

**FILMS BY JOVE, INC., and SOYUZMULTFILM STUDIOS, Plaintiffs, -against-
JOSEPH BEROV, NATASHA ORLOVA, THE RIGMA AMERICA
CORPORATION, and SAINT PETERSBURG PUBLISHING HOUSE AND
GROUP, Defendants.**

Civil Action No. 98-CV-7674 (DGT)

**UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW
YORK**

2003 U.S. Dist. LEXIS 6233

April 16, 2003, Decided

PRIOR HISTORY:

*Films by Jove, Inc. v. Berov, 154 F. Supp. 2d 432, 2001
U.S. Dist. LEXIS 12815 (E.D.N.Y., 2001)*

DISPOSITION:

[*1] Defendants' motion for reconsideration denied.

COUNSEL:

For FILM BY JOVE, INC., SOYUZMULTFILM
STUDIOS, plaintiffs: Julian H. Lowenfeld, New York,
NY.

For FILM BY JOVE, INC., plaintiff: Kenneth A.
Feinswog, Los Angeles, CA.

For JOSEPH BEROV, THE RIGMA AMERICA
CORPORATION, SAINT PETERSBURG
PUBLISHING HOUSE AND ENTERTAINMENT
GROUP, defendants: Paul R. Levenson.

For JOSEPH BEROV, defendant: Peter G. Eikenberry,
New York, NY.

For JOSEPH BEROV, THE RIGMA AMERICA
CORPORATION, SAINT PETERSBURG
PUBLISHING HOUSE AND ENTERTAINMENT
GROUP, NATASHA ORLOVA, defendants: Scott A.
Ziluck, Kaplan Gottbetter & Levenson, LLP, New York,
NY.

JUDGES:

David G. Trager, United States District Judge.

OPINIONBY:

David G. Trager

OPINION:

MEMORANDUM AND ORDER

TRAGER, District J.

This litigation began in December of 1998 when plaintiffs Films By Jove, Inc. ("FBJ") and Soyuzmultfilm Studio ("SMS" n1) brought an action for copyright infringement, breach of contract, unfair competition, and RICO violations against Joseph Berov ("Berov"), Natasha Orlova, Rigma America Corporation, and the St. Petersburg Publishing House and Group. A state-owned Russian company, the Federal State Unitarian Enterprise Soyuzmultfilm Studio [*2] ("FSUESMS"), subsequently intervened as a third-party plaintiff. n2 The central dispute between the parties concerns the ownership of copyrights in approximately 1500 animated films created by a state-owned Soviet film studio, Soyuzmultfilm Studio, between 1946 and 1991. n3

n1 As will become clear in the subsequent discussion, "Soyuzmultfilm Studio" (or "Soyuzmultfilm Studios," as it is sometimes called) is at once the name of a Soviet state enterprise created in 1936, a lease enterprise in existence between 1989 and 1999, and a joint stock company, named as a plaintiff in this suit. For the purposes of clarity, the abbreviation "SMS" will be used only to refer to the plaintiff joint stock company. The other entities will be referred to by their full names.

n2 The defendants and the third-party plaintiff, FSUESMS, are in agreement on substantially all the facts of this case, and many of their submissions - including all of their papers

in support of this motion for reconsideration - have been jointly filed. Throughout this opinion, it may be generally assumed that any arguments attributed to "defendants" are likewise advanced by FSUESMS, and vice versa. [*3]

n3 The complexities of the dispute defy concise description. However, for the moment it should be explained that SMS and FSUESMS are Russian enterprises, each of which claims to be the present successor to the original Soyuzmultfilm Studio and the rightful inheritor of the studio's copyright interests. FBJ is an American film company that, in 1992, obtained an exclusive license for Soyuzmultfilm Studio's films from a predecessor to SMS. FBJ subsequently embarked on an extensive project to restore the films, dubbing them in several languages for distribution in the international market - only to have the validity of its license retroactively challenged by FSUESMS.

On August 27, 2001, this court granted summary judgment in favor of the plaintiffs, relying primarily on the submissions of the parties' Soviet law experts, and also, in part, on interpretations of Soviet law from a series of decisions by the commercial courts of the Russian Federation, known as arbitrazh courts. See *Films By Jove, Inc. v. Berov*, 154 F. Supp. 2d 432 (E.D.N.Y. 2001). On December 18, 2001, the Presidium [*4] of the High Arbitrazh Court of the Russian Federation issued an opinion apparently overruling two of these lower court opinions. Following the High Arbitrazh Court's ruling, as well as an October 2, 2001 decision from the Paris Court of Appeals, which the defendants claim supports some of their arguments, defendants filed a motion, pursuant to *Rule 60(b)(2) of the Federal Rules of Civil Procedure*, for reconsideration of this court's August 27, 2001 decision, and for a stay of any enforcement proceedings pursuant to *Rule 62(b)*.

Plaintiffs counter that the French and Russian decisions upon which defendants base their motion in fact establish no basis for reconsideration. The Paris Appeals Court's decision, which, according to plaintiffs, has been appealed, is inconsistent with a previous ruling of the same court, upheld by the court of last resort, in another suit involving the same parties and turning on identical questions of Russian law. Moreover, plaintiffs contend that a French court's interpretation of Russian law is, in any event, not controlling on this court.

An opinion from Russia's High Arbitrazh Court is no doubt of greater significance as evidence of the content of Russian [*5] law. However, plaintiffs contend that the December 18, 2001 decision, nevertheless, does not

warrant reconsideration. First, plaintiffs claim that, although invited by this court to await the results of future decisions from the Russian courts, the parties expressly stipulated at oral argument that they would accept an immediate ruling. Second, plaintiffs maintain that even if this court were to entertain a motion to reconsider in reliance on the December 18 decision, notwithstanding the parties' stipulation, that opinion does not address the question of copyright ownership central to this case and, therefore, provides no basis for altering the previous ruling in favor of plaintiffs. Third, plaintiffs contend that because Russia is a civil law jurisdiction, which lacks a system of stare decisis, it is appropriate for this court to ignore the holding of the High Arbitrazh Court and to make an independent assessment of Russian law based on the submissions of the parties' experts - especially inasmuch as the High Arbitrazh Court's decision adopts an unprecedented and illogical construction of Soviet statutory law. Fourth, plaintiffs have submitted an affidavit from [*6] a distinguished Russian jurist advancing general allegations of corruption and institutional biases against private enterprise within the Russian courts and presenting specific evidence of undue governmental influence over the arbitrazh court proceedings leading up to the December 18, 2001 decision. These facts, according to plaintiffs, explain the peculiar nature of the decision and demonstrate that the opinion was the product of judicial misconduct. Based on this evidence, plaintiffs argue that for this court to vacate its ruling in reliance on the High Court's decision would violate plaintiffs' rights, in essence confiscating FBJ's substantial investment in developing the commercial value of Soyuzmultfilm Studio's animated films for the international market. Giving effect to the High Arbitrazh Court's December 18, 2001 decision would therefore offend domestic public policy with respect to private property rights, as well as norms of international law. Thus, if the decision is determined to have any relevance, plaintiffs contend that it should nevertheless be afforded no deferential weight. Fifth, plaintiffs advance an alternative claim to the disputed copyrights rooted in principles [*7] of equity and agency law.

Background

(1)

According to plaintiffs, on May 22, 1992, a valid licensing agreement was signed between FBJ, a California corporation, and the legal successor to a former state-owned Soviet film studio, Soyuzmultfilm Studio. See Mem. of Law in Supp. of Pls.' Mot. to Dis. the 3D-Party Compl. Pursuant to *FRCP 12(b)(6)* [hereinafter "Pls.' Mot. Dis."] at 3. Founded in 1936, on property that had been expropriated by the Soviet state from the Russian Orthodox Church, Soyuzmultfilm

Studio created approximately 1,500 animated motion picture films, many of which became very popular. See *id.* at 2. SMS, a privately-owned Russian joint stock company, is the successor to the entity with which FBJ entered into the May 1992 agreement. Thus, SMS claims to be the current successor to the original state enterprise Soyuzmultfilm Studio. See Decl. of Mila Straupe, Ex. 15, attached to the Decl. of Julian Lowenfeld of Sept. 22, 2000 [hereinafter "Straupe Decl."] P 12. The 1992 agreement purported to make FBJ the exclusive licensee worldwide for the animated films in the Soyuzmultfilm library, including those produced during the period of state ownership. [*8] See Pls.' Mot. Dis. at 3.

In reliance on this agreement, FBJ invested more than three million dollars to restore and update the library of films, which, plaintiffs submit, was in "woeful condition" in 1992. See Mem. Law in Supp. of Pls.' Mot. for Summ. J. and in Opp'n to Defs.' Mot. for Summ. J. [hereinafter "Pls.' Mot. for Summ. J."] at 19. FBJ further embarked on an extensive revoicing project, hiring famous actors to produce English, French, and Spanish versions of the original Russian-language animated films. See Decl. of Joan Borsten, Ex. 16, attached to Decl. of Julian Lowenfeld of Sept. 22, 2000 [hereinafter "Borsten Decl."] P 5.

FBJ and SMS accuse Berov, who operates several stores in Brooklyn that sell Russian-language entertainment products, of violating their exclusive rights in Soyuzmultfilm Studio's films. n4 See Pls.' Mot. Dis. at 3. Defendants counter that SMS's claim to the copyrights is invalid and that SMS's predecessor, the entity that purported to make FBJ the exclusive licensee of the Soyuzmultfilm library of animated films, was likewise not a legitimate copyright holder and thus lacked the authority to grant that license. See Mem. of Law [*9] in Opp'n to Mot. for Summ. J. by Pls./3D-Party Defs. and in Supp. of Cross-Mot. for Summ. J. by 3D-Party Pl. [hereinafter "FSUESMS's Cross-Mot."] at 5-6; Decl. of Peter B. Maggs [hereinafter "Maggs Decl."] P 69. Instead, defendants contend that the copyrights in question are in fact owned by the Russian state, and are under the "operative management" n5 of the third-party plaintiff, FSUESMS, which intervened in this case claiming that it, rather than SMS, is the lawful successor to the original state-owned Soyuzmultfilm Studio. See 3D-Party Compl. P 8.

n4 More precisely, Berov operates his stores through the Rigma America Corporation, doing business as St. Petersburg Publishing House. Berov is Rigma's sole officer, director, and shareholder. Defendants identify Natasha Orlova as "a sometime employee of Rigma who has no

ownership interest in the company." See Defs.' Mem. in Opp'n to Pls.' Mots. for Partial Summ. J. and for Ord. of Contempt and in Supp. of Defs.' Cross-Mot. for Partial Summ. J. [hereinafter "Defs.' Cross-Mot."] at 5.

n5 "Operative management" is a term used to describe a form of control over property without actual ownership. During the Soviet period, when practically all property was state-owned, property assigned by the state to a state enterprise was said to be under the operative management of the enterprise, which had the right to possess and use the property, while title remained with the state. See Maggs Decl. P 19 (citing W.E. Butler, Soviet Law 169-70 (1983)).

[*10]

Thus, "although this dispute started out purely as an infringement action by FBJ against the defendants, it has become a full-fledged dispute about copyright ownership between FBJ/SMS and FSUESMS." *Films By Jove*, 154 F. Supp. 2d at 434 n.5. Ultimately, the resolution of the present dispute requires determining who was the initial owner of the copyrights in the films produced by the state enterprise Soyuzmultfilm Studio, and, more importantly, how, if at all, the reforms of Perestroika, in the late 1980s, affected the ownership of the studio's intellectual property rights.

(2)

The complex and colorful history of the state-owned Soviet film studio that created the disputed films is examined in great detail in this court's August 27, 2001 opinion. A general familiarity with the underlying facts and with the parties' arguments will be assumed throughout this decision. Suffice it to say that plaintiffs and defendants (and their respective experts) have offered fundamentally different accounts of the studio's history, which, for the purposes of the instant motion, will be summarized as set forth below.

(a) Plaintiffs' Version

Plaintiffs' experts explain [*11] that under Soviet law the copyrights in the disputed films belonged as an initial matter to the studio that created the films, rather than to the Soviet state. See Decl. of Michael Newcity [hereinafter "Newcity Decl."] P 15, 20-52; Reply Decl. of Paul B. Stephan [hereinafter "Stephan Reply Decl."] P 5 n.1; Notice of Mot. to Dis. 3D-Party Compl. Pursuant to *FRCP 12(b)(6)* [hereinafter "Pls.' Not. Mot. Dis."] at 7-9. From its inception in 1936 until 1989, Soyuzmultfilm Studio, like practically all enterprises in the Soviet Union, operated as a state enterprise. See Pls.' Mot. Dis. at 2. However, according to plaintiffs, in

December 1989, pursuant to new legislation liberalizing the structure of ownership in the Soviet economy, the state enterprise was transformed into a "lease enterprise" or "rent entity," also called Soyuzmultfilm Studio. See *id.* at 2-3.

Plaintiffs note that "many state companies became rent enterprises in the late 1980s and 1990s. In accordance with law, they stopped to be 'state-owned', but having in mind a further transition to privately held companies, they acquired another legal status, taking on lease only state buildings and equipment, but keeping [*12] their income and products for themselves and thus they received freedom from the state." See Straupe Decl. P 11. Under the terms of a lease agreement with the Soviet State Film Committee, known as Goskino, n6 the lease enterprise Soyuzmultfilm Studio paid rent to the state in exchange for a ten-year lease on the state-owned tangible property previously assigned to the former state enterprise Soyuzmultfilm Studio - i.e., the studio's facilities and equipment. See *id.* at 3.

n6 Goskino, which literally translates as "government film," is a government ministry generally charged, during the Soviet era, with overseeing all aspects of film production and distribution.

More importantly, for the purposes of the present dispute, at the time the lease agreement entered into effect, plaintiffs contend, the original state enterprise ceased to exist, having been transformed into the lease entity, which was, according to the Soviet legislation governing the creation of lease enterprises, the legal successor to the rights [*13] and duties of the state enterprise it effectively replaced. As a result of this transformation, the copyrights in the disputed films passed by operation of law to the newly-formed lease entity. n7 See Straupe Decl. P 11.

n7 The precise legal act that officially established the lease enterprise remains somewhat unclear. In an official document dated December 12, 1989, Goskino ordered that Soyuzmultfilm Studio be "transferred ... to lease as of December 15, 1989." Ex. E, attached to Decl. of Sergey Skuliabin. However, the lease agreement with Goskino was executed on December 20, 1989, and plaintiffs have indicated that Soyuzmultfilm Studio became a lease enterprise on that date. See Pls.' Mot. Dis. at 2. FSUESMS's Russian law expert suggests that the lease enterprise "existed de facto from the time of

the signing of the lease" but did not register as a legal entity until November 14, 1990. See Decl. of Peter B. Maggs [hereinafter "Maggs Decl."] P 12. In any event, it is undisputed that the lease enterprise Soyuzmultfilm Studio did come into existence and that its facilities, personnel and equipment were substantially indistinguishable from those of the original state enterprise Soyuzmultfilm Studio.

[*14]

Moreover, unlike the state-owned tangible property, which was returned to the Russian state at the end of the lease term, the copyrights, which were initially studio property in the plaintiffs' version of the story, did not revert upon termination of the lease. See Decl. of Paul B. Stephan [hereinafter "Stephan Decl."] P 9 ("Intellectual property rights transferred to the lease enterprise were not leased, but rather fully owned by the lease enterprise."). Indeed, according to the plaintiffs, there was no longer any state enterprise in existence to claim a reversion interest in the copyrights at the end of the lease term, since the original state enterprise Soyuzmultfilm Studio had been transformed, in 1989, into the lease enterprise bearing the same name. In May 1992, the lease entity, which, according to the plaintiffs, had full title to the copyrights as the legal successor to the antecedent state enterprise, granted the exclusive license to FBJ as described above.

In July 1999, shortly before the lease was set to expire, the lease enterprise Soyuzmultfilm Studio was itself reorganized, this time in the form of a fully-privatized joint stock company. See Straupe Decl. [*15] P 12. That joint stock company is SMS, one of the plaintiffs in this case. Upon expiration of the lease term, the premises and equipment that had been leased from the Soviet state had to be returned. Accordingly, SMS moved the studio's offices to another location in a suburb of Moscow, taking with it the copyrights, ownership of which had passed to SMS, again by operation of law, as a consequence of the reorganization of lease enterprise. n8 See *id.* P 13.

n8 Of course, SMS's interest in the copyrights was subject to the license agreement with FBJ entered into by SMS's predecessor in interest, the lease enterprise.

On June 30, 1999, in response to the demands of a faction of disgruntled Soyuzmultfilm Studio employees who had lost an internal power struggle for control of the lease enterprise, the Prime Minister of the Russian

Federation, Sergei Stepashin, issued a decree accepting a proposal of the Russian Property Ministry that called for the establishment of a new state enterprise to take over the state-owned [*16] facilities and equipment that had been leased for ten years to the lease enterprise. See Pls.' Mot. Dis. at 5; Pls.' Ex. 17 [hereinafter "Stepashin Order"]; Tr. of Aug. 17, 2000 Hearing at 20. This new state entity, organized as a federal state unitarian enterprise, is FSUESMS, the third-party plaintiff in the present action. According to plaintiffs, it was only later, after the Russian Orthodox Church initiated a lawsuit to reclaim the property that had been expropriated from it in 1936, that FSUESMS, backed by Goskino and the State Property Ministry, began to advance the unfounded contention that FSUESMS was in fact a continuation of the original state enterprise and was, therefore, the rightful inheritor of Soyuzmultfilm Studio's extensive film library. See Pls.' Mot. Dis. at 5.; Borsten Decl. P 14.

In December 1999, a year after plaintiffs commenced their infringement suit against Berov in this court, and nearly seven years after FBJ acquired its Soyuzmultfilm copyright license from the lease enterprise, FBJ received a letter from E. Rakhimov, the director of FSUESMS, n9 asserting that Soyuzmultfilm Studio had been restored to its prior status as a state enterprise, [*17] that the copyrights for films produced by Soyuzmultfilm Studio prior to 1989 belonged to the Russian state, and that, therefore, any contractual arrangements between SMS and FBJ concerning such films were invalid. See Borsten Decl. P 14.

n9 Rokhimov had previously served as deputy director of the lease enterprise until he was fired in August 1999. See Decl. of Sergey Skuliabin P 6.

In sum, plaintiffs argue that: 1) Soviet law had since 1936 vested ownership of the copyrights for the animated films produced by the state enterprise Soyuzmultfilm Studio in the studio itself rather than the Soviet state; 2) in 1989, upon execution of the lease agreement with Goskino, the state enterprise was transformed into a lease enterprise, at which point full title to the copyrights passed by operation of law to the lease enterprise, which was the legal successor to the now-defunct state enterprise; 3) In 1992, the lease enterprise granted a copyright license to FBJ; 4) upon expiration of the lease in 1999, the copyrights, [*18] subject to FBJ's license, passed to the joint stock company SMS, while 5) the tangible equipment and facilities leased to the rent entity by Goskino on behalf of state reverted to the state; and 6) the state then transferred its tangible property to FSUESMS, a state

enterprise newly-created in 1999 to take over the state-owned property formerly assigned to the original state enterprise Soyuzmultfilm Studio and leased for ten years to the lease enterprise.

(b) Defendants' Version

Defendants have offered a fundamentally different version of events. First, they claim that the copyrights in the films produced by the state enterprise Soyuzmultfilm Studio were always owned by the state and were merely under the "operative management" of the studio. See Maggs Decl. P 18; FSUESMS's Cross-Mot. at 6-7. It follows from this premise that the lease enterprise could not have acquired plenary ownership of the disputed copyrights from the state enterprise, whether by outright transfer or by operation of law, since the state enterprise, according to the defendants, had no such ownership rights in the Soyuzmultfilm copyrights to convey. See FSUESMS's Cross-Mot. at 8.

Alternatively, [*19] even if the state enterprise were the initial owner of the copyrights, defendants emphatically deny plaintiffs' contention that the state enterprise was transformed into the lease enterprise in 1989 and ceased to exist thereafter. Instead, defendants argue that the state enterprise went into a period of "suspended animation," 2d Supp. Decl. of Peter B. Maggs [hereinafter "Maggs 2d Supp. Decl."] P 11, during the ten-year term of the lease, and was revived in 1999 in the form of a federal state unitarian enterprise, as FSUESMS. n10 Because, according to the defendants, the state enterprise Soyuzmultfilm Studio was not transformed or reorganized in 1989, no rights passed to the rent entity by operation of law. See Reply Mem. of Law of Defs. and 3D-Party Pl. in Supp. of Jt. Mot. for Recons. and Modification [hereinafter "Defs.' Reply Mem. for Recons."] at 5. Therefore, the only assets that the lease enterprise acquired were those expressly specified in the lease agreement. Under the terms of that agreement, the lease enterprise received, in exchange for rental payments to the state, a ten-year lease on the state-owned tangible property previously assigned to the state enterprise [*20] Soyuzmultfilm, including its equipment and offices. n11 The lease did not on its face purport to transfer any copyrights to the lease entity. Even if the copyrights had somehow passed in connection with the lease agreement, defendants maintain that any such transfer would be subject to the limit of the 10-year lease term, at which point the copyrights, like the tangible property, would have reverted to the state. See 9th Supp. Decl. of Peter B. Maggs [hereinafter "Maggs 9th Supp. Decl."] P 10. Moreover, defendants argue that the Soviet legislation regulating the formation of lease enterprises only permitted lease entities to transfer "material valuables" - i.e. tangible property. Therefore, the lease enterprise Soyuzmultfilm Studio had no authority to

enter into the 1992 copyright license agreement with FBJ and likewise could not have transferred any interest in the films to SMS upon expiration of the lease term. See Maggs Decl. PP 41-2.

n10 According to defendants, this change was mandated by the Civil Code of the Russian Federation, First Part, adopted in 1994, which abolished the state enterprise form under which the original Soyuzmultfilm Studio had been registered. See Maggs Decl. P 11. [*21]

n11 The exact terms of the December 1989 agreement gave the lease enterprise a lease on the assets that appeared on the balance sheet of the state enterprise as of the date of the agreement. See Dec. 20, 1989 Lease Agreement, attached to Oct. 30, 2000 Letter of Julian Lowenfeld [hereinafter "Lease Agreement"] P 1.1. These balance sheets have never been submitted to the court, and plaintiffs claim that they may not even exist. See Tr. of June 5, 2001 Oral Arg. at 34-49. In any event, all the parties appear to agree that the balance sheets of the state enterprise would have listed the enterprise's material assets only and would not have included intangible assets, such as copyrights. Defendants have argued that the absence of the copyrights from the balance sheets is fatal to plaintiff's claim; plaintiffs, of course, argue that the balance sheets are essentially irrelevant to the instant dispute, since the copyrights passed not through the terms of the lease but by operation of law.

Thus, defendants maintain that: 1) the copyrights in the films produced by the state enterprise were owned [*22] initially by the state; 2) the 1989 lease agreement did not terminate the state enterprise or cause its transformation into a lease entity, but rather 3) merely transferred state-owned tangible property to the lease enterprise for a period of ten years; n12 4) upon termination of the lease, the property leased by the state reverted to state ownership, and was assigned to FSUESMS, 5) which is a continuation of the original Soyuzmultfilm Studio, reorganized, in compliance with Russian legislation, in the form of a federal state unitarian enterprise.

n12 Defendants' view is that it is actually impossible, based on the current record, to determine with precision the specific assets that were transferred to the lease enterprise under the lease agreement, because the plaintiffs have never

produced the Soyuzmultfilm Studio balance sheets from December 1989.

(3)

French Litigation

Shortly after FBJ and the lease enterprise executed the licensing agreement in May 1992, the two companies became involved in two separate [*23] lawsuits in France, seeking to combat alleged infringement of the Soyuzmultfilm Studio copyrights by Sovexportfilm, an entity that throughout much of the Soviet period had exercised monopoly rights over the foreign distribution of films produced by Soviet film studios. n13 See Tr. of Aug. 18, 2000 Hearing at 183-85.

n13 Joan Borsten, President of FBJ, represents that copyright infringement actions were also initiated against Sovexportfilm in Mexico and Japan. See Borsten Decl. P 4. However, evidence regarding these suits has not been presented to the court.

According to plaintiffs, although Perestroika-era reforms eliminated Sovexportfilm's export monopoly in 1988, and granted the film studios the exclusive right to exploit their film copyrights commercially through direct contracts with foreign investors, Sovexportfilm continued to sell rights in films produced by Soyuzmultfilm Studio, and other Russian film studios, without obtaining the studios' permission. See id.

In 1993, believing that Sovexportfilm's [*24] infringing activities threatened to compromise the commercial value of FBJ's exclusive license, FBJ and the lease enterprise Soyuzmultfilm Studio initiated a copyright infringement suit against Sovexportfilm in France. See id. at 184. Initially, the County Court of Paris dismissed the suit. However, in a ruling handed down on September 12, 1997, the Court of Appeals of Paris overturned this decision and ruled in favor of the plaintiffs. See Court of Appeals of Paris, Sept. 12, 1997 Dec., Ex. 14, attached to the Decl. of Julian Lowenfeld [hereinafter "Sept. 12, 1997 French Dec."]. The appeals court found that the copyrights for films produced during the Soviet period by Soyuzmultfilm Studio belonged to the studio, and that, at least since September 19, 1989, the studio had exclusive rights to sell its films in foreign markets. See id. at 12. Accordingly, the appeals court concluded that Sovexportfilm could not license any films produced by Soyuzmultfilm Studio without obtaining the studio's permission. Therefore, Sovexportfilm committed copyright infringement by engaging in such unapproved

licensing transactions in France. See *id.* at 12-14. Recognizing that, in May [*25] 1992, Soyuzmultfilm Studio had "ceded the totality of its exploitation rights to [FBJ]," *id.* at 13, the court concluded that FBJ was "entitled and justified in its claims of copyright infringement." *Id.* at 14. This ruling was upheld by the final court of appeal, the French High Cassation Court, on July 6, 2000. See French High Cassation Court July 6, 2000 Dec., Ex. 14, attached to the Decl. of Julian Lowenfeld [hereinafter "July 6, 2002 French Dec."].

In 1994, FBJ and the lease enterprise, together with two other Russian films studios, Mosfilm and Lenfilm, took part in a second litigation in France challenging Sovexportfilm's unauthorized licensing of Soviet films. See Tr. of Aug. 18, 2000 Hearing at 185. This case raised essentially the same legal issues as the first suit, viz. the ownership of copyrights and attendant commercial exploitation rights in films produced by Soviet film studios. However, according to plaintiffs, most of the films that were the subject of the second suit had not been considered in the first suit. See Decl. of Joan Borsten in Opp'n to Defs.' Mot. for Recons. [hereinafter "Borsten Decl. in Opp'n to Recons."] P 4. On June 19, 1996, the [*26] Commercial Court of Paris ruled in favor of FBJ, Soyuzmultfilm Studio, Mosfilm Studio, and Lenfilm Studio. Rejecting the defendants' claim that Goskino, "having financed the films" on behalf of the Soviet state "became owner of the copyrights," the court found that Soviet law clearly established "the Studios[]" inalienable rights [in] their works." Commercial Court of Paris, June 19, 1996 Dec. [hereinafter "June 19, 1996 French Dec."] at 9. The Commercial Court of Paris further concluded that Soviet economic reforms enacted in 1986 and thereafter had put an end to the state monopoly on foreign trade, and that Sovexportfilm could therefore no longer license films produced by Russian studios without the agreement of the studios, which were the rightful copyright holders. See *id.* at 9-11.

On October 2, 2001, the Paris Court of Appeals, the same court whose September 12, 1997 decision in favor of the lease enterprise Soyuzmultfilm Studio and FBJ was upheld by the French High Cassation Court on July 6, 2000, reversed course and overturned the June 19, 1996 decision of the Commercial Court of Paris. See Court of Appeals of Paris, Oct. 2, 2001 Dec. [hereinafter "Oct. 2, 2001 French [*27] Dec."]. The appeals court acknowledged that pursuant to Article 486 of the Soviet Civil Code "the copyright of feature and documentary films belongs to the enterprise which executed their production." *Id.* at 25. Nevertheless, the court found that, for the Soviet-era films at issue in the French litigation, the right of commercial exploitation of the copyrights "belonged exclusively to the GOSKINO of the USSR which exercised it through the mediation of ...

Sovexportfilm," and therefore Sovexportfilm did not engage in copyright infringement by licensing those films in France. *Id.*

Thus, at present, the French courts, in two separate litigations, have reached inconsistent - indeed, flatly contradictory - conclusions with regard to the validity of FBJ's exclusive copyright license. n14 The first ruling in favor of FBJ has been upheld by the court of last resort. Plaintiffs represent that the October 2, 2001 decision resulted from an incomplete presentation of Soviet law to the French court and that the decision is currently on appeal. See Borsten Decl. in Opp'n to Recons. PP 12-16. To date, the parties have provided no further information concerning the status of the appeal. [*28]

n14 From the perspective of an American court, it is curious that the Paris Appeals Court's findings in the first suit - that Soyuzmultfilm Studio had the exclusive right to sell its films abroad and that the studio legitimately transferred its commercial exploitation rights to FBJ - evidently had no preclusive effect against Sovexportfilm in the second litigation. Though no expert testimony concerning French procedure has been presented to this court, it would appear that the French courts do not recognize the principle of collateral estoppel/issue preclusion.

(4)

Russian Litigation

While the present infringement action was pending in this court, SMS and FSUESMS were engaged in two separate series of lawsuits before the Russian arbitrazh courts, n15 in which each claimed to be the rightful successor to the state enterprise Soyuzmultfilm Studio, and each sought to nullify the other entity's corporate registration. The Public Prosecutor of the Moscow Region, together with the Ministry of State Property [*29] of Russia, Goskino, and FSUESMS, commenced the first of these two parallel proceedings in the Moscow Region Arbitrazh Court on November 11, 1999. See Maggs Decl. P 27. SMS subsequently commenced the second suit against FSUESMS in the same court, see *id.* PP 28-29, with the Ministry of State Property and Goskino evidently intervening on FSUESMS's behalf, in order to protect the interests of the Russian state.

n15 The Russian judiciary consists of two separate court systems. The courts of general jurisdiction handle criminal law, family law, and other non-commercial cases. The arbitrazh courts

have exclusive jurisdiction over disputes between commercial enterprises. See 7th Supp. Decl. of Peter B. Maggs [hereinafter "Maggs 7th Supp. Decl."] P 26; Sarah Reynolds, Handbook on Commercial Dispute Resolution in the Russian Federation 9 (Igor Abramov, ed., U.S. Dep't of Commerce, 2000), available at, http://www.mac.doc.gov/INTERNET/Handbook_July_2000.pdf ("The 'arbitrazh courts' in the Russian Federation are a system of courts which have jurisdiction over most commercial disputes and many other cases involving business entities.").

[*30]

The validity of SMS's and FSUESMS's respective corporate registrations was the focus of both litigations. However, "some of [the] cases found occasion to address the possession of the copyrights in the state enterprise Soyuzmultfilm Studio's library." *Films by Jove*, 154 F. Supp. 2d at 439. Although FBJ was not a party to any of the litigation in the Russian arbitrazh courts, the validity of FBJ's license, which, of course, is essential to plaintiffs' infringement action, hinges on determining whether, in 1989, the lease enterprise succeeded to the intellectual property rights of the state enterprise Soyuzmultfilm Studio such that it could properly license the copyrights in the studio's Soviet-era films. The parties' experts vigorously debate the significance of the legal conclusions reached in the arbitrazh court decisions, disputing the holdings of many of the cases, as well as whether, and to what extent, the various decisions control the outcome of this case. In the August 27, 2001 decision granting summary judgment to the plaintiffs, this court, without treating any arbitrazh court opinion as dispositive, referred extensively to the Russian decisions in explaining [*31] and justifying its conclusions regarding the relevant Russian law.

In the suit brought by FSUESMS and the Russian government, the Moscow Region Arbitrazh Court ruled in favor of SMS on March 6, 2000, and this decision was upheld by the Moscow Region Arbitrazh Appeals Court on June 7, 2000. The SMS-initiated suit likewise resulted in two early victories for the joint stock company: a favorable ruling from the Moscow Region Arbitrazh Court on June 5, 2000, which was upheld by the appeals court on July 24, 2000. The initial decisions in both litigations found that the right to the copyrights in the films and the trademark in the name Soyuzmultfilm Studio, among other intangible rights, passed to the lease enterprise by operation of law, and were legitimately transferred to the joint stock company. Moreover, in support of plaintiffs' theory of the case, the courts found no connection between the original state enterprise

Soyuzmultfilm Studio and FSUESMS. See June 5, 2000 Dec., Ex. 19, attached to Decl. of Julian Lowenfeld [hereinafter, "Jun. 5 Dec."]; June 24, 2000 Dec., Ex. 20, attached to Decl. of Julian Lowenfeld; Discussion of June 5, 2000 and July 24, 2000 Decs. within Aug. 18, 2000 Dec. [*32], Ex. 18, attached to Decl. of Julian Lowenfeld [hereinafter "Aug. 18 Dec."].

