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## IS ALLOFMP3 LEGAL? NON-CONTRACTUAL LICENSING UNDER RUSSIAN COPYRIGHT LAW

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### Introduction

Lately, Russian copyright law has attracted keen interest from foreign media and law review authors.<sup>1</sup> The interest is mostly related to the activity of several Russian Web sites, such as AllofMP3, which sell copyrighted music at surprisingly low prices and without piracy protection.<sup>2</sup> This questionable activity, claimed to be legal under Russian law, has been reported as a major obstacle facing Russia in joining the World Trade Organization (“WTO”).<sup>3</sup>

In a recent article, James Chapman discusses at length possible negative consequences of downloading music from these sites for users in the United States (“U.S.”).<sup>4</sup> Such consequences may include both criminal penalties<sup>5</sup> and civil sanctions.<sup>6</sup> However, criminal

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1. See Thomas Crampton, *On a Russian Site, Cheap Songs With a Backbeat of Illegality*, N.Y. TIMES, June 5, 2006, at C4; Associated Press, *Visa, MasterCard will not accept charges from Russian music Web site*, [http://www.iht.com/articles/ap/2006/10/19/america/NA\\_FIN\\_TEC\\_US\\_Downloading\\_Music.php](http://www.iht.com/articles/ap/2006/10/19/america/NA_FIN_TEC_US_Downloading_Music.php), (published Oct. 18, 2006) (last visited Dec. 4, 2006) (card payments to AllofMP3 are stopped); James Chapman, *Russian Web Sites Jeopardize U.S. Users: The Dangers of Importing Copyrighted Material over the Internet*, 29 HASTINGS INT'L & COMP. L. REV. 267 (2006).

2. See Crampton, *supra* note 1, at C4.

3. *Id.*; see also Greg Sandoval, *Russia agrees to shut down Allofmp3.com*, <http://news.com.com> (search CNET for “Russia agrees to shut down Allofmp3.com”; then follow hyperlink) (published Nov. 29, 2006) (last visited Dec. 4, 2006). Although Russia reportedly “agrees to shut down” the site, it is unclear how this can be done legally without first changing the law, as it is apparent from the discussion below.

4. Chapman, *supra* note 1, at 276-285.

5. *Id.* at 276.

penalties apparently do not apply to not-for-financial-gain, low-value, own-use downloaders.<sup>7</sup> Civil sanctions against such users are possible in principle but enforcement in the U.S. may require assistance of Russian authorities to collect users' personal information from the Web sites.<sup>8</sup> Such necessity of Russian assistance appears to render the whole idea impracticable.

Chapman analyzes the possibility of enforcement against Russian Web sites in the U.S. His finding is pessimistic: even if a civil plaintiff obtains a judgment in its favor in a U.S. court, the plaintiff may be unable to have the judgment enforced if the Web site does not have assets in the U.S.<sup>9</sup> Furthermore, enforcement of U.S. criminal copyright law against Web sites in Russia requires the assistance of Russian authorities, which is unlikely to occur.<sup>10</sup>

Chapman goes on to analyze Russian law applicable to the activities of the Web sites. While Russian law protects musical works generally, it also provides compulsory licensing in certain cases.<sup>11</sup> The royalties in such cases are collected by organizations managing copyright holders' right on a collective basis ("management organizations").<sup>12</sup> These statutory provisions are said to be the legal basis for the activities of the questionable Web sites, since the sites are licensed by Russian management organizations. While the validity of such compulsory licenses remains uncertain,<sup>13</sup> the Moscow City Prosecutor's office is reluctant to initiate criminal prosecution against the web-site operators.<sup>14</sup>

This does not sound encouraging for foreign right-owners; however, we are more optimistic in this respect. In this article we discuss in more detail the problem of compulsory, or so-called "non-contractual," licensing under Russian copyright law. We analyze the current statutory law and its upcoming changes as well as discuss

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6. *Id.* at 284.

7. 17 U.S.C. § 506(a)(1) (date) (providing criminal punishment if infringement was "(A) for purposes of commercial advantage or private financial gain; (B) by the reproduction or distribution, including by electronic means, during any 180-day period, of 1 or more copies or phonorecords of 1 or more copyrighted works, which have a total retail value of more than \$ 1,000; or (C) by the distribution of a work being prepared for commercial distribution, by making it available on a computer network accessible to members of the public, if such person knew or should have known that the work was intended for commercial distribution.").

8. Chapman, *supra* note 1, at 293.

9. *Id.* at 287.

10. *Id.*

11. *Id.* at 288.

12. *Id.*

13. *Id.* at 289.

