributed to Creative Funds affiliated with three of its sponsors: Writers Union, Artists Union and Journalists Union. Funds are withheld whether or not an artist belongs to a union. In return, the sponsors are supposed to contribute to VAAP's budget, should the need arise.²⁷ In reality, the sponsors have never contributed significantly and the government has assumed this financial burden. VAAP's representative, Vladimir Tverdovsky, recently stated that over the years the agency has transferred to the unions approximately one hundred million rubles in withholdings without being reimbursed for its administrative costs. This practice has resulted in a significant loss to the agency.²⁸

Another feature of VAAP's economic character which makes its independence doubtful is the agency's obligation to deliver all earned hard currency²⁹ to the government. In return, VAAP receives a twenty-five percent commission in Soviet currency, at an exchange rate of one Soviet ruble to one hard currency ruble (1:1).³⁰ By comparison, the official exchange rate is one hard currency ruble to ten Soviet rubles (1:10). The official rate is what VAAP must pay when buying hard currency back from the government in order to transact with the West. Margarita Voronkova, at the time the head of VAAP's legal department, stated that in 1989 the agency earned eight million hard currency rubles from transactions with the West and was therefore entitled to a two million hard currency ruble commission.³¹ Had VAAP been permitted to retain these funds, it would need no financial support from the government. Under the existing system, however, VAAP receives significant state subsidies.³² This situation further undermines the notion of its independence.

27. See VAAP's Statute Part III § 12, *supra* note 13.

28. See *VAAP with VAAP's Eyes*, OGONIEK, No. 23, May 1990, at 6.

29. "A national currency that is freely convertible into gold or into the currencies of other countries . . . differs from soft currency which is regulated by exchange controls and is thus not freely convertible. Hard currencies thus serve as international currency." MCGRAW-HILL DICTIONARY OF MODERN ECONOMICS: A Handbook of Terms and Organizations (3d ed. 1983).

30. Since the Soviet currency, the ruble, is not convertible, i.e. is not accepted for circulation in the international markets, the Soviet authorities use an artificial measure of currency, a hard currency ruble. A hard currency ruble is not an equivalent of a regular ruble circulated inside the Soviet Union. According to Dr. Vladimir Kanevsky, Senior Research Associate of the All-Union Research Institute for Foreign Economic Relations, "[n]ow the exchange rate between dollar and ruble is one dollar to 0.6 ruble, while at one of the latest Moscow currency auctions 26 or even more rubles were offered for one dollar." Kanevsky, *The Impact of Currency Liberalization*, VESTNIK, (Sept. 1990) at 5.

31. *VAAP with VAAP's Eyes*, *supra* note 28.

32. *Id.*

2. Abuses of Authors' Rights

From a Western point of view, as an agent of Soviet authors, VAAP would be expected to look after its clients, protect authors' rights in case of abuses and promote their interests. The following incidents are, however, illustrative of how this relationship between VAAP and its Soviet clients actually operates. In 1988, for example, a textbook entitled *Soviet Civil Law* appeared in American bookstores. The book was written by a group of Soviet legal scholars, none of whom had consented to or was aware of its publication in the United States.³³ The authors received no fees or royalties from the English language edition.³⁴

Another story is revealed by the science fiction writer Arkady Strugatsky who had received the following official notice from VAAP: "Dear Arkady Natanovich: We are in receipt of the payment in the amount of 529 rubles and 66 kopeks³⁵ for the publication in Hungary of your book 'The Land of Red Clouds.' After all deductions, you are entitled to 99 rubles and 49 kopeks."³⁶ Children's author Eduard Uspensky tells of being approached by VAAP's representative with a contract offer from a Japanese publisher, under which VAAP would take a twenty-five percent commission, a Japanese agency would take fifteen percent and the balance would be subject to Soviet state tax. VAAP also asked Uspensky not to insist on a royalty exceeding four percent, because the publisher was a "friend."³⁷

A different type of VAAP's negligence is related by the playwright Alexander Buravsky. While on tour in the Federal Republic of Germany, he was approached by a German literary translator who chided him for ignoring her numerous letters requesting missing pages from his new play. The translator found it difficult to believe that not only had Buravsky never seen her letters, but that he was not even aware that this particular play had been sent to Germany. Buravsky had considered the play unfinished and not yet ready for European production.³⁸

33. This incident was mentioned by Victor Dozortsev, a prominent Soviet copyright expert in a newspaper article. Dozortsev, *Does the Author Need a Guardian? VAAP Today and Tomorrow*, Literary Gazette, Dec. 20, 1989, No. 51 at 2. Dozortsev is probably referring to the book *SOVIET CIVIL LAW*, published by M. E. Sharpe, Inc., see *infra* note 47.

34. *Id.*

35. For exchange rate see *supra* note 30.

36. A. Sukhanov, A. Fokov, *A Tax on Each Beard or How to Help a Copyright Out of Trouble*, OGONIOK no. 44, Oct. 1989, at 7. Strugatsky is known in the West for his novel *Stalker*, adapted for film by Andrey Tarkovsky.

37. Eduard Uspensky, *A Little More About My "Favorite" Organization*, Literary Gazette, no. 18, May 2, 1990, at 2. Uspensky is a creator of one of the most popular children's book and cartoon characters, Cheburashka, and the most outspoken critic of VAAP.

38. Conversation with the author of this Comment.

Soviet authors offer many more examples of VAAP's preemption of what would normally be considered author's rights. These are symptoms of the underlying problem: one agency cannot adequately serve two clients with conflicting interests. Consequently, VAAP's ambivalence about its priorities permeates the entire spectrum of its activities. Thus, when a VAAP official acts as a state representative to negotiate the purchase of a literary work from a foreign publisher for dissemination in the Soviet Union, his superiors expect him to deliver the best deal. Should the same official happen to be negotiating with the same publisher over the sale of a Soviet work for dissemination abroad, the success of his efforts matters only to the Soviet author who has no power of hiring or firing his agents, nor any real input in the negotiations.³⁹

Similarly, among VAAP's duties is an obligation to promote Soviet works abroad.⁴⁰ However, compared with the task of acquiring copyrights to literary works for publication in the USSR, or the representation of state interests in high profile international conferences, the duty toward its authors appears very low on VAAP's list of priorities. This dual nature of the agency maintains the potential for abuse. VAAP's ambiguous status leads to a confusion of priorities which, many authors complain, hurts their interests. Inevitably, if indirectly, the agency's dual status also effects its Western clients.⁴¹

III. VAAP'S MONOPOLY IN THE AREA OF AUTHORS' REPRESENTATION

A. *Legal Background*

VAAP's activities have a clearly monopolistic character in the area of author's representation. Does this monopoly have a sound foundation in Soviet law? While the basic tasks of Soviet copyright law are expressed in the Soviet Constitution,⁴² the main body of applicable norms is found in the Fundamental Principles of Civil Legislation of the USSR and the Union Republics⁴³ and in the Civil Codes of the Union Republics.

The Civil Code of the Russian Republic ("RSFSR"), the largest re-

39. The potential for abuse is apparent. It could be advantageous for a VAAP official to cut a "sweetheart" deal with a foreign publisher, giving away some author's rights in exchange for a benefit to VAAP in some other transaction.