These initial decisions were vacated, however, by the Federal Arbitrazh Court for the District of Moscow, which remanded the cases to the Moscow Region Arbitrazh Court, instructing the court to consider evidence that the copyrights and other non-material assets may have belonged to the state at the time the lease agreement was executed and that these assets consequently never passed to the lease enterprise, or to its successor, SMS. See Aug. 18 Dec. (remanding the first suit); Sept. 25, 2000 Dec., Ex. G, attached to Decl. of Robert W. Clarida [hereinafter "Sept. 25 Dec."] (remanding the second suit). n16

n16 SMS evidently attempted to seek review of the August 18, 2000 decision by the High Arbitrazh Court. In a letter dated September 19, 2000, the Deputy Chairman of the High Court indicated that a further appeal was premature. However, he emphasized that the decision of the Federal Arbitrazh Court for the District of Moscow did not represent a binding view of the evidence in the case, and that SMS would be afforded an opportunity to argue its position on remand. See Arifulin Letter, Ex. 7, attached to Decl. of Paul Stephan.

[*33]

(a) FSUESMS's Suit Against SMS on Remand

Moscow Region Arbitrazh Court: December 26, 2000

On remand in the suit brought by FSUESMS, the Ministry of State Property of the Russian Federation, and Goskino against SMS, the Moscow Region Arbitrazh Court, by and large, reinstated and expanded upon its earlier findings and conclusions. Of all the opinions to emerge on remand, the December 26, 2000 decision was the only to address at length the question of copyright ownership, essentially adopting the theory of the case put forth by the plaintiffs in the present action. First, the court concluded that according to Article 486 of the Soviet copyright law "the copyrights to a film belong to the enterprise that shot the film." n17 Dec. 26, 2000 Dec., Ex. 8, attached to Decl. of Paul B. Stephan [hereinafter "Dec. 26 Dec."] at 6. The court went on to hold that, upon the signing of the lease agreement, the

state enterprise was transformed into the lease entity, which was the legal successor to the state enterprise, under Article 16 of the Fundamental Principles on Leasing. n18 See id. at 6, 7. The reorganization of the state enterprise in turn triggered the transfer of the copyrights [*34] to the lease enterprise by operation of law pursuant to Article 498 of the Soviet copyright law, which provides that upon the reorganization of an enterprise, copyrights owned by the enterprise pass to the legal successor. See id. at 6.

n17 Article 486 of the 1964 Civil Code provides that "copyright in a motion picture ... is owned by the enterprise which made the film." Newcity Decl. P 23. The majority of the films in dispute in this case were produced by Soyuzmultfilm Studio between 1946 and 1991, and thus fall under the provisions of the 1964 Civil Code. Those films produced prior to 1964 are covered by the Article 3 of the Decree of the All-Union Central Executive Committee of the R.S.F.S.R., dated October 8, 1928, which similarly specifies that the copyright in a film is granted to the film studio that published it. See id. P 24.

n18 The Fundamental Principles on Leasing, which governs the formation of lease enterprises, was adopted in November 1989 as part of the ownership liberalization trend that accompanied Perestroika and Glasnost.

[*35]

Moreover, the court concluded that the expiration of the lease term on December 20, 1999 did not affect the ownership of the copyrights because those rights did not pass to the lease enterprise under the lease, but rather by operation of law. See id. In fact, the court noted, the copyrights could not have been transferred through the lease agreement because, under Soviet law, the lessor, Goskino, did not control the intellectual property rights of the state enterprise Soyuzmultfilm Studio, which were owned by the studio itself rather than the state. See id. at 7. Thus, the court concluded that "copyright in the animated feature films made by [the state enterprise Soyuzmultfilm Studio] belonged to the Studio without time limit, and upon its reorganization, the copyrights went to the lease enterprise ... also with no term limitations." Id. at 6.

The December 26, 2000 decision explicitly rejected as without foundation the argument that "the copyrights to the animated films belong to [FSUESMS]." Id. at 7. FSUESMS's alleged interest in the Soyuzmultfilm Studio

copyrights was premised on the proposition, advanced by defendants in this case, that the formation of FSUESMS [*36] in June 1999 represented the resumption of the activity of the state enterprise. However, in the December 26 opinion, the court held that FSUESMS could not be a continuation of the original Soyuzmultfilm Studio because "a state enterprise, after leasing out an enterprise and complex of facilities and property, could not exist any more and could no longer be a legal person at the same time because it did not have its own property and legal capacity." Id.

Moscow Region Arbitrazh Appeals Court: February 22, 2001

The Moscow Region Arbitrazh Appeals Court initially upheld the December 26, 2000 decision of the Moscow Region Arbitrazh Court, in an opinion rendered on February 22, 2001. See Feb. 22, 2001 Dec., Ex. 6, attached to Decl. of Anya Zontova [hereinafter "Feb. 22 Dec."]. The appeals court explicitly affirmed the lower court's findings that: 1) "at the time the [state] enterprise switched to lease relations, a factual reorganization of the enterprise occurred"; and 2) as a consequence of this reorganization, "copyrights to animated films created by the state enterprise, by operation of law, and not the [lease] agreement, passed on to the successor of its rights, [*37] the lease enterprise." Id. at 6.

Federal Arbitrazh Court of the District of Moscow: April 20, 2001

On April 20, 2001, the Federal Arbitrazh Court for the District of Moscow, the same court that issued the August 18, 2000 order remanding the FSUESMS-initiated suit to the Moscow Region Arbitrazh Court, overruled the December 26, 2000 decision and the appeals court ruling upholding it. See Apr. 20, 2001 Dec., attached to Aff. of Vladimir Zlobinsky of May 9, 2001 [hereinafter "Apr. 20 Dec."]. The Federal Arbitrazh Court ultimately concluded that SMS's registration was invalid because its charter contained claims that it received state-owned property from the lease enterprise - a transfer to which the state, as owner of the property, never consented. However, in reaching this result, the decision appears to focus on tangible property that passed under the lease agreement, rather than on the studio's copyrights and other intangible property. At the outset of the opinion, the court summarizes what it takes to be reasoning of the lower court with respect to the transfer of Soyuzmultfilm Studio's intangible rights:

The Court found the provision in the Charter [of [*38] SMS] as to the succession of all intangible rights (including copyrights) from the leased enterprise to be legally correct. The court noted that based on Article 16

of the Basic Law of Leasing, the copyrights for production of [Soyuzmultfilm Studio] films, including intangible, were transferred to the leased enterprise, which is the successor in interest with respect to all rights of the leased state enterprise. Because the succession to the rights is based in law (Article 486 n19 of the Civil Code of the former Russian Soviet Federative Socialistic Republic, Article 58 of the Civil Code of the Russian Federation), it cannot be limited by lease agreement.

Id. at 4.

n19 Actually, it is Article 498 that provides for the transfer of copyrights by operation of law to a legal successor upon the reorganization of a commercial entity. Article 486 is the provision that vests the ownership of copyrights for a film in the entity that produced the film.

Immediately following this summary of the lower court's [*39] decision, the Federal Arbitrazh Court for the District of Moscow states that "the conclusions of the court are incorrect and are based on improper application of the norms of substantive law." Id. at 5. However, in the ensuing discussion, the court at no point explains why the lower court's analysis of the copyright transfer from the state enterprise to the lease enterprise, and thereafter to SMS, is incorrect. Instead, the Federal Arbitrazh Court focuses on the disposition of the state's tangible property. See *Films by Jove*, 154 F. Supp. 2d at 474-75. "According to the property transfer act," the court remarks, "there was transferred to the joint stock company the tangible assets owned by the state for separate accounting as state property in accordance with Annex No. 2." Apr. 20 Dec. at 6 (emphasis added). However, the court reflects, the charter of the lease enterprise acknowledged that the tangible property leased from the state would remain in state ownership. Therefore, that property could not be transferred without the approval of the state, through its agency, the Property Ministry. The Property Ministry's consent was never obtained, however. See [*40] id. On this basis, the court concluded that the lease enterprise improperly disposed of state property by transferring it to the joint stock company and, accordingly, the joint stock company's registration "must be deemed invalid as made in violation of law and interests of the state as owner of the property transferred to the joint stock company." Id.

Thus, on remand, the FSUESMS-initiated suit ended with the invalidation of SMS's registration but did not clearly resolve the copyright ownership question currently before this court. n20

n20 Plaintiffs initially advised this court of SMS's intent to seek review of the Federal Arbitrazh Court's April 20 decision from the High Arbitrazh Court - at one point suggesting that the April 20 decision had been stayed. See Tr. of June 5, 2001 Oral Arg. at 10, 66. However, plaintiffs have presented no further evidence to substantiate this claim.

(b) SMS's Suit Against FSUESMS on Remand

Moscow Region Arbitrazh Court: January 25, 2001

Meanwhile, another [*41] series of decisions was emerging on remand in the suit initiated by SMS. In the first of these cases, a month after the December 26 decision upholding SMS's registration, the Moscow Region Arbitrazh Court refused to cancel FSUESMS's registration. The reasoning of this decision echoes some of the arguments propounded by the defendants in the present dispute. For one thing, the court concluded - in direct contradiction to its December 26 decision - that the Soyuzmultfilm lease agreement did not effect the conversion of the state enterprise into the lease entity:

This Court believes that the state-owned enterprise Soyuzmultfilm Studios was never transformed into a lease-holding enterprise as such because Article 16 of the USSR Fundamental Legislation on Leasing provides for no such transformation. Transformation provides, above all, for ownership of the assets of the reorganized enterprise to be transferred to the newly established enterprise. That never took place because, following the establishment of the lease-holding enterprise, the physical assets of the state-owned enterprise ... remained state property and remain such to this day.

See Jan. 25, 2001 Dec., attached [*42] to February 8, 2002 letter of Julian Lowenfeld [hereinafter "Jan. 25 Dec."] at 3.

According to the January 25, 2001 decision, rather than transforming the state enterprise into a lease enterprise, the lease agreement simply resulted in "the transfer of all the employees of the state-owned enterprise to the leaseholders' organization n21 and, subsequently, to the [lease enterprise] and the joint-stock company." Id. Referring to emergence of FSUESMS in June 1999, the court concluded that "the State, in the person of a properly authorized agency, is entitled, upon termination of the Lease Agreement, to recruit new employees and to make a decision to resume the

activities of the state-owned enterprise on the basis of the state-owned physical assets." Id.

n21 The "leaseholders' organization" (translated elsewhere as the "organization of lessees") is a group consisting of employees of a state enterprise. It is formed solely for the purpose of signing a lease agreement with the state.

Acknowledging that [*43] "according to paragraph 4 of Article 16 of the USSR's Fundamental Legislation on Leasing, a lease-holding enterprise becomes the successor to the property rights and responsibilities of the appropriate state-owned enterprise," id. at 2, the court concluded that this succession of rights would not extend beyond the lease term:

Whether a lease-holding enterprise becomes a successor to a state-owned enterprise depends on the existence of a lease agreement. A lease-holding enterprise is a successor to a state-owned enterprise only to the extent that it lawfully possesses (holds on lease) the physical assets of a state owned enterprise, and, while having them in its possession, it can exercise the rights and perform the responsibilities of the state-owned enterprise.

Therefore, legal succession from a state-owned enterprise to a lease-holding enterprise provided for in point 4 of Article 16 ... results not from the transformation of the former in to the latter, as the Plaintiff believes, but from the existence of an agreement for the lease of the physical assets of the enterprise

Being based on a lease agreement, such succession is of temporary nature and is limited [*44] by the duration of the said agreement.

The lease-holder cannot continue to be the legal successor to a state-owned enterprise upon termination of the Lease Agreement because, in that situation, the lease-holder must return the leased property to the state

Id.

Moscow Region Arbitrazh Appeals Court: April 3, 2001

On appeal, the decision not to cancel FSUESMS's registration was upheld. However, the appellate court, in a ruling issued on April 3, 2001, reversed the lower court's reasoning regarding the operation of the lease agreement and its effect on the succession of rights from

the state enterprise to the lease enterprise. See Apr. 3, 2001 Dec., Ex. B, attached to Decl. of Anya Zontova [hereinafter "Apr. 3 Dec."]. More specifically, the appeals court rejected the conclusion that the succession of rights provided for in Article 16 of the Soviet leasing legislation "was based on the lease agreement, has a temporal nature and is restricted by the term of such agreement." Id. at 4. The appeals court found that

the succession of rights is tightly linked with the legal capacity of a legal entity. It is an integral property of a legal entity, [*45] not of a leased property complex. Therefore when the property is returned after the agreement ended, there is no automatic return of the succession of rights and obligations.

Id. at 5.

The appeals court further rejected the related proposition that the formation of FSUESMS in 1999 amounted to a "resumption of activity of the state enterprise," and specifically held that the state enterprise Soyuzmultfilm Studio ceased to exist in 1989 when it was transformed into the lease enterprise:

The fact of signing the lease agreement determines the formation of a lease enterprise. As it takes place, the activity of the state enterprise ceases through the conversion resulting from the formation of a lease enterprise on the basis of a state enterprise (Article 16 of the Fundamentals on Leasing.)

Thus, after signing the agreement of December 20, 1989 ... the state enterprise ceased. By operation of law, the successor of rights of this enterprise became the lease enterprise ..., which was later converted into the joint stock company.

Id. at 4-5.

Although the April 3 decision reversed the lower court's reasoning that SMS's rights were dependent on the terms [*46] of the lease agreement, it nevertheless confirmed the validity of FSUESMS's registration. Acknowledging that SMS had inherited certain rights of the state enterprise, which it continued to possess after the expiration of the lease term, the court held that the registration of the "newly formed" FSUESMS did not violate SMS's rights because FSUESMS's charter did not specifically stipulate that it had inherited the rights of the state enterprise. See id. at 5. A lone reference, in Item 1.1 of the FSUESMS charter, to the Order of 1936, which had created the state enterprise Soyuzmultfilm - though presumably intended as an assertion that FSUESMS was a continuation of the original film studio - did not,

according to the court, provide sufficient cause to nullify the registration. See id.

Federal Arbitrazh Court for the District of Moscow: June 4, 2001

Both SMS and FSUESMS appealed the April 3, 2001 appeals court decision to the Federal Arbitrazh Court for the District of Moscow: the former seeking reversal of the result of that decision, i.e., the refusal to cancel FSUESMS's registration; the latter challenging the appeals court's reasoning concerning succession of rights [*47] under the Soviet leasing law. See June 4, 2001 Dec., Ex. A, attached to Decl. of Anya Zontova [hereinafter "June 4 Dec."] at 3. Though these appeals were made to the same court that issued the April 20, 2001 ruling, overturning the lower court decisions in the suit initiated by FSUESMS, and canceling the joint stock company's registration, this time the court denied both appeals and upheld the reasoning and outcome of the April 3, 2001 ruling. See id. at 5. The Federal Arbitrazh Court explicitly affirmed that "after signing the lease agreement, the activity of the [state enterprise Soyuzmultfilm studio] ceased," and that FSUESMS was created in 1999, not as a continuation of the former state enterprise, but rather as "a new legal entity." Id. at 4.

(5)

Oral Argument Before This Court on Cross-Motions for Summary Judgment: June 5, 2001

In the meantime, as the litigation between SMS and FSUESMS proceeded in Russia, on June 5, 2001, a day after the Federal Arbitrazh Court for the District of Moscow issued its decision in the SMS-initiated suit, this court held a previously scheduled oral argument on the parties' cross-motions for summary judgment. During that argument, [*48] all the parties expressly agreed that they did not wish to await the outcome of any further appeals in the Russian litigation before proceeding to decision. See Tr. of June 5, 2001 Oral Arg. at 65-67. Consequently, at the time of this court's August 27, 2001 decision, the overall results of the Russian litigation appeared decidedly in plaintiffs' favor.

First, there was the December 26, 2000 decision of the Moscow Region Arbitrazh Court on remand in the FSUESMS-initiated suit, which directly addressed the issue of copyright ownership, and which "more or less, adopted virtually every aspect of plaintiffs' theory of the case." *Films by Jove*, 154 F. Supp. 2d at 470-71. The Federal Arbitrazh Court for the District of Moscow reversed the December 26, 2000 decision, on April 20, 2001, in a ruling that invalidated SMS's corporate registration. However, that opinion focused on claims in the joint stock company's charter that it had received

tangible property from the lease enterprise, without any indication that the owner of that property, the state, had consented to the transfer. The impact of the April 20 decision was further undermined by the April 3, 2001 and [*49] June 4, 2001 decisions in the suit initiated by SMS. Importantly, the latter of those two decisions was rendered by the same court that issued the April 20 ruling, and it post-dated that decision. Both the April 3 and June 4 opinions confirmed plaintiffs' contention that the state enterprise ceased to exist upon execution of the lease agreement, and, furthermore, that the agreement effected the transformation of the state enterprise into the lease enterprise. Both of those courts also found that while the material assets of the former state enterprise had to be returned to the state when the lease expired in 1989, the other "rights and obligations," presumably including copyrights, that passed to the lease entity as a legal successor to the state enterprise, survived the lease term and were properly transferred to SMS.

(6)

This Court's Ruling in Favor of Plaintiffs: August 27, 2001

On August 27, 2001, this court granted summary judgment in favor of the plaintiffs, concluding that: 1) the copyrights in Soyuzmultfilm Studio's animated films belonged ab initio to the studio itself, rather than to the Soviet state; 2) these rights were transferred to the lease enterprise by [*50] operation of law in 1989, when the state enterprise was transformed into the lease enterprise and ceased to exist; 3) Perestroika reforms solidified the lease enterprise's rights of commercial exploitation in its copyrights; 4) accordingly, in 1992, the lease enterprise entered into a valid licensing agreement with FBJ, granting FBJ exclusive international distribution rights in Soyuzmultfilm Studio's animated films; and 5) the underlying copyrights, subject to FBJ's license, passed in 1999 to SMS, when the lease enterprise was reorganized as a joint stock company, still bearing the Soyuzmultfilm Studio name.

(7)

Presidium of the High Arbitrazh Court for the Russian Federation: December 18, 2001

On December 18, 2001, some four months after this court's August 27, 2001 decision, the Presidium of the High Arbitrazh Court for the Russian Federation issued a ruling overturning the reasoning of the April 3, 2001 decision of the Appeals Court, and the June 4, 2001 decision of the Federal Arbitrazh Court for the District of Moscow. See Dec. 18, 2001 Dec., attached to Feb. 8, 2002 letter of Julian Lowenfeld [hereinafter "Dec. 18 Dec."]. Again, the High Court's opinion does not [*51] explicitly address the issue of copyright ownership. In

fact, as plaintiffs correctly point out, the word copyright appears nowhere in the opinion. n22 See Pls.' Mem. of Law in Opp'n to Defs.' Mot. for Recons. [hereinafter "Pls.' Opp'n to Recons."] at 5. The central issue in that litigation was the validity of FSUESMS's corporate registration. However, the High Arbitrazh court did reach relevant conclusions regarding legal succession under the Fundamental Principles on Leasing - the same law under which plaintiffs have previously persuaded this court that the execution of the Soyuzmultfilm lease agreement in 1989 effected the transformation of the state enterprise film studio into the lease enterprise, triggering the transfer of the disputed copyrights to the lease enterprise by operation of law.

n22 The same, of course, might be said of the April 3 and June 4 decisions, which, unlike the December 26, 2000 opinion in the FSUESMS-initiated litigation, did not specifically address the question of copyright ownership, instead focusing on the issue of corporate succession.

[*52]

The High Arbitrazh Court begins by noting that the First Deputy Prosecutor General of the Russian Federation officially protested the April 3, 2001 and June 4, 2001 rulings, requesting that the court "exclude" several conclusions from the "motivational part," i.e. the reasoning, of those decisions. n23 Specifically, the state prosecutor asked the High Arbitrazh Court to reverse the lower courts' conclusions:

[1] about the state enterprise [Soyuzmultfilm Studio] being converted into a lease enterprise; [2] [that] the succession of rights of the lease enterprise based on the lease agreement is not restricted by the term of the agreement[; and] [3] [that SMS] is a legal successor of the state enterprise [Soyuzmultfilm Studio]. n24

Dec. 18. Dec. at 2.

n23 Defendants' Russian law expert, Professor Peter B. Maggs, explains that to secure review of a lower court decision by the High Arbitrazh Court, the Prosecutor General or Deputy Prosecutor General must register a formal "protest" of that decision. Interestingly, the Chairman or Deputy Chairman of the High Court is likewise empowered to initiate review by protesting a lower court opinion. It appears that the most the parties themselves can do to obtain

High court review is petition those individuals empowered by Russian law to lodge a formal protest. See Maggs 9th Supp. Decl. P 39. See also Reynolds, Handbook on Commercial Dispute Resolution in the Russian Federation, supra, at 102. [*53]

n24 Plaintiffs and defendants have each submitted their own translation of the High Arbitrazh Court's December 18, 2001 ruling. Although there are, understandably, minor variations in wording between the two translations, the parties have agreed that these difference are of no material legal significance. See Tr. of Apr. 9, 2002 Oral Arg. at 4. Inexplicably, however, the defendants' translation apparently omits several paragraphs of the opinion. See Suppl. Decl. of Paul B. Stephan, Mar. 21, 2002 [hereinafter "Stephan Supp. Decl., Mar. 21, 2002"] P 2 n.1. Thus, in the interest of consistency, I will quote from the plaintiffs' translation, which appears to be the only complete translation available to this court.

The High Arbitrazh Court ruled that the disputed court acts would be "canceled" and that the January 25, 2001 decision of the Moscow Region Arbitrazh Court, would be left in effect:

The Appeals Court made the conclusion that the activity of the state enterprise [Soyuzmultfilm Studio] ceased through the conversion into a lease enterprise and that the succession of rights [*54] of the lease enterprise based on the lease agreement is not restricted by the term of such agreement.

This conclusion is made as a result of the wrong interpretation of law by the court.

Id.

In explaining the "grounds" for its conclusions, the Court offered an interpretation of Article 16 of the "Fundamental Principles of Legislation of the USSR and Union Republics on Lease," the Soviet legislation governing the formation of lease enterprises. Like the January 25 decision that it reinstated, the High Court concluded that the relevant provisions of the leasing statute did not provide for the conversion of a state enterprise into a lease entity, and furthermore that any succession of rights from a state enterprise to the lease entity would not survive the expiration of the lease term.

Pursuant to Item 1, Article 16 of the Fundamentals of USSR and Soviet republics law on Leasing, not a state enterprise but an independent legal entity - such as an organization of lessees created by a labor collective of a state enterprise - is converted into a lease enterprise. The

organization of lessees obtains the status of a lease enterprise after signing a lease agreement. [*55]

Pursuant to Item 4, Article 16 of the Fundamentals, a lease enterprise becomes a successor of property rights and obligations of the state enterprise leased by it. Because a lease is a possession and use for a fixed period of a property complex (Article 1 of the Fundamentals), this succession of rights is restricted by the term of the lease agreement.

Id.

The Court proceeded to rule that the Federal Arbitrazh Court for the District of Moscow erred in determining that the joint stock company is a successor to the original state enterprise Soyuzmultfilm Studio founded in 1936:

The property complex leased under the said agreement, was not privatized and after the formation of the joint stock company it remained state property. Pursuant to the Order of the Russian Federation Government of June 30, 1999 ..., the property of [Soyuzmultfilm Studio] which is in state property, is used for the formation on its basis of an enterprise to which it is assigned to under the right of economic management by Order of the Ministry of State Property of October 8, 1999 With the expiration of the lease agreement, the plaintiff had no further legal grounds for the use of [*56] rights and property obtained under this agreement.

Thus the Lower Court's conclusion that the company is not the successor of the state enterprise ... is well-grounded and complies with the case materials.

Id.

Discussion

(1)

Under Rule 60(b)(2) of the Federal Rules of Civil Procedure, a party may move for reconsideration of a final order or judgment on the basis of "newly discovered evidence that could not have been discovered earlier and that is relevant to the merits of the litigation." *Hemric v. City of New York*, 2002 U.S. Dist. LEXIS 9955, CV-96-0213, 2002 WL 1203850, at *2 (S.D.N.Y. June 3, 2002) (citing *Schwartz v. Capital Liquidators, Inc.*, 984 F.2d 53, 54 (2d Cir. 1993)(per curiam)). Such

motions, however, are "generally not favored," *United States v. International Bhd. of Teamsters*, 247 F.3d 370, 391 (2d Cir. 2001), and may not be used "solely to relitigate an issue already decided." *Shrader v. CSX Transp., Inc.*, 70 F.3d 255, 257 (2d Cir. 1995); accord *PAB Aviation, Inc. v. United States*, 2000 U.S. Dist. LEXIS 12201, CV-98-5952, 2000 WL 1240196, at *1 (E.D.N.Y. Aug. 24, 2000); *Resource N.E. of Long Island v. Town of Babylon*, 80 F. Supp. 2d 52, 64 (E.D.N.Y. 2000). [*57]

Defendants and FSUESMS base their joint motion for reconsideration on two foreign court rulings handed down shortly after this court's August 27, 2001 order granting summary judgment to the plaintiffs, viz. the October 2, 2001 decision of the Paris Court of Appeals, and, more significantly, the December 18, 2001 decision of the High Arbitrazh Court of the Russian Federation. Fundamentally, the motion requires this court to determine: 1) whether the December 18, 2001 ruling of the High Arbitrazh Court and the October 2, 2001 decision of the Paris Appeals court materially contradict the interpretations of Soviet law underpinning this court's previous order; and, if so, 2) whether, and to what extent, this court is required to, or should, defer to those courts' legal conclusions.

(2)

According to defendants, the significance of the Paris Appeals Court's October 2, 2001 decision lies in the court's conclusion that, under Russian law, Sovexportfilm retained exclusive commercial distribution rights for films produced by Soviet film studios, including Soyuzmultfilm Studio, during the period of state ownership. See Defs.' Mot. for Recons. at 11; Oct. 2, 2001 French Dec. at [*58] 25-26. Were this court to accept that premise, it would follow that the international copyright license the lease enterprise granted to FBJ in May 1992 was invalid. n25 However, defendants offer no compelling basis for deferring to the Paris Appeals Court's conclusions. As an initial matter, defendants grossly exaggerate the importance of the Paris Appeal Court's reversal of the June 19, 1996 ruling in favor of FBJ by suggesting that the now-overruled decision was "relied on as 'definitive'" in this court's August 27, 2001 decision. See Defs.' Mot. for Recons. at 11. In fact, that decision was only mentioned in passing in the background section of the August 27 opinion, by way of summarizing plaintiffs' account of the history of Soyuzmultfilm Studio. See *Films by Jove*, 154 F. Supp. 2d at 435; see also *id.* at 438 (reiterating that the section of the opinion containing, inter alia, the reference to the Sovexportfilm litigation in France constitutes "plaintiffs' version of the facts"). At no point in the ensuing discussion, did this court refer to - much less rely upon - the June 19, 1996 decision.

N25 In the October 2, 2001 decision, the Paris Appeals Court appears to be under the impression that Sovexportfilm's exclusive foreign distribution rights remained in effect until the Russian Federation passed its law "on copyrights and collateral rights" in 1993. Oct. 2, 2001 French Dec. at 26. The appeals court also refers to an official document, dated September 16, 1992, apparently granting certain distribution rights to Soyuzmultfilm Studio. See *id.* at 25-26. The record in this case, however, demonstrates that Sovexportfilm lost its export monopoly in 1988, and that Soyuzmultfilm Studio gained the right to market its films abroad on September 19, 1989. In fact, the Paris Appeals Court made precisely these findings in its 1997 decision in favor of FBJ and the lease enterprise Soyuzmultfilm Studio. See Sept. 12, 1997 French Dec. at 12 ("According to the letter of confirmation dated September 19, 1989, [Soyuzmultfilm] Studio enjoyed the right to market any films from its production[.] Hence[.] ... it may not be claimed that it was only starting from September 16, 1992 that the [studio] enjoyed the exclusive right to sell in foreign markets.").

[*59]

Noting that both plaintiffs in this case were parties to the French litigation, which turned on the same Soviet laws as this court's August 27, 2001 decision, defendants contend that principles of international comity favor deference to the Paris Appeals Court's findings. See Defs.' Mot. for Recons. at 12-14. Although they do not explicitly refer to the doctrine, the result defendants apparently seek is akin to issue preclusion. The argument would be that because FBJ and SMS had an opportunity to litigate the issue of copyright ownership before the French courts, in litigation that commenced prior to the initiation of proceedings before this court, and the Paris Appeals court has now determined that exclusive distribution rights for the disputed Soyuzmultfilm Studio films belonged to the state, plaintiffs should be precluded from reasserting their rights in the films in this forum.

"It is well-established that United State Courts are not obligated to recognize judgments rendered by a foreign state, but may choose to give *res judicata* effect to foreign judgements on the basis of comity." *Gordon & Breach Sci. Publishers S.A. v. American Inst. of Physics*, 905 F. Supp. 169, 178-79 (S.D.N.Y. 1995). [*60] At the same time, "the law is unsettled as to precisely what "comity" entails; thus it is primarily principles of fairness

and reasonableness that should guide domestic courts in their preclusion determinations." *Id.* at 179; accord *Alesayi Beverage Corp. v. Canada Dry Corp.*, 947 F. Supp. 658, 664 (S.D.N.Y. 1996). In this case, the October 2, 2001 decision of the Paris Appeals Court is not entitled to any such preclusive effect. For one thing, the decision is not the Paris Appeals Court's only ruling on the issue. In fact, in the first suit filed against Sovexportfilm that court ruled in favor of plaintiffs, expressly upholding the validity of FBJ's exclusive copyright license. See Sept. 12, 1997 French Dec. at 14 (finding that FBJ was "entitled and justified in its claims of copyright infringement"). Moreover, the Paris Appeals Court's earlier ruling has been affirmed by the court of last resort, the French High Cassation Court, while the more recent inconsistent decision is currently on appeal, according to plaintiffs. n26

n26 I am mindful of the traditional conflict of laws rule under which the later of two inconsistent judgments generally governs. See, e.g., Restatement (Third) of *Foreign Relations Law* § 482, cmt. g (1987) ("Courts are likely to recognize the later of two inconsistent foreign judgments."). However, this rule apparently rests in part on the presumption that the later court will have already considered the preclusive effect of the earlier ruling. See *Gordon & Breach Sci. Publishers*, 905 F. Supp. at 179 n.9 (citing Hans Smit, *International Res Judicata and Collateral Estoppel in the United States*, 9 *UCLA L. Rev.* 44, 46 n.13 (1962)). Here, such a presumption clearly does not obtain. The irreconcilable judgments reached by the Paris Appeals Court are obviously the result of a legal system that does not recognize the preclusive effect of prior judgments (at least not in the sense that an American court would), otherwise one expects that the final ruling of the French High Cassation Court in the first infringement suit would have precluded Sovexportfilm from reasserting, in the second suit, its claim to have retained monopoly rights under Russian law for the foreign distribution of films produced by Soviet film studios.

[*61]

More importantly, it remains the conclusion of this court, based on documents submitted by plaintiffs' experts, despite any contrary findings of the Paris Appeals Court, that Goskino in fact divested Sovexportfilm of its export monopoly in an order dated March 14, 1988, and that, one year later, a Decree of the U.S.S.R. Council of Ministers pronounced that Goskino

had no rights with respect to the export of films belonging to state studios. Accordingly, on September 19, 1989, three months before the lease agreement was executed, Soyuzmultfilm Studio, still operating as a state enterprise, received a license from the U.S.S.R. Ministry of Foreign Economic Relations to exploit its film library through direct contracts with foreign parties. See *Stephan Supp. Decl.*, Jan. 22, 2001 P 4, and accompanying exs.

Plaintiffs represent that their French attorneys, in what would appear to amount to blatant professional malpractice, failed to present evidence of these acts to the Paris Appeals Court. See Borsten Decl. in Opp'n to Recons. PP 12-16. The absence of such evidence could account for the conclusions reached in the October 2, 2001 decision. In the end, however, there [*62] is no need to speculate about the basis for the Paris Appeals Court's decision. Because the present dispute requires resolution of complex issues of Russian law, this court is not bound to give effect to the legal interpretation of a French court. Moreover, I am especially disinclined to do so when that interpretation is contradicted by an earlier ruling of the same court, upheld by the court of last resort, in a suit involving the same parties and identical legal issues, and, more significantly, when the interpretation appears very obviously mistaken based on the more probative evidence of Russian law furnished to this court by plaintiffs' experts.