14. *Id.* at 290.

relevant Russian case-law and conclude that while courts do recognize non-contractual licensing in principle, they do not enforce it against copyright holders where the latter are unwilling to cooperate with a specific management organization. Such *de facto* unenforceability of the non-contractual exception means that a foreign copyright holder might get protection after all, if she is ready to bring a civil action in Russia against a Russian management organization and its licensees.<sup>15</sup>

### Statutory Law

In this section we analyze provisions of the Russian copyright law that was adopted in 1993 and amended in 1995 and 2004.<sup>16</sup> According to this law, “musical works with a text or without text” are included into the objects of copyright.<sup>17</sup> The author has exclusive rights to use his works, including the rights of reproduction, distribution, “communication to the general public by cable,” and others (all referred to as the “property rights”).<sup>18</sup> These rights are transferable by an “author’s contract.”<sup>19</sup>

It is not absolutely clear whether the original statutory list of such property rights, as it existed until recently, included the right to place a musical work on a Web site in a downloadable form. This is sometimes referred to as the “Internet right.” Apparently, the Moscow Prosecutor Office did not think so, saying that Russian

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15. To catch up with the events that occurred after this paper had been prepared for publication, see BetaNews, *US Music Publishers Sue AllofMP3 for \$1.65 Trillion USD*, <http://www.betanews.com> (search BetaNews for AllofMP3, then follow hyperlink) (published Dec. 21, 2006) (last visited Dec. 22, 2006) (Sony, EMI, Warner, Universal and others sue AllofMP3 in a U.S. federal court for \$1.65 trillion).

16. *Zakon Rossiiskoi Federatsii “Ob Avtorskom Prave i Smezhnykh Pravakh”* [Law of the Russian Federation on Copyright and Neighboring Rights] No. 5351-1 of July 9, 1993, *Vedomosti S’ezda Narodnykh Deputatov Rossiiskoi Federatsii I Verkhovnogo Soveta Rossiiskoi Federatsii* [Ved. RF] [Bulletin of the Congress of People’s Deputies of the Russian Federation and Supreme Council of the Russian Federation] 1993, No. 32, Item 1242, *amended by* Federal Law No. 110-FZ of 19 July 1995, *Sobranie Zakonodatel’sтва Rossiiskoi Federatsii* [SZ RF] [Russian Federation Collection of Legislation] 1995, No. 30, Item 2866 (compiled translation available from Garant-Service, document no. 10001423) *and* Federal Law No. 72-FZ of July 20, 2004, *Sobranie Zakonodatel’sтва Rossiiskoi Federatsii* [SZ RF] [Russian Federation Collection of Legislation] 2004 No. 30, Item 3090 (translation available from Garant-Service, document no. 12036318) (hereinafter collectively the Russian Copyright Law).

17. Russian Copyright Law art. 7(1).

18. *Id.* art. 16(2).

19. *Id.* art. 30.

copyright law did not cover digital media.<sup>20</sup> However, many copyright law specialists believe that the Internet right was covered by other items of the list: either “reproduction,” “distribution,” or “communication to the general public by cable.”<sup>21</sup>

At any rate, the legislature has decided to explicitly insert the Internet right into the list of exclusive rights: as envisaged by the 2004 amendments, from September 1, 2006, the list is supplemented by the right of “communication of a work in such a way that it is accessible for any person in the interactive mode from any place and at any time at his choice (right of making available to the general public).”<sup>22</sup> Despite awkward language, this is clearly intended to cover the Internet right. Similar Internet rights are added, effective from the same date, to the lists of exclusive rights of performers and phonogram producers (“neighboring right” owners).<sup>23</sup>

As mentioned above, the law allows the establishment of organizations to manage property rights of copyright holders and neighboring right holders. Such organizations are “established directly by the holders of copyrights and neighboring rights and act within such powers as may have been granted by them.”<sup>24</sup> As a general rule, the authority to manage one’s property rights is voluntarily granted to the management organization by the right holder with a written contract (not being an “author’s contract”).<sup>25</sup> A foreign organization managing similar rights may also grant this authority.<sup>26</sup>

We now turn to the issue of compulsory or non-contractual licensing. With some exceptions, using a musical work (a phonogram) requires the permission of both the copyright holder and neighboring right holders. Alternatively, a license may be granted by a management organization that has the permission of a right holder. However, on three occasions the Russian Copyright Law mentions the possibility of a management organization to issue such a license or to collect royalties on behalf of right holders without having their permission.

First, the exception applicable to copyright, found in Section II of the Russian Copyright Law, allows for reproduction of an audiovisual

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20. BBC News, Legal Okay for Russian MP3 Site, <http://news.bbc.co.uk/2/hi/technology/4328269.stm> (last visited Nov. 8, 2006).

21. See Vadim Pogulyaev, Ob “Internet-Prave” [On the “Internet Right”], E.ZH.-YURIST No. 34, 2004.

22. Russian Copyright Law, art. 16(2), ¶ 11.

23. *Id.* arts. 37(2)(6), 38(2)(5).

24. *Id.* art. 44(1).

25. *Id.* art. 45(2).