40. VAAP's Statute Part 1 § 1, *supra* note 13.

41. See *infra* text at Part Three of this Comment.

42. KONST. SSSR (Constitution of USSR), reprinted in BASIC DOCUMENTS OF THE SOVIET LEGAL SYSTEM 3, (1983).

43. FUNDAMENTALS, Ch. IV, Copyright, *supra* note 4.

public in the USSR, is particularly influential and appears to govern the activities of VAAP.⁴⁴ The Code provides that an "assignment to a foreign citizen or foreign legal person of the copyright title to a Soviet work is recognized only when such assignment has occurred in accordance with the procedures established by Soviet legislation."⁴⁵

To discover those procedures, one must turn to the normative acts of the Council of Ministers of the USSR.⁴⁶ The Council is the highest administrative organ in the country and in accordance with article 131 of the Soviet Constitution⁴⁷ carries out the management of the national economy and the social-cultural development in the Soviet Union. The Council's normative acts are issued in the form of decrees, orders and statutes. A Soviet commentator observes that while "the normative acts of the USSR Council of Ministers are concerned, first of all, with the regulation of civil law relationships between socialist organizations . . . many of its acts are devoted to the regulation of relationships in which citizens participate."⁴⁸ A normative act may have an imperative (mandatory) or dispositive (discretionary) character.⁴⁹ However, unless its character is designated in the text of the act itself, this determination may be rather difficult, since Soviet legal framework provides no definitive way of interpretation of the act's character.

The procedures for the assignment of a copyright to a foreign party are set forth in the Decree No. 588 of the USSR Council of Ministers of 1973,⁵⁰ and reiterated in VAAP's Statute:

The right to use (publish, publicly perform or use in any other way) outside the USSR a work by a Soviet author previously published in or outside the USSR, may be assigned by the said author or by his successor in title to a foreign user only through the offices of the Copyright Agency of the USSR, and with the consent of the Soviet first user of the work or other possessor of a copyright to the work.⁵¹

With regard to an unpublished work, the Decree No. 588 similarly provides that rights may be assigned only through VAAP and further

44. CIV. CODE, *supra* note 8. Copyright provisions of other republics in most aspects are similar or identical to those of RSFSR.

45. CIV. CODE, Art. 478 ¶ 3, *supra* note 8 at 2.

46. State acts which prescribe general rules of conduct. See generally W.E. BUTLER, SOVIET LAW, Ch. 4, 41 (Butterworths Legal Publishers 1988).

47. KONST. SSSR *supra* note 42.

48. SOVIET CIVIL LAW, 21 (M.E. Sharpe, Inc. 1988).

49. *Id.* at 27.

50. See Decree of the USSR Council of Ministers No. 588, *supra* note 12.

51. *Id.*

states that "a violation of the procedure set forth in this decree voids the agreement and may also lead to other obligations under current law."⁵² In the pre-glasnost era, the last provision was actually a veiled threat by the government to resort to a variety of methods of intimidation, including imposition of certain legal penalties against an author who took the risk of bypassing VAAP. The author could have been criminally charged with conducting "anti-Soviet propaganda,"⁵³ accused of "parasitism,"⁵⁴ or criminally prosecuted for conducting private hard-currency transactions.⁵⁵

In the current climate, an increasing number of authors circumvent VAAP by acting independently and contracting directly with foreign parties. Although criminal prosecution seems unlikely in the liberal atmosphere of Mikhail Gorbachev's reforms, the law prescribing VAAP's exclusivity has not been amended.⁵⁶ The prohibition against private hard-currency transactions is still in effect.⁵⁷ No mechanism has been created which would allow Soviet citizens to lawfully conduct business using hard currency, nor has a tax structure for hard-currency transactions been established.⁵⁸

Another theory justifying VAAP's exclusivity is derived from Article 73(10) of the USSR Constitution which provides for a state monopoly in foreign trade.⁵⁹ A Soviet commentator, A. Bikov, points out that "operations in connection with the publication and performance in the capitalist countries of Soviet scientific, literary and musical work have a commercial character, in particular, because they include payment of author's royalties and therefore belong to external trade operations."⁶⁰ In essence, he denies a Soviet author the right to contract with a foreign

52. *Id.*

53. RSFSR CRIMINAL CODE, art. 70, reprinted in English in BASIC DOCUMENTS ON THE SOVIET LEGAL SYSTEM, *supra* note 40. See trial of Daniel & Sinyavsky, LUDMILLA ALEXEYeva, SOVIET DISSENT, 274 (Wesleyan University Press 1985).

54. Parasitism — i.e., not earning a living through a regular employment — is a criminal offense under Soviet law, RSFSR CRIMINAL CODE, *see supra* note 53. See discussion of the trial of Joseph Brodsky: Burford, *Getting the Bugs Out of Socialist Legality: The Case of Joseph Brodsky and a Decade of Soviet Anti-Parasite Legislation*, 22 AM. J. COMP. L. 465 (1974).

55. RSFSR CRIMINAL CODE, *supra* note 53, at art. 88.

56. While this Comment was being written, the law has been amended. *See infra* note 169.

57. This situation is changing rapidly. *See generally* Vladimir Kanevsky, *The Impact of Currency Liberalization*, *supra* note 30, and *Liberalizing Currency Transactions*, *id.* at 55.

58. *See infra* text at Part Three for a fuller discussion. *See infra* text at Conclusion for the latest developments.

59. KONST. SSSR, *supra* note 42.

60. M.M. BOGUSLAVSKY, COPYRIGHT IN INTERNATIONAL RELATIONS: INTERNATIONAL PROTECTION OF LITERARY AND SCIENTIFIC WORKS, 163 (Sydney 1979), quoting A. Bikov.

party and concludes that "Soviet physical and legal persons cannot conduct commercial operations abroad without permission from [the] Ministry of External Trade."⁶¹

This restrictive position is viewed somewhat more liberally by another Soviet scholar, M. M. Boguslavsky, who explains: "External trade monopoly . . . must be understood in a broader manner by Soviet legal literature. This monopoly consists in particular of the fact that the Soviet Government defines which organizations conduct the corresponding operations and in which order."⁶² Therefore, VAAP, as a designated organization, is a necessary participant in effectuating the transfer of rights to a Soviet work for the use abroad. Under this reasoning, state monopoly can be effectuated by a designated *state* agency. VAAP, however, maintains, that it is a nongovernmental public organization.⁶³ As such, it normally should not be charged with affecting a governmental function.⁶⁴

Another Soviet commentator points out that the model publishing contract, the use of which is mandated by both Article 101 of the Fundamental Principles and the RSFSR Civil Code, contains a clause empowering a publisher to sell an author's work, either inside or outside the country, on condition that the author receive notice of the sale.⁶⁵ This clause, by failing to mention VAAP, appears to conflict with the Decree No. 588 of the USSR Council of Ministers which directs all such activities through VAAP.⁶⁶ In fact, decrees of the Council of Ministers, the normative acts, appear to be the only legal authority justifying VAAP's monopoly, or its very existence, for that matter. VAAP is not mentioned in the Constitution, the Fundamental Principles, or in the Civil Codes. Thus, VAAP's monopoly seems to rest on a rather thin legal foundation.

William B. Simons, an American expert on Soviet law, commenting on the Soviet legal system, suggests, however:

[W]hile the civil codes (*kodeksy*) of the Soviet republics, and the federal principles (*osnovy*) of civil legislation (on which the former are based) are the *primary* source of Soviet civil law, they by no means form the total body of Soviet civil law legislation. There exists an entire gamut of subordinate rules and reg-

61. *Id.*

62. *Id.*

63. See *supra* text at Part II(C).

64. Moreover, the very reasoning that allows the state to control copyright assignment as an item of foreign trade, and at the same time to consider it as inalienable from the author, under *droit moral* concept, appears unconvincing.