(3)

Before reaching the merits of defendants' arguments with regard to the December 18, 2001 decision of the High Arbitrazh Court, one preliminary issue must be addressed: whether the parties stipulated at the June 5, 2001 oral argument to be bound by an immediate ruling, without awaiting the results of potential future appeals in the SMS-FSUESMS litigations then pending before the Russian arbitrazh courts. Plaintiffs argue that all the parties so stipulated, and that defendants' motion for reconsideration is, therefore, barred [*63] insofar as it is predicated on an arbitrazh court decision post-dating the stipulation. See Pls.' Opp'n to Recons. at 2 n.1. Defendants counter that although the parties agreed that this court should resolve the parties' cross-motions without waiting for a final outcome in the Russian litigation, defendants did not intend to waive their right to move for reconsideration in the event that subsequent Russian court decisions materially contradicted this court's conclusions as to matters of Soviet law. See Defs.' Mot. for Recons. at 3.

The issue is complicated somewhat by the fact that at the June 5, 2001 oral argument, the parties did not foresee, or at least did not address, the possibility that the High Arbitrazh Court might eventually intervene in the SMS-initiated suit. The Federal Arbitrazh Court for the

District of Moscow, the appellate court immediately below the High Arbitrazh Court, issued an opinion in that litigation on June 4, 2001. As it turned out, the High Arbitrazh Court ultimately reviewed the June 4 decision, resulting in the December 18, 2001 ruling. In all likelihood, however, the parties were not aware of the June 4 decision at oral argument - it having been [*64] issued only a day earlier. At the very least, the case was not discussed, and it appears that this court was not apprised of the June 4 decision until it was submitted in translation later that month. See Decl. of Anya Zontova.

Instead, at the June 5, 2001 oral argument, the possibility of High Court intervention was raised when plaintiffs represented that the April 20, 2001 decision of the Federal Arbitrazh Court for the District of Moscow - the decision in the FSUESMS-initiated litigation that invalidated SMS's registration - had been stayed and that SMS was in the process of appealing the decision. See Tr. of June 5, 2001 Oral Arg. at 10, 66. As to the April 20 decision, plaintiffs and defendants expressly agreed that this court should not delay its decision in anticipation of future appeals. See *id.* at 65-67.

It is curious that defendants would encourage this court to issue a ruling without waiting for the Russian litigation to reach a definitive conclusion if counsel in fact believed that future decisions from the Russian courts might require that ruling to be vacated. Nonetheless, defendants do not appear to have explicitly disclaimed reliance on future [*65] arbitrazh court decisions. On the contrary, referring to the April 20 decision, defense counsel conceded that "if this decision were appealed to the highest court in Russia ... and it went against us, we're bound by that decision." *Id.* at 62. In any event, I will proceed to consider the merits of defendants' motion with respect to the High Arbitrazh Court's December 18, 2001 decision.

(4)

Defendants argue that the December 18, 2001 decision categorically rejects fundamental conclusions of Russian law underlying this court's August 27, 2001 decision granting summary judgment to the plaintiffs, and, therefore, warrants reconsideration of that opinion. FSUESMS's expert, Professor Maggs, points out that the High Arbitrazh Court is the "court of last resort" in the Russian legal system for commercial disputes. See Maggs 7th Supp. Decl. P 7. Because there is no higher court to which SMS can appeal, defendants view the December 18, 2001 decision as definitive proof that this court was "thoroughly misled by plaintiffs' arguments, premised on certain fundamental conclusions which the High Arbitrazh Court has now refuted." Defs.' Mot. for Recons. at 11. Defendants [*66] argue that the High Court's decision provides "dispositive and unappealable

Russian legal authority" refuting plaintiffs' claim to the copyrights in Soyuzmultfilm Studio's Soviet-era films. Id. As a result, defendants contend, plaintiffs lack standing to pursue their infringement action against Berov, and this court should, accordingly, vacate the previous order and issue a new order, dismissing the plaintiffs' claims with prejudice. Id.

Disputing defendants' contention that the December 18, 2001 decision of the High Arbitrazh Court warrants reconsideration, plaintiffs first argue that this court's August 27, 2001 decision "did not rely on any Russian decisions and found that all prior decisions were irrelevant because none of the decisions had ruled on issues relating to copyright." Pls.' Opp'n to Recons. at 5. Because the December 18, 2001 decision was simply an appeal of earlier Russian decisions that this court previously considered, plaintiffs assert that it is likewise irrelevant and thus, whatever its holding, does not warrant reconsideration of the August 27, 2001 decision. See id.

Although my ruling did not treat any Russian opinion as conclusive or dispositive, [*67] the characterization of the arbitrazh court decisions as "irrelevant" surely overstates the case. At the very least, the December 26, 2000 decision by the Moscow Region Arbitrazh Court expressly ruled on the issue of copyright ownership, by and large adopting plaintiffs' theory of the case. See *Films by Jove*, 154 F. Supp. 2d at 470-71; see also Feb. 22 Dec. at 6 (finding that "copyrights to animated films created by the state enterprise ... passed on to the successor of its rights, the lease enterprise"). The decisions on remand in the SMS-initiated litigation did not expressly reach the question of copyright ownership, but they did address, in general terms, the succession of rights from the state enterprise Soyuzmultfilm Studio - an issue that is hardly irrelevant to the instant dispute, considering that plaintiffs' primary claim to ownership of the Soyuzmultfilm copyrights depends on the premise that the lease enterprise succeeded to the rights of the state enterprise by operation of law upon execution of the lease agreement in 1989.

Defendants first argue that the High Arbitrazh Court's decision negates this court's conclusion that the creation of the lease [*68] enterprise terminated the existence of the state enterprise. See *Films by Jove*, 154 F. Supp. 2d at 476 n.40 (concluding that the state enterprise "ceased to exist in 1989"); id. at 480 (same). According to defendants, the continued existence of the state enterprise after 1989 bolsters the contention that FSUESMS is a continuation of the original Soyuzmultfilm Studio and the true inheritor of whatever property interest the state enterprise had in the copyrights to its films. n27 Moreover, plaintiffs' theory that the

copyrights passed to the lease enterprise by operation of law under Article 498 of the Soviet Civil Code depends on the transformation of the state enterprise into the lease enterprise. Such a transformation could not have occurred, however, if the state enterprise maintained an independent existence after the lease enterprise came into existence.

n27 Defendants assert that the state was and continues to be the owner of the copyrights for the films produced during the Soviet period. FSUESMS claims to possess only a limited right of "operative management" in the films.

[*69]

In its review of the lower courts' reasoning, the High Arbitrazh Court explains: "the Appeals Court made the conclusion that the activity of the state enterprise ... ceased through the conversion into a lease enterprise and that the succession of rights of the lease enterprise based on the lease agreement is not restricted by the term of such agreement." Dec. 18 Dec. at 2. However, in the opinion of the High Court "this conclusion is made as a result of the wrong interpretation of law by the court." Id. Thus, the December 18 decision appears to reject the premise that the state enterprise ceased to exist after the execution of the lease agreement - albeit without offering any explanation of what happened to the state enterprise during the 10-year lease term if it was not, as this court previously held, transformed into the lease enterprise.

Plaintiffs counter that, properly read, the December 18, 2001 opinion does not hold that the state enterprise remained in existence following the formation of the lease enterprise. Their argument apparently rests on a close reading of the excerpts quoted above. The High Arbitrazh Court initially refers to two conclusions of the appeals court [*70] - the first regarding the cessation of the state enterprise's activity, and the second concerning the succession of rights under the lease agreement - but, ultimately, the High Court rejects "this conclusion," in the singular. See Tr. of Apr. 9, 2002 Oral Arg. at 51-52. Thus, Professor Stephan, one of plaintiffs' principal Soviet law experts, contends that "the [High] Arbitrazh Court did not assert ... that [the state enterprise] remained in existence after the creation of [the lease enterprise]." *Stephan Supp. Decl.*, Mar. 21, 2002 P 5. Rather, according to Professor Stephan, the "wrong interpretation of law" to which the court referred concerned only the second conclusion about succession of rights under the lease agreement. n28

n28 Furthermore, Professor Stephan asserts that the High Court's discussion of legal succession has nothing to do with intangible rights that passed by operation of law, but only with tangible rights leased from the state under the agreement with Goskino. However, as will be discussed shortly, the limitation Professor Stephan seeks to impose on the scope of the High Arbitrazh Court's ruling, while of some initial appeal, is ultimately untenable.

[*71]

Considering the challenge inherent in construing opinions translated from Russian, it is difficult to evaluate arguments that rest on such fine parsing of the court's language. However, reading this excerpt in the context of the opinion as a whole - and in conjunction with the lower court decision of January 25, which it reinstated - suggests that the High Arbitrazh Court did intend to rule that the establishment of the lease enterprise Soyuzmultfilm Studio did not terminate the existence of the original state enterprise. As discussed below, the court unequivocally overruled the finding that the state enterprise was converted into the lease enterprise. Although the opinion does not explain the status of the state enterprise during the lease term, the explicit determination that no transformation occurred strongly suggests that, despite any ambiguity in the language, the "wrong interpretation of the law" referenced by the High Arbitrazh Court encompassed the conclusion that the state enterprise ceased to exist upon execution of the lease agreement.

However, given defendants' concession that, during the lease term, the state enterprise had no office, no equipment, no staff, indeed [*72] no tangible property at all, and thus, unsurprisingly conducted no business from 1989 to 1999, the conclusion that the activity of the state enterprise did not cease during this period seems entirely counterfactual. The court may be indicating that the state enterprise continued its legal existence during the lease period, in a state of "suspended animation," as defendants have suggested, see Maggs 2d Supp. Decl. P 11, even if, for all practical purposes, its operations had effectively ceased. On the other hand, plaintiffs' experts contend that it was not possible under Soviet law for an enterprise, having transferred substantially all its assets and personnel, to nevertheless subsist in some latent form for ten years. Professor Stephan explains that "Soviet legislation ... had elaborate formalities and requirements, involving registration, maintenance of a bank account, and tax filings, with which an enterprise had to comply to continue in existence." Supp. Decl. of Paul B. Stephan, June 20, 2001 [hereinafter "Stephan Supp. Decl., June 20, 2001"] P 14. In the same vein,

plaintiffs' expert Dr. Sergei Anatolievich Pashin n29 argues that upon transferring all its personnel, [*73] facilities, inventory, and equipment, pursuant the 1989 lease agreement, the state enterprise lost "all the qualities of the juridical person established by Article 23 of [the 1964 Civil Code]," including ownership of defined property and the ability to acquire rights and fulfill obligations. Decl. of Sergei Anatolievich Pashin [hereinafter "Pashin Decl."] P 35. Moreover, because it was no longer functioning as "an independent commercial entity producing a product or providing services or labor," the state enterprise did not, according to Dr. Pashin, fall within the definition of an enterprise "contained in Part 1, Article 4 of the Law of the RSFSR of December 25, 1990." Id.

n29 Dr. Pashin is a Russian legal scholar and former judge. His affidavit alleging improper conduct in the arbitrazh court proceedings leading up to the December 18 decision will be discussed in detail infra.

Defendants cite no evidence that suggests any practical signs of life on the part of the state enterprise after December [*74] 1989. Instead, they assert that, in 1999, FSUESMS filed an "amended charter" that revived state enterprise in a new organizational form. Defendants' argument for the continued, albeit quiescent, existence of the state enterprise as an independent entity during the lease term might be strengthened, then, if the High Arbitrazh Court's opinion substantiated defendants' claim that, in 1999, FSUESMS simply picked up where the state enterprise had left off ten years earlier. Perhaps recognizing the significance of this issue, plaintiffs' expert Professor Stephan insists that "the [High] Arbitrazh Court did not assert (and no previous court in this litigation, including the January 25, 2001 decision of the Moscow Arbitrazh Court asserted) that [FSUESMS] became [the successor of the state enterprise] as a matter of law." *Stephan Supp. Decl., Mar. 21, 2001* P 5. The December 18, 2001 decision never expressly confirms the alleged continuity between FSUESMS and the original state enterprise Soyuzmultfilm Studio. In fact, the High Arbitrazh Court indicates that the "property complex" originally assigned to the state enterprise was used for the "formation" of FSUESMS, Dec. 18 [*75] Dec. at 3, language fully consistent with plaintiffs' contention, confirmed by the April 3 and June 4 decisions, that FSUESMS was not a successor to the original state enterprise Soyuzmultfilm Studio, but rather a newly-formed entity created to take over the tangible property formerly assigned to Soyuzmultfilm Studio.

Similar language appears initially in the now-reinstated January 25, 2001 decision of the Moscow Region Arbitrazh Court. See Jan. 25 Dec. at 5 (referring to the June 30, 1999 "Instruction" of the Russian government, "which expressed the intention - due to expiration of the term of the lease in December 1999 - to use the leased assets to establish a federal state-owned unitary enterprise") (emphasis added). On the other hand, the January 25, 2001 lower court opinion, expressly reinstated by the High Arbitrazh Court, later refers to the transfer of state-owned assets to FSUESMS as a legitimate decision by the state to "resume the activities of the state enterprise," *id.* at 3, which could be taken to imply a connection between FSUESMS and the original state enterprise. Similarly, the April 3 appeals court ruling, which initially overturned the January 25 decision, [*76] objected to the lower court's "conclusion about the resumption of activity of the state enterprise ... after the lease agreement ended, and returning to it the rights and obligations which have been passed on to the lease enterprise" Apr. 3 Dec. at 5. This characterization of the January 25, 2001 decision, in particular the description of the rights and obligations "returning," would seem to presuppose that the state enterprise from which these rights were initially transferred still existed at the end of the lease term, presumably in the form of FSUESMS, in order to accept the return of its rights.

Defendants have also repeatedly pointed out that FSUESMS's charter indicates that it was founded in 1936, the year that the Soviet government created the original Soyuzmultfilm Studio. See, e.g., 8th Supp. Decl. of Peter B. Maggs [hereinafter "Maggs 8th Supp. Decl."] P 8 (indicating that FSUESMS "remains duly registered as being the same State Enterprise founded in 1936"); Defs.' Reply Mem. for Recons. at 5 ("All attempts by [SMS] to expunge the registration of [FSUESMS] as a 'continuation' of the 1936 state enterprise have failed."); Tr. of Apr. 9, 2002 Oral Arg. at 8-9. Though [*77] such claims in an organization's charter are of course not dispositive of its legal rights, defendants observe that this charter, with its implicit claim of legal succession from the state enterprise, has been consistently, and, after the December 18 decision, conclusively, upheld, at least against allegations that it violates the rights of SMS.

The question of whether the state enterprise legally ceased to exist in 1989 bears on the relevance of an earlier pronouncement from the High Arbitrazh Court previously brought to this court's attention by defendants' expert, Professor Maggs. See Maggs Reply Decl. P 5. In support of his argument that the copyrights to the films produced by the state enterprise Soyuzmultfilm Studio could not have passed to the lease enterprise through an automatic (and undocumented) succession by operation

of law, Professor Maggs cited an Information Letter issued by the High Arbitrazh Court on September 28, 1999. See *id.*; Information Letter of the High Arbitrazh Court, Sept. 28, 1999 [hereinafter "Information Letter"], Ex. 1, attached to Maggs Reply Decl. Information Letters are essentially advisory opinions through which the High Court provides [*78] guidance to lower courts in the arbitrazh system, often by stating the facts and holdings of lower court decisions that were correctly decided, to indicate the High Court's approval of these decisions. See Maggs Reply Decl. P 5. The lower courts are apparently expected to study the Information Letters and to follow the guidance offered or risk reversal. See *id.* According to Professor Maggs, the September 28, 1999 Information Letter, which dealt with the transfer of copyrights upon the reorganization of a film studio, rejected the possibility of automatic legal succession, holding instead that "legal succession of enterprises is determined by the content of the property, rights, and obligations transferred by the statement (balance)." *Id.* P 7 (quoting Information Letter at 2). This language, Professor Maggs claimed, refuted plaintiffs' claim that the lease enterprise succeeded to ownership of the Soyuzmultfilm Studio copyrights by operation of law under Article 498 of the Soviet Civil Code.

The September 28, 1999 Information Letter "would be devastating to plaintiffs case," *Films by Jove*, 154 F. Supp. 2d at 468, if it meant, as Professor Maggs suggested, [*79] that the succession of rights following the reorganization of an enterprise was in all cases limited by the expressly delineated terms of the documents of transfer, since plaintiffs admit that the 1989 lease agreement did not purport to transfer any copyrights to the lease enterprise Soyuzmultfilm Studio. n30 However, in the August 27, 2001 decision, this court concurred with the arguments of plaintiffs' experts distinguishing the scenario discussed in the Information Letter from the type of reorganization that occurred in the case of Soyuzmultfilm Studio.

n30 Of course, plaintiffs argue that the lease agreement could not have transferred the copyrights. They maintain that the copyrights were owned by the studio, and thus the lessor, Goskino, lacked the authority to transfer them.

Put simply, the Information Letter cited by Professor Maggs dealt with a situation in which an independent film studio was "separated" or "spun off" from an existing state enterprise. See Information Letter at 1. Under this form [*80] of reorganization, the original state enterprise "continued to exist, with the exclusion of certain aspects of its activity in connection with the

reorganization." *Id.* at 2. Because the original state enterprise and the "spin-off" were to conduct business simultaneously, "it would obviously be essential that there be a clear agreed-upon delineation of which assets of the parent enterprise were being transferred to the daughter enterprise." Reply Decl. of Michael Newcity [hereinafter "Newcity Reply Decl."] P 16. Moreover, "there was no automatic succession by the daughter enterprise to the ownership of the parent's assets since the parent continued in existence." *Id.* In contrast, the plaintiffs' experts argued, and this court agreed, the state enterprise Soyuzmultfilm Studio did cease to exist and was transformed into the lease entity. There was no need for an asset-by-asset itemization of the property transferred to the lease enterprise because the totality of the assets of the state enterprise passed to its successor, contemplating eventual privatization: all the tangible assets previously assigned to the state enterprise were transferred under the lease for a 10-year period, [*81] while the copyrights passed independently, and without limitation, by operation of law under Article 498 of the Soviet Civil Code.

Insofar as the December 18, 2001 decision suggests that the state enterprise did not cease to exist upon execution of the lease agreement, defendants argue that the grounds this court relied on in distinguishing the Information Letter - and its conclusion that no automatic succession to the copyrights is possible - are no longer viable. According to the defendants, the December 18, 2001 decision "establishes beyond reasonable dispute that the parent (state) enterprise and the daughter (lease) enterprise did in fact exist simultaneously, that the parent did not cease to exist, and that the parent enterprise retained a continuing interest in at least some of its rights and property." Defs.' Reply Mem. for Recons. at 4. In further support of this conclusion, defendants point to Article 37 of the Soviet Law on Enterprises and Entrepreneurial Activity, previously cited by plaintiffs' expert, Professor Stephan. That provision indicates that "an organization shall be considered to be reorganized from the moment it is removed from the lists of state registration. [*82]" Defendants argue that plaintiffs have made no showing that the state enterprise was ever removed from the registration lists prior to the registration of FSUESMS in 1999, which defendants characterize as an amendment to the charter of the original state enterprise Soyuzmultfilm Studio. n31

n31 Plaintiffs have offered no direct response to this reading of Article 37, but it might be noted that it is not at all clear from the face of the provision whether it establishes a necessary or simply a sufficient condition for determining when the "reorganization" of an enterprise has

taken place. It could well be that a de facto reorganization of the state enterprise occurred by virtue of the state enterprise having transferred to the lease enterprise all its assets and personnel and ceased all business activities for a ten-year period. See, e.g., the arguments of Professor Stephan and Dr. Pashin, discussed *supra* (arguing that a state enterprise could not continue to exist under these conditions).

Although [*83] the December 18 decision of the High Arbitrazh Court does apparently instruct that the state enterprise did not cease to exist upon execution of the lease agreement, this continued existence, such as it was, did not implicate the concerns that appear to have motivated the Information Letter: namely, the need to sort out ownership interests between two simultaneously operating business entities. It is beyond dispute that between 1989 and 1999 the state enterprise did not operate a business in any meaningful way. As FSUESMS's counsel indicated at oral argument, during the lease period "all of the personnel, all of the ... facilities, all of the cash flow coming from the Russian or Soviet government [went] to the Lease Enterprise and not to the State Enterprise," Tr. of Apr. 9, 2002 Oral Arg. at 18, and therefore, the state enterprise did not operate in any capacity during the lease term.

Importantly, the inactivity of the state enterprise was not limited to current film production. Defendants have made no showing that during the lease period the supposedly extant state enterprise, or the state bureaucracy that would have been charged with managing its affairs, granted any licenses [*84] or took any other action with respect to the copyrights in Soyuzmultfilm Studio's library of animated films. The advisory opinion defendants cite dealt with a situation in which the original enterprise continued to operate, "with the exclusion of certain aspects of its activity in connection with the reorganization." Information Letter at 2. Here, it is clear that for all practical purposes the 1989 lease agreement terminated all business activities of the state enterprise Soyuzmultfilm Studio, transferring the entirety of the studio's operations to the lease enterprise. Indeed, defendants have not (and cannot) point to a single official or unofficial act undertaken by or on behalf of the state enterprise between 1989 and 1999. See *Films by Jove*, 154 F. Supp. 2d at 480. Thus, the Information Letter remains inapposite to the present case.

The Information Letter aside, defendants argue that the High Arbitrazh Court's December 18 ruling negates the premise that the state enterprise was transformed into the lease enterprise. In the August 27, 2001 decision, this

court found that, pursuant to Article 498 of the 1964 Soviet Civil Code, "the disputed copyrights passed [*85] by operation of law ... from the state entity to the lease entity upon the transformation of the former into the latter." *Films by Jove*, 154 F. Supp. 2d at 472. Some form of "reorganization" is a necessary predicate to the applicability of Article 498, which provides: "in the case of the reorganization of the organization which owns it, the copyright is transferred to its successor in title, and in the case of its liquidation, to the state." Newcity Decl. P 55 (emphasis added). If, however, the lease agreement did not effect a reorganization of the state enterprise - or, more precisely, did not result in the conversion of the original state enterprise into the lease enterprise - the copyrights would not have passed to the lease enterprise by operation of law, at least not under Article 498.

There is no question that the High Arbitrazh Court rejects the conclusion that the lease agreement resulted in the transformation of the state enterprise. Among the findings of the April 3 and June 4 decisions that the High Arbitrazh Court "canceled" at the outset of the December 18 opinion, was the conclusion "about the state enterprise being converted into a lease enterprise. [*86] " Dec. 18 Dec. at 2. As its sole support for this determination, the High Arbitrazh Court adopts a facially plausible, though analytically problematic, reading of the Fundamental Principles on Leasing, Article 16(1) of that statute sets forth procedures for the formation of a lease enterprise:

The labor collective of a State enterprise ... shall have the right to form an organization of lessees as an independent juridical person in order to create a lease enterprise on the basis thereof.

The decision to form an organization of lessees ... shall be taken by the general meeting (or conference) of the labour collective by not less than two thirds of the vote of its members.

The organization of lessees shall jointly with the trade union committee work out a draft contract of lease and send it to the State agency empowered by the owner to lease State enterprises

After signature of the contract, the organization of lessees shall accept the property of the enterprise in the established procedure and shall acquire the status of a lease enterprise.

Fundamental Principles of Legislation of the USSR and Union Republics on the Lease, in Basic Documents [*87] of the Soviet Legal System 290-91 (W.E. Butler,

ed. 1991)[hereinafter "Fundamental Principles"] (emphasis added).

The High Arbitrazh Court interprets Article 16(1) as providing for the transformation of the "organization of lessees" - a group formed by the "labor collective," or employees, of the state enterprise solely for the purpose of signing the lease agreement - rather than the state enterprise itself. See Dec. 18 Dec. at 2. Having concluded that the Fundamental Principles on Leasing does not provide for the conversion of the state enterprise into the lease enterprise, the court must account for Article 16(4) of that statute which, as the court acknowledges, explicitly provides that upon execution of a lease agreement, "a lease enterprise becomes a successor of property rights and obligations of the state enterprise leased by it." *Id.* According to the High Arbitrazh Court, the legal succession provided for in Article 16(4) does not survive the term of the lease.

In support of this result, the Court engages in a form of statutory construction previously employed by defendants' expert Professor Maggs. The Court cites Article 1 of the Fundamental Principles, the "General [*88] Provisions" of the Statute, which establishes that a lease shall be for "fixed term possession and use." *Id.* Professor Maggs had previously suggested that under normal Soviet civil law drafting style, the General Provisions section of a statute should be considered applicable to the subsequent provisions except where it is "clearly negated." Maggs Decl. P 38. The High Court appears to adopt a similar approach here, concluding that "because a lease is a possession and use for a fixed period of a property complex" under the General Provisions of the statute, the succession of rights provided for in a subsequent section is properly understood to be "restricted by the term of the lease agreement." Dec. 18 Dec. at 2.

Proceeding from this interpretation of the Fundamental Principles on Leasing, the High Court goes on to observe that in the case of Soyuzmultfilm Studio, the "property complex" leased to the lease entity in 1989 was never privatized, and, thus, when the lease entity was converted into the joint stock company, SMS, the state retained its ownership interest in the leased property. See *id.* Upon the expiration of the lease in December 1999, the property reverted to its [*89] owner and was properly transferred by the state to FSUESMS. See *id.*

The High Court's conclusions concerning the disposition of the tangible leased property are not inconsistent with the plaintiffs' theory of the case, or with this court's August 27, 2001 order. Neither, for that matter, does the observation that the studio's tangible property remained in state ownership necessarily

contradict the conclusions of the April 3 and June 4 opinions, which the High Arbitrazh Court purports to overturn. In the present proceeding, SMS does not claim any interest in the equipment and facilities leased by the state to its predecessor, the lease enterprise, and, in any event, the ownership of that property is not relevant to the instant dispute over the copyrights in Soyuzmultfilm Studio's Soviet-era films. The High Arbitrazh Court goes on to conclude, however, in somewhat broader language, that "with the expiration of the lease agreement, [SMS] had no further legal grounds for the use of rights and property obtained under this agreement." Dec. 18 Dec. at 3. On this basis, the court reinstates the January 25, 2001 ruling of the Moscow Region Arbitrazh Court that "[SMS] is not the successor [*90] of the state enterprise." *Id.*

Defendants argue that "it is absolutely beyond question that [the December 18, 2001 decision of the High Arbitrazh Court] finds no legal succession from the state enterprise to the lease enterprise." Defs.' Reply Mem. for Recons. at 2. Therefore, "the fundamental premise of plaintiffs' claim to [copyright] ownership, i.e. that the lease enterprise and joint stock company were legal successors to the state enterprise, has been utterly eviscerated by the December 18 Russian Decision." *Id.* Defendants acknowledge, as they must, that the High Arbitrazh Court does not expressly address the question of copyright ownership. However, they contend that the absence of any direct discussion of the copyrights is of no moment. Defendants' expert Professor Maggs, points out that the December 18, 2001 decision was rendered by way of supervisory review, the purpose of which is to correct errors of law in lower court proceedings, not to review findings of fact. Thus, the High Arbitrazh Court confines its discussion to the broader question of legal successorship, without addressing the disposition of any particular property, tangible or intangible. [*91] See Maggs 8th Supp. Decl." P 10.

Professor Maggs construes the High Court's failure to discuss copyrights or other intangible rights that plaintiff's claim passed to the lease enterprise by operation of law as an implicit affirmation of defendants' position that the lease entity never received any property other than the tangible equipment and facilities expressly transferred by the lease agreement. n32 See Maggs 7th Supp. Decl. P 5. The High Arbitrazh Court never affirmatively asserts that the lease enterprise received nothing more than the tangible assets listed on the Soyuzmultfilm Studio balance sheets. However, the explicit conclusion that the state enterprise was not transformed would appear to frustrate any claim that the lease enterprise acquired the studio's copyrights by operation of law. Furthermore, the December 18, 2001 decision does expressly indicate that, at the end of the

lease term, the successor of the lease enterprise, SMS, "had no further legal grounds for the use of rights and property obtained under [the lease] agreement." Dec. 18 Dec. at 3 (emphasis added). Defendants argue that this language is broad enough to negate the conclusion that any intangible [*92] rights that might have been transferred to the lease enterprise were retained after the lease expired in December 1999.

n32 In this vein, Professor Maggs views the December 18 decision as a tacit vindication of his argument in favor of applying the September 28, 1999 Information Letter to the present case. "The reason that the December 18 Decision concentrates on [the rights transferred under the lease agreement]," Professor Maggs explains, "is that it was already perfectly clear from the previously published Information Letter of the High Arbitrazh Court of September 28, 1999 ... that succession to assets of a film studio by a document transferring specific rights other than copyrights did not carry with it succession to the copyrights managed by a film studio." Maggs 8th Supp. Decl. P 3. Of course, the High Court never references the Information Letter in its opinion, and this court has already expressed its continued doubts about the applicability of the case discussed therein to the Soyuzmultfilm Studio lease agreement of 1989. Furthermore, Professor Maggs' way of framing the argument assumes that the copyrights to the Soyuzmultfilm Studio films produced by the state enterprise, like the studio's tangible equipment and facilities, were state-owned and were merely under the "management" of the film studio. This court previously concluded, however, that Article 486 of the Soviet copyright law vested copyright ownership for a film in the studio that produced the film. Because the December 18, 2001 decision does not address the question of initial copyright ownership, that opinion does not on its face provide any reason to reconsider this court's previous conclusion on that issue.

[*93]

At the April 9 oral argument, FSUESMS's counsel supported this interpretation by explaining the December 18, 2001 decision as a ruling on SMS's standing to challenge the registration of FSUESMS: n33

The December 18th decision holds that the joint stock company had no standing to challenge that registration because it has no interest in any property claimed by

[FSUESMS]. Specifically [FSUESMS] is claiming to be a bold successor to the State enterprise in every respect. In fact to be a continuation of the same enterprise.

...

I think if you look at the issue as being a standing issue, it is clear that we are talking not only about intangible rights but of tangible and intangible rights. Any rights that the State Enterprise had to which [FSUESMS] is now claiming title by virtue of its charter. As to any of those rights, the Joint Stock Company has no lawful right or interest. So I think it does pertain both to copyrights and to tangible rights.

Tr. of Apr. 9, 2002 Oral Arg. at 8-9.

n33 Plaintiffs also frame the legal issue before the High Arbitrazh Court as concerning "the standing of the joint stock company to challenge the registration of [FSUESMS]." *Stephan Decl., Mar. 21, 2002 P 5.*

[*94]

Viewed as a ruling on SMS's standing to challenge FSUESMS's registration, the December 18, 2001 decision is more easily understood as addressing all the property and rights (tangible and intangible) to which SMS and FSUESMS might claim ownership.

In effect, the April 3 and June 4 opinions, now overruled by the High Arbitrazh Court, also ruled on SMS's standing to bring a claim against FSUESMS. Those decisions, it might be remembered, held that independent of the tangible property that passed under the agreement with Goskino, the lease enterprise, and by extension SMS, were successors to other "rights and obligations" of the former state enterprise. Moreover, this successorship survived the termination of the lease. The April 3 and June 4 decisions ultimately held, however, that SMS could not assert a claim against FSUESMS - not because SMS had no rights, but rather because FSUESMS's charter, as those courts interpreted it, did not stipulate that it was a successor to the rights SMS validly claimed.

The December 18, 2001 decision of the High Arbitrazh Court reaches the same result - that SMS has no standing to challenge FSUESMS's registration - but overturns the reasoning of the [*95] April 3 and June 4 decisions. According to the High Court, SMS lacks standing to assert a claim against FSUESMS because SMS is not a legal successor to the original state enterprise. More importantly for the purposes of the present dispute, the court holds that SMS is not a successor because, to the extent that its predecessor, the

lease enterprise, succeeded to the rights of the state enterprise, "this succession of rights [was] restricted by the term of the lease agreement." Dec. 18 Dec. at 2. According to the defendants, just as the lease entity could not transfer to SMS the "rights and obligations" to which it was arguably a temporary successor under the Fundamental Principles on Leasing, it similarly lacked the authority to grant a copyright license to FBJ. n34

n34 It should be emphasized that defendants argue that the lease enterprise was never a successor to the copyrights for any of the films produced by the state enterprise, even during the lease term. See Maggs 7th Supp. Decl. P 5 ("The decision of the High Arbitrazh Court did not need to discuss copyrights, because they never passed to the lessee organization at all."). Defendants believe that the lease agreement defines the totality of the property rights the lease enterprise acquired.