26. *Id.*

work or record without authorization of the author, performer, or producer, for personal needs.<sup>27</sup> The royalty is paid not by the users, but rather by the manufacturers or importers of the relevant equipment (audio and video recorder, etc.) and material carriers (tapes, CDs, etc.).<sup>28</sup> The royalty is collected by a management organization.<sup>29</sup> The government is supposed to fix the royalty amount.<sup>30</sup> Since the government never moved to fix the royalty amount, however, this statutory provision is of limited to no value. At any rate, this exception is obviously not applicable to selling music from Web sites.

Second, in Section III, which is devoted to neighboring rights, there is a provision allowing 1) performance, 2) broadcasting, and 3) transmission by cable to the general public of a phonogram without the permission of the producer or the performer of the musical work.<sup>31</sup> Nevertheless, the royalty must be collected by a management organization and distributed to the neighboring right holders.<sup>32</sup> The amount of the compensation again may be fixed by the government, and in this instance the government acted to fix the recommended performers' fees in certain cases.<sup>33</sup>

On September 1, 2006, a provision was added stating that the above exception does not apply to "making the phonogram available to the general public" (which apparently includes the Internet right).<sup>34</sup> Accordingly, at least from that date, this exception also does not cover Web sites selling music.

Notably, no similar exception is found in the section devoted to the copyright (property rights of an author). This means that the permission of the copyright owner must be obtained in the three mentioned cases (performance, broadcasting, and transmission by cable to the general public). Accordingly, copyright owners (including musical composers) are protected better than the neighboring right owners (performers and producers).<sup>35</sup>

Third, there is an exception in the Section IV, which is devoted to

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27. *Id.* at art. 26(1).

28. Russian Copyright Law, art. 26(2) ¶ 1.

29. *Id.* art. 26(2) ¶ 2.

30. *Id.* art. 26(2) ¶ 3.

31. *Id.* art. 39(1).

32. *Id.* art. 39(2).

33. Postanovlenie Pravitel'stva RF [Decision of the Government of the Russian Federation] of 17 May 1996 No. 614, Sobranie Zakonodatel'stva Rossiiskoi Federatsii [SZ RF] [Russian Federation Collection of Legislation] 1996 No. 21, Item 1151.

34. Russian Copyright Law, art. 39(1.1).

35. *Contra* Chapman, *supra* note 2, at 291.

management organizations. According to the statute, the authority to manage the property rights is granted to management organizations directly by copyright and neighboring right holders.<sup>36</sup> Based on this authority, the management organization grants licenses to the users of the works.<sup>37</sup> Such licenses permit use of “all works and objects of neighboring rights” and are granted on behalf of “all copyright and neighboring right holders, *including those not having granted authority to the management organization.*”<sup>38</sup>

Of course, these statutory provisions are contradictory, and the statute does not attempt to resolve the contradiction. Fortunately, copyright and neighboring right holders who have not granted authority to a management organization can demand exclusion of their works and neighboring right objects from this management organization’s licenses.<sup>39</sup> The text of the law is not clear about whether this exclusion right also covers the non-contractual use under the neighboring-right section discussed above.

Accordingly, at least in some cases, management organizations are allowed to act without right holders’ permission. Here “right holders” include both copyright and neighboring right holders. Note that no special reservation concerning the Internet right is made in this section.

Scholarly commentators explain that non-contractual licensing corresponds to the existing practice under the rationale that non-contractual licensing simplifies the operations of licensee organizations such as radio stations.<sup>40</sup> This activity of the management organizations can be classified as “representation without mandate” which is generally allowed by Russian civil legislation.<sup>41</sup> An unwilling right holder can always challenge the undesired representation in court.<sup>42</sup>

Summarizing all of the discussed statutory provisions is not an easy task. The legislative intent is far from clear. Provided the right holder does not explicitly object, are management organizations allowed to act without right holders’ permission in *any* case? If they are, why do they need special exemptions envisaged by other sections

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36. Russian Copyright Law, art. 45(2).

37. *Id.* art. 45(3) ¶ 1.

38. *Id.* art. 45(3) ¶ 2 (emphasis added).

39. *Id.* art. 47(2).

40. See S.P. GRISHAEV, INTELLEKTUALNAYA SOBSTVENNOST: UCHEBNOE POSOBIE [INTELLECTUAL PROPERTY: A TEXTBOOK] Ch. 3, § 6 (Yurist 2004) (Russ.). This non-contractual licensing has existed since the Soviet era when a monopolistic state-controlled organization managed all copyrights.

41. *Id.*

42. *Id.*

of the law? If they are not, in what cases exactly are they allowed to act? The law provides no unequivocal answers.

Two things are certain. First, in some cases management organizations are allowed to grant licenses without right holders' permission. Second, unwilling copyright holders can prohibit a management organization from granting such licenses. This means that this "non-contractual" licensing is not exactly "compulsory."