65. V. Chertkov, *Hostages of VAAP*, *Literary Gazette*, No. 24, July 13, 1990, at 5.

66. See Decree of the USSR Council of Ministers No. 588, *supra* note 12.

ulations contained in the legislation of the supreme soviets of the USSR and the union republics and autonomous republics, as well as their governments, ministries, departments, and agencies In addition to extralegal influences or controls, Soviet administrative law affects civil and familial relationships. It is only partially codified and — perhaps more than any other branch of Soviet law — is characterized by the prevalence of *unpublished* rules and regulations The Soviet law provides that laws, edicts, and decrees of a nonnormative character need not be published, but only communicated to the relevant addressee.⁶⁷

These observations are particularly applicable to the workings of VAAP, which appears to be a self-controlling organization, answerable to no one. As a nongovernmental organization, VAAP is responsible to no government ministry. Under its statute, VAAP should be answerable to its fourteen sponsors, who, through the Council of Sponsors, elect the agency's governing body, the Board of the agency.⁶⁸ However, the sponsors themselves appear ignorant of VAAP's operating rules and frequently express their frustration with their inability to obtain information.⁶⁹ Not surprisingly, most often the complaints are expressed in connection with VAAP's withholdings of commissions and taxes.

B. Commissions and Taxes

Withholding of commissions for VAAP's services is prescribed in the VAAP's Statute,⁷⁰ which states that a commission is to be paid to VAAP out of fees paid to Soviet and foreign authors, and their heirs, as well as out of the amounts withheld on behalf of the three creative unions.⁷¹ However, the VAAP Statute provides no specific information as to the size of the commission, nor as to who has the power to decide the size. Legal authority may be buried in the broad and ambiguous language of the catchall provision of the VAAP's Statute itself which pro-

67. William Simons, *SOVIET CIVIL LAW*, *supra* note 48, at xiv-xv.

68. VAAP's Statute, *supra* note 13.

69. Although there are many examples illustrating this point, one of the most telling is the discussion in the Soviet publication, *THE SOVIET STATE AND THE LAW*, No. 6, at 75 (1984), in which a number of the participants — members of the Unions-sponsors — voiced their dissatisfaction with the system. They were later chided by a legal commentator as persons "not quite understanding the meaning of the problems they address and even not knowing the factual situation." Dozortsev, *VAAP in the Mechanism of a Copyright*, *THE SOVIET STATE AND THE LAW*, No. 11, at 99 (1984).

70. VAAP's Statute, at art. III § 12, *supra* note 13.

71. *Id.*

vides that VAAP effectuates "publication of instructions and explanations pertaining to the copyrights, to be promulgated under existing Soviet laws, which it is competent to address."⁷² No other authority defines the parameters of VAAP's competency. Thus, nothing prevents the agency from deeming itself competent to decide the size of the commission it can withhold from its clients.⁷³

It appears that internal regulations issued by VAAP, largely inaccessible to authors, govern the agency's withholding policy.⁷⁴ The amounts withheld appear to be from two to twenty-five percent, depending on the type of service provided and to whom it is provided.⁷⁵ Mr. Alexander Olshansky, a member of the board and the head of the Department of Export and Import of Works of Art and Literature, mentioned in a letter to a newspaper: "The size of the commission withheld from fees received from abroad is now 25%, in some cases, 15%."⁷⁶ This illuminating statement apparently provides the only available answers to a question which troubles many Soviet authors.

Apart from the confusion about the authority and size of withholdings, there is an even more serious problem concerning VAAP's receipt of author's fees. An organization which claims to be a nongovernmental, private entity is entitled to make its own determination as to what to charge its clients. However, when it invokes state authority to impose its services on its clients, such reasoning begins to appear suspect. Even more troubling is the realization that the normative acts issued by VAAP have legal force with regard to governmental agencies, ministries and organizations.⁷⁷ A private organization would not normally be entrusted with such powers, which are reserved for the state agencies. Therefore, VAAP's "nongovernmental" character again appears to be false.

VAAP's role as an enforcer of state tax policies makes this contradiction even more apparent. Fiscal duties are not mentioned in the VAAP's statute. A nongovernmental organization acting strictly as a

72. *Id.* at art. I, § 1(p).

73. In conversation with the author of this Comment, Prof. Dozortsev suggested that the size of commission withheld might be coordinated with and approved by the USSR Ministry of Finance. However, there appears to be no available documentation to confirm this assertion.

74. See Chertkov, *supra* note 65.

75. From numerous discussions with Soviet friends, the author of this Comment gathered that the size of the commission may be as low as two percent if the service is provided to the heirs of the deceased writer. The standard withholding from the fee received from abroad appears to be twenty-five percent.

76. "Good Storyteller" and "Horrible" Reality: *The History of a Conflict*, *Literaturnaya Rossia*, No. 17 at 22, Apr. 22, 1989.

77. Dozortsev, *VAAP in the Mechanism of a Copyright*, 11 *SOVIET STATE AND LAW*, 95, 102 (1984).

private party is not supposed to have any administrative powers.⁷⁸ In spite of that, the old Decree of the Presidium of the Supreme Soviet on taxation, since repealed, prescribed that VAAP effectuate tax withholding on the sums transferred from and to abroad.⁷⁹ Note that a new Income Tax Law adopted in 1990 does not mention VAAP in its provisions.⁸⁰ The USSR Ministry of Finance's instruction, however, not a readily obtainable document, authorizes VAAP to continue the practice of tax withholding.⁸¹

The amounts withheld are set in a Decree of the Presidium of the USSR Supreme Soviet⁸² which provides a sliding rate schedule of taxes to be levied on authors' fees remitted from abroad, with a floor of thirty percent levied on annual income up to five hundred rubles and a ceiling of 2,775 rubles plus seventy-five percent of any amount over five thousand rubles. This sliding rate translates into an effective rate of over eighty percent. The rates are even higher for the heirs of authors: the floor is sixty percent, and the ceiling applies earlier, at an annual income of 3,001 rubles.⁸³

VAAP representatives have declared on numerous occasions that they have nothing to do with the duty of taxation imposed on them "from above," that they resent having to withhold the money, and that they have absolutely no control over these issues, including the amounts withheld. They emphasize the fact that VAAP is merely implementing the policy adopted by "higher" authorities.⁸⁴

An interesting fact, however, throws doubt on those earnest declarations. The new Decree on taxation provides that the "rules set forth in the present article do not apply when sums remitted from abroad are paid . . . for works *specialy created* for use in the established manner

78. *Id.*

79. The Decree of the Presidium of the Supreme Soviet of the USSR "On Taxation of the Population" of Apr. 30, 1943, as amended Oct. 20, 1983, § 19, Ved. Verkh. Sov. SSSR (Vedomosti of the Supreme Soviet USSR), No. 43 at 653 (1983).

80. Law of the USSR "On taxation of citizens of the USSR, foreign citizens and persons without a citizenship," Pravda, No. 126, May 6, 1990, at 4.

81. USSR Ministry of Finance Instruction No. 83 of June 25, 1990, "About the Order of Application of the USSR Law 'About Income Tax from USSR Citizens, Foreign Citizens and Persons Without Citizenship,'" Part IV. A Russian copy is available in the author's files.

82. "On the income tax levied . . .," as amended up to May 12, 1975, § 1(a). Reprinted in English in 3 COPYRIGHT LAWS AND TREATIES OF THE WORLD, USSR: Item 6A.

83. *Id.*

84. Nikolay Chetverikov, Chairman of the Board of VAAP, states: "We have made numerous requests to be released [from the responsibility of tax withholding]," *VAAP with VAAP's Eyes*, *supra* note 28. Alexander Olshansky, the head of the department of export-import of copyrights to works of art and literature, clarifies: by April 1989 there were two requests to this effect by VAAP. See "Good Storyteller," *supra* note 75.

outside the USSR.”⁸⁵ What are those “specially created” works and who is to decide which works fall into this category and at what rate they should be taxed? The terse language of the tax decree does not answer these questions.