[*96]

Plaintiffs' expert Professor Stephan contends that the defendants read too much into the December 18, 2001 decision, which, he maintains, has no bearing on the disposition of Soyuzmultfilm Studio's copyrights. Professor Stephan reminds the court that Soviet law recognized three types of property that a lease enterprise could possess: 1) property acquired by lease; 2) property accumulated by the enterprise as the result of its economic activity; and 3) property acquired through legal succession. See *Stephan Supp. Decl., Mar. 21, 2002 P 7*. He argues that in ruling that SMS is not a "successor" to the original state enterprise Soyuzmultfilm Studio, the December 18, 2001 opinion was concerned solely with the tangible property that passed under the lease agreement, i.e. property of type 1. This argument picks up on the High Court's conclusion that, upon expiration of the lease, SMS "had no further legal grounds for the use of rights and property obtained under this agreement," referring to the 1989 lease agreement. Dec. 18 Dec. at 3 (emphasis added); see also *id.* at 2 (overruling the conclusion that "the succession of rights of the lease enterprise based on the [*97] lease agreement is not restricted by the term of the agreement") (emphasis added). Plaintiffs have argued that the lease agreement itself did not, indeed could not, have transferred the copyrights to the lease enterprise because the lessor, Goskino, lacked the authority to transfer them. See, e.g., *Stephan Supp. Decl., Mar. 22, 2002 P 8*. Thus, according to Professor Stephan, the December 18 opinion, which, by its terms, reaches a conclusion about rights and property transferred under

the agreement, says nothing about non-leased property, including intellectual property, that the lease enterprise might have acquired through its own economic activity during the lease term or, more importantly, by operation of law under Article 498 of the Soviet copyright law. See *id.* PP 7-8.

As Professor Stephan would have it, the High Arbitrazh Court's ruling is, therefore, limited to the narrow proposition that "the ownership of balance sheet property rights transferred from [the state enterprise] to [the lease enterprise] pursuant to the lease [was] limited by the terms of the lease and that [the lease enterprise] did not receive any additional rights [*98] in this property as a result of legal succession." *Id.* P 7. Thus, he concludes that "the December 18, 2001 decision ... does not state that with the termination of the lease either [the lease enterprise] or [SMS] ceased to own any rights, but only that the property obtained by [the lease enterprise] had to be surrendered to the Russian state, which in turn had the right to transfer that property to [FSUESMS]." *Id.* P 9.

In reaching a conclusion concerning the succession of rights acquired "under the lease agreement," the High Arbitrazh Court does appear to pass over the lower courts' distinction between property transferred for a limited term under the lease, and other rights that passed independently through legal succession. The deficiency in Professor Stephan's argument, however, is that it is ultimately unresponsive to the unequivocal conclusion of the December 18, 2001 High Court decision that, pursuant to the Fundamental Principles on Leasing, the lease agreement did not effect the conversion of the state enterprise into the lease enterprise. Even if Professor Stephan were correct that the court only referred to tangible property [*99] when it concluded that "with the expiration of the lease agreement, the plaintiff had no further legal grounds for the use of rights and property obtained under [the lease] agreement," Dec. 18 Dec. at 3, the fact that the state enterprise was not converted into the lease entity would still undermine plaintiffs' central theory of the case: that the transformation of the state enterprise into the lease enterprise triggered the transfer of the copyrights to the lease entity by operation of law. In other words, even if the High Court argument Professor Stephan addresses were focused on what he terms "type 1 property," the conclusion that the state enterprise was not transformed (a conclusion Professor Stephan sidesteps) would nevertheless mean that no category 2 property, i.e., no copyrights, passed under Article 498 of the 1964 Soviet Civil Code.

Moreover, Professor Stephan's interpretation of the December 18, 2001 decision ascribes too narrow a scope to the ruling. If, as Professor Stephan contends, the High Court simply wished to assert that the lease enterprise

had no rights in the tangible leased property after the termination of the lease, there would have been no reason to [*100] grant the public prosecutor's request for an appeal and certainly no reason to overrule the April 3 and June 4 decisions. Those cases acknowledged that the tangible property transferred by the lease agreement had to be returned upon the expiration of the lease term, and, moreover, that this property was properly transferred to FSUESMS. The significance of the April 3 and June 4 decisions lay in the conclusion that the maturation of the state's reversion interest in the tangible leased property did not mean that other "rights and interests" of the state enterprise to which the lease enterprise succeeded by operation of law, including presumably copyrights, would likewise revert. "When the property is returned after the agreement ended," the April 3 decision explained, there is no automatic return of the succession of rights and obligations." Apr. 3 Dec. at 5. Although copyrights are not specifically mentioned, it is clear that the "rights and obligations" to which the court refers here signifies intangible assets - or, at the very least, comprises property other than the tangible equipment and facilities that passed under the lease. To interpret "succession of rights and obligations" [*101] as referring only to the tangible property would be to attribute to the April 3 and June 4 courts the nonsensical argument that the return of the leased property upon expiration of the lease did not result in the automatic return of "rights and obligations" concerning the very same leased property.

Without explanation, Professor Stephan's reading of the High Arbitrazh Court's decision ascribes a new meaning to "succession of property rights and obligations" provided for in Article 16(4) of the Fundamental Principles on Leasing - one that relates to tangible rather than intangible property. Plaintiffs have previously asserted that the provision of the Fundamental Principles on Leasing that makes the lease entity the legal successor to the "property rights and obligations" of the state entity, Article 16(4), reflected the Soviet legislature's recognition that property other than the tangible property specified in the lease could pass to the lease enterprise through legal succession, in this case under Article 498 of the Soviet copyright law. See *Stephan Decl.*, Jan. 22, 2001 P 7; *Newcity Decl.* PP 59-60. Indeed, it would seem to be crucial to plaintiffs' theory of the [*102] case that this "succession of property rights and obligations" be treated as separate from the tangible property, which all the parties agree, and all the relevant Russian decisions conclude, had to be, and was in fact, returned to the state upon the expiration of the lease agreement. Now, in order to dismiss the significance of the December 18 decision, Professor Stephan argues that the High Court's reasoning limiting the "succession of rights" provided for in Article

16(4) to the term of the lease was intended to suggest only that the rights of the lease enterprise in the facilities and equipment transferred by lease could not be extended beyond the lease term through legal succession. As discussed above, the April 3 and June 4 decisions never suggested that Article 16(4) permitted what would amount to a perpetual extension of the lease through legal succession. Instead these courts held that notwithstanding the termination of the lease, and the concomitant return of the leased property to the state, the other rights and obligations, presumably including copyrights along with perhaps other intangible forms of property, did not likewise revert.

In the final analysis, plaintiffs' [*103] efforts to dismiss the December 18, 2001 decision of the High Arbitrazh Court as irrelevant are unavailing. The opinion does not address the question of copyright ownership, but it does expressly, if somewhat unconvincingly, reject the premise upon which plaintiffs base their claim to the Soyuzmultfilm copyrights, viz. that the state enterprise was converted into the lease enterprise in 1989 and thereafter ceased to exist, triggering the transfer of the studio's copyrights to the lease enterprise by operation of law. Plaintiffs' narrower reading of the opinion as relating only to tangible property that passed under the lease fails to account for how the copyrights could have passed to the lease enterprise by operation of law, if, as the High Court explicitly held, the lease agreement did not effect the transformation of the state enterprise into the lease enterprise.

However, the analysis of defendants' motion for reconsideration does not end here. It is apparent that the High Arbitrazh Court's December 18, 2001 ruling undermines certain operative premises supporting my previous decision. However, it still remains to be seen whether I am required to defer to that court's interpretation, [*104] or whether my decision may stand in spite of what appears to be contrary authority from the Russian courts.

(5)

Under *Rule 44.1 of the Federal Rules of Civil Procedure*, the determination of a foreign country's law is an issue of law to be resolved by considering "any relevant material or source." To the extent it addresses issues relevant to the present dispute, the High Arbitrazh Court's December 18, 2001 decision clearly constitutes relevant (indeed, presumptively highly probative) evidence of the foreign law upon which this case turns. See Michael D. Ramsey, Escaping "International Comity", 83 *Iowa L. Rev.* 893, 905 (1998) ("Foreign court rulings on the content of foreign law are ordinarily the best proof of that content.").

Defendants contend that this court should defer to the December 18 decision of the High Arbitrazh Court pursuant to principles of international comity. See Defs.' Mot. for Recons. at 13. "American courts will normally accord considerable deference to foreign adjudications as a matter of comity." *Diorinou v. Mezitis*, 237 F.3d 133, 142 (2d Cir. 2001). In some cases, this deference leads a domestic court to adopt [*105] a foreign tribunal's previous resolution of a particular legal or factual issue, thus precluding parties to a foreign litigation from rearguing, in United States courts, matters previously resolved in the foreign forum. See, e.g., *Alfadda v. Fenn*, 966 F. Supp. 1317, 1330-32 (S.D.N.Y. 1997) (precluding plaintiffs from relitigating issues previously resolved by a French court), aff'd 159 F.3d 41 (2d Cir. 1998); *Gordon & Breach Sci. Publishers*, 905 F. Supp. at 178-79 ("United States courts ... may choose to give res judicata effect to foreign judgments on the basis of comity."). Here, however, it is clear that the High Arbitrazh Court's findings can have no preclusive effect against FBJ, which was not a party to the Russian litigation. See *Gordon & Breach Sci. Publishers*, 905 F. Supp. at 179 n.9 ("When parties currently before an American court were not parties to the foreign action, the *Due Process Clause* prohibits application of the rule of collateral estoppel against them.").

Thus, this court is faced with a conflict of laws problem, viz. how much weight to afford the High Arbitrazh Court's conclusions, in [*106] assessing the parties' rights, under Russian law, to the Soyuzmultfilm Studio copyrights. n35 This determination may likewise implicate comity concerns. However, deference to a foreign adjudication as a matter of comity is by no means automatic. See *Cunard Steamship Co. AB v. Salen Reefer Servs.*, 773 F.2d 452, 457 (2d Cir. 1985) (quoting *Somportex Ltd. v. Philadelphia Chewing Gum Corp.*, 453 F.2d 435 (3d Cir. 1971) ("Although more than mere courtesy and accommodation, comity does not achieve the force of an imperative or obligation.")). In particular, such deference is appropriate only if it "does not prejudice the rights of United States citizens or violate domestic public policy." *Victrix S.S. Co. v. Salen Dry Cargo A.B.*, 825 F.2d 709, 713 (2d Cir. 1987); accord *Cunard*, 773 F.2d at 457; *Bridgeway Corp. v. Citibank*, 45 F. Supp. 2d 276, 285 (S.D.N.Y. 1999), aff'd 201 F.3d 134 (2d Cir. 2000).

n35 It should be emphasized that the validity of FBJ's copyright license - the central issue in the present case - was not before the High Arbitrazh Court, and the court expressed no opinion on that question. However, as detailed above, the High Arbitrazh Court did conclude that the lease agreement did not effect a

transformation of the state enterprise, and that the succession of rights contemplated by the Fundamental Principles on Leasing did not extend beyond the term of the lease. If credited, both conclusions bear on the lease enterprise's ownership interest in the Soyuzmultfilm Studio copyrights, and thus are relevant to determining the validity of the copyright license FBJ acquired from the lease entity in 1992.

[*107]

Therefore, although we begin with a presumption that the High Arbitrazh Court's December 18, 2001 decision constitutes probative evidence of the matters of Soviet law addressed therein, this court is not under any absolute obligation to follow the lead of the Russian courts in construing Soviet law. Cf. *Karaha Bodas Co., L.L.C. v. Pertamina*, 313 F.3d 70, 92 (2d Cir. 2002) ("[A] foreign sovereign's views regarding its own laws merit - although they do not command - some degree of deference.") (emphasis added). Deference to the High Court's legal conclusions, without analysis of their persuasiveness or consideration of other factors that might counsel against following that court's interpretation of Russian law, is not required. n36

n36 In this respect, this court's task differs from that of a federal court sitting in diversity, which must determine and apply state law in conformity with the precedent of the courts of the relevant state.

Plaintiffs point to several factors that weigh against [*108] deference to the High Arbitrazh Court's December 18, 2001 decision. First, Russia's civilian legal system does not follow the principle of stare decisis, and therefore, the precedential import of the December 18, 2001 decision as a generally applicable articulation of Soviet law is questionable. More importantly, plaintiffs have submitted a declaration from a Russian jurist casting doubt on the independence of the Russian judiciary in general, and, in particular, challenging the legal accuracy and ultimately the integrity of the High Arbitrazh Court's December 18, 2001 ruling.

(a) The Weight of Judicial Precedent in a Civil Law System

Plaintiffs assert that even if the December 18, 2001 does address issues relevant to the resolution of the present dispute, this court can nonetheless "ignore all Russian decisions and rule on Russian law as set forth by experts." See Pls.' Opp'n to Recons. at 9 n.3. Plaintiffs

note that the Russian courts function in a civil law system in which judicial decisions do not establish binding precedent and, in general, are not regarded as controlling sources of law. See generally John Henry Merryman, *The Civil Law Tradition* 22 [*109] (2d ed. 1985) ("The familiar common law doctrine of stare decisis - i.e. the power and obligation of courts to base decisions on prior decisions - is ... rejected by the civil law tradition. Judicial decisions are not law."). Professor Stephan explains that, unlike their common law counterparts, the Russian courts

lack the power to interpret law; they can only apply the law as they find it to particular facts. As they apply the law in a particular case, the courts might express inferences as to what the law of Russia might be, but these inferences are not considered to be especially meaningful. Expressions of the intention of the legislature and scholarly consensus have much greater weight as a source of understanding the law than do any opinions offered by courts in the context of particular disputes.

Stephan Decl., Jan. 22, 2001 P 12. Accordingly, Professor Stephan argues, "materials emanating from the Arbitrazh system should be given only such weight as their persuasive force merits, and should not be regarded as authoritative pronouncements." *Stephan Reply Decl. P 14.* n37

n37 Professor Stephan further contends that the authority of the Russian arbitrazh court's pronouncements is especially diminished in the particular circumstances of the present case, insofar as the arbitrazh courts are a part of the legal system of the present Russian Federation and thus are not "creatures of or representatives of Soviet, as opposed to Russian law." *Stephan Decl., Jan. 22, 2001 P 12.* The Fundamental Principles on Leasing, the legislation that plaintiffs argue provided for the transformation of state enterprise into lease enterprises, was a Perestroika-era enactment of the Soviet government. See *id.* Professor Stephan contends that no interpretation of Soviet law during the 1989-1990 period by a contemporary Russian court would be considered an authoritative interpretation by Russian legal thinkers. See *id.* These observations might be understood to blunt any comity concerns, since, in effect, the sovereign that enacted the laws this court is now called upon to interpret, the Soviet Union, is not the same sovereign whose courts have subsequently weighed in on the matter. In the

end, however, Professor Stephan concedes that the Russian courts are "certainly in a position to offer an informed opinion on matters of Soviet law." *Id.*

[*110]

Plaintiffs point to two authorities in support of the proposition that the relative unimportance of judicial decisions as a source of law in Russia's civil law system makes it appropriate for this court to ignore all the Russian court decisions that emerged from the litigation between SMS and FSUESMS and to make an independent assessment of Soviet law. First, plaintiffs cite a section of Professor Nimmer's treatise on copyright law. The relevant section discusses the ramifications of the Second Circuit's decision in *Itar-Tass Russian News Agency v. Russian Kurier, Inc.*, 153 F.3d 82 (2d Cir. 1998). In that case, the Second Circuit established, as a matter of federal common law, a choice of law rule for determining copyright ownership. Noting that copyright is a form of property, the court borrowed the position of the Second Restatement on Conflict of Laws that the interest of parties in property is determined by the law of the state with "the most significant relationship" to the property and the parties. *Id.* at 90 (citing Restatement (Second) of *Conflict of Laws* § 222).

Applying this doctrine to the case before it, which involved a dispute over [*111] Russian newspaper articles written by Russian nationals and first published in Russia, the court concluded that "Russian law is the appropriate source of law to determine issues of ownership of rights." *Id.* After summarizing the Second Circuit's legal ruling, Professor Nimmer notes that among the questions the courts will face in applying the holding is the issue presently before this court: namely, "how to go about determining foreign law":

Should it be to determine the law as propounded by the experts? Should it be, as in diversity cases, an attempt to divine what the highest court of the affected jurisdiction would determine it to be? Indeed, if Russian courts subsequently weigh in on the question at issue before the Second Circuit, should a district court in New York follow *Itar-Tass* as a matter of stare decisis or defer to what those home courts have determined in the interim? If so, is it only a decision of the highest court that deserves to be followed? Or should even that court's pronouncements not be followed, to the extent that they come from a civil law system, which lacks a system of stare decisis?

4 Melville B. Nimmer & David Nimmer, [*112] Nimmer on Copyright [hereinafter "Nimmer"] §

17.05[B][4]. After laying out the issues, Professor Nimmer concludes that "all of these matters remain unaddressed in the [*Itar-Tass*] ruling, and hence [are] unanswered at present." *Id.* Thus, despite plaintiffs' repeated citations to Professor Nimmer's treatise, see, e.g., Pls.' Supp. Reply Mem. of Law at 3; Tr. of June 5, 2001 Oral Arg. at 52; Pls.' Mem. in Opp'n to Recons. at 9 n.3, the treatise at best opines that when future courts face the task of applying the holding in *Itar-Tass*, the relative weight to be assigned to Russian judicial interpretations of Russian law is an open question that will require the creation of additional federal common law to fill the interstices of the Copyright Act. See Nimmer § 17.05[B][4].

Plaintiffs locate a somewhat more decisive authority in the Second Circuit's decision in *Itar-Tass*. Although, as Professor Nimmer rightly points out, the Second Circuit did not provide any explicit guidance on the question of how to determine the content of foreign law, Professor Stephan contends that the Second Circuit's analysis in *Itar-Tass* implicitly affirms his position [*113] concerning the limited significance of arbitrazh court decisions as evidence of Soviet law. Specifically, he notes that in determining the parties' rights under Russian law, the Second Circuit summarily disregarded the decision of a Russian arbitrazh court that "seemed to offer an unpersuasive interpretation of Russian copyright law." Stephan Reply Decl. P 14 (citing *Itar-Tass*, 153 F.3d at 93 n.14). Similarly, Professor Stephan argues, this court is free to disregard unpersuasive legal conclusions from the arbitrazh court decisions in the litigation between SMS and FSUESMS. See *Id.*

Professor Stephan is correct that in *Itar-Tass*, the Second Circuit unhesitatingly rejected the legal conclusion of a lower arbitrazh court. Having relegated its discussion of that case to a footnote, the court evidently did not regard the decision as particularly significant, even though the arbitrazh court addressed the precise issue of Russian law that was before the Second Circuit. n38 However, the arbitrazh court decision that the Second Circuit dismissed in *Itar-Tass* can be distinguished from the December 18, 2001 decision upon which defendants rely in at least two respects: [*114] 1) the ruling was rendered by one of the lower courts in the arbitrazh system; and 2) it does not appear to have involved any of the parties to the *Itar-Tass* case.

n38 In fairness, it appears that the arbitrazh court opinion rejected by the Second Circuit was not simply unpersuasive but patently contrary to an express provision of Russian statutory law. The arbitrazh court concluded that, based on Article 14(2) of the Russian Copyright Law, a

newspaper owns exclusive rights in the articles it publishes. However, according to the Second Circuit, Article 14(4) of the same statute, a provision the arbitrazh court apparently ignored, expressly renders Article 14(2) inapplicable to newspapers. See *Itar-Tass*, 153 F.3d at 93 n.14.

On the face of it, one would expect that a decision from the High Arbitrazh Court would be afforded greater weight as evidence of the content of Soviet law than the decision of a lower court, in light of the High Court's status as the court of last resort for commercial [*115] disputes in the Russian Federation. Moreover, unlike the other courts in the arbitrazh system, the High Arbitrazh Court evidently does have some limited authority to interpret Russian law. Article 10(1) of the Federal Constitutional Law on Arbitrazh Courts authorizes the High Arbitrazh Court to "study and generalize ... the application by arbitrazh courts of the laws and other normative legal acts [and] regulations ... [in] the sphere of entrepreneurial and other economic activity." *Stephan Decl.*, Jan. 22, 2001 P 13. To this end, plenary sessions of the High Arbitrazh Court issue advisory opinions, known as Information Letters, which are addressed to the lower courts as guiding explanations of the law. n39

n39 Professors Maggs and Stephan debate the extent to which such High Court guidance can be considered a conclusive articulation of the law. Professor Maggs asserts that the lower arbitrazh courts are expected to study and follow the Information Letters or risk reversal. See Maggs Reply Decl. P 5. Professor Stephan seems to believe that the legal interpretations the High Court sets forth in its Information Letters are of more modest precedential significance, providing "guidance as to what [the High Arbitrazh Court] believes the law to be." Stephan Reply Decl. P 14. On the other hand, Professor Stephan does not dispute that lower courts are expected to follow that guidance.

[*116]

Professor Stephan points out that the December 18 decision was rendered by the Presidium of the High Arbitrazh court, which is a lower committee of the court. See *Stephan Supp. Decl.*, Mar. 21, 2002 P 3. According to Professor Stephan, although the High Arbitrazh Court is the court of last resort for commercial disputes in the Russian Federation, and thus its rulings in individual cases cannot be appealed by the parties, statements the Presidium makes in decisions resolving particular cases

nevertheless have no precedential weight. Such statements are not intended "to send a broader message to other courts, but only to guide the lower courts dealing with the particular dispute." *Id.* P 3. This is evidenced, according to Professor Stephan, by the fact that arbitrazh court opinions do not cite or otherwise refer to other court decisions, even those rendered by the High Arbitrazh Court itself, with the exception of earlier decisions from the same proceeding. See *id.*

Professor Maggs counters that High Arbitrazh Court opinions are published on the court's internet site, and that lower courts are in fact expected to study these decisions, risking reversal [*117] should they fail to follow the legal principles enunciated in them. See Maggs 7th Supp. Decl. P 4. Professor Stephan claims that in many parts of Russia, lower courts lack practicable access to the internet, and, therefore, cannot study the High Court's internet site. See *Stephan Suppl. Decl.* March 21, 2002 P 4. Professor Maggs responds that internet access, at least in the Moscow courts, is more widespread than Professor Stephan believes. See Maggs 8th Supp. Decl. P 7. In addition, according to Professor Maggs, lawyers arguing cases before the arbitrazh courts routinely cite relevant High Arbitrazh Court rulings. See *id.*

This court is in no position to resolve these factual disputes concerning arbitrazh practice. It might be noted, however, that even if Professor Maggs is correct, his arguments at best suggest that the High Arbitrazh Court's December 18, 2001 decision might be "brought to the attention" of a Russian court hearing a case involving similar issues. *Id.* P 8. Professor Maggs has not established, or even directly asserted, that the decision would be in any sense formally binding as *stare decisis*. And this is precisely plaintiffs' [*118] point: that Russian judicial decisions resolving individual cases, even those rendered by the High Arbitrazh Court, lack the precedential authority of analogous decisions in common law regimes, and therefore, the High Arbitrazh Court's December 18, 2001 decision is entitled to less weight than defendants' arguments suggest. See Defs.' Mot. for Recons. at 11 (arguing that the High Arbitrazh Court decision constitutes "dispositive" Russian legal authority).

In the end, however, the undeniably diminished significance of judicial opinions in the civil law system of the Russian Federation is not, in itself, a sufficient ground for disregarding the legal conclusions articulated in the December 18, 2001 decision of the High Arbitrazh Court. Even if the High Court's decision is not a conclusive statement of the matters of Soviet law upon which this case turns, it nevertheless undoubtedly constitutes relevant evidence under *Rule 44.1*. See, e.g., *Carlisle Ventures, Inc. v. Banco Espanol De Credito*,

S.A., 176 F.3d 601, 608 (2d Cir. 1999) (citing a case from the Supreme Court of Spain, a civil law jurisdiction, as relevant proof of Spanish law). n40 In the absence of countervailing [*119] evidence or other circumstances weighing against deference to the High Arbitrazh Court's conclusions, there would be no reason for this court to deviate from the December 18, 2001 decision with respect to the effect of the lease agreement and the succession of rights from the state enterprise to the lease enterprise and SMS.

n40 In fact, while explicitly cautioning that Russian judicial opinions are not entitled to the same weight as similar decisions in common law jurisdictions, plaintiffs' expert Professor Newcity cited two arbitrazh court decisions to support the argument that Soviet law vested the ownership of motion picture copyrights in the studio that produced the film. See Newcity Decl. P 40. This court considered these cases, as well as the December 26, 2000 decision of the Moscow Region Arbitrazh Court in the SMS-FSUESMS litigation, as relevant, though not conclusive, support of that proposition. See *Films by Jove*, 154 F. Supp. 2d at 452.

Indeed, at first blush, the case for adhering [*120] to the High Arbitrazh Court's conclusions would appear to be particularly strong here, insofar as the decision addresses the very leasing transaction that FBJ claims transferred the Soyuzmultfilm Studio copyrights to the lease enterprise, FBJ's licensor. Although the High Court does not specifically consider, much less determine, the disposition of Soyuzmultfilm Studio's copyrights, the December 18, 2001 decision does reach conclusions that would appear irreconcilable with plaintiffs' argument - and this court's determination - that the lease enterprise succeeded to ownership of Soyuzmultfilm Studio's copyrights by operation of law, under Article 498, upon the reorganization of the state enterprise Soyuzmultfilm Studio into the lease enterprise bearing the same name. Most fundamentally, the High Arbitrazh Court suggests that no such reorganization took place.

In the ordinary case, this court would be inclined to adopt the High Arbitrazh Court's positions with respect to issues of Soviet law. However, this is no ordinary case. First, there are strong reasons to question the accuracy of the December 18, 2001 decision on its face. Furthermore, plaintiffs have presented specific evidence [*121] indicating that the decision was, in fact, animated by coordinated efforts on the part of the Russian government to re-nationalize studio copyrights, recapturing for the state property rights that were

acquired nearly a decade earlier by an American investor.

(b) The Persuasiveness of the High Arbitrazh Court's Decision

This court has already expressed skepticism about various aspects of the High Arbitrazh Court's December 18, 2001 decision. The conclusion that the state enterprise Soyuzmultfilm Studio was not transformed into the lease enterprise would seem to run counter to the apparent purpose of the Fundamental Principles on Leasing, which was to effect the incremental privatization of the Soviet economy. See Stephan Decl. P 7 ("The lease enterprise was intended to serve as a bridge to privatization and the creation of a fully private corporation."). At the very least, the High Court's suggestion that the "activity of the state enterprise" was not terminated by virtue of the lease agreement, n41 is plainly contrary to the facts and the reality on the ground. Neither defendants nor the High Arbitrazh Court have offered any evidence to contradict this court's previous [*122] observation that "the state enterprise did not undertake a single act, either official or unofficial, to which anyone can point between 1989 and 1999." *Films by Jove*, 154 F. Supp. 2d at 480. Defendants characterize FSUESMS's registration in 1999 as an "amendment" to the 1936 charter of the state enterprise Soyuzmultfilm Studio - an amendment that was supposedly necessitated by the adoption of the Civil Code of the Russian Federation, First Part, in 1994. See Maggs Decl. P 11; Defs.' Reply Mem. for Recons. at 5. The suggestion is that FSUESMS and the state enterprise Soyuzmultfilm Studio are one and the same, the latter having reemerged from hibernation as a continuation of the former. However, defendants do not explain why the 1999 "amendment" to the charter of the state enterprise - if it truly were an amendment - did not occur until five years after the enactment of the law that supposedly created the necessity for the change. See *Films by Jove*, 154 F. Supp. 2d at 467. Neither do they adequately reconcile the alleged existence of the state enterprise during (and after) the lease term with an admitted decade of complete inactivity.

n41 See Dec. 18 Dec. at 2 (rejecting the lower court's "conclusion that the activity of the state enterprise ... ceased through the conversion into a lease enterprise" as "a wrong interpretation of law").

[*123]

This court's misgivings are reinforced and amplified in a declaration submitted on behalf of plaintiffs by Dr.

Sergei Anatolevich Pashin, a Russian lawyer, law professor and former judge, with impressive expert credentials. Most notably, Dr. Pashin participated in drafting the currently effective Federal Constitutional Law "On Arbitrazh Courts in the Russian Federation," and the Arbitrazh Procedure Code, as well as other laws concerning Russian judicial practice. See Pashin Decl. PP 1-25. In a declaration presented in conjunction with Dr. Pashin's affidavit, Edmund Beard, a professor of political science at the University of Massachusetts Boston, who has worked with Dr. Pashin, describes him as "a man of enormous stature, accomplishment and credibility," and as "perhaps the most distinguished figure in the area of judicial reform in Russia today." Decl. of Professor Edmond Beard at 1.

Dr. Pashin dismisses as "unprecedented" and "illogical" the High Arbitrazh Court's conclusion that the Soyuzmultfilm Studio lease agreement did not transform the state enterprise into the lease enterprise. Pashin Decl. P 30. According to Dr. Pashin, an analysis of the Fundamental Principles [*124] on Leasing, passed in November 1989, "leaves no room for doubt that: First, the State enterprise [Soyuzmultfilm Studio] was transformed into the lease enterprise ... according to the wishes of the general conference on signing a lease contract [and] secondly, at that moment the State enterprise lost its quality as a juridical person and ceased to exist." *Id.* PP 32-33.

The High Arbitrazh Court's analysis would mean that the state enterprise somehow continued to exist throughout the lease term, despite having no office, no personnel, no assets, and conducting no business operations or any other activities during this period. Such a result is nonsensical according to Dr. Pashin and does not accord with Soviet or Russian law. As a practical matter, following the execution of the lease agreement, the state enterprise was no longer functioning as "an independent commercial entity producing a product or providing services or labor," and therefore, it did not "fall within the definition of an enterprise contained in Part 1, Article 4 of the Law [on Enterprises and Entrepreneurship] of the RSFSR of December 25, 1990." *Id.* P 35. Similarly, after the lease agreement entered [*125] into effect, the state enterprise "lost all the qualities of the juridical person established by Article 23 of the Civil Code of the Russian Federation of 1964," including ownership of defined property and the ability to acquire rights and fulfill obligations. *Id.* See also *Stephan Supp. Decl.*, June 20, 2001 P 14 (explaining that "Soviet legislation ... had elaborate formalities and requirements, involving registration, maintenance of a bank account, and tax filings, with which an enterprise had to comply to continue in existence"); *Pls.' Supp. Reply Mem. of Law* at 4 (asserting that none of the

"formalities and requirements" to which Professor Stephan refers were undertaken on behalf of the state enterprise Soyuzmultfilm Studio during the lease term).

The High Arbitrazh Court's contrary explanation that the 1989 lease agreement transformed the "organization of lessees" into a lease enterprise -- the apparent implication of which is that the state enterprise somehow survived as an independent legal entity -- is for Dr. Pashin a specious argument that could only have been motivated by the court's desire to manufacture an outcome perceived to be favorable to the financial [*126] interests of the Russian state. Dr. Pashin accuses the High Arbitrazh Court of deliberately distorting the law in an effort

to make it appear as if the state enterprise did not transform into the lease enterprise. The statement that an organization of lessees created by a labor collective, not a state enterprise, is converted into a lease enterprise might be interpreted to mean that the involvement of an organization of lessees somehow affects the undeniable fact that the state enterprise transformed into the lease enterprise.

An organization of lessees is merely the workers of the lease enterprise. Said parties execute documents authorizing the transformation. It is merely a ministerial middle step in the transformation from the state enterprise to lease enterprise. It does not affect the fact that the state enterprise transformed into the lease enterprise and the state enterprise ceased to exist thereafter. Tens of thousands of state enterprises have been transformed in the same manner.

The High Arbitrazh Court used an unprecedented and illogical judicial construction because the lease enterprise could not have inherited any assets from the organization of lessees [*127] because it was created by the collective for the sole purpose of signing the agreement with Goskino. All rights that the lease enterprise inherited would have been inherited from the state enterprise.

Pashin Decl. P 28-30 (emphasis added).