### International Treaties

In this section we discuss international aspects of Russia's copyright law. The protection of foreign copyright and neighboring right holders in Russia relies on Russia's international treaties.<sup>43</sup> That is, unless a foreigner copyright holder is covered by a treaty, she is not protected by the Russian Copyright Law. Fortunately, most modern foreign authors are treaty-covered, as discussed below.

The most important of such treaties is the Berne Convention for the Protection of Literary and Artistic Works ("Berne Convention").<sup>44</sup> The Berne Convention guarantees national treatment in each country of the Convention<sup>45</sup> to authors from other countries of the Convention and to works first published in other countries of the Convention.<sup>46</sup> Significantly, the Berne Convention in principle allows compulsory licensing provided equitable remuneration is paid to the right holder.<sup>47</sup>

Before joining the Berne Convention, Russia joined the Universal Copyright Convention ("Geneva Convention").<sup>48</sup> Like the Berne Convention, the Geneva Convention also protects foreign copyright owners, albeit to a more limited extent. In particular, foreign works first published before a country joined the Convention are not protected in that country.<sup>49</sup>

The Soviet Union became a party to the Geneva Convention on May 27, 1973; Russia, being the Soviet Union's legal successor, has

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43. Russian Copyright Law, arts. 5(1)(3), 35(4).

44. Berne Convention for the Protection of Literary and Artistic Works, July 24, 1971, S. TREATY DOC. NO. 99-27, 1161 U.N.T.S. 3.

45. *Id.* art. 5. Russia, as a contracting state to the Berne Convention, must grant the same copyright protection as it "accords to works of its nationals first published in Russia." 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 17.04[B] (2006).

46. Berne Convention for the Protection of Literary and Artistic Works, *supra* note 44, art. 3.

47. *Id.* arts. 11(2), 13(1).

48. Universal Copyright Convention, July 24, 1971, 25 U.S.T. 1341, 943 U.N.T.S. 178.

49. Grishaev, *supra* note 40, ch. 2, § 2.

confirmed its membership in the Convention effective from 1973.<sup>50</sup> On March 13, 1995, Russia became a party to the Berne Convention,<sup>51</sup> however, Russia made an important reservation: foreign works were not protected if they had already been in the public domain in Russia before it joined the Convention.<sup>52</sup> The validity of such a reservation is not certain but Russia continues to adhere to it.<sup>53</sup> The U.S. ratified the Geneva Convention in 1972<sup>54</sup> and joined the Berne Convention in 1989.<sup>55</sup>

Separate treaties deal with neighboring rights—the rights of performers and producers. The Convention for the Protection of Producers of Phonograms against Unauthorized Duplication of Their Phonograms (“Phonograms Convention”)<sup>56</sup> covers only producers. Russia joined the Phonograms Convention on March 13, 1995 and the U.S. joined in 1974.<sup>57</sup> The International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (“Rome Convention”) covers both performers and producers.<sup>58</sup> Russia joined the Rome Convention on May 26, 2003, but the U.S. is not a party to it.<sup>59</sup> The scope of protection under both conventions, however, is somewhat limited. In particular, Art. 7(3) of the Phonograms Convention does not protect phonograms recorded before the Convention entered into force in a member country—

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50. *Id.*

51. World Intellectual Property Organization, Contracting Parties > Berne Convention, <http://www.wipo.int/treaties> (follow “Berne Convention hyperlink; then follow “Contracting Party” hyperlink) (last visited Nov. 17, 2006).

52. Decision of the Government of the Russian Federation of 3 November 1994 No. 1224, *Sobranie Zakonodatel'stva Rossiiskoi Federatsii [SZ RF] [Russian Federation Collection of Legislation] 1994 No. 29, Item 3046.*

53. L. Podshibikhin & K. Leontiev, *Realizatsiya Polozheniy Bernskoy Konventsii v Rossii [The Application of the Berne Convention Provisions in Russia]*, 4 ROSSIYSKAYA YUSTITSIA [RUSSIAN JUSTICE] (2001) (available in Consultant Plus).

54. United Nations Educational, Scientific and Cultural Organization, States Parties to the Universal Copyright Convention, as revised at Paris on 24 July 1971, [http://www.unesco.org/culture/laws/copyright/html\\_eng/state1971.shtml](http://www.unesco.org/culture/laws/copyright/html_eng/state1971.shtml) (last visited Nov. 8, 2006).

55. Contracting Parties, *supra* note 51.

56. Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms, October 29, 1971, 25 U.S.T. 309, 866 U.N.T.S. 67.

57. World Intellectual Property Organization, Contracting Parties > Phonograms Convention, <http://www.wipo.int/treaties> (follow “Phonograms” hyperlink; then follow “Contracting Parties” hyperlink) (last visited Nov. 17, 2006).