Some Soviet commentators suggest that this provision was introduced into the tax decree with VAAP’s blessing and, in effect, allows the agency to control the level of taxation imposed on its clients. Apparently, “specially created” works are being taxed at the rate of up to thirteen percent (as compared to up to eighty percent effective rate on other works),⁸⁶ with VAAP being the only authority to make the determination of what falls into the “specially created” category. Soviet authors suggest that this arrangement not only provided VAAP with an extra degree of power over its clients but also has somehow benefitted VAAP financially, hinting at possible wrongdoing.⁸⁷

Whether or not these assertions are true, they clearly indicate that the level of frustration with VAAP’s operations, its secretiveness and its lack of information pertaining to authors’ most basic rights and responsibilities has reached a peak in the Soviet artistic and literary community. “There is no copyright protection,” declares artist Boris Zhutkovsky.⁸⁸ “There is robbery and lawlessness. [The internal] regulations and orders appear and change with such mysterious unpredictability, as if a band of robbers is at work. The changes are constant because no one ever knows what is PERMISSIBLE.”⁸⁹

The entire practice of VAAP, as directed at its Soviet clients, bespeaks of neglect, disinterest and lack of adequate representation. Not surprisingly, many Soviet artists have demanded a change and have declared a war on VAAP. Some others have gone a step further by taking their representation into their own hands. Unavoidably, these developments have a significant impact on VAAP’s international clients.

IV. VAAP AND ITS INTERNATIONAL CLIENTELE: DO WE STILL NEED VAAP?

The unhappiness with VAAP’s practices is widespread in the Soviet Union. Paradoxically, however, the same features which irritate Soviet

85. The Decree of the Presidium of the Supreme Soviet of the USSR “On the income tax levied. . .,” § 4, *supra* note 82, (emphasis added).

86. See *supra* notes 82-3 and accompanying text.

87. A. Sukhanov, A. Fokov, *supra* note 36.

88. Zhutkovsky, *Master and Ministry*, Literary Gazette, May 16, 1990, No. 20 at 17 (emphasis in original).

89. *Id.*

authors — the centralized, monopolistic character of the agency — are perceived as a great advantage by some of VAAP's international clients. Many American companies find it convenient to deal with one centralized entity, which is expected to take care of all their needs. In a country which is lacking familiar information services and where communication with local residents, including phone operators, may seem to an English-speaking person a task next to impossible, VAAP is easy to find. Its representatives speak English and have experience dealing with Western clientele. Some American publishers gratefully speak of VAAP's efficiency in preparing requested literature, setting up meetings in advance and generally being very accommodating.⁹⁰ Of course, at times, red tape can be excruciating and one has to tread lightly so as not to spoil the relationship with VAAP, but for many that is a small price to pay for the convenience.

VAAP's preeminent position as an exclusive Soviet representative, whether with or without legal justification, has been a fact of life for almost two decades. However, since it has become the focus of an ongoing debate in the Soviet Union, it would be beneficial to reevaluate VAAP's role in the Soviet Union from an American perspective. A clear understanding of VAAP's position within the Soviet legal framework is of utmost importance to an American entity interested in developing a business relationship with its Soviet counterpart. A correct assessment of VAAP's role may have a determinative effect on the outcome of the negotiations.

A. *VAAP's Participation is Still Mandatory*

The first and most obvious question is whether VAAP must be included in any negotiations with a Soviet author or entity. Although it appears that VAAP's monopoly is based on a rather thin legal foundation,⁹¹ with respect to individual Soviet copyright owners it still appears to stand, in spite of the earthquake of glasnost. At least, such is the assertion of Nikoly Chetverikov, chairman of the board of VAAP, who, in this context, points to a need "to respect existing norms and adhere to them until they are revised or rescinded."⁹² This conclusion was affirmed in a recent article by Victor Dozortsev, a leading Soviet copyright

90. Conversation with Nadia Columbus of Nova Science Publishers, Inc., New York, on Nov. 4, 1990. Nova specializes in scientific and political literature and has many years of experience dealing with VAAP.

91. See *supra* text at Part III(A).

92. *Creative Work, the Law and Commerce*, Pravda, Jan. 4, 1990, at 4, reprinted in XLII THE CURRENT DIGEST OF THE SOVIET PRESS 3, at 26.

expert: "[T]he laws on which the agency's [VAAP] authority is based have not been repealed but are still in force."⁹³

However, these laws, still on the books, which affirm the monopolistic hold of government agencies, such as VAAP, on international transactions seem to be contradicted by the new Decree of USSR Council of Ministers.⁹⁴ This decree allows any state organization, production cooperative or other public organization to directly enter the international market. Although this new law restricts trade in such commodities as inventions or artistic activities, there is no express limitation on copyrights as such.⁹⁵ The question arises as to whether a screenplay or a book manuscript would fall under an "artistic activity." The decree provides no answer.

The practical outcome of this legal development is still unclear. It appears that, under the new law, a Soviet organization (such as a studio or a publishing house) is allowed to acquire rights to a foreign work. It is not known, however, whether it can sell a work created by a Soviet author. The result may depend on who has the copyright: the organization or the individual author. If an organization itself owns the copyright, it arguably can bypass VAAP. However, within the context of publishing, the new model agreement makes it clear that a copyright belongs to the author, rather than the publisher.⁹⁶ Of course, an easy solution would be for the author to assign his or her copyright to the organization. Yet, the mandatory model publishing agreement does not provide for such an assignment.⁹⁷

Television and film studios currently possess the copyrights to works they produced and, thus, appear able to benefit from the new law by entering the international market directly.⁹⁸ It is anticipated, however, that when the new copyright law is enacted in the near future this situation will also change: copyrights to cinema, television and video productions will belong to the director and screenwriter.⁹⁹ If that happens, the studios will not be able to bypass VAAP.

93. Dozortzev, *Talents and Middlemen: What Service Does the All-Union Copyright Agency Provide in Exchange for Its "Percentage"?*, *Izvestia*, Apr. 14, 1989, at 2, *reprinted in* XLI THE CURRENT DIGEST OF THE SOVIET PRESS 23.

94. *Id.* (citing the Decree of USSR Council of Ministers of Mar. 7, 1989).

95. *Id.*

96. See Order of the USSR State Committee on Publishing as of Nov. 15, 1989, No. 356, § 2, *Bulleten of Normative Acts of Ministries and Agencies of the USSR*, No. 5, 1990.

97. See *supra* note 8 and accompanying text.

98. In any event, State Committees for Cinematography and Television are not obligated to go through VAAP. See *supra* note 12.

99. *Creative Work*, *supra* note 92.

B. Soviet Copyright Law and its Impact on International Business

Certain substantive provisions of Soviet copyright law find no counterpart in American copyright law, and vice versa. Although both countries are signatories to the Universal Copyright Convention, the USSR is not a member of the Berne convention.¹⁰⁰ One distinction is that Soviet copyright law contains no provisions analogous to the American "work for hire" concept.¹⁰¹ Therefore, a Soviet author remains the copyright owner even if his work has been commissioned by a third party.

Another substantive feature of Soviet copyright law which impacts on contracts between Soviet and American parties is a Soviet provision protecting *droit moral*, or moral rights. Serge L. Levitsky observed that:

[T]he doctrine of 'moral rights' clashes with what has become the 'traditional' American approach to copyright as protecting only the author's economic rights. These doctrinal differences should not be underestimated because they have a very practical significance in determining the scope, the duration, the transferability and the means of protection, of the authors' exclusive rights.¹⁰²

Consequently, a complete assignment of author's rights to a foreign buyer may not be possible under Soviet copyright law. VAAP's participation, backed up by the state authority legitimizing its practices, might be a welcome reassurance that the sale is legal and enforceable.