Dr. Pashin further argues that "the position of the High Arbitrazh Court in its December 18, 2001 decision appears to be inconsistent with the position that the courts of general jurisdiction as well as the High Arbitrazh Court itself have previously taken about related questions." *Id.* P 36. In this connection, Dr. Pashin first cites a series of decisions from the courts of general jurisdiction, involving complaints of employees of a state-owned enterprise who were fired at the time a lease agreement was executed by the labor collective of

the state enterprise. In those cases, the courts, according to Dr. Pashin, recognized that the lease agreement had the effect of transforming the state enterprise into a lease enterprise. As a result, the former employees of the state enterprise had a right to continue labor relations with the lease enterprise, which was the successor to their previous employer. See *id.*

Even more [*128] on point, and thus more perplexing, is a decision of the High Arbitrazh Court of January 23, 2001, which, according to Dr. Pashin, stated unequivocally that the state enterprise for design, remodeling and construction, known as Mosoblremstroy, was transformed into a lease enterprise, called PPRS Mosoblremstroy. See *id.* P 37; Jan. 23, 2001 Dec. [hereinafter "Jan. 23 Dec."], attached to Jan. 9, 2003 letter of Kenneth Feinswog. In that case, Dr. Pashin explains, "the law was implemented according to its actual meaning. The court stated that the state enterprise, not the organization of lessees, was transformed into a lease enterprise." *Id.* Finding no legal explanation for the directly contrary position the High Arbitrazh Court took in interpreting the effect of the Soyuzmultfilm Studio lease agreement, Dr. Pashin concludes that "there was a distortion in this case of the legal framework in favor of the interests of the organs of executive power. In Russia this phenomenon is called 'an ordered judicial decision.'" *Id.* P 38. Thus, Dr. Pashin questions not simply the legal accuracy, but, ultimately, the legality of the December 18, 2001 decision. The [*129] High Court's suggestion that the lease agreement did not effect a reorganization of the state enterprise, supported solely by "illogical and entangled judicial constructions," resulted, according to Dr. Pashin, "in a decision which allowed the organs of the executive branch to interpret this decision in any manner they deemed fit[,] which would be for the purpose of protecting what is specifically understood to be 'state interest.'" *Id.* P 39.

FSUESMS's expert, Professor Maggs, responds that Dr. Pashin completely misrepresents the High Arbitrazh Court's argument concerning the alleged transformation of the state enterprise Soyuzmultfilm Studio under the 1989 lease agreement. Contrary to Dr. Pashin's allegation that the court issued an outcome-driven opinion, which employed an illogical judicial construct, Professor Maggs argues that the court's conclusion was compelled by Article 16(1) of the Fundamental Principles on Leasing. See Maggs 9th Supp. Decl. PP 55-56. This provision, Professor Maggs points out, was directly relied on by the High Arbitrazh Court but is not discussed in Dr. Pashin's assessment of the December 18, 2001 decision. See *Id.* P 55. [*130] In particular, Article 16(1) indicates that "after the signature of the [lease agreement], the organization of lessees shall accept the property of the enterprise ... and shall acquire the status

of a leased enterprise." Fundamental Principles at 291 (emphasis added). Thus, Professor Maggs contends, the plain language of the statute, and not any ulterior motive, dictated the High Court's conclusion that the "organization of lessees," rather than the state enterprise, is transformed into the lease enterprise. It follows, according to Professor Maggs, that upon its transformation into the lease enterprise, the organization of lessees, having been formed solely to sign the lease agreement with Goskino, could only bring with it the tangible property that it acquired under that lease, not any other property that might have belonged to the state enterprise. See *id.* P 6.

As for the prior judicial opinions that Dr. Pashin claims contradict the December 18, 2001 decision of the High Arbitrazh Court, Professor Maggs contends that they are distinguishable. The first set of cases concerned labor law, the principles of which, Professor Maggs claims, are "quite different" under Russian [*131] law than the principles of civil law. *Id.* P 57. In particular, Russian labor law is designed to protect the job rights of workers. Thus, "if the result of a lease of all or even part of an enterprise is to transfer a job position from a state enterprise to a lessee enterprise, it may be quite appropriate under labor law to give an employee of a state enterprise the right to continue its employment with a lessee enterprise. Otherwise, by use of leasing, an enterprise could rid itself of obligations under labor law to provide employees with job security." *Id.*

To distinguish the January 23, 2001 decision of the High Arbitrazh Court - the decision in which the High Arbitrazh Court explicitly stated that a state enterprise was transformed into a lease enterprise - Professor Maggs points out that in that case, in contrast to the Soyuzmultfilm Studio lease agreement, the lessee enterprise eventually purchased the leased property. It is not immediately apparent why this distinction should produce two apparently contradictory outcomes. Nothing in the January 23, 2001 decision suggests that the transformation of the state enterprise Mosoblremstroy depended on the purchase of the leased [*132] property. In fact, the High Arbitrazh Court indicates that the transformation was effected on February 3, 1990, while the agreement to purchase the leased property was not executed until the following year on December 29, 1991. See Jan. 23 Dec. at 1, 3.

In suggesting that the lease entity's eventual purchase of leased property is a determinative factor, Professor Maggs may be alluding to previous submissions in which he argued that Article 10 of Fundamental Principles on Leasing provided for two distinct types of leasing arrangements: those where the contract of lease did and those where it did not provide for an eventual buy-out of the leased property. See

Maggs. Decl. P 61; Maggs Reply Decl. P 32. The thrust of this argument appears to be that, notwithstanding the execution of a lease agreement, a state enterprise is not actually privatized (i.e. it is not "transformed" into the lease enterprise) until this buyout right, if it exists at all, is exercised. n42 The Soyuzmultfilm lease agreement of December 1989 expressly provided that the leased property would remain in state ownership. The state never consented to a transfer of title to this property, and, in fact, demanded [*133] return of the property upon expiration of the lease agreement in December 1999. Therefore, the argument would go, there was no transformation under the Soyuzmultfilm Studio lease agreement, even though other leasing arrangements, such as the one discussed in the January 23, 2001 High Arbitrazh Court decision, that did allow the lease enterprise to purchase the leased property, could ultimately result in the transformation of the state enterprise into the lease enterprise.

n42 Professor Maggs understanding does find some apparent support in the January 25, 2001 decision of the Moscow Region Arbitrazh Court, which the High Arbitrazh Court reinstated. In rejecting SMS's claim to be the successor to the original state enterprise Soyuzmultfilm Studio, the court explained:

Transformation provides, above all, for ownership of the assets of the reorganized enterprise to be transferred to the newly established enterprise. That never took place because, following the establishment of the leaseholding enterprise, the physical assets of the state-owned enterprise ... remained state property and remain such to this day.

Jan. 25 Dec. at 3.

[*134]

Whatever the argument's merit, Professor Maggs does not expressly reiterate his previous position regarding Article 10 of the Fundamental Principles in his response to Dr. Pashin. Instead, after noting that, in the Mosoblremstory case, the lease enterprise eventually purchased the leased property, Professor Maggs posits that "if Plaintiffs' claim were correct that [the] transformation of a state enterprise into a leased enterprise gave the lessee permanent title to property obtained in connection with the lease, then it would have been unnecessary for the lessee enterprise to have bought the property." Maggs 9th Supp. Decl. P 58.

Professor Maggs mischaracterizes plaintiffs' arguments about the effect of the lease agreement, betraying, in the process, fundamental flaws in defendants' theory of the case. Plaintiffs have never maintained that the transformation of the state enterprise into the lease enterprise resulted in the permanent transfer of all property obtained "in connection with the lease." In fact, plaintiffs do not argue that the lease enterprise retained an interest in any of the property leased from the Russian state, following the termination of the lease agreement. [*135] Plaintiffs do claim ownership in the copyrights for the Soviet-era films produced by Soyuzmultfilm Studio. However, the record clearly establishes that these copyrights were never state property, but rather were owned by the studio itself. This conclusion is supported, if not compelled, by the plain language of Article 486 of the 1964 Soviet Civil Code, and the analogous provision of the 1928 code, both of which vest copyright ownership in a film in the enterprise that produced the film. Moreover, the Russian scholarly authority presented to this court unanimously confirms the proposition that "the state enterprise responsible for producing a film owns the copyright to that film." n43 *Films by Jove*, 154 F. Supp. 2d at 451-52.

n43 Supplementing the litany of expert commentary on the issue of copyright ownership presented in conjunction with plaintiffs' cross-motion for summary judgment, plaintiffs have submitted an article by Professor V.A. Dozortsev, which appeared in the Journal of the High Arbitrazh Court in 2000. Professor Dozortsev confirms that Article 486 of the Soviet Civil Code vested ownership of motion picture copyrights in the studio that produced the film, rather than the state, even though, at the time this provision was enacted - and for many years thereafter - all Russian film studios were state-owned. See V.A. Dozortsev, Right to the Film as a Complex Multi-Layered Work, Journal of the High Arbitrazh Court of the Russian Federation, No. 3 (2000), Ex. 1, attached to Supp. Decl. of Michael Newcity, Apr. 8, 2002 [hereinafter "Supp. Newcity Decl."]. The publication of Professor Dozortsev's article in the High Arbitrazh Court's Journal, while not necessarily indicating the High Court's endorsement of his argument, is nonetheless an indication of his stature as a legal scholar. See Supp. Newcity Decl. P 5. Indeed, Professor Maggs himself acknowledges that Professor Dozortsev is a "distinguished expert." Maggs Reply Decl. P 18.

[*136]

During nearly all of the Soviet period, Soyuzmultfilm Studio's copyright ownership rights, though legally recognized, were of little or no practical commercial value to the studio, as a result of the Soviet state's monopoly over domestic and foreign film distribution. See Paul B. Stephan, *Toward a Positive Theory of Privatization - Lessons from Soviet-Type Economies*, 16 *Int'l Rev. L. & Econ.* 173, 187 (1996) ("Under Soviet-type systems intellectual property rights had no value, because the state monopolized production."). However, during Perestroika, these commercial rights were reintegrated into the underlying copyright "clearing up any ambiguity that may have existed about the division of what American jurists would think of as copyright ownership." *Id.* at 480. Crucially, nothing in the High Arbitrazh Court's decision suggests otherwise. The December 18, 2001 decision simply does not address the question of copyright ownership, and thus provides no reason to question the well-supported premise that motion picture copyrights were studio property. n44

n44 Professor Maggs resorts to arguments already rejected in this court's August 27, 2001 decision in an effort to refute this premise. In particular, Professor Maggs devotes a significant portion of his Ninth Supplemental Declaration to reasserting his contention that the Russian verb "prinadlezhat," which appears in Article 486 of the Soviet Civil Code, is properly translated as "belongs to" rather than "owns." See Maggs 9th Supp. Decl. PP 14-19. The supposed implication of this translation is that the studio's rights under 486 are limited to "operative management" of the copyrights, which were in fact owned by the state. In the absence of any new evidence supporting this argument, however, its mere reiteration cannot support a motion for reconsideration. See *PAB Aviation, Inc.*, 2000 U.S. Dist. LEXIS 12201, 2000 WL 1240196, at *1 (noting that a party moving for reconsideration may not "merely reiterate or repackage an argument previously rejected by the court"); *Resource N.E. of Long Island, Inc.*, 80 F. Supp. 2d at 64 ("[A motion for reconsideration] is not a vehicle to reargue those issues already considered when a party does not like the way the original motion was resolved.").

[*137]

Because the Soviet state did not own Soyuzmultfilm Studio's copyrights in the first instance, those rights could not properly have been the subject of the 1989

lease agreement, and the fact that the agreement did not transfer title to any property leased from the state does not mean that copyright ownership did not pass to the lease enterprise. As Professor Stephan explained:

Article 4 of the Fundamentals states that the right to lease property belongs to the owner of that property. The lease between Goskino and [the lease enterprise Soyuzmultfilm Studio] therefore covered only property under the management of Goskino, and had no bearing on those interests belonging to [the state enterprise Soyuzmultfilm Studio] in its own right. The land occupied by the studio and other material assets (such as film stock) was under the operative management of the higher bureaucratic agency Goskino. [The lease enterprise Soyuzmultfilm Studio] obtained only such an interest in those assets as Goskino conveyed by lease. But as to other rights - the copyrights, contracts with skilled employees of the studio, the know-how on which a creative enterprise rests, past awards and the reputation [*138] that went with them, indeed almost everything that would make a film studio valuable - [the lease enterprise Soyuzmultfilm Studio] obtained ownership by stepping into the shoes of its predecessor pursuant to Article 498 of the Civil Code, not by lease based on the Fundamentals.

Stephan Decl., Jan. 22, 2001 P 8.

Defendants, of course, argue that the contention that the lease enterprise "stepped into the shoes" of the state enterprise begs the question insofar as plaintiffs assume that the lease agreement effected the transformation of the state enterprise Soyuzmultfilm Studio into the lease enterprise, laying the necessary predicate for a transfer of the studio's copyrights by operation of law under Article 498. Because the High Arbitrazh Court concluded that the lease enterprise did not transform the state enterprise, defendants contend, the lease enterprise was not a successor under Article 498, and therefore would not have acquired the Soyuzmultfilm Studio copyrights even if the state enterprise studio had been the initial copyright owner under Soviet law.

The logic of the High Arbitrazh Court's conclusion that the state enterprise Soyuzmultfilm Studio was [*139] not transformed into the lease enterprise would reduce the 1989 agreement to an ordinary leasing transacting that did nothing more than effect a temporary transfer of certain state property. It is clear, however, that the statute - the Fundamental Principles on Leasing - was intended to accomplish more than "the transfer of state property to lease enterprises ... for a limited term." *Stephan Decl., Jan. 22, 2001 P 6.* Indeed, the principle purpose of the legislation was to encourage and facilitate the eventual conversion of state enterprises into

privately-owned companies. To this end, "the Fundamentals permitted a complete transformation of a state enterprise into a lease enterprise, resulting in the disappearance of the state enterprise and the emergence of the lease enterprise as its legal successor." *Id.* P 7. As Professor Stephan notes, the political and legal authorities who first introduced and defended the leasing legislation attested to its broader purpose:

In a 1988 speech to the Central Committee of the Communist Party of the Soviet Union, General Secretary Gorbachev spoke of the need to extend leasing relations to "all branches of the [*140] national economy," explaining that these relations "ensure the real economic independence and responsibility of workers and labor collectives, as well as a direct connection between people's earnings and the final result of their work There ensued what U.S.S.R. Prime Minister Ryzhkov described as "a massive conversion to leasing."

Id. P 6 (emphasis added).

In the case of Soyuzmultfilm Studio, Goskino's order calling for the creation of the lease enterprise indicated that the studio was to be "transferred ... to lease." Ex. E, attached to Decl. of Sergey Skuliabin (emphasis added). Similarly, many of the lower arbitrazh court opinions in the record expressly conclude that the execution of the lease agreement in 1989 effected a transformation of the state enterprise into the lease enterprise. See Dec. 26 Dec. at 7 ("When leasing out an enterprise (state property) took place ... this action shall constitute an actual reorganization of a state enterprise."); Feb. 22 Dec. at 6 ("At the time the enterprise switched to lease relations, a factual reorganization of the enterprise occurred."); Apr. 3 Dec. at 4-5 ("[Upon] signing the lease agreement [*141] ... the activity of the state enterprise ceases through the conversion resulting from the formation of a lease enterprise on the basis of a state enterprise."). Indeed, as Dr. Pashin points out, the High Arbitrazh Court has itself indicated, in the Mosoblremstroy case, that a lease agreement affected the conversion of a state enterprise into the lease enterprise. See Jan. 23 Dec. at 3 ("According to the decision of the Executive Committee of the Moscow Region of the Soviet of People's Deputies ... State Enterprise [Mosoblremstroy] was transformed into the lease enterprise [PPRCO Mosoblremstroy].") (emphasis added).

Defendants make much of the absence of any official document or decree conclusively indicating that the state enterprise Soyuzmultfilm was transformed into the lease enterprise and ceased to exist thereafter. See Defs.' Mem. for Recons. at 6 n.4 ("Plaintiffs simply argue that the Lease Enterprise magically "stepped into

the shoes" of the state entity without so much as a note to the file."). However, Professor Stephan credibly explains that this apparent lack of formality was simply a function of the chaotic political climate in which the leasing legislation [*142] was enacted:

The 1989 transformation of [the state enterprise Soyuzmultfilm Studio] into [the lease enterprise] occurred in a time of great legal flux and uncertainty, and the governing laws did not specify in any detail a precise legal form that was required to achieve a desired legal result. Lease enterprises were largely an unprecedented legal form prior to the enactment of the 1989 Fundamental Principles on Leasing The Fundamental Principles themselves did not specify any forms for achieving the transformation, leaving it to the parties to fall back on the general provisions of the Civil Code as well as relevant administrative regulations. Because the Civil Code had not been drafted with this transformation in mind, it operated more by way of negative pregnant than prescriptively. The Code, along with other Soviet legislation, provided for an elaborate process, involving multiple administrative determinations and significant documentation, to achieve the liquidation of an enterprise. Soviet legislation also had elaborate formalities and requirements, involving registration, maintenance of a bank account, and tax filings, with which an enterprise had to comply to [*143] stay in existence. But the transformation of a state enterprise into a lease enterprise entailed neither the liquidation nor the continuation of the former state enterprise. As a result, there was no official document stating that this transformation had occurred.

Rather a process of exclusion of other alternatives produced this legal result. There would be a lease agreement between the new entity and the old entity's superior agency (in [this] case, Goskino ...), and no official act liquidating the old entity The absence of any liquidation, accompanied by proof that the old entity had ceased to exist ... established the process of elimination that a transformation had occurred. Although it might have been desirable for the 1989 Fundamentals to provide for more formality on this point, the fact remains that this legislation did not. A recent book by Judge S.A. Gerasimenko, a member of the High Arbitrazh Court, discusses this point in some detail. See S.A. Gerasimenko, *Rental as an Organizational-Legal Form of Enterprise* 39-41 (2001).

Stephan Supp. Decl., June 20, 2001 P 14.

Professor Stephan's description of the background of the leasing legislation [*144] establishes the incompatibility of the High Arbitrazh Court's

conclusions with the purpose of the Fundamental Principles on Leasing. The ultimate flaw in defendants' position, however, is that if the High Arbitrazh Court's December 18, 2001 decision leads to the conclusion that the lease enterprise did not succeed to ownership of Soyuzmultfilm Studio's copyrights - a conclusion that is never explicitly reached in the High Court's decision, but which implicitly follows from the determination that the state enterprise was not transformed into the lease enterprise - then there would appear to have been no entity actually authorized to grant a copyright license for Soyuzmultfilm Studio films during the decade-long term of the lease agreement. Defendants have suggested a would-be licensee should, or could, somehow have sought to obtain a license from the state. See, e.g., Tr. of Apr. 9, 2002 Oral Arg. at 19. But the uncontroverted evidence presented by Professor Stephan indicates that by March 1989 the Soviet government had disclaimed whatever monopoly interests it had formerly exercised over the foreign distribution of films produced by Soviet film studios. On September 19, 1989, the [*145] state enterprise Soyuzmultfilm Studio obtained a license from the Ministry of Foreign Economic Relations authorizing the studio to exploit its film library in the international market. Thus, as of that date, a foreign investor seeking to purchase Soyuzmultfilm Studio's films could only do so through direct transactions with the studio. In 1992, an investor, such as FBJ, could not, as a practical matter, have acquired a copyright license from the state enterprise. That entity had ceased all operations in December 1989, having transferred all its assets and personnel to the lease enterprise. Indeed, if defendants' analysis of this issue is correct, then there was no place for FBJ, or any investor seeking foreign distribution rights for Soyuzmultfilm Studio films, to go to obtain a license.

In sum, the High Arbitrazh Court is plainly incorrect in concluding that the establishment of the lease enterprise did not result in the transformation of the original state enterprise into the lease entity - a position that is inconsistent with the court's prior treatment of similar transactions. Accordingly, just as a court in a civil law jurisdiction is not strictly bound by prior judicial decisions, [*146] this court, in seeking to discern Russian law, is free to apply its best understanding of the relevant statutes - especially when this understanding is supported by the majority of the lower arbitrazh court decisions, by the overwhelming scholarly consensus that motion picture copyrights belong to the studio and not the state, and by the undeniable fact that the state enterprise could not be found and did not exist in any practical sense after the execution of the lease agreement, in December 1989.

If the High Arbitrazh Court's clearly erroneous decision impacted only the rights of Russian parties, this court might, nevertheless, defer to the High Court's arbitrary departure from what appears to have been the consensus understanding of the leasing legislation. However, insofar as this ruling affects the rights of a non-Russian party, FBJ, which invested over three million dollars in acquiring a copyright license for Soyuzmultfilm Studio's films, and developing the commercial value of these copyrights, the sudden shift in Russian law effected by the High Arbitrazh Court's decision, which operates to deprive an American corporation of its substantial investment, is simply unconscionable. [*147] For these reasons, this court will not defer to the conclusions articulated in High Arbitrazh Court's December 18, 2001 decision.

(c) Allegations of Judicial Misconduct

As an explanation for the High Arbitrazh Court's abrupt turnabout concerning the role of lease enterprises in the privatization of Russia's formerly socialist economic system, plaintiffs have advanced allegations of pervasive corruption in the Russian courts, and in particular of bias against private enterprises engaged in disputes with the state concerning property ownership. See Feb. 8, 2002 Letter of Julian Lowenfeld at 2 (alleging a "significant decrease" in the "independence of the Russian judiciary" under President Putin, "in connection with a creeping nationalization of ... the media, including providers of entertainment"). Beyond these general allegations, plaintiffs have submitted documents from the High Arbitrazh Court's case file, which they claim demonstrate improper governmental influence over the arbitrazh court proceedings in the FSUESMS-SMS litigations, in violation of various provisions of the Arbitrazh Procedural Code and the Constitution of the Russian Federation. According to plaintiffs, [*148] this alleged illicit conduct unfairly biased the High Arbitrazh Court against SMS.

The resulting decision, plaintiffs maintain, amounts to a thinly-veiled attempt to re-nationalize Soyuzmultfilm Studio's copyrights to the detriment of FBJ, a foreign investor that expended millions of dollars to develop the commercial value of the studio's library of animated films. FBJ acted in reliance on the copyright license it acquired from the lease enterprise Soyuzmultfilm Studio, without any remotely contemporaneous objection from the Russian government or from any other party. Plaintiffs assert that, under these circumstances, for this court to reverse the previous ruling in deference to the December 18, 2001 decision would "harm a United States corporation [FBJ] in violation of Constitutional safeguards such as due process, [and the prohibitions against] ex post facto

laws and the unlawful taking of personal property." Pls.' Opp'n to Recons. at 9.

Dr. Pashin, who has done considerable work in the area of judicial reform in the Russian Federation, provides some illuminating and troubling commentary on the present state of the Russian judiciary. According to Dr. Pashin, although Russian [*149] constitutional and statutory law provide that "in consideration of economic disputes, no priority should be given to the state and those in possession of its property," n45 this principle is not widely adhered to in practice. *Id.* P 51-52. For one thing, Dr. Pashin explains, the judges and staff of the current arbitrazh courts are for the most part former employees of the Soviet "State Arbitrazh," a system that was designed to resolve disputes between socialist enterprises administratively rather than judicially, "with an implied objective of [protecting] the Soviet state's interests." *Id.* P 53. Until August 7, 2000, long after the fall of the communist regime, the civil procedure code under which the arbitrazh courts operated recognized "the protection 'of the Socialist economic system and Socialist property'" as a guiding principle in civil legal proceedings, and "judges were instructed to resolve civil cases based on law in accordance with the socialist sense of justice." *Id.* P 55 (internal quotation marks omitted). Thus, Dr. Pashin contends, the current generation of Russian judges, having been "raised in the spirit of Soviet [*150] law," perpetuate a pro-state approach "simply by inertia." *Id.* P 55.

n45 The equality of state and private entities before the arbitrazh courts is set forth in a variety of provisions, which Dr. Pashin delineates:

Pursuant to Part 2, Article 8 of the Russian Federation Constitution, "Russian Federation equally recognizes and protects private, state, municipal, and other property forms." The Federal Constitutional Law of April 28, 1995 "On Arbitrazh Courts in the Russian Federation" among the fundamental principles of the arbitrazh court activities names "the equality of organizations and citizens before the law and court" (Article 6.) "Justice in the arbitrazh court is implemented on the basis of equality of organizations before the law and the court regardless of the location, subordination, and property form," says Article 6 of the current Arbitrazh Procedural Code of the Russian Federation.

Item 1 of the Decree of the Plenary Session of the Higher Arbitrazh Court of the Russian Federation

No. 8 of February 25, 1998 "On some issues of the practice of resolution of disputes concerned with protection of property rights and other material rights," says that "the rights of ownership, use and disposal of their property [by] all property owners are subject to court protection in equal manner."

Id. P 51.

[*151]

In addition to the lingering ideological influence of Russia's recent communist past, Dr. Pashin cites other factors that he believes further bias the arbitrazh courts against private property holders involved in disputes with the state. The arbitrazh courts have been consistently underfunded and are dependent on budget allotments from the Russian Federation Government. According to Dr. Pashin, this state of affairs has the effect of seriously compromising the independence of the judiciary:

Court chairmen, including the heads of the Supreme Court of the Russian Federation and the [High] Arbitrazh Court, are interested in maintaining friendly relations with the authorities, especially because the judges and the staff ... while being on a relatively modest salary, receive far greater benefits (such as company cars, summer houses, low cost vacations at resorts, service in Kremlin hospitals and clinics for themselves and their families, clothing at special tailor's shops, passes to the exclusive cafeteria on Ilyinka street, and apartments) from the hands of the officials of the Russian Federation President's Administration.

Id. P 57. The court chairmen, [*152] in turn, use their power over case assignments, promotions, and the distribution of various benefits among lower court judges to influences these judges' rulings. n46 See *id.* P 58.

n46 Dr. Pashin's general assessment of the Russian judiciary finds some support in a recent report from the United States Department of State. The report characterizes the judiciary as "weak" and "subject to political influence." While acknowledging some recent reforms (mostly in the area of criminal procedure), the report concludes that Russian "judges are only beginning to assert their constitutionally mandated independence from other branches of government." United States Department of State, Bureau of European and Eurasian Affairs, Background Note: Russia (October 2002), available at, <http://www.state.gov/r/pa/ei/bgn/3138pf.htm>.

Although this report is admittedly brief and conclusory in its description of Russia's judicial system, the willingness of the State Department to state publicly such conclusions is not without significance.

[*153]

Evidence undermining "the essential fairness of [a] judicial system" can, in a sufficiently extreme case, justify non-recognition of a judgment or decision rendered by the courts of that system. Restatement (Third) of *Foreign Relations Law* § 482, cmt. b (1987); see also *Diorinou*, 237 F.3d at 143 ("Deference as a matter of comity often entails consideration of the fairness of a foreign adjudicating system."); *Bridgeway Corp. v. Citibank*, 201 F.3d 134 (2d Cir. 2000) (upholding a district court's refusal to enforce a money judgment from the courts of Liberia, on the ground that the judgment was rendered by a system that did not provide impartial tribunals or procedures compatible with the requirements of due process). In this regard, "evidence that the judiciary was dominated by the political branches of government ... would support a conclusion that the legal system was one whose judgments are not entitled to recognition." *Restatement (Third) of Foreign Relations Law* § 482, cmt. b (1987).

Although the alleged flaws in the Russian judicial system are troublesome, the present record does not support a sweeping condemnation of Russia's judiciary. [*154] n47 Cf. *Monegasque De Reassurances S.A.M. v. Nak Naftogaz*, 311 F.3d 488, 499 (2d Cir. 2002) (noting the Second Circuit's "reluctance to find foreign courts 'corrupt' or 'biased'"). However, in this case, it is unnecessary to reach any broad conclusions as to the impartiality and essential fairness of the arbitrazh system as a whole. Plaintiffs have produced specific evidence - in the form of documents obtained from the High Arbitrazh Court's file - of improprieties in the specific arbitrazh court proceedings leading up to the December 18, 2001 decision. See Restatement (Third) of *Foreign Relations Law* § 482, cmt. b (1987) ("[A] particular case may disclose such defects as to make the particular judgment not entitled to recognition."); *Diorinou*, 237 F.3d at 143 (stating that "a case-specific inquiry is sometimes appropriate" when determining the propriety of deference to a foreign court ruling). The relevant documents were discovered by Larissa N. Riabchenko, an attorney who has represented SMS in the arbitrazh courts since 1999. See Decl. of Larissa N. Riabchenko [hereinafter "Riabchenko Decl."] P 2.

n47 Three judges in the Southern District of New York have recently considered, and rejected,

allegations of bias and inadequate procedures in the Russian arbitrazh courts, in the context of determining whether Russia constitutes an "adequate forum" under a forum non conveniens analysis. See *Base Metal Trading SA v. Russian Aluminum*, 2003 U.S. Dist. LEXIS 4767, F. Supp. 2d , 2003 WL 1618088 (S.D.N.Y. Mar. 27, 2003); *Pavlov v. The Bank of N.Y. Co., Inc.*, 135 F. Supp. 2d 426 (S.D.N.Y. 2001); *Parex Bank v. Russian Savings Bank*, 116 F. Supp. 2d 415 (S.D.N.Y. 2000). In *Pavlov* and *Parex Bank*, the plaintiffs' arguments against transfer rested on general, largely conclusory, accusations of corruption. See *Pavlov*, 135 F. Supp. 2d at 434 ("It would be inappropriate ... to pass judgment on the [Russian judicial system], particularly on the basis of the sort of broad brush, hearsay accounts upon which plaintiffs' attack rests."); *Parex Bank*, 116 F. Supp. 2d at 423 (concluding that a foreign forum cannot be found to be inadequate on the basis of "general allegations of judicial corruption," and that plaintiff failed to prove its claims that the Russian courts provide inadequate procedural safeguards and are biased against foreign litigants).

The plaintiffs in *Base Metal Trading* appear to have offered a somewhat more particularized showing of official corruption. That suit was brought in response to the alleged illegal takeover of two Russian companies, facilitated, in part, by sham bankruptcy proceedings in the arbitrazh courts. Among their evidentiary submissions, the plaintiffs produced an affidavit from a former Russian government official who claims to have exerted improper influence over bankruptcy proceedings at the behest of a corrupt Russian governor. See *id.* at *19. Ultimately, the court concluded that the plaintiffs had not shown indicia of corruption in the particular bankruptcy proceedings that precipitated their suit, see *id.* at *20-*21, and that the record did not justify "a mass indictment of the Russian judicial system." *Id.* at *24.

[*155]

In an affidavit submitted in conjunction with Dr. Pashin's Declaration, Ms. Riabchenko explains that, contrary to Russian law, SMS never received a copy of the complaint that the Deputy Prosecutor General of the Russian Federation filed with the High Arbitrazh Court on October 15, 2001, initiating the appeal that led to the December 18, 2001 decision. Therefore, she went to the court to review the complaint. While Ms. Riabchenko was perusing the court file, two documents caught her

attention, see *id.* PP 3-4, both of which have been presented to this court in English translation. The first of these documents appears to be the minutes of a "consultation meeting" of the Deputy Chairman of the Russian Federation, held on March 31, 2001. See Ex. 2, attached to Riabchenko Decl. The agenda of the meeting concerned the "creation of necessary conditions for the activity of the Federal State Unitarian Enterprise [Soyuzmultfilm Studio]." *Id.* at 2. In addition to the director of the third-party plaintiff here, FSUESMS, an array of officials from the executive branch of the Russian Federation government attended the meeting, including representatives of: 1) the Ministry of Culture; [*156] 2) the Ministry of Property; 3) the Prosecutor General's office; 4) the Russian agency for Patents and Trademarks; 5) the Department of the State Regulation and Development of Cinematography; 6) the Staff of the Russian Federation Government; and 7) the Administration of the President of the Russian Federation. Controversially, at least according to the plaintiffs, a representative of the High Arbitrazh Court, E. A. Lyubichev, n48 was also present at the meeting. See *id.* at 1-2.

n48 The minutes identify E.A. Lyubichev as the "Senior Consultant of the Administration of Generalization of Judicial Practice of the High Arbitrazh Court of the Russian Federation." *Id.* at 1.

The attendees appear to have concluded that "as a result of the uncoordinated actions of the interested state organizations the measures necessary for the preservation of the state interests in the process of the settlement of the situation surrounding [Soyuzmultfilm Studio] have not been undertaken." *Id.* at 2. To remedy this situation, [*157] the parties agreed to undertake various efforts on behalf of FSUESMS, with the stated purpose of protecting "state interests." *Id.* The Ministry of Culture, for instance, was to develop a long-term plan for the development of FSUESMS, and, together with the Ministry of Property, to look into procuring additional premises for the activity of the Unitarian Enterprise. It was also decided that the Russian Agency for Patents would take steps to "secure" FSUESMS's control over the use of the Soyuzmultfilm Studio trademark within Russia and would assist in the protection of the trademark internationally. The Ministry of Culture was assigned the task of studying the lawfulness of the use of Soyuzmultfilm Studio films by Russian television stations. *Id.* at 2-3.