58. International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, October 26, 1961, 496 U.N.T.S. 43.

59. World Intellectual Property Organization, Contracting Parties > Rome Convention, <http://www.wipo.int/treaties> (follow “Rome” hyperlink; then follow “Contracting Parties” hyperlink) (last visited Nov. 17, 2006).



namely, before 1995 for Russia.<sup>60</sup>

It should be noted that although Russia makes efforts to join the WTO,<sup>61</sup> currently it is not a party to its TRIPS agreement (protecting IP rights).<sup>62</sup>

To summarize, foreign authors' copyrights, including musical composers, are not protected in Russia at all if the work was first published before 1973. Works first published between 1973 and 1995 are protected if the relevant country was a member of the Geneva Convention. Works published later are protected if the relevant country is a member of either the Berne Convention or the Geneva Convention. Presently rights of foreign performers and producers are generally protected; however, U.S. performers' rights are not, because the U.S. is not a party to the Rome Convention.

### Case Law

In this section we discuss application of the statutory provisions by courts. Russia is a civil-law jurisdiction which theoretically means that only statutory law is relevant and no court judgment is precedential. In practice, however, only court decisions can clarify the meaning of vague or contradictory statutory provisions, as those under consideration here. Of course, decisions of higher-instance courts have great persuasive value for their respective lower courts, and highest-instance court decisions are *absolutely* persuasive. In addition, certain types of highest-instance court rulings are legally binding for lower courts.<sup>63</sup> This means that for practical purposes Russian courts do make law, at least to a certain extent.<sup>64</sup>

The Russian judicial system consists of two "parallel universes" of general-jurisdiction courts, the Supreme Court being the highest instance,<sup>65</sup> and economic or "arbitration" courts, the Supreme Arbitration Court being their highest instance.<sup>66</sup> Here we use

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60. Chapman, *supra* note 1, at 291.

61. CNNMoney.com, *U.S. Welcomes Russia to WTO*, [http://money.cnn.com/2006/11/19/news/international/russia\\_us\\_wto.reut/index.htm?postversion=2006111913](http://money.cnn.com/2006/11/19/news/international/russia_us_wto.reut/index.htm?postversion=2006111913) (published Nov. 19, 2006) (last visited Dec. 1, 2006).

62. World Trade Organisation, *TRIPS material on the WTO website*, [http://www.wto.org/english/tratop\\_e/trips\\_e/trips\\_e.htm](http://www.wto.org/english/tratop_e/trips_e/trips_e.htm) (last visited Dec. 4, 2006).

63. See Christopher Osakwe, *Modern Russian Law of Contracts: A Functional Analysis*, 24 LOY. L.A. INT'L. & COMP. L. REV. 113, 125 (2002).

64. See O.N. Sedukina, *K Voposu o Normotvorcheskoy Deyatelnosti Vysshikh Sudov Rossii [On the Issue of Law-Making Activity of the Higher Courts in Russia]*, 11 ROSSIYSKIY SUDYA [RUSSIAN JUDGE] 15 (2004) (Russ.) (available in Consultant-Plus).

65. Konstitutsiia Rossiiskoi Federatsii [Konst. RF] [Constitution] art. 126.

66. *Id.* art. 127.

economic courts' cases, because they are more elaborate and more important for business practice. Note, however, that general-jurisdiction courts consider individual right holders' civil claims and all criminal claims. Except for the decisions of the highest, fourth-instance courts, most court decisions are unpublished. However, third-instance economic courts' (Federal Arbitration Courts') decisions are available on Russian electronic legal systems, such as Garant and Consultant-Plus.

In a recent Supreme Court Plenum decision,<sup>67</sup> a binding decision for general-jurisdiction courts, the Court addressed the problem of non-contractual licensing to a limited extent. According to the decision, “[n]on-contractual usage of works and (or) objects of neighboring rights can be exercised only for the purposes and to the extent explicitly indicated in the law.”<sup>68</sup> In particular, broadcasters using commercial phonograms under the neighboring-right-section exception must fulfill the requirements of the relevant article of the law. If they do not pay royalties to a management organization, they are in breach of the law.<sup>69</sup> As for managing-organization-section exception, the decision is even less helpful: the Court just reiterates the relevant but contradictory provisions of the statute without attempting to interpret them in any consistent way.<sup>70</sup>

Below we review several economic cases of the Moscow Circuit relating to activities of management organizations and to the non-contractual-licensing provisions of the law. This review is not intended to be complete—its purpose is to exemplify judicial interpretation of the provisions under consideration.

1. A musical publishing house sued a journal that had published a text of song lyrics copyrighted by the publishing house. The journal argued that it had paid for, and obtained, a relevant license from a management organization. The court in three instances held for the plaintiff on the following grounds. The defendant did not prove that the “catch-all” type license covered the text in question and that the author had

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67. Plenum Verkhovnogo Suda Rossiiskoi Fderatsii [PVS] Postanovlenie O Voprosakh, Voznikshikh u Sudov Pri Rassmotrenii Grazhdanskikh Del, Svjazannykh s Primeneniem Zakonodatel'stva ob Avtorskom Prave i Smeznykh Pravakh. [Decision of the Plenum of the Supreme Court of the Russian Federation On Issues in Civil Suits Related to Application of the Legislation on Copyright and Neighboring Rights] June 19, 2006, RF No. 15 (unpublished) (available in Consultant-Plus) (Russ.).