At this time, whether dealing with an individual or a corporate entity in the Soviet Union, an American buyer is well advised to bring VAAP into the negotiations. Soviet authors, however, are more frequently refusing the agency's services, in spite of the apparent illegality of such conduct. The consequences of bypassing VAAP in negotiating the acquisition of a copyright from a Soviet author may differ, depending on where the contract is signed. In the current relaxed climate of perestroika, some Soviet writers and artists travel the world and occasionally encounter an offer to buy their work. If the agreement of such a sale is concluded in the United States, it would appear to be governed by the

100. This situation is expected to be rectified in the near future. See Agreement on Trade Relations between USA and USSR wherein both countries agreed to "enhance their copyright relations through adherence to the Berne Convention for the Protection of Literary and Artistic Works (Paris 1971) (the "Berne Convention")." XXIX I.L.M. 4, 949, 954 (July 1990).

101. See generally M. NIMMER & P. GELLER, INTERNATIONAL COPYRIGHT LAW AND PRACTICE, *supra* note 3.

102. Levitsky, *The Union of Berne at 100: What Keeps the Superpowers Away? Thoughts and Apprehensions*, Law and the Gorbachev Era, 39 LAW IN EASTERN EUROPE, 271, 284 (1988).

local laws.¹⁰³ Such contracts, nevertheless, are still an exception rather than the rule. The impact of the Soviet laws on the sale of a copyright between Soviet and foreign parties remains, however, of primary interest. This impact has been explained in the Decree No. 8 of the Plenum of the USSR Supreme Court,¹⁰⁴ which states in pertinent part: "Non-observance by the author . . . of the established order of transfer of an unpublished work (or rights to use the work published in the USSR) for use abroad . . . leads to an invalidation of a contract" by the court.¹⁰⁵

Thus, under this decree, the agreement signed without the benefit of VAAP's participation is declared null and void. Moreover, the decree further provides that the court may go after a Soviet author and confiscate whatever compensation he has recovered or is due under the contract.¹⁰⁶ Therefore, it appears that even though the contract is declared void, and the copyright has reverted to its original owner, money will not be returned to the buyer. A foreign buyer may, of course, sue the author, but a Soviet citizen is not likely to obtain hard currency to pay the buyer back, especially if his money were confiscated by the State.

The effect of bypassing VAAP from a Soviet legal standpoint appears dramatic. Whether the practical impact outside the USSR is as severe cannot be answered with complete confidence.¹⁰⁷ However, this question arose in Germany in 1975. Alexander Solzhenitsyn, then a Soviet citizen, signed a contract with a German party without VAAP's participation. Later, the issue of validity of this contract was raised in a copyright infringement case between two German publishers. The German Federal Supreme Court concluded in this case that "the government monopoly of foreign trade . . . is limited, in its effect, to the foreign territory in question."¹⁰⁸ As a result, the court concluded that the contract was valid under German law.¹⁰⁹ Thus, if this holding is to be widely

103. See M. NIMMER & P. GELLER, *INTERNATIONAL COPYRIGHT LAW AND PRACTICE*, *supra* note 3, § 6(2).

104. The Decree No. 8 of the Plenum of the USSR Supreme Court as of Apr. 18, 1986, entitled "About Enforcement of the Law by the Courts in Deciding Conflicts Arising from the Copyright Law Implementation," § 5, *reprinted in* E. GAVRILOV, *COPYRIGHT*, 165, 168 (Moscow 1988).

105. *Id.*

106. *Id.*

107. M.M. Boguslavsky points out another possible legal effect of transferring Soviet work to the West over VAAP's head: "[T]he foreign publisher who was first to publish the work abroad cannot sue if further use of this work occurs on USSR territory." *COPYRIGHT IN INTERNATIONAL RELATIONS*, *supra* note 60, at 216 n.55. However, this observation does not appear particularly significant from a practical standpoint.

108. *Hermann Luchterhand Verlag GmbH v. Albert Langen*, IZR 40/73, *reprinted in* English in 7 IIC 134, 137 (1976).

109. *Id.*

accepted, the impact of Soviet laws nullifying any contract signed without VAAP's participation is limited to the territory of the USSR.

The recent history of relationships between Soviet authors and Western buyers is full of blatant violations of the laws prescribing VAAP's monopoly, committed by authors resorting to self-representation. VAAP, while fully aware of this, has done nothing to enforce its rules.¹¹⁰ An interesting example of such violation is mentioned by Serge L. Levitsky: "M. Gorbachev's *Perestroika: New Thinking for Our Country and the World*, published in the United States in English translation by Harper & Row after its appearance in Russian in the USSR, was copyrighted directly by Mr. Gorbachev, i.e., technically, no copyright has been transferred."¹¹¹ Under Soviet law, President Gorbachev has committed not one but two violations: the transfer was effectuated without VAAP's participation, and the first Soviet publisher's consent had not been obtained. Thus, under the Decree No. 8,¹¹² the contract with Harper & Row must be technically recognized as void.

C. Licensing Agreements and Model Contracts

The Soviet Union's accession to the Universal Copyright Convention in 1973 demanded certain changes in the Soviet copyright laws. Among the most important developments was the introduction of a licensing contract.¹¹³ Legal authority for the licensing contract rests with the Fundamentals¹¹⁴ and the corresponding provisions of the RSFSR [Russia] Civil Code.¹¹⁵ Those provisions provide, in pertinent part:

Author's contracts can be of two types: an author's contract for the transfer of a work for use; an author's licensing contract Terms of an author's licensing contract which assign the rights to use a work by way of translation into another language or by way of adoption to a different type of work (such as, from a narrative work into a drama or a screenplay or vice versa) are defined by the parties upon concluding the agreement

110. For a discussion of a Soviet writer, Chingis Aitmatov, who bypassed VAAP, see *Tax on Each Beard*, *supra* note 34. VAAP itself also acknowledges the problem. See *VAAP with VAAP's Eyes*, *supra* note 28.

111. Levitsky, *Changes in the Fundamental Principles of USSR Civil Legislation, Part IV: Copyright*, *The Impact of Perestroika on Soviet Law*, 41 *LAW IN EASTERN EUROPE*, 205, 209 (1990).

112. See *supra* note 104.

113. INTERNATIONALE GESELLSCHAFT FÜR URHEBERRECHT E.V., *SCHRIFTENREIHE*, 1, 26 (Wien 1985).

114. FUNDAMENTALS, see *supra* note 4.

115. CIV. CODE, see *supra* note 8.

unless the laws of USSR and RSFSR provide otherwise.¹¹⁶

An author's contract for the transfer of a work for use is distinguished from a licensing contract in that, under Article 504 of the RSFSR Civil Code, practically all transactions in copyright fall within the first category and, as such, are governed by the model agreements.¹¹⁷ Although it is not specifically stated in the RSFSR Civil Code, it appears to be a generally accepted principle that licensing agreements are used primarily when trading abroad.¹¹⁸

Assignment of rights under model agreements is severely limited.¹¹⁹ For example, the assignment cannot be granted for a period longer than three years; rights have to be assigned for a specific use, such as theatrical production or publication, but not both, and cannot be reassigned to a third party.¹²⁰ Licensing agreements may not be subject to such limitations.¹²¹ However, there is no authority stating the case one way or the other, and as such, licensing agreements may nevertheless be indirectly affected by the models.

Thus, VAAP often provides a reassuring presence in the Soviet legal context full of ambiguities. One example of these many ambiguities is that before the adoption of the recent law which provides that the authors are the owners of a copyright to their published work,¹²² legal entities other than owners could possess a copyright and assign it.¹²³ What now happens to those copyrights assigned under the old law? Do they revert to the author? VAAP's seal of approval provides a welcome degree of comfort to foreign purchasers.