In the context of these various strategies to aid FSUESMS, the participants at the consultation meeting

also addressed the litigation between SMS and FSUESMS, which was at that time ongoing before the arbitrazh courts. To this end, the Ministry of Property was instructed to secure the participation of its representative in the legal proceedings "on a permanent basis." *Id.* at 3. It was decided that the Prosecutor General [*158] would be asked "to take necessary measures to supervise over court acts which have become legally effective, which were made under the appeals by [FSUESMS] and the Moscow Region Prosecutor's Office, for the purpose of verifying their lawfulness and groundedness." *Id.* Plaintiffs' allegations of misconduct focus primarily on item 7 on the agenda, which expressed the intent to "ask the High Arbitrazh Court of the Russian Federation (V. A. Yakovlev) n49 to carry out, in procedural forms established by federal law, the court supervision over the cases re: the appeals of [FSUESMS], the Moscow Region Prosecutor's Office, and [SMS], which are being considered in the Arbitrazh courts of Moscow and the Moscow Region." *Id.*

n49 V.A. Yakovlev is the Chairman of the High Arbitrazh Court of the Russian Federation.

Plaintiffs' expert Dr. Pashin argues that the participation of a High Arbitrazh Court representative at the March 31, 2001 consultation meeting constituted an unlawful form of collaboration between the [*159] executive and judicial branches of the Russian government in violation of the principle of division of authorities set forth in Article 10 of the Russian Federation Constitution. n50 See Pashin Decl. P 43. As Dr. Pashin sees it, the minutes uncovered by Ms. Riabchenko demonstrate that "a representative of the highest level body of judicial power [participated] in a consultation meeting organized at the highest level body of executive power, in order to discuss, in particular, the specific issues being considered by arbitrazh courts in a specific case and to develop recommendations to the General Prosecutor's Office of the Russian Federation and the High Arbitrazh Court." *Id.* For Dr. Pashin, this participation in itself "makes doubtful the impartiality of both the High Arbitrazh Court and the lower arbitrazh courts in their consideration of the cases in question." *Id.*

n50 Article 10 of the Russian Constitution provides that "State power in the Russian Federation shall be exercised on the basis of the separation of the legislative, executive and judiciary branches. The bodies of legislative, executive and judiciary powers shall be independent." Const. of the Russian Federation,

available at
<http://www.supcourt.ru/EN/frames.htm> (last
 visited Apr. 15, 2003)

[*160]

The second document Ms. Riabchenko uncovered is an office memorandum from E.A. Lyubchev, the High Arbitrazh Court representative who attended the March 30 consultation meeting, to A. A. Arifullin, whom plaintiffs identify as a High Court judge. See Ex. 1, attached to Riabchenko Decl. The letter's subject heading references the case number of the appeal that resulted in the December 18, 2001 decision; the text of the letter relays the substance of the consultation meeting and in particular conveys the request outlined in item 7 of the minutes:

At the aforesaid consultation meeting at the Deputy Chairman of the Russian Federation Government a wish was expressed about the necessity by all state organs to provide the protection of interests of the Russian Federation (the Federal State Unitarian Enterprise [Soyuzmultfilm Studio]) and in particular the reinforcement of control on behalf of the General Prosecutor's Office and the High Arbitrazh Court of the Russian Federation over the decisions of the said courts.

Id.

Dr. Pashin contends that item 7 of the consultation meeting minutes, together with the follow-up office memorandum, provides convincing evidence [*161] that executive officials improperly pressured the High Arbitrazh Court to intervene in the Soyuzmultfilm Studio litigation on behalf of FSUESMS. More specifically, according to Dr. Pashin, the High Arbitrazh Court Chairman was assigned the task of conducting "court supervision" over pending litigation between FSUESMS and SMS. Thus, the High Arbitrazh Court was treated "not as the independent body of judicial power that it is supposed to be, but as if it was some mid-level department, one of, as it is said in the preamble to the [minutes] 'the interested state organizations.'" Pashin Decl. P 46. Moreover, because at the time of the consultation meeting, the lower arbitrazh courts were still considering appeals in the FSUESMS/SMS litigation, the request for High Arbitrazh Court "supervision" over these cases was inappropriate. Under Russian constitutional law, High Court intervention in matters pending before a lower court constitutes "an unlawful interference [with] the court's activity." Id. P 48. The Chairman of the High Arbitrazh Court is empowered to initiate review of lower court decision only "upon the completion of court proceedings in the

lower courts and only after [*162] the lower courts' decisions take effect." Id.

Thus, Dr. Pashin infers that the "court supervision" contemplated at the consultation meeting was in fact a euphemism for the concept of "control." Id. P 49. He does not explain precisely what this concept entails, but it appears to refer to various practices, common during the Soviet period but in principle illegal in the Russian Federation, through which court officials, under pressure from other branches of government, would take steps to ensure pro-state outcomes in court proceedings. See July 6, 2002 Letter of Kenneth Feinswog at 2. Dr. Pashin supports his deduction by noting that the office memorandum to High Arbitrazh Court Judge A. A. Arifullin specifically refers to "the reinforcement of control" over the decisions of the courts presiding over the litigation between FSUESMS and SMS.

Defendants argue that, contrary to plaintiffs' allegations of improper, indeed illegal, conduct, the presence of a High Court representative at a consultation meeting of executive branch officials was entirely appropriate. Professor Maggs notes that the Arbitrazh Procedure Code and the Federal Constitutional Law, entitled "On Arbitrazh [*163] Courts in the Russian Federation," both of which Dr. Pashin helped draft according to his affidavit, expressly provide for ex parte contact between officials of the High Arbitrazh Court and litigants seeking High Court review of lower court decisions.

This is because under Articles 180-181 of the 1995 Arbitrazh Procedure Code, review of a lower court ruling by the High Arbitrazh Court is possible only if the Chairman or Deputy Chairman of the court or the Prosecutor General or Deputy Prosecutor General makes a formal "protest" of the lower court decision. Under Article 185, the parties to an arbitrazh court litigation can only petition these officials for review. According to Professor Maggs, in practice, parties seeking High Arbitrazh Court review make their petitions in writing and also request meetings to argue that the decisions should be reviewed. Under High Arbitrazh Court procedure, these petitions and meetings are ex parte, and the opposing party is only afforded notice and an opportunity to be heard if and when a formal protest is made and a hearing is scheduled. See Maggs 9th Supp. Decl. P 39. Professor Maggs notes that Russian government, represented by the Ministry [*164] of State Property, was a party to the FSUESMS/SMS litigation. Therefore, Professor Maggs claims, it was proper for the various agencies representing the government's interests to meet with High Arbitrazh Court officials for the purpose of asking the High Court chairman to exercise his discretion to "protest" the lower court rulings. See id.

Even if Professor Maggs were correct that some sort of ex parte hearing would have been an appropriate means for the Russian government, as a party to the arbitrazh litigation, to petition the Chairman of the High Arbitrazh Court to initiate review of lower court decisions, the stated objective of the March 31 meeting was not to argue the merits of FSUESMS's case against SMS or to seek High Court review of the lower courts' rulings against FSUESMS. Rather the broader purpose of the meeting was to coordinate efforts of government officials to advance state interests by "securing [the] necessary conditions for the activity of [FSUESMS]." Indeed, the memorandum sent to High Arbitrazh Court Judge A. A. Arifullin does not simply relay a request for High Court intervention in the FSUESMS-SMS litigations, but rather specifically conveys the Russian [*165] government's view concerning "the necessity by all state organs to provide the protection of interests of the Russian Federation." Thus, the assertion that the Arbitrazh procedure code provides for some ex parte communications between High Court officials and would-be appellants of lower court rulings (including representatives of the Russian government in those cases in which the government happens to be a litigant) does not explain or justify what is alleged to have happened here: improper ex parte collaboration between representatives of the executive branch and the judiciary.

Viewed in the light most favorable to the defendants, the consultation meeting documents Dr. Pashin discusses demonstrate that the December 18, 2001 decision of the High Arbitrazh Court resulted from a concerted attempt on the part of Russian government officials to assert state property interests that certain of these officials may feel were improvidently (or improperly) transferred to private ownership, and ultimately conveyed to foreign investors, perhaps without adequate compensation to the state. In the first of his many submissions to this court, defendants' expert Professor Maggs explained [*166] that the privatization of the Russian economy in the late 1980s and 1990s was riddled with corruption. During this period, Professor Maggs reports, it was distressingly common for managers entrusted with state property to engage in systematic plundering of former state enterprises, selling the state-owned property abroad and often hiding the proceeds in offshore bank accounts. See Maggs Decl. P 62 (citing Bernard Black, et al., *Russian Privatization and Corporate Governance: What Went Wrong?*, 52 *Stan. L. Rev.* 1731 (2000)). According to Professor Maggs, in the case of Soyuzmultfilm Studio

allegations that the Lessee Organization and the joint stock company have been engaged in "asset stripping" are at the heart of the ongoing litigation in Russia. This is

why it was the Public Prosecutor of the Moscow Region who brought the case against the Joint Stock Company in the Arbitrazh Court of [the] Moscow Region and why the Ministry of State Property of the Russian Federation has been a party to all the litigation taking place in Russia related to this case.

Id. P 62.

Without gainsaying the prevalence of corruption among many managers charged with [*167] administering state property during the tumultuous transformation of the Russian economy to a system of private ownership, it is difficult to see precisely what state-owned assets the lease enterprise and SMS can be said to have "stripped" as a result of the copyright license granted to FBJ in 1992. The tangible property transferred to the lease enterprise was obviously not a subject of that agreement, and, moreover, that property was by all accounts duly returned to the state after the expiration of the lease. As far as the studio's intangible property is concerned, it is clear that since at least 1928 (eight years before the establishment of Soyuzmultfilm Studio) Soviet law vested ownership of film copyrights in the studio that produced the film. What is more, by the time FBJ acquired the disputed copyright license, in 1992, the Soviet government had already, some three years earlier, deliberately abdicated its longstanding monopoly over the foreign distribution of films produced by state enterprise film studios. Under these circumstances, it appears that the Russian government is now seeking to reacquire rights that were knowingly and voluntarily relinquished even before the December [*168] 1989 lease agreement initiated the privatization of Soyuzmultfilm Studio.

It is telling in this regard that, at as late a stage in this protracted litigation as the April 9, 2002 oral argument, when this court asked defendants to clarify precisely which Russian government agency actually exercised the copyright ownership rights defendants claim belonged in 1992 (and allegedly still belong) to the Russian state, FSUESMS's counsel, was unable to give a clear answer. Compare Tr. of Apr. 9, 2002 Oral Arg. at 20, lines 1-2 ("If it was a foreign entity, it would have been [Sovexportfilm].") n51; with id. at 20, lines 6-7 ("It would have been the State Enterprise [that] succeeded to [Sovexportfilm].") n52; id. at 20, line 18-19 ("I suppose it would have been Goskino") n53; and id. at 21, lines 1-2 (asserting that the Ministry of Culture had an office to which a would-be copyright licensee could have gone). Ultimately, counsel conceded that he did not know where up the bewildering chain of Russian bureaucracy FBJ would have found the agency authorized to grant the copyright license FBJ sought in 1992. See id. at 20. In

fact, the record is utterly devoid of any evidence [*169] indicating that such an agency even existed.

n51 The record indicates that Sovexportfilm was divested of its monopoly over foreign film distribution on March 14, 1988. See *Stephan Decl.*, Jan. 22, 2001 P 4.

n52 There is no evidence that any state agency succeeded to Sovexportfilm's monopoly rights. Rather, on September 19, 1989, the state enterprise Soyuzmultfilm Studio received a license to exploit its film library through direct contracts with foreign parties. See *id.*

n53 Goskino lost its authority over the export of foreign films on March, 7, 1989. See *id.*

Professor Maggs' most recent declaration asserts that the predecessor to the Ministry of State Property was the agency authorized to license the Soyuzmultfilm Studio copyrights, having purportedly succeeded, following the collapse of the Soviet Union, to the broad authority over studio property formerly exercised by Goskino. See Maggs 9th Supp. Decl. P 28. However, the Russian government's course of conduct during the [*170] ten years of the lease belies this entirely unsubstantiated assertion. Significantly, despite an explicit request from this court, see Tr. of Apr. 9, 2002 Oral Arg. at 61, defendants have introduced no evidence that the Ministry of Property, Goskino, or any other agency of the Russian government granted any copyright licenses or took any action whatsoever with respect to the Soyuzmultfilm Studio copyrights during the ten-year lease term.

Instead, the current record establishes to the satisfaction of this court that at the time FBJ obtained the disputed copyright license in May 1992, there was only one entity that purported to exercise any ownership interest in the Soyuzmultfilm copyrights: the lease enterprise, which was subsequently transformed into the joint stock company, SMS. Moreover, from 1992 to 1999 no body of the Russian government - not Goskino, not the Property Ministry, not the Public Prosecutor, not the supposedly existing, though admittedly non-functioning, state enterprise - sought to challenge the legality of the copyright license FBJ obtained from the lease enterprise. See *Stephan Decl.*, Jan. 22, 2001 P 22.

There is absolutely no evidence of [*171] any attempt on the part of the lease enterprise or SMS to conceal the licensing transaction with FBJ or to hide the proceeds acquired therefrom. On the contrary, as Professor Stephan notes, the 1992 licensing agreement specifies that payments to the lease enterprise are to be

made in a Russian account controlled by a Russian government bank. See *Stephan Decl.*, Jan. 22, 2001 P 20. Tax records submitted to the court by plaintiffs further demonstrate that the lease enterprise paid taxes to the state for revenue received from FBJ under the 1992 agreement. See Ex. F, attached to Decl. of Anya Zontova. These uncontroverted facts cast significant doubt on any claims that the actions of the lease enterprise in granting a copyright license constituted illicit asset-stripping.

The Russian government may well have reasons to rethink the propriety of various privatization reforms enacted over the past decade. As far as its own citizens are concerned, the Russian government is free to embark on a course to reclaim ownership rights through legislation, or through re-distributive litigation in the arbitrazh courts of the sort that appears to have been attempted here. n54 The [*172] propriety of such actions is not for this court to determine. However, vague and dilatory allegations of asset-stripping cannot now, at this late date, be used to impair the contractual rights of FBJ, an American corporation that acted in good faith, expending millions of dollars to develop the commercial value of Soyuzmultfilm Studio's animated films.

n54 With regard to SMS, the Russian government may have accomplished its purpose. The April 20, 2001 decision of the Federal Arbitrazh Court for the District of Moscow invalidated SMS's corporate registration, albeit on grounds that would appear to have no bearing on the question of copyright ownership. See Apr. 20 Dec. at 7. Plaintiffs initially represented that they intended to appeal this decision, but there has been no further indication that the April 20 ruling has been reversed or otherwise modified. In their cross-motions for summary judgment, the parties debated whether the April 20 ruling had already taken effect or whether the defects in SMS's registration could be easily remedied.

SMS's standing to bring suit in this court depends on its valid corporate existence under Russian law. In fact, after the initial set of decisions in the arbitrazh litigations resulted in the cancellation of FSUESMS's registration, plaintiffs argued that FSUESMS lacked standing to bring its third-party complaint because it no longer legally existed in Russia. See Pls.' Mot. Dis. at 7. However, this court need not at this time determine whether SMS continues to exist in Russia. Whatever SMS's present status as a legal entity under Russian law, it is clear that the lease enterprise validly possessed the copyrights in

Soyuzmultfilm Studio's animated films at the time FBJ acquired its copyright license. Therefore, "FBJ's rights under the agreement would still be enforceable against anyone currently claiming ownership of the copyrights." *Films by Jove*, 154 F. Supp. 2d at 476 n.40.

[*173]

Aside from the faulty legal analysis underpinning the High Arbitrazh Court's December 18, 2001 decision, these considerations provide an independent basis to reject the High Court's rationale, but also reenforce the conclusion that Russian law provided for the transformation of the state enterprise Soyuzmultfilm Studio into the lease enterprise, resulting in the transfer of the studio's copyrights to the lease enterprise by operation of law. To the extent the High Arbitrazh Court's decision undermines this court's determination that FBJ acquired a valid copyright license from the lease enterprise in 1992, that decision is entitled to no deference and will not be followed.

(6)

Plaintiffs advance a significant alternative argument in favor of their claim to copyright ownership, based on principles of equity and agency law, which merits some discussion. Put simply, the argument is that even if defendants are correct in their assertion that the copyrights in Soyuzmultfilm Studio's Soviet-era films are property of the Russian state, and, therefore, the lease enterprise had no actual authority to grant FBJ an exclusive license in 1992, various acts and omissions attributable to [*174] the state either: 1) induced FBJ's reasonable reliance by cloaking the lease enterprise with apparent authority to license the Soyuzmultfilm Studio copyrights; or 2) had the effect of ratifying FBJ's licensing agreement after it was executed.

Plaintiffs point to three main sources of evidence in support of this alternative claim to copyright ownership. First, plaintiffs have produced a letter sent to the lease enterprise by the Chairman of the Committee on Cinematography of the Russian Federation, Roskomkino. See Ex. 22 [hereinafter "Sept. 16 Letter"], attached to Decl. of Julian Lowenfeld. The letter is dated September 16, 1992, just under four months after the lease enterprise and FBJ signed their licensing agreement. Joan Borsten, President of FBJ, explains that the lease enterprise obtained the letter after FBJ's Los Angeles Bank requested some official confirmation that the lease enterprise was, in fact, authorized to license Soyuzmultfilm Studio's films. See Borsten Decl. P 6. The letter erroneously asserts that the Russian government is the "sole owner" of films "produced by [Soyuzmultfilm] Studio using funds from the State

budget." Sept. 16 Letter. However, it [*175] nevertheless confirms the studio's "exclusive rights for worldwide distribution" of those films. Id.

Second, plaintiffs point to a January 22, 1997 document from the Russian State Taxation Auditors, which specifically references the lease enterprise's 1992 agreement with FBJ, indicating that the lease enterprise paid taxes on the proceeds received from FBJ. See Ex. F, attached to Decl. of Anya Zontova. According to plaintiffs, this document demonstrates that the Russian government was aware of the copyright license FBJ acquired in 1992, and that the government permitted the transaction to go forward, "accepting the benefits" of the deal by collecting the applicable tax revenues.

Last, plaintiffs have submitted two licensing agreements between the lease enterprise and what plaintiffs claim are state-owned Russian television studios. n55 See Exs. D and E, attached to Decl. of Anya Zontova. The translated portions of the agreements do not indicate which particular films were licensed. However, plaintiffs represent that the licenses covered Soyuzmultfilm Studio's pre-1989 films. See Tr. of Apr. 9, 2002 Oral Arg. at 23. Plaintiffs offer no extensive discussion of the significance [*176] of these documents, but the apparent implication is that, if the Russian state in fact owned the copyrights, there would have been no reason for a state-owned enterprise to approach the lease enterprise Soyuzmultfilm Studio to obtain broadcasting rights for the films.

n55 The second licensing agreement is signed by an entity called "Public Russian Television." However the contract refers to this entity as a "private joint stock company."

Plaintiffs alternative claim to the Soyuzmultfilm Studio copyrights raises a potentially complex choice of law question, which the parties have for the most part ignored. Plaintiffs do note in one of their submissions that the licensing agreement between FBJ and the lease enterprise contained a choice of law clause, indicating that California law would govern the agreement. Based on this provision, plaintiffs contend that their apparent authority argument should be evaluated under California law. See Pls.' Supp. Reply Mem. of Law at 5. Courts will generally enforce a contractual [*177] choice of law provision in a dispute between the parties to a contract - at least where the dispute concerns the construction or validity of the contract. However, it does not necessarily follow that this court should apply California law to plaintiffs' alternative arguments, which do not actually concern the contract itself, but rather involve

determining whether actions undertaken entirely in Russia, by agencies of the Russian government, could have induced FBJ to rely on the apparent authority of the lease enterprise.

In the end, however, there is no need to resolve this choice of law question. It is clear that Soviet law initially vested the ownership of Soyuzmultfilm Studio's copyrights in the state enterprise, and that these rights were transferred by operation of law to the lease enterprise in 1989. Thus, this court need not determine whether FBJ's license might be validated under an alternative apparent authority or ratification theory, if - contrary to the overwhelming evidence in the record - the Russian state and FSUESMS in fact had a valid claim to ownership of the Soyuzmultfilm Studio copyrights. Moreover, a determination of whether FBJ could claim rights in Soyuzmultfilm [*178] Studio's films based solely on the apparent authority of the lease enterprise or acts of the Russian state supposedly ratifying the licensing transaction would likely require additional evidentiary hearings. For example, it would be necessary to establish, among other things, the authority of the government agency that sent the September 16, 1992 letter, and the precise circumstances under which the letter was issued, as well as FBJ's awareness of the acts that purportedly induced its reliance.

It would appear, however, that plaintiffs' additional evidentiary submissions, although not conclusive, provide further evidence in support of the lease enterprise's actual authority over the copyrights in Soyuzmultfilm Studio's animated films. All of these documents reflect the general consensus, throughout the decade-long lease term, that the lease enterprise was the valid titleholder of the studio's copyrights.

Conclusion

Neither of the foreign court rulings upon which defendants and FSUESMS base their joint motion for reconsideration warrants the drastic relief they seek. The French court opinions from the Sovexportfilm infringement litigation do not constitute controlling interpretations [*179] of the complex issues of Russian law upon which this case turns. With good reason, therefore, these decisions were not relied on in this court's August 27, 2001 ruling, and any subsequent developments in the French courts provide no basis for modifying the previous order. Furthermore, those aspects of the Paris Appeals Court's October 2, 2001 decision that appear favorable to defendants' position - namely, the suggestion that Sovexportfilm continued to exercise exclusive commercial exploitation rights in Soyuzmultfilm Studio's films after March 1988 - are clearly refuted by the evidence in this case.

Although the December 18, 2001 decision of the High Arbitrazh Court of the Russian Federation demands closer consideration, that opinion likewise does not merit reconsideration of this court's prior decision granting summary judgment to the plaintiffs. Hardly a resounding vindication of defendants' theory of the case, the High Arbitrazh Court's opinion offers no direct discussion of the central issue presently before this court: ownership of the copyrights in Soyuzmultfilm Studio's classic films. Thus, the High Court's decision does nothing to undermine this court's conclusion, supported [*180] by the overwhelming consensus of scholarly commentary, that the copyrights in Soviet motion pictures belonged to the studio that produced the film.

The High Court boldly asserts that the formation of the lease enterprise Soyuzmultfilm Studio did not result in the transformation of the original state enterprise film studio. If true, this conclusion would negate this court's finding that Soyuzmultfilm Studio's copyrights passed to the lease enterprise in 1989, such that they could be validly conveyed by that entity to FBJ. However, this aspect of the High Arbitrazh Court's analysis is plainly erroneous, and unjustifiably departs from the universal understanding that the purpose of the Fundamental Principles on Leasing was, as a part of Perestroika, to effect the incremental transformation of state enterprises into private companies. Indeed, the High Arbitrazh Court itself endorsed this very view in a previous decision in which it acknowledged that a state enterprise was transformed into a lease enterprise. It is, furthermore, apparent that the High Arbitrazh Court's December 18, 2001 decision was strongly influenced, if not coerced, by the efforts of various Russian government officials [*181] seeking to promote "state interests." Under these circumstances, the High Arbitrazh Court's decision is entitled to no deference.

Ultimately, despite the seemingly endless twists and turns in the international litigation over Soyuzmultfilm Studio's copyrights, the essential facts underlying FBJ's infringement suit have remained essentially unchanged. Defendants have all along conceded to having engaged in unauthorized copying of Soyuzmultfilm Studio's animated films, thus clearly infringing the copyrights in these works. Indeed, defendants acknowledge that their infringing activities continued unabated even after this court issued a preliminary injunction, on consent, expressly prohibiting defendants from reproducing any motion picture in which plaintiffs own the copyright. Defendants have never asserted that their use of Soyuzmultfilm Studio's films was authorized; rather their sole defense is that FBJ and SMS are not the proper plaintiffs to bring this infringement suit.

It remains the conclusion of this court, however, that FBJ obtained a valid copyright license in 1992 from the

lease enterprise. FBJ's licensor acquired its rights in 1989, when the state enterprise Soyuzmultfilm [*182] Studio was transformed into a lease entity, in accordance with the Fundamental Principles on Leasing. At the time FBJ obtained its license, this lease enterprise - which was indistinguishable in its personnel, facilities, and equipment from its predecessor - was the only entity in a position to grant such a license. Significantly, between 1992 and 1999, neither Goskino, nor the state enterprise, nor anyone else sought to challenge the validity of FBJ's licensing agreement, and it was only after FBJ's substantial investment in restoring Soyuzmultfilm Studio's animated films for potentially lucrative international distribution that the Russian government

initiated an attempt to reacquire the commercial exploitation rights it had long ago ceded voluntarily.

Accordingly, the motion for reconsideration is denied. Plaintiffs shall submit a proposed judgment on notice.

Dated: Brooklyn, NY

April 16, 2003

SO ORDERED:

David G. Trager

United States District Judge

(Cite as: 2001 WL 967781 (E.D.N.Y.))

--- F.Supp.2d ---

Only the Westlaw citation is currently available.

United States District Court,
E.D. New York.
FILMS BY JOVE, INC., and Search Term Begin Soyuzmultfilm Search Term End Studios, Plaintiffs,
v.
Joseph BEROV, Natasha Orlova, The Rigma America Corporation, Saint Petersburg
Publishing House and Group, Defendants.
No. CIV. A. 98-CV-7674 (DGT).
Aug. 27, 2001.

MEMORANDUM AND ORDER

TRAGER, District Judge:

*1 In December of 1998, plaintiffs Films by Jove ("FBJ") and Soyuzmultfilm Studio ("SMS" [\[FN1\]](#)) (collectively, "the plaintiffs" or "the third party defendants") brought this action for copyright infringement, breach of contract, unfair competition and RICO violations against Joseph Berov, Natasha Orlova, Rigma America Corporation and the St. Petersburg Publishing House and Group (collectively, "the defendants"). On May 4, 1999, this court issued a preliminary injunction on consent of the defendants restraining them from reproduction of any motion picture in which plaintiffs own the copyright. On August 10, 2000, plaintiffs moved to hold the defendants in contempt for violating and continuing to violate the court's injunction by selling copyrighted material allegedly belonging to the plaintiffs [\[FN2\]](#) out of their St. Petersburg Publishing House retail stores in Brooklyn. A hearing on that motion was held on August 17 and August 18, 2000, but the issue was left undecided, and the hearing was adjourned until October 10, 2000 after it became apparent that a third party, the Federal State Unitarian Enterprise Soyuzmultfilm Studio ("FSUESMS" or "the third party plaintiff"), would be intervening in the lawsuit as a third party plaintiff, seeking declaratory and injunctive relief necessary to secure its right of operative management [\[FN3\]](#) of the copyrights to the films at issue, which, it claimed, were owned, strictly speaking, by the Russian government. [\[FN4\]](#) On October 10, 2000, the contempt hearing was continued. The defendants, at that time, conceded a violation of the injunction in the event that the plaintiffs do, in fact, possess the copyrights to the animated films sold by the defendants.

This same question of copyright ownership is now before the court. The plaintiffs have moved for summary judgment on this issue, and FSUESMS has cross-moved for summary judgment on its own claims to the copyrights. [\[FN5\]](#) The final resolution of the plaintiffs' contempt motion hinges on the disposition of the question of copyright ownership.

Background

(1)

The parties agree that in 1936, the Soviet government expropriated from the Russian Orthodox Church the premises of the Church of St. Nicholas the Enlightener in Moscow, Russia and founded there a state enterprise [\[FN6\]](#) called

Soyuzmultfilm Studio, which, from 1936 until the present, created about 1500 animated motion picture films, many of which became extremely popular. [\[FN7\]](#) See Mem. Law. Supp. Pls.' Mot. Dis. 3D Party Compl. Pursuant to [FRCP 12\(b\)\(6\)](#) [hereinafter "Pls.' Mot. Dis."] at 2; Notice of Mot. to Dismiss 3D Party Compl. Pursuant to [FRCP 12\(b\)\(6\)](#) [hereinafter "Pls.' Not. Mot. Dis."] at 2. From 1936 to 1989, Soyuzmultfilm Studio, like virtually all enterprises in the Soviet Union, operated as a state enterprise. See Pls.' Mot. Dis. at 2. Unfortunately, as far as the history of Soyuzmultfilm Studio goes, the parties agree on little else, although their disagreements, as the patient reader will discover, are either disputes as to issues of law or disputes about facts that are not dispositive on any of the issues resolved in this opinion. [\[FN8\]](#)

*2 According to plaintiffs, on December 20, 1989, as part of the ownership liberalization trend that accompanied Glasnost and Perestroika, Soyuzmultfilm Studio became a "lease enterprise" or "rent entity." [\[FN9\]](#) See *id.* at 2- 3. "Many state companies became rent enterprises in the late 1980s and 1990s. In accordance with law, they stopped to be 'state-owned', but having in mind a further transition to privately held companies, they acquired another legal status, taking on lease only state buildings and equipment, but keeping their income and products for themselves and thus they received freedom from the state." Pls.' Ex. 15, Decl. of Mila Straupe [hereinafter Straupe Decl."] ¶ 11. The lease enterprise, operating under a ten-year lease agreement concluded with the Soviet State Film Committee known as Goskino, [\[FN10\]](#) paid rent to the state for facilities and equipment, while the copyrights to the films, which, in the plaintiffs' version of the story, originally belonged to the state enterprise, passed by operation of law from the no-longer-existent state enterprise Soyuzmultfilm Studio to the identically-named rent enterprise that took its place. See *id.* at 3; Pls.' Response to Def.'s and Third Party Pls.' Jnt. Statement Pursuant to Local Rule 56.1 [hereinafter "Pls.' 56.1 Resp."] ¶ 32; Straupe Decl. ¶ 12.

On July 1, 1999, shortly before the lease was due to expire, the rent entity Soyuzmultfilm Studio was again reorganized, this time into a private joint stock company. [\[FN11\]](#) See Straupe Decl. ¶ 12. That corporation, still named Soyuzmultfilm Studio, became the lawful successor to all of the rights and obligations of its predecessor, including, according to plaintiffs, all copyrights and trademarks. See *id.* The joint stock company, however, did not incorporate into its institutive capital the state-owned material assets, e.g., premises, equipment, furniture, etc., that had been leased to the rent enterprise by Goskino, and those state-owned assets reverted to the state upon the expiration of the lease term. See *id.* Accordingly, the joint stock company relocated in 1999 from its old offices in the Church of St. Nicholas the Enlightener to a new office in Krasnogorsk, a Moscow suburb. See *id.*

From the early nineties on, the lease enterprise and SMS, its successor, have had "to put up with a fight in Russia once spearheaded by Goskino and now [Soveksportfilm] and the State Property Ministry to take control of the films produced by the studios of Russia during the USSR." See Sept. 22 Borsten Decl. ¶ 6. The rights of the lease enterprise Soyuzmultfilm Studio and its successor, the joint stock company SMS, among other studios, were vindicated in various court decisions, see Decl. of Rimma Erokhina, Ex. 6, attached to Decl. of Julian Lowenfeld, most definitively in a June 19, 1996 decision of the Commercial Court of Paris, which ruled for Soyuzmultfilm Studio, Mosfilm Studio, Lenfilm Studio and Films by Jove and against Soveksportfilm, finding that economic legislation passed by the USSR in 1986 and thereafter had put an end to the state monopoly on foreign trade, and Soveksportfilm could no longer license films produced by Russian film studios without the agreement of the studios,

which were the rightful copyright holders. *See* Ex. 14, attached to Decl. of Julian Lowenfeld. The French court noted a series of under-the-table transactions that Sovetskoyefilm had engaged in in order to transfer to itself, without consent, rights to 125 films owned by the studios. [\[FN12\]](#) *See id.*

*3 Around the same time that SMS was leaving its Church of St. Nicholas the Enlightener location, then-Prime Minister Sergei Stepashin, responding to the demands of Goskino and a faction of approximately fifty people displeased with the leadership of a certain Mr. Skuliabin (spelled elsewhere as "Sculabin"), the director of the lease enterprise Soyuzmultfilm Studio as of 1993, [\[FN13\]](#) issued a decree recommending the creation of a new state enterprise for the exploitation of the Church of St. Nicholas facilities vacated by the joint stock company. *See* Pls.' Mot. Dis. at 5; Pls.' Ex. 17 (hereinafter "Stephashin Order"); Tr. of Hearing on Aug. 17, 2000 at 20; Decl. of Vitoslav Shilobreev attached to FSUESMS's Order to Show Cause. [\[FN14\]](#) On October 11, 1999, that faction of SMS officers who had been unsuccessful in their attempts to be elected to SMS's governing board proceeded to register the newly-organized "Federal State Unitarian Enterprise Soyuzmultfilm Studio." [\[FN15\]](#) *See id.*

Meanwhile, the Russian Orthodox Church had initiated a lawsuit to reclaim the property that had been expropriated from it in 1936. *See id.* According to the plaintiffs--and, it should be reiterated, everything discussed heretofore and postdating the creation of the lease enterprise is the plaintiffs' version of the facts--FSUESMS, faced, by virtue of the Church's claims, with the loss of its only assets, viz., the premises and their facilities, decided to make a unilateral claim that it, and not the joint stock company SMS, was the "real" Soyuzmultfilm Studio. *See id.* To accomplish this end, FSUESMS, working closely with Goskino and the State Ministry of Property, *see* Sept. 22 Borsten Decl., advanced the contention that the lease enterprise Soyuzmultfilm Studio either had never existed or, at the very least, had not taken possession of anything other than the material assets of the state enterprise Soyuzmultfilm Studio and further, that the state enterprise had continued to exist in a latent, non-functioning form during the entire pendency of the lease (1989- 1999). *See* Straupe Decl. ¶ 15. FSUESMS then, instead of attempting to register as a new company, requested to register as an amended form of the non-existent state enterprise Soyuzmultfilm Studio. It proceeded to request to register amendments to the extinguished charter of the state enterprise Soyuzmultfilm Studio, which had ceased to exist in 1989. *See id.* ¶ 16. These amendments were mistakenly and illegally registered by the Moscow City Registration Chamber in October of 1999. *See id.* ¶ 17. Thus, by the close of 1999, two independent enterprises, SMS and FSUESS, were both registered by the government and both claimed to be the rightful heirs of the state enterprise Soyuzmultfilm Studio and its extensive film library. So much for the plaintiffs' version of Soyuzmultfilm Studio's colorful history. The defendants and FSUESMS offer a fundamentally different account. [\[FN16\]](#) According to them, the copyrights in the films made by the state enterprise Soyuzmultfilm Studio belonged at all times to the Soviet state and were merely under the operative management of the state enterprise Soyuzmultfilm Studio. *See* Mem. Law. Opp. Mot. for Partial Sum. J. by Pls./3rd Party Defs. and Supp. Cross-Mot. for Sum. J. by 3rd Party Pl. [hereinafter "FSUESMS's Cross-Mot."] at 2. The state enterprise administered those copyrighted films on behalf of the state and Goskino, the state agency responsible for managing the funding for state film production. *See id.* at 3.