68. *Id.* § 41.

69. *Id.*

70. *Id.* § 42.

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directly authorized the management organization to manage his rights.<sup>71</sup>

As we see, in this case the court simply ignores the statutory non-contractual-license exception discussed above. Moreover, the court effectively required the licensee to check the existence of contractual relations between the right holder and the management organization, a requirement which is disputable.

2. The author of a song transferred his exclusive rights for it to a private entrepreneur. A company sold a karaoke system containing a disc with the song in question. The system was manufactured by a large and reputable Korean firm holding a relevant license from a Russian management organization. The entrepreneur sued the company. The courts twice held for the plaintiff but the third-instance court reversed and remanded on the following grounds. The lower courts did not examine whether the author had had contractual relations with the management organization. Existence of such relations could affect validity of the author's contract with the entrepreneur and establish a violation of the plaintiff's right. The first-instance court was directed to examine the issue of contractual relations between the author and the management organization.<sup>72</sup>

Here the court again completely ignores any non-contractual exceptions. Moreover, it ignores the difference between a right-management contract and an "author's contract": the court effectively says that entering into a right-management contract prevents an author from later transferring his exclusive rights to a third party, which is very much disputable.

3. A large television station had a contract with a large management organization *A*. *A* provided licenses for musical works to the station for 2% of the total station's income. *A* was a reputable management organization having right-management contracts with thousands of authors. *B* was a

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71. Postanovlenie FAS Moskovskogo Okruga [Decision of the Federal Arbitration Court of the Moscow Circuit] of 15 May 1999, No. KA-A40/550-99 (unpublished) (available in Consultant-Plus) (Russ.).

72. Postanovlenie FAS Moskovskogo Okruga [Decision of the Federal Arbitration Court of the Moscow Circuit] of 9 November 2001, No. KG-A40/6391-01 (unpublished) (available in Consultant-Plus) (Russ.).

brand new management organization without many (perhaps without any) right-management contracts. *B* offered a license contract to the station at 1.8%. The station terminated the contract with *A* and entered into a similar but cheaper contract with *B*. *A* sued *B* and the station asking the court to hold their contract invalid.<sup>73</sup>

The first-instance court held for the defendants indicating, in particular, that the law allowed creation of multiple management organizations and that *A* had not proved its standing in the case.<sup>74</sup> On appeal the second-instance court reversed and held the license agreement between *B* and the station invalid on the following grounds. According to the Berne Convention, an author has exclusive rights to allow usage of his works. *B* did not present evidence of any contracts with an author. The contract between *B* and the station effectively compels authors to enter into right-management contracts with *B*. This is unconstitutional as to the authors and harmful for *A*, which creates standing for the suit.<sup>75</sup> However, on cassation the third-instance court reversed and held for the defendant, reasoning that *A* did not prove that the authors authorized it to represent them in court. Right-management contacts do not constitute such authorization.<sup>76</sup> *B* did not confirm violation of its own rights, and therefore, did not prove its standing.<sup>77</sup>

As we see, although the factual background is rather straightforward, various level court' interpretation of the law significantly varies. However, courts of all levels consistently ignore the statutory non-contractual licensing exception by

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73. *RAO Ne Udalos Sygrat v Monopoliyu [RAO Could Not Play Monopoly]*, KOMMERS., Sep. 24, 2004, at 7.

74. Arbitrazhnyi Sud Goroda Moskvy 30 Sentjabrja 2004 Delo N. A40-34778/04-110-339 [Decision of the Moscow City Arbitration Court of 30 September 2004 No. A40-34778/04-110-339] (unpublished), available at <http://www.roche-duffay.ru/decisions/30-09-2004-a40.htm>.

75. Devyatui Arbitrazhnyi Appeljatzionnui Sud, Postanovlenie N. 09 AP 4624/04-GK [Decision of the Ninth Arbitration Court of Appeals of 25 November 2004 No. 09 AP 4624/04-GK] (unpublished), available at <http://www.roche-duffay.ru/decisions/25-11-2004-ap.htm>

76. *But see* PVS, *supra* note 67, at § 10 (holding a management organization may represent a right-owner in court without a power of attorney provided they have a right-management contract).

77. Postanovlenie FAS Moskovskogo Okruga [Decision of the Federal Arbitration Court of the Moscow Circuit] of 30 March 2005, No. KG-A40/813-05 (unpublished), available at <http://www.roche-duffay.ru/decisions/30-03-2005-a40.htm> (last visited Nov. 10, 2006) (Russ.).

repeating again and again that a management organization must be authorized by right holders (or by relevant foreign management organizations).