116. CIV. CODE, *see supra* note 8, at art. 516.

117. Model agreements are promulgated under art. 506 of the RSFSR CIV. CODE, *see supra* note 8.

118. E. Gavrilov, *About the Principles of the Soviet Copyright Law*, 3 SOVIET STATE AND THE LAW, 73, 75 n.6 (1988).

119. Not to complicate matters further, but I should mention the ongoing dispute between the leading Soviet scholars as to whether an assignment of a copyright as such exists under Soviet copyright theory. *See generally* V. Dozortsev, E. Gavrilov.

120. *See* E. Gavrilov, *About the Principles of the Soviet Copyright Law*, *supra* note 118, at 76.

121. "Since one of the parties to an agreement is abroad, and since there are potential difficulties with observance of timing and other terms of a model agreement, the law allows for greater freedom to parties to a licensing agreement." Gavrilov, *Legal Enforcement of Authors' Contracts*, *supra* note 9, at 48.

122. *See* USSR State Committee on Publishing Decree No. 356, of Nov. 15, 1989, 5 BULLETEN OF NORMATIVE ACTS OF USSR MINISTRIES AND AGENCIES, (1990) (providing that copyright protection is offered to an author).

123. Such could have been the scenario of the purchase without authors' consent of the book SOVIET CIVIL LAW, mentioned *supra* note 48. It is rather ironic that the book describing Soviet law was sold with apparent disregard to this law.

Another example is that the assignment was and is allowed only with the permission of a first user.¹²⁴ Whether or not VAAP usually bothers to obtain such permission, with its participation, the legality of the transaction is again supported by the authority of the state.

Another ambiguity in the relationship between model agreements and licensing contracts has to do with the vague status of the latter within the framework of Soviet copyright law. The RSFSR Civil Code provides that the terms of a licensing agreement, including those regarding compensation, are to be determined by the parties to the contract, unless the "law provides otherwise."¹²⁵ One possible interpretation is that the above caveat refers to the Article 506 of the RSFSR Civil Code,¹²⁶ which provides that "terms of an author's contract which worsen his position as compared to terms provided by law or the model agreement, are void and are to be substituted by the terms provided by law or a model agreement."¹²⁷ Nowhere is it expressly stated that licensing agreements are exempt from these provisions. Moreover, in its Decree No. 8, the Plenum of the USSR Supreme Court emphasized that a contract which leaves an author in a less favorable position becomes null and void automatically, irrespective of whether any legal action was taken in this regard.¹²⁸ However, the Plenum of the USSR Supreme Court does not expressly include or expressly exclude licensing contracts from its explanation.¹²⁹ Thus, any licensing contract adjudged to place an author in a less favorable position, as compared to a model agreement, may be invalid. Even though the parties might have bargained in good faith, the results of their negotiations might be ruled invalid, if they compare unfavorably with the terms of a model contract.

D. Effect of VAAP's Monopoly and Soviet Copyright Law on International Practice

As it often happens in the Soviet Union, the letter of the law can be a significant distance from everyday reality. In practice, the effect of the substantive provisions of Soviet copyright laws on contracts signed with Western parties may be less severe than suggested by the above analysis of the conflicting provisions of Soviet law. Contradictions in the existing law stem largely from the relative brevity and generality of the Soviet

124. See *supra* notes 48-9 and accompanying text.

125. RSFSR CIV. CODE, arts. 503, 516. See *supra* note 8.

126. RSFSR CIV. CODE, *supra* note 125. Also see corresponding provisions, FUNDAMENTALS, *supra* note 4, art. 101.

127. RSFSR CIV. CODE, *supra* note 8, at art. 506.

128. See *supra* note 104.

129. *Id.*

copyright provisions and their lack of attention to detail.¹³⁰ It appears that those ambiguities have not, as yet, been interpreted to limit contractual freedom in the context of licensing agreements.¹³¹ It is even less likely that they will be so interpreted in the future.

A relatively easy solution to problems arising from a perceived need for a licensing contract to conform to a model agreement would be for VAAP to promulgate its own model licensing agreement. It appears that such a document indeed exists for VAAP's internal use.¹³² Therefore, VAAP's participation again becomes necessary to protect the enforceability of a transaction.

While not necessarily a legal restraint on parties negotiating a licensing contract, Soviet copyright law, law of taxation, and VAAP's practices nevertheless have a profound practical, if indirect, effect on both sides. Consequently, some understanding of how the Soviet system works may allow an American buyer better insight into what would make a deal more attractive for a Soviet seller and what would facilitate reaching an agreement. Thus, a publisher who realizes that sometimes almost ninety percent of a Soviet writer's fees are withheld in VAAP's commissions and state taxes might propose to pay a lesser amount upfront, and instead include a paid promotional trip to the United States and a greater per diem. An attorney familiar with the red-tape style of VAAP's operations will not rely on this organization when time is of the essence, but will instead seek direct contact with the Soviet party. A producer might attempt to structure a joint venture with a Soviet company or hire his screenwriter as a consultant. In other words, when pitfalls are known, solutions are more easily found.

Now that the Soviet Union is attempting to become a major player in the international arena and has opened its doors to the West, such knowledge is particularly important as the number of business contacts between Soviet and American sides increase. However, after almost complete immobility for most of this century, Soviet laws that at times seem etched in stone are, in fact, subject to change. Laws are changing on an almost daily basis, revolutionizing the life of the country as well as provoking resistance. VAAP, whose influence on the intellectual forces

130. To illustrate this point, Victor Dozortsev compares four pages containing the Copyright Law of Russia in its entirety to well developed copyright laws in the Western countries. See Dozortsev, *How Much is Brain Matter?*, Literary Gazette, July 11, 1990.

131. See *supra* note 121 and accompanying text.

132. This conclusion is reached if we were to compare identical provisions of various contracts, even though Professor Dozortsev denies that such model contract exists. See Dozortsev, *VAAP in the Mechanism of Copyright*, *supra* note 69, at 99.

in the country is so significant, now understandably finds itself on the front lines.

V. REFORMS IN THE SOVIET UNION AND VAAP'S FUTURE

A. VAAP is Losing its Grip

The virtual revolution which began in the Soviet Union in 1986 inevitably affected the relationship between VAAP and the Soviet artistic community. Much of the state power which buttressed VAAP's authority has been undermined. Increasingly, the agency finds itself under direct attack by criticism in the press and, indirectly, by authors who ignore existing laws and resort to self-representation.¹³³

Acknowledging the problem, VAAP, rather than using legal means theoretically available to it, fights back with scare tactics and its superior expertise. Nikolay Chetverikov, chairman of VAAP's board, said, "I am concerned about the desire on the part of authors to enter the Western market. They do not possess the same amount of commercial and competitive information that we do. They will be lost like a splinter in the ocean."¹³⁴ In essence, VAAP suggests to Soviet authors: "Without us you will sell yourself short, make mistakes and come begging to VAAP for help."¹³⁵ As its achievement, VAAP's officials emphasize the fact that VAAP's contracts are almost never litigated.¹³⁶ Whether this result is due to VAAP's attorneys' superior legal skills, or to the self-restraint exercised by parties unwilling to spoil their relationships with the exclusive Soviet representative, is, of course, open to debate.

Paradoxically, there is some merit to VAAP's assertions. Soviet authors, unprepared by their Soviet experience to deal with the complexities of Western commercial and legal systems, are often ignorant of the most basic concepts, such as exclusivity or finality of a contract.¹³⁷ Of course, the continuation of VAAP's monopoly is not the only solution. A degree of legal education, or maybe even some negative experiences, will quickly cure the problem, teaching by example. In fact, many Soviet authors, individually or through their organizations, are now seeking in-

133. See examples of Chingiz Aitmatov, *A Tax on Each Beard*, *supra* note 36, Eduard Uspensky, *Field of Miracles*, OGONIOK, No. 2, Jan. 1989, at 14; *VAAP with VAAP's Eyes*, *supra* note 28, at 7.