*4 The creation of the lease enterprise Soyuzmultfilm Studio in 1989 as part of the restructuring of the Soviet economy did not terminate the existence of the state enterprise Soyuzmultfilm Studio. *See id.* at 4. Rather, the state

enterprise had suspended film production during the period of the lease. *See id.* The lease itself, entered into with the lease enterprise Soyuzmultfilm Studio by Goskino, as the funding entity for state-owned film assets, transferred to the lease enterprise only material assets, viz., the premises and equipment, located at the site of the Church where the state enterprise had heretofore been active. *See id.* at 3. The copyrights to the state enterprise's film library continued to be owned by the state. *See id.*

In 1994, the "state enterprise" form was abolished and replaced by a similar "state unitarian enterprise" form by the Civil Code of the Russian Federation, First Part (1994), and the state enterprise Soyuzmultfilm had to be restructured accordingly. *See* Maggs Decl., attached to FSUESMS's Not. of Cross-Mot. and Cross-Mot. for Sum. J. [hereinafter "Maggs Decl."] at 5 (Peter B. Maggs is defendants'/FSUESMS's Russian law expert). This restructuring was effectuated in 1999 when FSUESMS was created by order of Prime Minister Stepashin and registered soon thereafter. *See* FSUESMS's Cross-Mot. at 4. Also in 1999, "certain employees of the lease enterprise formed a fully private joint-stock company ... also calling itself 'Soyuzmultfilm Studios.'" *Id.* That company proceeded to claim itself as the rightful successor to the lease enterprise and the rightful owner of the copyrights in the film library created during the era of the state enterprise's active operation. *See id.*

At this point, the narratives of the parties begin to converge. A series of lawsuits ensued between SMS and FSUESMS, with each trying to nullify the registration of the other. Although the validity of corporate registrations and not the ownership of copyrights was the central issue being decided, some of these cases found occasion to address the possession of the copyrights in the state enterprise Soyuzmultfilm Studio's library. The decisions of lower courts, [\[FN17\]](#) which ruled in favor of SMS, found that the right to the copyrights in the films and trademark in the name Soyuzmultfilm Studio, among other intangible assets, passed to the lease enterprise by operation of law and was legitimately transferred to the joint stock company SMS when the lease enterprise sold its assets to that newly-formed entity prior to the expiration of the lease term. *See* June 5, 2000 Decision, Ex. 19, attached to Decl. of Julian Lowenfeld [hereinafter "Jun. 5 Dec."]; June 24, 2000 Decision, Ex. 20, attached to Decl. of Julian Lowenfeld [hereinafter "Jun. 24 Dec."]. In addition, these decisions found no connection between the 1936 State Enterprise Soyuzmultfilm Studio and its purported 1999 resurrection in the form of FSUESMS. *See id.* Accordingly, the FSUESMS's registration was cancelled. *See id.*

*5 However, these decisions [\[FN18\]](#) were vacated by the Federal Arbitrazh Court for the District of Moscow, which premised its conclusions on the failure of the lower courts to consider evidence that the copyrights and other non-material assets of the state enterprise Soyuzmultfilm Studio may have belonged to the state at the time that Goskino concluded the lease agreement with the lease enterprise and that these assets, consequently, never passed to either the lease enterprise or to the joint stock company:

The lease enterprise "Studio Souzmultfilm" [sic] was established on the basis of a rent agreement without the right to purchase all the property of the enterprise, which was state-owned. Moreover, the composition and the quantity of the property subject to be rented out was not identified, because the transference-acceptance act was never recorded and documents listing the property were never produced.

In the process of transferring the leased enterprise to a joint-stock company it was necessary to separate the property of the enterprise from the property owned by the state and include in a separate balance sheet. Furthermore, the

separate balance sheet was worked out independently by the leased enterprise, without the participation of the owner, who leased out the enterprise. This balance was then not presented to the owner for approval.

* * *

The Court when settling the dispute did not consider the fact if the act of transference can be considered accurate, which defined the size of the Charter capital of the joint-stock company and identified the size of the property owned by the state. The issue is if the leased enterprise has the right to independently and without the approval of the property owner to transfer according to the act of transference to the joint-stock company the property that does not belong to it. The Court also ignored this fact.

The decision reached by the Court that the Charter capital did not include state-owned property was based on incomplete evidence.

The conclusions of the Court that the property acquired in 1990-91 was not state-owned was not based on factual evidence.

Aug. 18 Dec. [\[FN19\]](#)

Importantly, on September 19, 2000, the Higher Arbitrazh Court of the Russian Federation denied SMS a further appeal at the current time but instructed, for the purposes of remand, that the August 18, 2000 opinion of the Federal Arbitrazh Court for the District of Moscow, quoted above, is not a binding view of the evidence in the case, and the lower court should allow SMS to argue its position on remand. Arifulin Letter, Ex. 7, attached to Decl. of Paul Stephan.

On remand, the Moscow Region Arbitrazh Court issued an opinion on December 26, 2000 in the suit by FSUESMS, the Ministry of State Property of the Russian Federation and Goskino against SMS. That opinion, by and large, reinstated and expanded upon the earlier lower court findings:

According to Article 486 of the RSFSR Civil Code which was in effect at the time of the transformation of the state enterprise, "Film Studios Soyuzmultfilm" into a lease enterprise with the identical name, the copyrights to a film belong to the enterprise that shot the film.

*6 According to Article 498 of the RSFSR Civil Code, copyrights of an organization do not have term limitation.

When the organization is transformed the copyrights shall be transferred to the successor organization.

Therefore, copyrights to animated films created by the state enterprise "Film Studios Soyuzmultfilm" were transferred by operation of law to its successor-- [l]ease enterprise "Film Studios Soyuzmultfilm." A lease enterprise with an identical name became the successor of rights of the state enterprise "Film Studios Soyuzmultfilm" according to the existing laws, i.e., Article 16 of the ... Fundamental Principles [of] [L]egislation and Union Republics on Lease.

Copyrights were not and could not be transferred by the lease agreement because they had been transferred by operation of law and cannot be limited by an agreement.

Therefore, the copyrights of the lease enterprise are not related to the issues of the lease agreement, and the expiration of that agreement does not cause the copyrights of the [l]ease enterprise "Film Studios Soyuzmultfilm" to expire.

At the time of the transformation of the [l]ease enterprise into a [shareholding] company[,] the lease enterprise had the copyrights to its animated film[s] by law.

* * *

Pursuant to Article [486] of the RSFSR Civil Code, copyright in the animated feature films belonged to "Film Studios Soyuzmultfilm" and not to Goskino USSR or any other representative of the state.

According to RSFSR Article 496 the copyrights to the animated feature films made by "Film Studios Soyuzmultfilm" belonged to the Studio without time limit, and upon its reorganization, the copyrights went to [l]ease enterprise "Film Studios Soyuzmultfilm" also with no term limitations.

Thus Goskino of the Russian Federation could not have transferred copyrights of the animated movies of "Film Studios Soyuzmultfilm" to the Lease Enterprise for lease because Goskino never had those rights to begin with.

* * *

[FSUESMS's] argument that the copyrights to the animated films belong to [it] has no foundation, based on the submitted documents and oral arguments of both sides in the lawsuit, because, pursuant to Articles 23, 37 of the RSFSR Civil Code and Article 11 of the Fundamentals of Civil Legislation USSR and Republics, a state enterprise, after leasing out an enterprise and complex of facilities and property, could not exist anymore, and could no longer be a legal person at the same time because it did not have its own property and legal capacity.

When leasing out an enterprise (state property) [takes] place in accordance with paragraph 4, Article 16 of the Fundamental Principles on Lease, which established full succession of rights to the state enterprise assumed by the [l]ease [e]nterprise, then according to Article 37 of the RSFSR Civil Code [,] this action shall constitute an actual reorganization of a state enterprise.

Dec. 26, 2000 Dec., Ex. 8, attached to Decl. of Paul Stephan [hereinafter "Dec. 26 Dec."].

*7 The December 26 decision was affirmed on appeal on January 22, 2001. However, on April 20, 2001, well after the motion in this case had been submitted, the Federal Arbitrazh Court for the District of Moscow, the same court that had earlier remanded the case, issued a ruling overturning the December 26, 2000 and January 22, 2001 decisions. *See* Apr. 20, 2001 Ruling [hereinafter "Apr. 20 Dec."], attached to Aff. of Vladimir Zlobinsky of May 9, 2001.

That ruling began the core of analysis by noting that Article 59 of the Civil Code of the Russian Federation provides that the act transferring property from one owner to another is the document that "defines the scope of rights and obligations being transferred to the respective recipient of rights." *Id.* at 5. But, in this case, because that transfer document is signed only by the deputy director of the lease enterprise and not signed at all by the general director of the joint stock company, it is "not deemed [to be] indisputable evidence establishing succession rights" from the lease enterprise to the joint stock company.

Accordingly, the court goes on to analyze the transfer in more detail:

At the time of the creation of the leased enterprise "Film Studio Soyuzmultfilm" on the basis of the assets of the film studio, no determination was made as to the specific property to be transferred for lease and no property transfer and acceptance act was made. Therefore, it is impossible to determine which property was leased, and therefore impossible to determine the rights of the leased enterprise in respect of the state property subsequently transferred to

the joint stock company.

According to paragraph 1.2 of Charter of the leased enterprise the leased property remains property of the state. It is being utilized by the lessee.

According to Article 295 of the Civil Code of the Russian Federation an enterprise has no right to sell the real property it is utilizing, to lease it ... or to otherwise dispose of it without the owner's consent.

Therefore, the court's conclusion that the property transfer act is not subject to approval by the State Property Ministry, which acts for the property owner, is not based in law. The consent of the owner of state property was never obtained[;] the evidence is missing in this case.

Therefore, the leased enterprise, in violation of the aforementioned legal requirements, disposed of the state property by transferring it to the joint stock company.

Id. at 6. The court went on to nullify the joint stock company's registration. *See id.* at 7. As yet, although SMS represented at oral argument that they are appealing the decision to the Higher Arbitrazh Court of the Russian Federation, *see* Oral Arg. at 66, there has been no word about whether that court will accept the appeal or what the result of any such appeal will be.

However, this situation was significantly complicated by the other series of decisions in the case, the opinions on remand in the suit by SMS against FSUESMS. On January 25, 2001, the lower court refused to nullify FSUESMS's registration and found that

*8 the succession of rights of the lease enterprise from the state enterprise, as stipulated in Item 4, Article 16 of the Fundamentals of USSR law "On Leasing," arises not as a result of the conversion of the state enterprise into the lease enterprise, but by the operation of the agreement on lease of the property complex which definition is given in Article 132 of the Civil Code of the Russian Federation. Because the succession of rights is based on the lease agreement, it has a temporal nature and is restricted by the terms of such agreement. The succession of the lessee from a state enterprise can not continue after termination of the lease agreement because the lessee in this event, in accordance with Article 664 of the Civil Code of the Russian Federation, is obliged to return the leased property of the state. In this case the term of the agreement on the lease of the property complex of the state enterprise expired on December 20, 1999.

Discussion of January 25, 2001 decision within Decision of April 3, 2001, Ex. B, attached to Decl. of Anya Zontova, at 2.

On appeal, the conclusion of the January 25, 2001 decision, viz., that the registration of the FSUESMS was not to be nullified, was upheld, but the appellate court, in a decision issued on April 3, 2001 specifically took issue with the bases for the January ruling:

After examining all the case materials, including the arguments of appeals claims and listening to the representatives of the appellants participating in the case, the Appeals Court concluded that the Lower Court rightfully denied to satisfy the demands of the appealed claims[. H]owever, the Appeals Court cannot agree with the conclusions by the Lower Court in its decision denying the appeal. Thus, the Appeals Court considers as wrongful the Lower Court's statement that the succession of rights of the lease enterprise that was based on the lease agreement, has a temporal nature and is restricted by the term of such agreement. The Lower Court's conclusion does not comply with the law

which was in effect at the time of concluding the agreement on the lease of the property complex of the state enterprise of December 20, 1989....

Item 4, Article 16 of the Fundamentals on Leasing stipulates that a lease enterprise becomes the successor of material rights and obligations of the state enterprise leased by it, including its right to use land and other natural resources.

After signing the agreement, the organization of lessees receives in the established order the property of the state enterprise and acquires the status of a lease agreement.

The fact of signing the lease agreement determines the formation of a lease enterprise. As it takes place, the activity of the state enterprise ceases through the conversion resulting from the formation of a lease enterprise on the basis of a state enterprise (Article 16 of the Fundamentals on Leasing.)

Thus, after signing the agreement of December 20, 1989 by the USSR State Committee on Cinematography and the labor collective of [the state enterprise Soyuzmultfilm Studio], the activity of the state enterprise ..., created by decree # 246/001 of June 10, 1936, ceased. By operation of law, the successor of rights of this enterprise became the lease enterprise [Soyuzmultfilm Studio], which later was converted into the joint stock company [Soyuzmultfilm Studio] and continues to be such at the present time.

*9 The Lower court's conclusion about the resumption of activity of the state enterprise [Soyuzmultfilm Studio] after the lease agreement ended, and returning to it the rights and obligations which have been passed on to the lease enterprise is erroneous, because the existing law does not stipulate the implementation of such a legal construct.

The succession of rights is tightly linked with the legal capacity of a legal entity. It is an integral property of a legal entity, not of a leased property complex. Therefore when the property is returned after the agreement ended, there is no automatic return of the succession of rights and obligations.

In addition, as it was mentioned previously, the state enterprise [Soyuzmultfilm Studio] ceased its activity by operation of law, for which reason any resumption of specifically its activity is impossible.

Apr. 3, 2001 Dec., Ex. B, attached to Decl. of Anya Zontova [hereinafter "Apr. 3 Dec."] at 4-5.

The Appeals Court, however, went on to conclude that although SMS inherited the rights of the state enterprise after the expiration of the lease term, this did not mean that FSUESMS was invalidly registered. "The registration of the newly formed [FSUESMS] does not violate the Plaintiff's civil rights and interests protected by law," the court wrote. *Id.* at 5. FSUESMS's charter, the court found, did not specifically stipulate that it had inherited the rights of the state enterprise Soyuzmultfilm Studio, and a mere reference in Item 1.1 of that charter to the Order of 1936, which had created the state enterprise Soyuzmultfilm Studio, was not grounds to invalidate the registration. *Id.* That decision, in turn, was appealed to the Federal Arbitrazh Court for the District of Moscow, the same court responsible for the April 20, 2001 reversal of lower court rulings in the suit brought by FSUESMS and others against SMS. This time, however, in a decision issued on June 4, 2001, the court affirmed the decision below. It summarized the holding below as follows:

The Appeals Court has established that on December 20, 1989, the labor collective of the state enterprise [Soyuzmultfilm Studio] concluded the agreement with the USSR State Committee on Cinematography on the lease of the state enterprise property (case file 30-33, Vol. 1) after the signing of which, the activity of the state enterprise

[Soyuzmultfilm Studio], created by decree of No. 246/001 of June 10, 1936 ceased.

The successor of rights of this state enterprise by operation of law became the lease enterprise [Soyuzmultfilm Studio,] which later was converted into the joint stock company [Soyuzmultfilm Studio].

The succession of rights, in the opinion of the Appeals Court, is tightly linked with legal capacities of a legal entity. It is an integral property of a legal entity, not a leased property complex. Therefore when the property is returned after the agreement ended, there is no automatic return of the succession of rights and obligations.

*10 However, the act of the registration by MRC of the [FSUESMS] on November 10, 1999, disputed by the Plaintiff, in the Appeals Court's view, does not violate the rights and interests of the Plaintiff, because the [FSUESMS] is a newly formed entity on the basis of the state property and does not affect the civil rights of the [joint stock company Soyuzmultfilm Studio] and its interests protected by law.

June 4, 2001 Dec., Ex. A, attached to Decl. of Anya Zontova [hereinafter "Jun. 4 Dec."] at 2-3.

The FSUESMS, according to the court, appealed the ruling in order to alter what the court described as "the motivational part" of the ruling, *id.* at 3, in other words, the reasoning underlying the decision, while SMS appealed the ruling that had allowed FSUESMS's registration to stand. *See id.* The court refused both appeals:

The case materials show that on December 20, 1989 between USSR State Committee on Cinematography (lessor) and the labor collective of "Kinostudiya Soyuzmultfilm" (lessee) the lease agreement was concluded, under which the film studio were given for a lease use, for the term of 10 years, the main and circulating assets (equipment, appliances and other commodity and material assets) which were in the film studio's balance sheets at the moment the agreement became effective, as well as the monies received from the centralized sources of funding under the plans of major construction work and material and technical procurement for the 12th and 13th five-year periods (Items 1.1, 5.6 of the Agreement). Pursuant to Item 1.2 of the Agreement, the leased property remains state property and in the economic management of the lessee. As this took place, the composition and the quantity of the leased property was not determined, because the receipt and transfer acts were not executed, and the documents identifying that property were not made.

The executive committee of the Moscow Sverdlovskiy regional council registered by the Decision of November 14 1990 the Charter of the lease enterprise [Soyuzmultfilm Studio] which was adopted on January 4, 1990 at the conference of the film studio labor collective.

Item 4, Article 16 of the Fundamentals of USSR law "On Leasing" stipulates that a lease enterprise becomes the successor of property rights and obligations of a state enterprise that was leased by it, including its rights to dispose of the land and other natural resources.

Thus, the Appeals Court has made the rightful conclusion that after signing the lease agreement, the activity of the state enterprise [Soyuzmultfilm Studio] created by decree No. 246/001 of June 10, 1936 ceased.

On October 11, 1999, a new legal entity was formed, the [FSUESMS].

This enterprise was created on the basis of the Order of the Russian Federation Government of June 30, 1999 No. 1038-R (Vol. 1, case file 80) in connection with the expiration in December 1999 of the term of the December 20, 1989 agreement with the labor collective of [Soyuzmultfilm Studio], on the lease of the film studio's assets which were in state property.

*11 Pursuant to Article 13 of the Civil Code of the Russian Federation, a non-normative act of a state body or a local government body is subject to being invalidated by the court in the event this act simultaneously does not comply with the law or other legal acts and it violates a legal entity's rights and interests protected by law. The court fully and thoroughly investigated the circumstances of the case, evaluated in the aggregate the arguments collected regarding the case, and came to a rightful conclusion that the registration of the newly formed [FSUESMS] does not violate the civil rights and interests of [SMS] protected by law.

In the Charter of the newly formed enterprise, the succession of rights from the state enterprise [Soyuzmultfilm Studio] is not stipulated.

The one and only indication in the Charter's Item 1.1 of the Order No. 246/001 of June 10, 1936 is not grounds for invalidating the registration of the state enterprise.

Considering the aforementioned statements, the Cassation Court finds that the Arbitrazh Court rendered the case full and comprehensive consideration, in compliance with the norms of the material and procedural laws.

Id. at 4-5.

As of time of the writing of this opinion, I have not received any information about possible appeals from this ruling. Therefore, at this time the ruling stands that the state enterprise Soyuzmultfilm Studio ceased to exist at the time of the formation of the lease enterprise, that a new entity, FSUESMS, was created in 1999 to take over the state property, i.e., material assets, held by the lease enterprise for a ten-year period between 1989 and 1999 and that the other rights and assets belonging to the lease enterprise passed by operation of law to SMS, its successor, in 1999.

[\[FN20\]](#)

(2)

On May 22, 1992, an agreement was signed between the lease enterprise and a California corporation called Films by Jove, Inc. by which the parties agreed, in exchange for valuable consideration, to make the latter the exclusive licensee worldwide for the Soyuzmultfilm film library. *See* Pls.' Mot. Dis. at 3. FBJ thereafter invested more than three million dollars to restore, update and revoice the library. *See id.* Partnered with the world-famous dancer Mikhail Baryshnikov, FBJ employed well-known actors from around the world to revoice the films in multiple languages: English-language versions: Jessica Lange, Kathleen Turner, Bill Murray, Shirley MacLaine, Charlton Heston, Sarah Jessica Parker and Jim Belushi; French-language versions: Catherine Deneuve and Irene Jacob; Spanish-language versions: Julio Iglesias, Maria Conchita Alonso and Edward James Olmos. *See id.* ¶ 5. When the lease enterprise Soyuzmultfilm Studio was reorganized into SMS, the agreement between the lease enterprise and FBJ also passed to SMS.

Defendant Rigma America Corporation, doing business as St. Petersburg Publishing House, operates several stores in Brooklyn, a warehouse and major wholesale / distribution and duplication facilities for Russian-language entertainment products, including audio and videocassettes, CDs and DVDs. *See* Pls.' Mot. Dis. at 4. Defendant Joseph Berov is Rigma's sole officer, director and stockholder. *See* Defs.' Mem. Opp. Pls.' Mots. for Partial Sum. J. and for Ord. of Contempt and Supp. Defs.' Cross-Mot. for Partial Sum. J. [hereinafter "Defs.' Cross-Mot."] at 5. Defendant Natasha Orlova, according to the defendants, is "a sometime employee of Rigma who has no ownership interest in the company." *Id.*

*12 FBJ and Rigma concluded an agreement on July 20, 1998 to give defendants the rights to distribute certain films to which FBJ has the exclusive rights. *See* Pls. Mot. Dis. at 4. The agreement permitted distribution of a special edition of these titles only for retail purposes within the defendants' retail catalogue. *See id.*

Following what they perceived to be repeated violations of the agreement and of their copyrights in the films, FBJ instituted this present action. A preliminary injunction in plaintiffs' favor was entered on defendants' consent on May 4, 1999. As has been detailed above, defendants have admitted to violating the injunction, and the sole issue now before the court is whether or not FBJ is the legitimate copyright holder in the films sold by the defendants.

Discussion

(1)

Plaintiffs first contend that FSUESMS has no standing to bring suit in this court because its registration has been cancelled, and therefore, it does not legally exist in Russia. *See* Pl.'s Mot. Dis. at 7. As plaintiffs have indicated, to make a determination about whether a foreign corporation has standing to sue, the courts must look to the law of the country where the corporation is or claims to be incorporated:

A corporation organized and existing under the laws of a foreign state which we have recognized and with which we have comity may ordinarily seek the aid of our courts in assertion of its rights, even against our own citizens. If the existence of the corporation, its capacity to sue, or the authority of its directors to represent it or to bring the action is challenged, we look to the charter and the law of its corporate domicile for the data upon which we can rest our determination of such questions.

[*Russian Reinsurance Co. v. Stoddard*, 240 N.Y. 149, 147 N.E. 703 \(Court of Appeals, New York, 1925\)](#). Also, [Fed.R.Civ.P. 17\(b\)](#) explicitly provides that "[t]he capacity of a corporation to sue or be sued shall be determined by the law under which it was organized."

Plaintiffs argue that because FSUESMS's registration was cancelled by the June 5, 2000 and July 24, 2000 Russian court decisions, FSUESMS is not a legal enterprise, cannot do business under Russian law, *see* Art. 135 of the Russian Arbitration Procedural Code, and therefore, does not have standing to sue in this court. *See* Pls.' Mot. Dis. at 8-9. Plaintiffs add that the August 18, 2000 decision by the Federal Arbitrazh Court for the District of Moscow that is relied on by FSUESMS did not overturn the June 5, 2000 and July 24, 2000 decisions but rather, addressed itself to the March 6, 2000 and June 7, 2000 lower court decisions in the suit brought by FSUESMS against SMS. *See id.* [at 9-10, 147 N.E. 703](#). The legitimacy of FSUESMS's registration was not litigated in those cases. *See id.*

Plaintiffs' memorandum in support of their motion to dismiss is dated September 22, 2000. On September 25, 2000, the Federal Arbitrazh Court for the District of Moscow issued a brief order vacating and remanding for reconsideration the June 5, 2000 and July 24, 2000 decisions relied upon by the plaintiffs that cancelled FSUESMS's registration. *See* Sept. 25 Dec. As of the date of this opinion, a decision on remand has upheld FSUESMS's registration, and that decision has been affirmed at two successive appellate levels. [\[FN21\]](#) Although there is one last appeal that may be taken, at the present time FSUESMS's registration has been held valid, and accordingly, it will be presumed that FSUESMS has the necessary standing to bring suit in this court until such time as a Russian court with authority to revoke FSUESMS's corporate registration should decide otherwise. [\[FN22\]](#)

(2)

*13 In order for Films by Jove to be able to pursue its claim against the defendants, FBJ must be the rightful owner of the copyrights in the relevant films. [\[FN23\]](#) FBJ claims its rights in the copyrights on the basis of the 1992 agreement between it and the lease enterprise Soyuzmultfilm Studio, which purported to make FBJ the exclusive worldwide licensee in the films produced by the state enterprise and lease enterprise Soyuzmultfilm Studio. The first question that must be answered, then, in determining whether or not FBJ is currently entitled to maintain a suit for copyright infringement is whether or not the lease enterprise Soyuzmultfilm Studio was the rightful owner of the copyrights at the time when it licensed them to FBJ.

The issue of initial copyright ownership must be decided in accordance with Russian law. The Second Circuit has endorsed this view. See [Itar-Tass Russian News Agency v. Russian Kurier, Inc., 153 F.3d 82, 90 \(2d Cir.1998\)](#) ("Since the works at issue were created by Russian nationals and first published in Russia, Russian law is the appropriate source of law to determine the issues of ownership of rights."). Many of the works at issue are "restored works," which are no longer in the public domain as a result of the Uruguay Rounds Agreements Act of 1995. See Pls.' Not. of Mot. to Dis. 3rd Party Compl. Purs. to [FRCP 12\(b\)\(6\)](#) at 6. [17 U.S.C. 104A\(b\)](#) awards ownership of a restored work to "the author or initial rightholder of the work as determined by the law of the source country of the work." The source country, as defined by [17 U.S.C. 104A\(h\)\(8\)](#) is Russia. In any case, therefore, Russian law applies, and all parties are in agreement on this. See FSUESMS's Cross-Mot. at 5.

No similar agreement exists, however, on the question of what Russian law has to say about the paradigm this case involves. Each side presents experts in Soviet and Russian copyright law to support its position. It should be noted, in this connection, that "[d]etermination of a foreign country's law is an issue of law." [Itar-Tass, 153 F.3d at 92](#); see [Fed.R.Civ.P. 44.1](#); [Bassis v. Universal Line, S.A., 436 F.2d 64, 68 \(2d Cir.1970\)](#). Therefore, disagreements among experts about Russian law do not stand in the way of a grant of summary judgment in favor of either party.

Both parties agree that in Russian copyright law, as in its American counterpart, "[o]nly the successor to the primary rights of the author may further transfer the rights. There must be a continuous chain of transfers starting with the Film Studios. Otherwise a party conducting the transfer does not have the authorship rights and cannot transfer such right to anybody else." Decl. of Professor V.A. Dozortsev ¶ 1, Ex. 10, attached to Decl. of Julian Lowenfeld.

Accordingly, Plaintiffs' principal experts, Professor Paul B. Stephan, who is Percy Brown, Jr. Professor of Law and the E. James Kelly, Jr. Class of 1965 Research Professor at the University of Virginia School of Law and Professor Michael Newcity, who is Deputy Director of the Center for Slavic, Eurasian, and East European Studies at Duke University begin by arguing that the copyrights belonged, as an initial matter, to the state enterprise Soyuzmultfilm Studio. The suggestion is that if the copyrights were owned by the state enterprise Soyuzmultfilm Studio, they could have been legitimately transferred to the lease enterprise Soyuzmultfilm Studio, whereupon the lease enterprise could have concluded an equally legitimate agreement with FBJ. If, on the other hand, as FSUESMS's expert, Prof. Maggs, argues, the copyrights were never owned by the state enterprise Soyuzmultfilm Studio, they could never have been legitimately transferred to the lease enterprise Soyuzmultfilm Studio, which, therefore, could not make them the subject of an agreement with FBJ. We will see in due course whether or not this starkly polarized way of putting the question holds up under scrutiny.

*14 Professor Newcity first notes that the films at issue in this case were initially published between the years 1946

and 1995, [\[FN24\]](#) the majority between 1964 and 1990. *See* Newcity Decl. of January 23, 2001 [hereinafter "First Newcity Decl."] ¶ 21. For most of this period, the copyright law in effect was either the U.S.S.R. Fundamentals of Copyright Law adopted by the Russian Soviet Federative Socialist Republic ("R.S.F.S.R.") in October, 1928 or the R.S.F.S.R. Civil Code which superseded the 1928 law in 1964. *See id.* It is not disputed that the 1964 law and the 1928 law were, in all relevant respects, identical. *See id.* ¶ 22. The 1964 law was itself expressly superseded by the Russian Law on Copyright and Neighboring Rights in 1993. *See id.* ¶ 21.

Article 3 of the Decree of the All-Union Central Executive Committee of the R.S.F.S.R., dated October 8, 1928, "On Copyright," provided that copyright in a film was granted to the film studio that published it. *Id.* ¶ 24. [\[FN25\]](#)

Article 486 of the 1964 Civil Code, entitled "Copyright in Motion Pictures, Television Films, Radio and Television Transmissions," provided that

Copyright in a motion picture or a television film is owned by the enterprise which made the film.

Copyright in an amateur motion picture [or] television film is owned by its authors or coauthors. The author of the script, the composer, director, chief cameraman, artistic director, and the authors of other works which constitute a component part of a motion picture or a television film own the copyright in each of their works.

Copyright in a radio or television transmission is owned by the radio or television organization transmitting it, and the copyrights in the works included in that transmission are owned by their authors.

Id. ¶ 23. Thus, it would appear that the copyrights in all films during the period of the state enterprise Soyuzmultfilm's active existence, 1936-1989, would have belonged to that same enterprise.

However, FSUESMS's principal expert, Peter B. Maggs, Peer and Sarah Pedersen Professor of Law at the University of Illinois College of Law, contends that this interpretation of Article 486 is inaccurate. *See* Maggs Decl. ¶ 18. According to him, the above translation of that article erroneously uses the terminology "is owned by," whereas "[c]opyright in a cinematic film or a television film *belongs to* the enterprise which has effectuated the filming" would have been the more appropriate translation. *Id.* (emphasis added by Professor Maggs). The Russian verb that gave rise to this dispute, transcribed into the Latin alphabet, is "prinadlezhat," which, according to both Professor Maggs and Professor Newcity, can be translated as either "to belong to" or "to own." *See* Maggs Decl. ¶ 18; First Newcity Decl. ¶ 27. Professor Newcity provides entries from two dictionaries which suggest that "prinadlezhat" can be translated in either fashion. *See* Ex. 1, attached to First Newcity Decl. But, despite this ambiguity, Professor Maggs insists that "belongs to" is the proper translation in the current context.