4. While the third-instance court decision discussed above was final, it did not end the story. The television station chose to reconsider its election. It terminated the contract with *B* and again used the reputable *A* as its general licensor. *B* sued the station for the royalty due under their contract and the station counterclaimed for the return of the royalty already paid.

The first-instance court held for *B* indicating that the contract between *B* and the station had never been rescinded; moreover, a court had refused to hold this contract invalid. On appeal, the second-instance court reversed and held for the station, indicating that *B* was not authorized by the right holders to manage their rights. On cassation, the third-instance court affirmed. Here, the court finally found it necessary to analyze the non-contractual licensing provision of the law. According to the court, this provision must be viewed as an exemption from the general legal norm. The provision seeks to protect the interests of right holders rather than creating a right for management organizations to manage other persons' property rights independently of those persons' wills. Another interpretation would contradict the purposes of the Russian Copyright Law. Therefore, including *all* Russian and foreign authors' works into the repertoire of *B* does not have legal basis. While there is no sufficient basis to hold the license contract void, it may be viewed only as a framework agreement requiring addition of material provisions (apparently, a list of the right holders whose rights are managed).<sup>78</sup>

As we see, courts normally prefer to ignore the questionable non-contractual exception wherever the management organization authority to manage one's rights is challenged. The exception is viewed as applicable only in some extraordinary circumstances (perhaps where the author/right holder can not be found to ask for his or her permission). As for foreign right holders, it is doubtful that simply residing

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78. Postanovlenie FAS Moskovskogo Okruga [Decision of the Federal Arbitration Court of the Moscow Circuit] of 11 April 2006, No. KG-A40/2421-06 (unpublished), available at <http://www.roche-duffay.ru/decisions/11-04-2006-a40.htm> (last visited Nov. 10, 2006) (Russ.).

abroad may be viewed as such an extraordinary circumstance.

5. The most interesting cases from the foreign right holders' point of view could be the several civil suits filed in a Moscow general-jurisdiction court by authors/right holders of musical compositions against ROMS (Russian Organization for Multimedia and Digital Systems).

ROMS is a right-management organization known for providing a blanket license to the notorious AllofMP3 site (according to the information from the site, currently ROMS provides licensing to the site together with FAIR, a competing management organization).<sup>79</sup> To add some background, ROMS, unsurprisingly, is in a permanent conflict with RAO (Russian Authors Society), the biggest and probably the most reputable Russian right-management organization.<sup>80</sup> In 2004 ROMS was expelled from CISAC (International Confederation of Societies of Authors and Composers, a Paris-based organization unifying 217 authors' societies from 114 countries)<sup>81</sup> for "issuing licenses to copyright users without the authority to do so from all relevant copyright owners."<sup>82</sup>

Returning to the case under consideration, ROMS had issued licenses to several Russian content providers to distribute the music; ROMS did not have authors' permission and did not pay royalties to the authors. The authors sued ROMS and the content providers. Unfortunately, the parties finally settled (the terms are not publicly known), so the court did not have a chance to test the questionable non-contractual licensing provision.<sup>83</sup> Most likely, the judgment would have been for the plaintiffs: the law, as discussed above, requires payments to right holders in any case and explicitly allows them to withdraw their pieces from a management

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79. AllofMP3, *Is it legal to download music from AllofMP3.com?*, <http://music.allofmp3.com/help/help.shtml> (last visited Nov. 10, 2006).

80. See Russian Authors Society, *O RAO [About RAO]*, [http://www.rao.ru/publications/26\\_11\\_04.htm](http://www.rao.ru/publications/26_11_04.htm) (last visited Nov. 10, 2006).

81. International Confederation of Societies of Authors and Composers, *What is CISAC?*, <http://www.cisac.org> (mouse over "ABOUT US"; then follow "What is CASIC?" hyperlink) (last visited Nov. 10, 2006).

82. International Confederation of Societies of Authors and Composers, *ROMS No Longer a CISAC Member*, <http://www.cisac.org> (search "ROMS No Longer a CISAC Member"; then follow hyperlink) (last visited Nov. 10, 2006).

83. Sud Prekratil Proizvodstvo Po Iskam Naslednikov Vizbora I Tukhmanova [Court Dismisses Action of Vizbor and Tukhmanov's Heirs] RIA NOVOSTI NEWS AGENCY (Jun. 16, 2005), available at <http://www.rian.ru/society/20050616/40531910.html> (Russ.).

organization.

To summarize, the courts have not thoroughly examined the statutory non-contractual-licensing provision. Normally, courts just ignore it, though sometimes they find it worthwhile to explain that this is an exception, not a rule. No case of actual enforcement of the provision against a right holder is known to us.

### Upcoming Reform

Russian intellectual property legislation is relatively new: the Russian Copyright Law was enacted in 1993; the patent and most other relevant legislation is only a year older. The legislation, however, is far from perfect. For a number of years a draft of the new legislation (the Fourth Part of the Civil Code) intended to replace all existing intellectual property legislation has been prepared. However, it has never been publicly debated.