134. See *VAAP with VAAP's Eyes*, *supra* note 28.

135. Writer Karpov, for example, signed a "slave contract" with a Western publisher and then came to VAAP begging for help, as described by Alexander Olshansky in *VAAP with VAAP's Eyes*, *supra* note 28.

136. *Id.*

137. *Id.*

dependent legal advice in the Soviet Union.¹³⁸

Independence from VAAP, however, represents not only a violation of the laws which are not presently enforced, but a violation of Soviet fiscal laws as well. When VAAP is bypassed, a Soviet author is forced to forgo the only opportunity he has to pay the tax on income derived from the transaction. This situation is illustrated by writer Eduard Uspensky's protracted struggle to open a hard-currency account with the USSR VNESHECONOM Bank.¹³⁹ Uspensky's numerous requests to open an account where he could deposit the fees received and from which he offered to pay state tax have been rejected by the Bank which referred him back to VAAP, the only organization authorized to open an account for him.¹⁴⁰ Whether their fears are well founded or not, Soviet authors appear to be greatly concerned with this violation. However, to date, no prosecution for tax evasion has apparently been initiated by the Soviet authorities in this context.

The present situation is unstable and cannot last for long. In a new Soviet law-based society, which the country is striving to create, the role of VAAP will have to be redefined. Anticipating the inevitable, VAAP has developed a proposal for its own reform.

B. VAAP's Proposal for Reform

Although VAAP's leadership considers its proposal a confidential document and appears unwilling to open it to analysis,¹⁴¹ some envisioned changes (or lack thereof, as the case may be) can be ascertained through published articles and interviews with VAAP's officials.

Continuation of VAAP's monopoly is, of course, the most troublesome question, the answer to which may determine many other aspects of a new VAAP. Nikolay Chetverikov, chairman of VAAP's board, acknowledged in a recent interview that "existing conditions and procedures . . . have come into conflict with the drastically altered situation in the country."¹⁴² Recognizing that VAAP's exclusivity is now "not satisfactory either for creative unions or for the authors themselves,"¹⁴³ he further stated: "We understand and support their [the authors'] desire to

138. Soviet Writers Guild hired an attorney in the Soviet Union to counsel its members on transactions with Western parties, even though it officially still has to go through VAAP. Conversation with Eduard Akopov, president of the Soviet Writers Guild with the author.

139. USSR Bank for Foreign Economic Activity.

140. See Uspensky, *Field of Miracles*, *supra* note 133.

141. Both formal and informal requests by the author of this Comment to see the proposal have not been answered by VAAP.

142. *Creative Work, the Law and Commerce*, see *supra* note 92.

143. *Id.*

establish independent contacts with foreign publishers — it is fully in the spirit of the democratization processes in our country and accords with world practice.”¹⁴⁴

Thus, it would appear that VAAP itself wants to demonopolize its activities. However, the VAAP's proposal seems to suggest that the agency should retain its exclusive position, at least through 1992.¹⁴⁵ After 1992, VAAP's leadership envisions the development of a network of individual agencies affiliated with VAAP, which would supply those agencies with information and legal services in return for a fee.¹⁴⁶ This arrangement would provide a measure of competition between the agencies, but this competition would be regulated by the parent organization. In other words, VAAP wants to remain in control. In the opinion of Mr. Chetverikov, this is the only way to alleviate the dangers of unrestricted competition, which gives an advantage to Western dealers.¹⁴⁷

What if Soviet authors, unintimidated by the dangers of a free market, still choose not to work through VAAP? Historically, when the carrot approach fails, out comes the stick. In this case, the stick appears in the form of package services. VAAP is currently the only organization capable of collecting royalties from twenty thousand theaters and other companies in the Soviet Union. This domestic service will be offered, under the new proposal, only as a part of a package deal for international representation.¹⁴⁸ Thus, VAAP is not sincerely prepared to voluntarily relinquish its control.

The other hotly debated issue is VAAP's withholdings of commissions for itself and taxes on behalf of the State. VAAP proposed to reduce its commissions from twenty-five percent to between ten and fifteen percent, and “to continue reduction in commission fees in accordance with . . . economic performance results.”¹⁴⁹ VAAP also suggests that the State reduce its tax withholdings to between thirteen percent to fifty percent and relieve the agency of the duty to collect taxes altogether. Moreover, Mr. Chetverikov states that the agency favors a method which would allow authors complete financial independence from VAAP by having their own foreign currency accounts with the USSR Bank for Foreign Economic Activity.¹⁵⁰ However, the text of the proposal apparently contains the following clause: “VAAP has the right to grant Soviet

144. *Id.*

145. See *VAAP with VAAP's Eyes*, *supra* note 28.

146. *Id.*

147. *Id.*

148. *Id.*

149. *Creative Work, the Law and Commerce*, *supra* note 92.

150. *Id.*

authors permission to receive hard currency abroad."¹⁵¹ Again, independence, but only with VAAP's permission.

C. Future of VAAP

"VAAP is changing. Slowly and unwillingly," says Eduard Uspensky.¹⁵² Much of its future depends on the changes in Soviet society in general and on changes in Soviet copyright laws in particular. Leading Soviet copyright scholars,¹⁵³ as well as VAAP's representatives,¹⁵⁴ emphasize the need for legal reform. The Fundamental Principles of Civil Law, including the chapter on Copyright, were to be revised in 1990.¹⁵⁵ As this Comment is being written, the revision of copyright laws has not yet occurred.¹⁵⁶ Apparently the delay is due to the proposed elimination of Soviet radio and television's right to the free use of copyrighted works. The State Committee for Television and Radio apparently also resists the notion that the copyright of cinema and television productions shall not belong to the studio, but to the director and screenwriter.¹⁵⁷ This controversy will, however, be resolved and new copyright laws will be adopted. This intention has been stated expressly in the Agreement on Trade Relations between the United States and USSR, wherein both parties agreed to adhere to the Berne Convention and further agreed: "To provide adequate and effective protection and enforcement of intellectual property rights, each Party agrees to submit, to their respective legislative bodies, the draft laws necessary to carry out the obligations of this Article and to exert their best efforts to enact and implement these laws."¹⁵⁸

Among anticipated changes are those addressing protection of video rights, elimination of "free uses" of copyrighted materials, enhanced protection for computer programs and data bases, sound recordings and extension of *post mortem auctoris* copyright protection.¹⁵⁹ There is also a

151. *VAAP with VAAP's Eyes*, *supra* note 28.

152. Letter to the author of this Comment, (Oct. 4, 1990).

153. V. Chertkov, *supra* note 65; Dozortsev, *supra* note 130.

154. *Creative Work, the Law and Commerce*, *supra* note 92.

155. Levitsky, *On the Eve of Perestroika: The Impact of Administrative Law upon Soviet Copyright Law*, *Soviet Administrative Law: Theory and Policy*, 40 *LAW IN EASTERN EUROPE* 209, 215 (1989).

156. Prof. Dozortsev expects, however, that changes will be completed by mid-1991. Conversation with the author.

157. *Creative Work, the Law and Commerce*, *supra* note 92.

158. Agreement on Trade Relations between the United States of America and the Union of Soviet Socialist Republics, *see supra* note 100, art. VIII(2).

159. *Id.* A more detailed discussion of the anticipated copyright laws in the Soviet Union is beyond the scope of this Comment.

widespread sentiment that, when enacted, the new laws should address the issue of VAAP. As an influential Soviet copyright expert put it:

It might seem convenient to have all compensation from abroad come in through a single channel — namely, the copyright agency. But its performance in paying out that compensation has caused universal dissatisfaction The time has come to codify explicitly, in black and white, the right of organizations that use creative works to conclude contracts with foreign organizations and authors, and likewise the right of Soviet organizations and authors to conclude contracts with foreign publishers, theaters and film studios. Pluralism is needed in the mechanism for selling copyrights, as in other areas.¹⁶⁰

While copyright law still awaits its reform, revisions of other major laws have already taken place. These revisions might provide some guidance as to the general direction of Soviet legislation. The new Law on Property, although not specifically addressing issues of intellectual property, which are to be regulated by special legislation, appears to be generally more liberal in its provisions.¹⁶¹ By allowing recognition of ownership of property other than by the State, such as cooperative property, the new law takes a big step toward a market driven economy. Its spirit contradicts the logic behind VAAP's monopoly, that of concentrating maximum control in one place. New economic regulations,¹⁶² which allow a greater number of entities direct entry into the international market, are also directed toward an anticipated move to a free-market economy within the Soviet Union and underscore the need to officially codify the demonopolization and decentralization of VAAP's practice.¹⁶³

The new Law on Press, which proclaims freedom of speech, also seems totally incompatible with the very essence of VAAP's practices directed at preventing free exchange of ideas and dissemination of information.¹⁶⁴ VAAP's function, described as that of a "bottleneck,"¹⁶⁵ appears

160. Dozortzev, *see supra* note 93.

161. Law of the Union of Soviet Socialist Republics "About Property in USSR," *Pravda*, Mar. 10, 1990, at 4.

162. *See* the Joint Decree of the CPSU Central Committee and the USSR Council of Ministers of 19 August 1986, *Economicheskaya Gazeta*, No. 4, Feb. 24, 1987, at 3.

163. *Id.* The Joint Decree of 19 August 1986, *supra*, appear to allow Goscomizdat (State Committee on Publishing) to engage directly in export-import operation. An American copyright expert Serge Levitsky, asks: "Will 'decentralized' publishing houses vie with one another for market shares in copyrights . . . ?" Levitsky, *supra* note 111. Until the new legislation on copyright is enacted, we have no answer to his question.

164. Law of the Union of Soviet Socialist Republics "About Press and Other Means of Mass Communications," *Izvestia*, June 20, 1990, at 3.

165. Dozortsev, *supra* note 93.

outmoded in the current Soviet climate where newspapers, books and television compete to become most voiceful critics of the current political system.

As recently as March 15, 1989, well known researcher of Soviet law Serge Levitsky wrote with alarm about a negative trend in the development of Soviet copyright law which at the time found a statutory confirmation. For a while, cooperatives were prohibited from engaging in publishing activities, production of film or television works and their distribution.¹⁶⁶ This prohibition has since been repealed.¹⁶⁷ All these new developments seem to point VAAP to the exit door.

On the other hand, the new tax law¹⁶⁸ proposes various tax rates, some over sixty percent on the fees earned for artistic or literary works, and over ninety percent levied on heirs when works are used more than once.¹⁶⁹ This rate would mean that an author who spent years writing a novel would not be allowed to amortize his onetime remuneration when the book is published. Although the law is still in its infancy, the creative community has already invented ways around it. Instead of a one-time fee, artists are being paid monthly salaries and authors are receiving their fees divided in a few smaller installments over time.¹⁷⁰ The tax laws pertaining to creative forces do appear insensitive, however, to the unique circumstances of artistic labor. This insensitivity may be interpreted as a warning sign for the future of the intellectual property policies in the Soviet Union.

Because of its experience, accumulated contacts and legal expertise VAAP is likely to remain an important player in the next decade. But it is yet to be seen how much authority and control it will retain. VAAP's future will depend on how successfully it will transform from a controlling, government sponsored organization to a competitive, service-oriented agency, ready to work with and for its clients, not against them.

VI. CONCLUSION

Events in the Soviet Union unfold so rapidly that it becomes a challenge for a researcher to keep up with the new developments. On Octo-

166. Levitsky, *supra* note 111.

167. The Decree of USSR Council of Ministers No. 1003 "On Restructuring of Creative, Organizational and Economic Activity in Soviet Cinema," of Nov. 18, 1989, SP SSSR, Vol. 1, at 5 (1990).

168. "Law of the Union of the Soviet Socialist Republics, About Income Tax on Citizens of USSR, Foreign Citizens and Persons without Citizenship," *Pravda*, May 6, 1990 at 4.

169. *Id.*, Ch. IV, art. 17(1) and (2).

170. Conversation with Leonid Zagalsky, correspondent for *Literary Gazette*, on Nov. 3, 1990.

ber 26, 1990, the USSR Council of Ministers adopted Decree No. 1095, which provides that as of January 1, 1991 VAAP has lost its monopoly on copyright transactions with foreign parties.¹⁷¹ Soviet authors may now enter into agreements with foreign parties for sale or acquisition of copyrights independently, as well as with VAAP's assistance or help from some other organizations, such as publishing houses. The same decree eliminated the mandatory commission charged by VAAP, or any other organization acting as an agent, with the amount to be negotiated by the parties.¹⁷²

Inevitably, this new normative act has a significant effect on the preceding analysis. Most importantly, the decree finally codified what had been a widespread practice among the Soviet writers. The parties now have a welcome reassurance that they are not violating a law by entering into a contract without VAAP's participation.

However, the number of other problems addressed in this Comment remain unresolved. Firstly, although no longer a monopoly, VAAP has not ceased to exist. It is likely to remain an important player in the copyright arena, especially in light of its international experience, legal expertise and unique power to collect royalties throughout the Soviet Union. Into the new era of the liberated relationships with the authors VAAP carries its old baggage: dual legal status of being partially a state agency, partially a nongovernmental, public organization. With its new bylaws not written as of yet, it is not known whether VAAP intends to continue to function as a procuring agent for government-run publishing houses, along with representation of individual Soviet authors in the international arena. In the past, this dual role led to a confusion of priorities by VAAP and to numerous abuses of authors' rights by the agency.

Secondly, the Soviet legal framework within which a Soviet author must conduct his international copyright transactions remains one of great uncertainty, full of ambiguities and conflicting legal propositions. The necessity to conform to a model agreement, the unclear legal status of a licensing agreement, and the absence of some common Western copyright concepts such as "work for hire," create an urgent need for the overall review of the Soviet copyright law. Until a comprehensive new system of copyright statutes is enacted by the Soviet government, many of the problems discussed in this Comment will continue to haunt an American entering into a copyright transaction with a Soviet party.

Thirdly, many of the financial problems connected with payment of

171. Danilov, *Now without VAAP*, *Literary Gazette*, No. 47, Nov. 21, 1990, at 3.

172. *Id.*

state income tax on a fee received from abroad are still present. Although it appears that Soviet citizens, as of January 1, 1991, are allowed to open hard-currency accounts in the Soviet banks,¹⁷³ the mechanism of paying the tax has not yet been created. Moreover, the old rates appear to still be in effect, which means that if not via VAAP, an author must voluntarily turn in up to eighty percent of his fee to the state treasurer. Thus, the practical suggestions to an American party of how to make a deal more attractive to a Soviet author, articulated in this Comment, remain as valid as ever.

Finally, as fast as the changes occur in the Soviet Union, the mentality of people living through those changes takes a much longer time to adjust. It is the belief of the author of this Comment that some understanding of the role VAAP played in the last twenty years will be helpful to an American practitioner in assessing the present and future trends in copyright transactions in the Soviet Union.

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173. See *Liberalizing Currency Transactions*, VESTNIK, 55, 56 (Sept. 1990).

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