Finally, in July 2006, President Putin submitted the bill to the State Duma.<sup>84</sup> On September 20, 2006 the document passed the first reading.<sup>85</sup> The draft was rather controversial.<sup>86</sup> In some points it was arguably in contradiction with the international obligations of Russia.<sup>87</sup> It is worth noting that putting all intellectual property legislation into the Civil Code is unusual even for civil-law countries.<sup>88</sup> Besides systematizing the existing legislation, the draft contained brand new provisions never tested in practice.<sup>89</sup> Worst of all, new legislation virtually cancels the existing case-law.<sup>90</sup>

Nevertheless, by the end of November 2006, the bill passed all three readings in the State Duma and was submitted for approval to the Federation Council (the upper chamber of the Federal Assembly,

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84. *Grazhdanskiy Kodeks Razoshelsya s Trebovaniyami VTO [Civil Code Deviates from WTO Requirements]*, KOMMERS., Jul. 24, 2006, at 2.

85. RBC News, *Gosduma Prinyala v Pervom Chtenii Proyekt IV Chasti Grazhdanskogo Kodeksa RF [State Duma Adopts in the First Reading the Draft of the Fourth Part of the Civil Code]*, <http://www.rbc.ru/rbcfreenews.shtml/?/20060920140837.shtml> (last visited Jan. 3, 2007).

86. See A.P. SERGEEV, *ZAKLYUCHENIE NA PROEKT CHETVERTOY CHASTI GRAZHDANSKOGO KODEKSA ROSSIYSKOY FEDERATSII OT 21 DEKABRYA 2005 G. [OPINION ON THE DRAFT OF THE FOURTH PART OF THE CIVIL CODE OF THE RUSSIAN FEDERATION OF 21 DECEMBER 2005]*, [http://www.cipr.org/activities/advocacy/civil\\_code/activities/expert\\_opinion\\_sergeev.doc](http://www.cipr.org/activities/advocacy/civil_code/activities/expert_opinion_sergeev.doc) (last visited Jan. 3, 2007) (Russ.).

87. *Id.* § 3.

88. *Id.*

89. *Id.* § 4.2.

90. *Id.* § 3.

the Russian parliament).<sup>91</sup> Some five hundred amendments were made; most notably, the section related to the legal protection of domain names has been excluded.<sup>92</sup> Several days later, the Federation Council approved the bill, and on December 18, 2006, President Putin signed the bill into force. The new legislation will become effective from January 1, 2008.<sup>93</sup>

Here, we do not discuss the new legislation in detail.<sup>94</sup> Arguably, it is not as bad as the critics say, since it incorporates most provisions of the existing legislation and adds some substantial improvements. Note that the new legislation offers a clearer view on the non-contractual licensing problem. According to the new legislation, a management organization can manage one's rights without having a contract with the right holder only if the organization is accredited by the state.<sup>95</sup> Only one organization can be accredited for each particular type of collective right-management activity.<sup>96</sup> An unwilling right holder has a right to withdraw his pieces from the accredited management organization.<sup>97</sup> Furthermore, accredited organizations are controlled by a federal authority.<sup>98</sup>

Accordingly, at least in this particular point the new legislation offers right holders, including foreign right holders, better protection than the existing legislation.

### Conclusion

Russian law in principle allows collective right-management organizations to issue licenses for musical works without having the respective right holders' permission. The statutory law does not clearly indicate when exactly this is possible. However, courts do not enforce this provision against unwilling right holders. Foreign right holders covered by the Berne Convention or other international treaties of Russia can obtain protection if they are willing to sue relevant management organizations and their licensees in Russia.

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91. Gosduma Prinyala Chast Grazhdanskogo Kodeksa, Zashchishchayushchuyu Avtorskie Prava [State Duma Adopts the Part of the Civil Code Protecting Authors' Rights] RIA NOVOSTI NEWS AGENCY (Nov. 24, 2006), available at <http://www.rian.ru/politics/parlament/20061124/55945280.html> (Russ.).

92. *Id.*

93. *Id.*

94. Grazhdanskii Kodeks Rossiiskoi Federatsii, Chast' 4 [Civil Code of the Russian Federation, Part Four], Federal Law No. 230-FZ of December 18, 2006, 289 Rossiyskaya Gazeta 25 (2006) (Russ.).

95. *Id.* at art. 1244(3).

96. *Id.* at art. 1244(2).

97. *Id.* at art. 1244(4).

98. *Id.* at art. 1244(6).



The upcoming intellectual-property-law reform will enhance protection of right holders in this particular respect.

Answering the title question, *Is AllofMP3 Legal?*, we conclude that the activity of the Web site and its licensor, a right-management organization, is arguably legal under Russian law but only unless and until it is challenged by a right holder. However, under the new IP legislation the non-contractual licensing will be allowed only to state-accredited managing organizations.