*15 What hinges on this distinction, at least according to Professor Maggs, is the question of who actually owns the copyrights, the state enterprise or the state itself. The state, Professor Maggs argues, was the actual owner of the pre 1989 copyrights. *See* Maggs Decl. ¶ 18. State enterprises such as Soyuzmultfilm Studio did not own property but rather, held the property of the Soviet state in "operative management," which means, simply, that the state enterprise was responsible for managing property owned by the state. *See id.*

In support of this interpretation of the law, Professor Maggs offers two pieces of evidence, Article 94 of the 1964 Russian Civil Code and an excerpt from a text, *Soviet Law* (London: Butterworths, 1983), by Professor William Butler, an expert on Soviet law. The former reads:

The state is the sole owner of all state property

State property assigned to state organizations is in the operative management of these organizations exercised within the limits established by law, which exercise--in accordance with the purposes of their activity, planned tasks, and the purpose of the property--the rights of possession, use, and disposition of the property.

Id. ¶ 18. The latter states:

The State is regarded as the sole owner of all state property In those instances when the State allocates a portion of its property to State organisations it does not relinquish ownership but places the property in the 'operative management' of that organization whose right of possession, use, and disposition must be exercised in accordance with law, the charter of the organization, and the purpose of the property.

Id. ¶ 19.

Plaintiffs contest Professor Maggs' reading of Article 486 as well as the significance of both pieces of evidence. Professor Newcity first notes that the relevant paragraph from Article 486 applies both to state and to non-state enterprises, and, as Professor Maggs concedes, non-state enterprises have full ownership of their copyrights. *See* First Newcity Decl. ¶ 28; Maggs Decl. ¶ 18 ("In particular, under Article 486, if a non-state enterprise, for instance a cooperative, made a motion picture, it would become the owner of the intellectual property rights in the picture, while if a state enterprise made a motion picture it would have the right of operative management of the intellectual property rights in the picture."). Why, to frame Professor Newcity's argument sharply, would the drafters of the copyright statute allow the ambiguous word "prinadlezhat" to designate two very different levels of ownership or control depending on whether the enterprise of relevance is a state or non-state enterprise without making that distinction apparent? Furthermore, the word "prenadlezhat" is used throughout the rest of Article 486 to refer to copyright ownership on the part of individuals, as opposed to enterprises, and there is no dispute that the word would certainly denote true ownership in these contexts. *See* Newcity Decl. ¶ 29. Why, once again, use the same ambiguous word in consecutive paragraphs from within a single provision of a code to denote two very different levels of ownership / control without taking care to note any such differentiation with particularity?

*16 Furthermore, Professor Newcity notes, Professor Maggs has cited no scholarly or judicial authority in support of his interpretation. *See id.* ¶ 35. The sole authorities in his favor, Article 94 of the 1964 R.S.F.S.R. Civil Code and the above-cited excerpt from Professor Butler's book, are irrelevant because they refer to physical or material property, not intellectual property. *See id.* ¶ 36. Article 94, Professor Newcity points out, is taken from Part II of the R.S.F.S.R. Civil Code, which relates to the law of tangible property used by state enterprises to produce goods and services. *See id.* In support of this view, Professor Newcity cites Article 95:

Article 95. Objects of the Right of State Ownership

State property extends to all land, its minerals, waters, forests, factories, mills, pits, mines, and electric power stations, to rail, water, air, and motor transport, banks, means of communication, agricultural, trading, communal, and other enterprises organised by the state, and also to the main housing resources in towns and urban settlements. The state may also own property of any other kind.

The land, its minerals, waters, and forests, being the exclusive property of the state, may be granted out for use only. *See id.* Copyright, Professor Newcity notes, is addressed by Part IV of the Civil Code. *See id.* Therefore, Article 94 is inapplicable to the case at bar. *See id.* Adducing Professor Maggs' own statement that "[u]nder normal Soviet civil

law drafting style, the 'General Provisions' of a statute apply also to the more specific narrower types of transactions covered by the statute, unless clearly negated," Maggs Decl. ¶ 38, Professor Newcity observes that the "General Provisions" of the Civil Code are to be found in Part I, which is then followed by seven parts each addressing a discrete area of the law, of which Part II, "The Law of Property" and Part VI, "Copyright Law" are examples. *See* First Newcity Decl. ¶ 37; Ex. 3, attached to First Newcity Decl. This, offers Newcity, is an additional reason why these two parts of the code are not directly relevant to one another. *See* First Newcity Decl. ¶ 37.

Professor Newcity goes on to survey scholarly and judicial authority and finds all sources to support the view that the state enterprise responsible for producing a film owns the copyright to that film. Professor Newcity attests to having consulted more than a dozen scholarly books with not one dissenting voice. *See id.* ¶ 43. For example, copyright expert Eduard P. Gavrilov in his 1984 book *Soviet Copyright Law* has written:

The cases in which an original copyright is owned by a legal entity are established by the legislation of the USSR and the civil codes of the union republics. All-union legislation does not provide for such cases, but the civil code secures, in the first place, to an organization that publishes a scientific collection, encyclopedic dictionary, journal, and other periodic publications, the copyright to that publication as a whole; and in the second place, to an enterprise that shoots a motion picture or television film, and to radio and television organization that transmit radio and television broadcasts, the copyright to the specified works.

*17 *See id.* ¶ 43. Gavrilov's view is seconded by S.A. Chernysheva in her 1984 book *Legal Regulation of Copyright Relations in Cinematography and Television*, as well as by Irina Savel'eva in her 1986 text *Legal Regulation of Relations in the Field of Artistic Creation*. [\[FN26\]](#) *See id.* ¶ 44.

Those who have surveyed the 1928 law reach similar conclusions. Among these experts are B.S. Antimonv and E.A. Fleishits who, in their 1957 book, *Copyright Law*, speaking of the 1928 legislation, conclude that "[the law] recognized ... film studios that create films as subjects of copyright." *See id.* ¶ 42. V.I. Serebrovskiy echoes this conclusion in his 1956 book *Problems of Soviet Copyright Law*, as does Serge L. Levitsky in his 1964 book *Introduction to Soviet Copyright Law*. *See id.*

Further, Professor Gavrilov has submitted a declaration in this case in which he concludes, in accordance with his view conveyed above, that "the unlimited exclusive copyright, including the right to show the films, was vested in film studio 'Soyuzmultfilm' ... for all the films under consideration." Decl. of Eduard P. Gavrilov, Ex. 4, attached to Decl. of Julian Lowenfeld. In addition to Gavrilov, another leading authority on Russian copyright law, Professor Viktor A. Dozortsev has written that "the Studio which filmed the picture is the sole proprietor of the copyright ... that has ... the right to use the work and the entire right to dispose of the work." Decl. of V.A. Dozortsev, Ex. 10, attached to Decl. of Julian Lowenfeld. Svetlana Rozina, another expert on Russian copyright law, has also submitted a declaration in agreement with this conclusion. *See* Decl. of Svetlana Rozina, Ex. 11, attached to Decl. of Julian Lowenfeld.

Judicial decision, although not entitled to the same weight as similar decisions in common law regimes, as Professor Newcity cautions, have reached identical determinations. Professor Newcity makes mention of the *Matveevna v. Krupniy Plan* case, in which the court held that "[a]ccording to the Civil Code (Article 486, CC of RSFSR) ... all the proprietary rights belonged to the film studio, which produced the film," Ex. 8, attached to Decl. of Julian

Lowenfeld, and the *Sergeyev* case, where the court held that "[a]ccording to the Article 486 of CC of the Russian Soviet Socialist Federation of 1964, which was in effect during the creation of the films--the author's right for the film belonged to the organization which shot the films ..., i.e., film studios." Ex. 9, attached to Decl. of Julian Lowenfeld. The December 26, 2000 remand decision of the Moscow Region Arbitrazh Court in the suit between SMS and FSUESMS, quoted at length above, also held that the copyrights produced by the state enterprise Soyuzmultfilm Studio belonged to that state enterprise as per the operations of Article 486. [\[FN27\]](#)

Additional evidence cited by Professor Newcity in support of his argument includes the fact that after 1978, at which time Goskino instituted the requirement that copyright notices be placed on films, the state enterprise Soyuzmultfilm was listed as the copyright proprietor. *See* First Newcity Decl. ¶ 47. Further, Professor Newcity cites specific circumstances under which the state could become a copyright holder. *See id.* ¶ 48. These circumstances are limited to: (1) the case where the state uses its right, available both under the 1928 and 1964 law, to purchase compulsorily an author's copyright; (2) the case where a copyright proprietor specifically designated the state as a successor to the copyright in his or her will; (3) the case where an enterprise owning a copyright is liquidated and the copyright escheats to the state; and finally, (4) the case where the term of copyright on a given work had expired, whereupon the R.S.F.S.R. Council of Ministers could proclaim it to be state property. *See id.* None of these circumstances obtain here, Professor Newcity notes, and therefore, the copyrights in this case could not have belonged to the state. *See id.* ¶ 49. Article 498 of the 1964 R.S.F.S.R. Civil Code, which provides that "[a] copyright of an organization is valid permanently. In case of the reorganization of the organization which owns it, the copyright is transferred to its successor in title, and in case of its liquidation, to the state," *Id.* ¶ 55, is, according to Professor Newcity, particularly compelling evidence that the copyrights belonged to the state enterprise *ab initio*, since otherwise there would be no need to include such a provision in the Code, or alternatively, the provision would only apply to non-state enterprises, which its broad language does not indicate. *See id.* ¶ 51.

*18 Finally, Professor Newcity points to legislative action by Russia's current government that implicitly recognized that state enterprises such as Soyuzmultfilm Studio were indeed copyright holders. *See id.* ¶ 52. Plaintiffs' other principal expert, Professor Stephan, elaborates on the nature of this action in detail. In 1998-99, the Russian Duma contemplated a bill that would have, if enacted, asserted government ownership of all copyrights in audiovisual works created before August 2, 1992, aside from those held by individuals, as opposed to organizations. *See* Decl. of Paul Stephan of January 22, 2001 [hereinafter "Second Stephan Decl."] ¶ 16. A November 11, 1998 letter from the Russian Federation State Committee on Cinematography ("Roskino") argued against the adoption of the proposal, observing that "for films made before August 3, 1992, there exist two kinds of rights: first the state rights, expressed through keeping all the initial stock of films in state archival facilities, and second, exclusive property rights to films (objects of copyrights), which belong to the film studios." *Id.* ¶ 16. The letter further argued that the ends of the proposed legislation could only be properly achieved by "a transfer of copyright on a contractual basis, an obligatory condition of which would be the payment of copyright compensation." *Id.* The Russian government followed suit, submitting an official response opposing the law to the legislature on April 12, 1999, arguing that copyrighted works created before the enactment of the 1993 Russian Copyright Law had the protection of Russian law and could not be expropriated by the proposed measure, which would have applied to "juridical persons, including those that had

been transformed at that time [from state enterprises] into shareholding companies and other organizations." *Id.* A similar conclusion was reached by the Duma's Committee for Cultural Affairs, which concluded that the proposal "in form directed toward taking away the proprietary rights to audio-visual creative work of juridical persons (movie and TV studios), would amount to an expropriation of intellectual property from their legal rightful owners." *Id.* Persuaded by such opinions, the Duma rejected the bill. *See id.*

Professor Stephan also presents some very illuminating background information on the Soviet copyright situation that is helpful in distinguishing the rights of the state enterprise from the rights of the state. According to him, Professor Maggs' use of the term "operative management" to describe the rights of state enterprises vis-à-vis the works that they had created obscures the debate extending from the 1950s to the 1980s among Soviet legal scholars about what precisely the rights of such enterprises were and should be. *See id.* ¶ 2. As a threshold matter, there was no dispute that the copyright itself, the underlying right, was held by the state enterprise. *See id.* ¶ 3. The dispute centered more on the question of what precisely that copyright entailed, i.e., to what extent the state could restrict and control the economic uses of the state enterprise's copyrights. *See id.*

*19 Two schools of thought evolved. *See id.* ¶ 2. The advocates of the "economic law" approach suggested that "all organs of the Soviet government held whatever they possessed or controlled at the sufferance of the Soviet state and acted only as agents of the state." *Id.* By contrast, the "civil law" advocates "conceded that the state had ultimate sovereignty over all state property, but maintained that the assignment of ownership rights to state entities was legally meaningful and would be supported by the normal rules of civil law absent some specific enactment of the state to the contrary." *Id.* "The economic law school maintained that the state enterprise had essentially no rights, and that the default owner of state property was some higher level of the state bureaucracy. The civil law school argued that state enterprises had property and contract rights, subject to specific and valid orders from the state bureaucracy limiting those rights." *Id.*

In practice, although Article 486 of the Civil Code of the R.S.F.S.R. awarded copyrights to their authors and to state enterprises if they were the originators of the copyrighted works, the exploitation of those copyrights was restricted by the state. *See id.* ¶ 3. For example, the right to foreign exploitation of a film was denied to copyright holders by the State Monopoly on Foreign Trade from the early days of the U.S.S.R. A December 29, 1973 decree of the U.S.S.R. Council of Ministers adopted a "Regulation on the State Committee of the Council of Ministers of the U.S.S.R. on Cinematography" "confirmed Goskino's monopoly rights to distribute films produced by Soviet film studios within the Soviet Union (Article 63) and to market films abroad through the auspices of the All Union Association [Soveksportfilm] (Article 60)." *Id.*

Professor Stephan summarizes this state of affairs as follows: "Thus an act of Soviet administrative law limited the ability of the enterprises that held copyrights in films of a range of powers to exploit these rights commercially. But the underlying right, as opposed to the power to exploit commercially, remained with the enterprise, and with perestroika the commercial power was regained." [\[FN28\]](#) *Id.* But, after all, what does it mean to "own" a copyright other than to have some ability to exploit it? Or, to employ the dominant law school property metaphor, if the proverbial "bundle of sticks" commonly associated with the right of possession to an intangible item belongs to someone other than the "rightful holder" of that item, can it truly be said that the rightful holder retains anything at

all, and is it not precisely this issue--the question of who owned what sticks in the bundle--that constituted the essence of the dispute between the civil law and economic law advocates? Accordingly, taking Professor's Stephan's position as accurate, it could be concluded that the issue of the true "ownership" of Soviet-era copyrights, or at least ownership as American copyright law would define it, could not be fully resolved until after the collapse of the Soviet Union and the subsequent Perestroika period reforms had made a choice, one way or the other, either to valorize, or alternatively, to devalue the incipient right granted to the state enterprise. Thus, the inquiry of whether or not the copyrights were owned by the state or by the state enterprise, requiring no definitive resolution during the Soviet era, would be collapsed into an inquiry of how Perestroika-era legislators elected to treat these rights. There will be occasion to return to these questions later, when the legitimacy of the copyright transfer between the state enterprise Soyuzmultfilm and the lease enterprise Soyuzmultfilm is discussed.

*20 Professor Maggs disputes many of the various arguments suggested by Professor Newcity and Professor Stephan. He begins by noting that even if Professor Newcity were correct that the state enterprise Soyuzmultfilm had full ownership of as opposed to operative management over the copyrights, this would not help plaintiffs, since there is no documentary evidence that any copyrights were ever transferred from the state enterprise to the lease enterprise in 1989. *See* Reply Decl. of Peter B. Maggs [hereinafter "Maggs Reply Decl."], attached to Reply Decl. of Robert W. Clarida [hereinafter "Clarida Reply Decl."] ¶ 15. Moreover, if the state enterprise had truly been liquidated in 1989 when the lease enterprise came into being, its copyrights would have escheated to the state pursuant to Article 498 of the Civil Code, which, as Professor Newcity noted, provides for such an outcome in the event of an enterprise's liquidation. *See id.*

Professor Maggs proceeds to insist, however, that the copyrights were, in fact, owned by the Soviet state. He suggests that Professor Newcity has misinterpreted his linguistic argument by attributing to Professor Maggs the position that the word "prinadlezhat" in Article 486 means something less than full ownership. *See id.* ¶ 20.

Professor Maggs corrects this misconception:

My position was very simple. My position was not that the language of Article 486 indicated that the State Enterprise owned or did not own the copyright. My position was that since the word 'prinadlezhit' [FN29]--'belongs to' in Article 486 could cover either ownership or operative management, it is necessary to look to other sources, both to accepted Soviet legal theory of property rights and to the specific language of the directly relevant Article 94 of the Civil Code to determine what is meant by the word in a particular context.

See id.

Article 94, which, the reader will remember, set forth the notion of operative management, was, according to Professor Newcity, only pertinent to forms of property other than intellectual property. Professor Maggs disagrees. First, he notes that Article 95, the basis for Professor Newcity's argument, explicitly states that "[t]he state may also own property of any other kind." *See id.* ¶ 21. Next, he takes issue with Professor Newcity's suggestion that Article 94 and the other provisions of Part Two of the Civil Code that detail the law of property do not apply to the Civil Code as a whole. "In fact, 'Part One. General Principles,' 'Part Two. Law of Property,' and 'Part Three (I.) General Principles of Obligations' apply throughout the Code." *See id.* ¶ 22. Professor Maggs adduces, as evidence, a 1970 commentary on the Code by E.A. Fleishits & O.S. Ioffe, where citations to the applicability of provisions from Part

Two and Part Three (I) appear throughout after individual code sections. *See id.* In particular, Articles 94 and 95 are cited in a commentary to Article 237 "Contract of Purchase and Sale." *See id.* ¶ 23. Another authoritative 1982 commentary edited by S.N. Bratus and O.N. Sadikov also cites the applicability of Articles 94 and 95 to Article 237. These citations, according to Professor Maggs, belie Professor Newcity's argument that Article 94 does not apply to other sections of the Civil Code. *See id.*

*21 Professor Maggs goes on to attempt to cast doubt upon the import of Newcity's impressive catalogue of expert opinion in support of the point that the copyrights were owned by the state enterprise Soyuzmultfilm Studio as opposed to the state. Every one of these experts, Professor Maggs says, use ambiguous terms such as "holder" and "belongs to" rather than the Russian word "sobstvennik" that, according to Professor Maggs, "unambiguously denote[s] ownership." *Id.* ¶ 24. To the extent that Professor Newcity has used the word "own" or "ownership" in his translations, he has skirted the issue. *See id.* ¶ 25.

It is not entirely clear how Professor Maggs' distinction between "belongs to" and "is/are owned by," both of which can, after all, mean the same thing, refutes the above-quoted opinion of Professor Gavrilov, when Gavrilov says that "the unlimited exclusive copyright, including the right to show the films, was vested in film studio 'Soyuzmultfilm'... for all the films under consideration." Decl. of Eduard P. Gavrilov, Ex. 4, attached to Decl. of Julian Lowenfeld, or the opinion of Professor Dozortsev, where he says that "the Studio which filmed the picture is the sole proprietor of the copyright ... that has ... the right to use the work and the entire right to dispose of the work." Decl. of V.A. Dozortsev, Ex. 10, attached to Decl. of Julian Lowenfeld. The word "prenadlezhat" does not appear in these quotations, and Professor Maggs does not meaningfully address their substance. What, after all, does Professor Gavrilov mean other than copyright ownership when he talks about "the unlimited exclusive copyright" being "vested in" Soyuzmultfilm Studio? What does Professor Dozortsev mean other than copyright ownership when he claims that the studio is the "sole proprietor of the copyright" and has the "right to use" and "entire right to dispose" of the work? Professor Maggs offers no response to such questions.

He does, however, parry Professor Newcity's point about the placement of copyright notices on films, calling it inconsequential, since "[r]egistration did not establish ownership; it merely allowed central authorities, who were providing the funds for making films and were censoring films, to keep track of which studios made which films." *Id.* ¶ 26.

As for the proposed copyright legislation mulled over and ultimately rejected by the Duma, Professor Maggs objects to the discussion as being irrelevant, "because Russian courts have never treated the history of legislation that was not passed nor comments on such legislation as of any legal significance whatsoever." *See id.* ¶ 30. His claim here is surely a bit overstated, since, although rejected legislation may not be binding legal authority, it can certainly be useful as an indication of what authoritative voices understand the current state of the law to be. If a legislature would have to pass a new law in order to put copyrights in the hands of the state, then it stands to reason that without that law, those copyrights are owned by someone or something other than the state. The series of letters opposing the measure by Roskino, the Russian government and the Duma's Committee for Cultural Affairs, all of which label the proposed legislation an exercise in expropriation of intellectual property, gives credence to precisely this notion.

*22 Perhaps sensing that his dismissal of this legislative action as irrelevant does not quite suffice to dispel its

import, Professor Maggs' proceeds to make the following argument:

None of the material [Professor Stephan] discusses refers specifically to Soyuzmultfilm. One of the letters does refer to Mosfilm, the largest of the Russian film studios. As we know from *Mosfilm v. Committee of the Russian Federation for Cinematography, et al.* (Exhibit 10 to the Declaration of Julian Lowenfeld), a Russian court, after examining the relevant documents, held the privatization process for Mosfilm properly transferred copyrights to the successor private company. Obviously with respect to Mosfilm and other privatized studios that did own copyrights, the writers of the comments quite properly viewed the proposed law as involving expropriation. But we know from the Information Letter of the High Arbitration Court that film studios created by a reorganization whose reorganization papers did not provide for transfer of copyrights had no copyright rights at all to prior repertory. And certainly those film studios like the lessee enterprise, that merely leased equipment and buildings, obtained no copyrights. Thus it would be totally improper in any event to apply the conclusions in these comments to the copyright rights of film studios not mentioned in the letter.

Id. ¶ 30. This argument is somewhat less than analytically bulletproof. First of all, Professor Maggs has elsewhere in his reply declaration discussed the December 26, 2000 remand decision of the Moscow Region Arbitrazh Court which concluded that the privatization process for Soyuzmultfilm Studio, like the Mosfilm privatization process that Professor Maggs refers to, succeeded in transferring the copyrights of the state enterprise to the lease enterprise (and later to the joint stock company plaintiff). [\[FN30\]](#) *See id.* ¶ 11. The Information Letter of the High Arbitration Court (appearing as Exhibit 1 attached to the Maggs Reply Declaration) on which Professor Maggs seems to place great reliance here and elsewhere, is a document of little relevance to the case at bar, as will be explained shortly.

Professor Maggs also provides no reason to exclude Soyuzmultfilm Studio from the rather broad language of the letters adduced by Professor Stephan. The Duma's October 15, 1999 "Official Response" to the proposed legislation, for example, states that the "[p]roposed bill is directed toward taking away proprietary rights of juridical persons (movies and TV studios) to audio-visual creative works and that would mean expropriation of intellectual property from their legal rightful owners." Duma's Official Response, Ex. 11, attached to Second Stephan Decl. ¶ 1. The state enterprise, it will be recalled, "is a juristic person, it enjoys the rights and performs the duties connected with its activity, and it possesses a specific part of public property and has its own balance sheet." The Legislation of Perestroika, Ex. 2, attached to Second Stephan Decl. at 21. In addition, Article 486 of the 1964 Civil Code of the R.S.F.S.R., the article that awards copyrights in motion pictures to the enterprises which shot them, is specifically cited in the Duma's letter. Duma's Official Response, Ex. 11, attached to Second Stephan Decl. ¶ 1. Thus, it is quite clear that the language of the Duma's Official Response is broad enough to have applied to Soyuzmultfilm Studio.

*23 In response to Professor Stephan's distinctions between the "civil law" theorists and the "economic law" theorists, Professor Maggs advances the claim that during the pre-Perestroika period, even the most ardent representatives of the civil law school, such as Professor O.S. Ioffe, emphasized the fact that there was a "single fund" of state property and that enterprises owned no property:

State socialist ownership constitutes national property. It is characterized therefore *by the principle of a single fund*. The content of this principle is that state property, regardless of in whose possession it is located belongs by right of ownership only to the state. Individual state agencies--state enterprises and institutions--possess specified systems of

state property necessary for the performance of the tasks placed upon them. However the state agencies are not the owners of the state property transferred to them. The Soviet state acts as the single and sole owner.

* * *

State agencies possess, use, and dispose of the property in their possession not by their authority but by the authority granted to them by the state as owner.

Id. ¶ 16. Professor Maggs points out that the unambiguous word "sobstvennik" (owner) is used here. *See id.*

Professor Newcity and Professor Stephan respond to Professor Maggs' arguments. Newcity's first point is that he has not misread Professor Maggs' argument with respect to the use of the word "prinadlezhat."

In his Declaration Professor Mags asserts that there is a dichotomy in Soviet copyright law. Non-state enterprises and individuals enjoyed ownership of their copyrights; state enterprises had only the right of operative management. The thrust of the analysis in my Declaration was that no such dichotomy existed. The Russian word that Professor Mags seizes on as the basis for his argument-- *prinadlezhat*--is used throughout Soviet and Russian copyright legislation to refer to the rights of individuals, non-state enterprises, and state enterprises. No ambiguity existed in the copyright legislation; state enterprises owned the copyright in their films to the same extent as non-state enterprises and individuals. The ambiguity that Professor Maggs seeks to create by introducing principles of law relevant to other forms of property simply is fallacious.

Newcity Reply Decl. ¶ 6., attached to Decl. of Julian Lowenfeld of Feb. 20, 2001 (citations omitted). The "*prinadlezhat*" language was used throughout legislation and commentaries by Soviet and Russian scholars in referring to state enterprises, non-state enterprises and individuals. *See id.* ¶ 8. No distinction was made among these categories. *See id.* Yet, Professor Maggs insists that this same language denoted a different possessory interest for state enterprises than for non-state enterprises and individuals. *See id.* Professor Newcity's argument is that, without some basis for this distinction, Professor Maggs' view cannot be maintained. *See id.*

*24 Professor Newcity likewise disputes Professor Maggs' interpretation of Article 94 and its applicability to non-material assets. *See id.* ¶ 7. While conceding that parts of the Civil Code may be cited by scholars to help interpret provisions from other parts of the Civil Code, Professor Newcity notes that it is a far cry from that proposition to Professor Maggs' suggestion that the provisions of Part II, which are clearly intended to govern tangible assets, will supersede the provisions of Part IV, which deal with intangible assets, absent some clear, express statement in the Civil Code that effects such a result. *See id.*

Finally, Professor Newcity responds to Professor Maggs' claim that even if the state enterprise had originally owned the copyrights, its copyrights would have automatically escheated to the state as per the operations of Article 498 of the R.S.F.S.R. Civil Code upon the liquidation of the state enterprise by pointing out that the enterprise was not liquidated, but rather, was transformed into the lease enterprise, an event that would have triggered a different paragraph of Article 498 and resulted in the passing of the copyright from the state enterprise to the lease enterprise. *See id.* ¶ 16. This point will be developed more fully later as part of the discussion of the transfer of the copyright from the state enterprise to the lease enterprise.

Professor Stephan disputes Professor Maggs' application of the "single fund" concept. "Soviet law," he writes, "gave great significance to the distinction between material and immaterial property. The former were characterized by the

principle of the single fund, as the reference to Professor Ioffe's 1967 treatise indicates. Immaterial rights, and in particular intellectual property, stood on a different basis, as the language of the R.S.F.S.R. Civil Code clearly indicates." Stephan Reply Decl. ¶ 5, attached to Decl. of Julian Lowenfeld of Feb. 20, 2001. Professor Stephan goes on to note that Professor Ioffe himself recognized this distinction when, in the same treatise quoted by Professor Maggs, in speaking of state enterprises among other institutions, he wrote: "If the legal entity is the *original owner* of the copyright, its copyright is transferred: 1) in the case of reorganization--to its legal successors, and 2) in the case of liquidation--to the state." *Id.* (emphasis added).

In the final analysis, it appears that plaintiffs and their experts have the better of the argument on the issue of who owned the copyrights prior to 1989. The text of Article 486 of the 1964 Civil Code of the R.S.F.S.R. and the corresponding provision of the 1928 Code, which vest copyright ownership in a film in the enterprise that created the film, is too clear, and Professor Maggs has not provided sufficient justification to depart from the obvious reading of the statute. He has adequately explained away neither the litany of expert opinion provided by the plaintiffs' principal experts nor the import of the Duma's contemplated 1998-1999 legislative action. Nor has he adequately accounted for Article 498 of the 1964 Civil Code and other provisions of the Code which expressly enumerate the circumstances under which the state could have possibly obtained ownership of the copyrights.

*25 At the very least, plaintiffs have established the following proposition: before 1989, the state enterprise Soyuzmultfilm was, in some sense, the owner the copyrights in the films it produced. The argument would then be over the extent to which it was understood, during the Soviet era, that the state was *also*, in some sense, the owner of the copyrights. It is quite clear, for example, that the state enterprise Soyuzmultfilm did not enjoy the rights of foreign or even domestic distribution that a copyright owner in the United States would have had and that some of these rights were retained by the state and placed under the aegis of various state agencies, such as Goskino and Sovetskportfilm. Nevertheless, the state enterprise Soyuzmultfilm was a legal entity with at least nominal ownership of the copyrights. Although Professor Maggs has made much of the distinction between "prinadlezhat" and "sobstvennik," it appears that the distinction in Russian is no less murky than the difference between "belongs to" and "is/are owned by," in English, [\[FN31\]](#) and it would be foolhardy to make any bold conclusions about the power of the state enterprise Soyuzmultfilm Studio to transfer film copyrights to the lease enterprise on the basis of the contrast between these words, particularly when other provisions of the law address the transfer issue more directly. Thus, although plaintiffs are probably correct in saying that the copyrights in the films produced by the state enterprise Soyuzmultfilm Studio belonged, for most purposes, to the state enterprise, the issue of initial copyright ownership, at least as far as this case goes, must inevitably collapse into the question of whether or not the state enterprise had the power to alienate those copyrights, the power to transfer them to another organization such as the lease enterprise and, if not, whether those copyrights could have passed to the lease enterprise in some other fashion. We turn, then, to these questions.

(3)

Plaintiffs' expert Professor Stephan delineates the history of the formation of the lease enterprise Soyuzmultfilm Studio and the transfer of copyrights to it from the state enterprise:

To understand the somewhat unusual attributes of a lease enterprise, one must locate the concept of a lease enterprise within the unfolding of the Perestroika program of the Soviet leadership between 1986 and 1991. In the beginning, Communist doctrine and Soviet law were hostile to the concept of private ownership of property used for productive economic activity. Aside from a few economically necessary but ideologically inconvenient exceptions, such as the use of small patches of land by members of collective farms for personal profit, the regime treated private economic activity as an undesirable, indeed criminal act. Thus any entity engaged in for-profit conduct had to trace its ownership back either to the state or some other collective entity, without the possibility of private investment.

*26 By the mid-1980s the Soviet leadership had come to the realization that the concept of social ownership was not working and that reforms were needed. At the same time, the leaders wanted change to be incremental. Rather than introducing sweeping reforms, the government experimented with projects that pointed toward privatization, but avoided full consummation of private ownership of the means of production. Thus in 1986 the Supreme Soviet (then the highest legislative body in the Soviet Union) authorized family-based economic activity, on the grounds that no one outside the family would have to work for a private person. In 1987 the legislature reformed the organization of the state-owned enterprise, the predominant business form of that era, to give those entities some characteristics of a private firm but without private ownership. In that year it also became possible for foreign private investors to take minority positions in joint ventures established under Soviet law. The following year the parliament enacted a law on cooperatives, which extended the family-business model by permitting private employment but did not leave much (if any) room for passive investors. It was against this background that the lease enterprise was created, first by a decree of the Presidium of the Supreme Soviet in April 1989, and then, following the constitutional reform that led to the establishment of the Congress of Deputies as the highest legislative body, by enactment of the Fundamental Principles on Leasing in December 1989.

The lease enterprise was intended to serve as a bridge to privatization and the creation of a fully private corporation, the legality of which was not confirmed until the Congress of Deputies amended the Soviet Constitution in February 1990. As a result, the legislation establishing lease enterprise provides for attributes that go beyond a narrow conception of leasing. The overall conception of the legislation, as is apparent both from its terms and from the statements of the political and legal authorities who introduced and defended it, is to transfer all the functions, rights and responsibilities of a state-owned firm into a private entity, so that the state would become only the passive recipient of rents and that all the risks and rewards of the business would rest with the private firm. At the same time, the state would retain a reversionary ownership interest so as not to violate the then extant prohibition against private ownership of the means of production. The legislation also left open what would happen to that reversionary interest, anticipating that state ownership would come to an end and that lease enterprises ultimately would be succeeded by private firms with absolute ownership rights.

Lease enterprises were organized to acquire all the assets and liabilities of a state-owned firm in return for rental payments. These arrangements, as leases, had terms, in the case of Soyuzmultfilm ten years. But this did not mean that the lease enterprise acquired only the right to use these assets for ten years, or that it could be returned to its prior form as a state-owned enterprise. The prior entity, having gone through the process of creating a lease

enterprise, ceased to exist at the moment of the reorganization. The lease enterprise became the legal successor of the predecessor state-owned firm, possessing all its rights, debts and other legal obligations. The rights received by the lease enterprise included the rights to use and dispose of the property transferred to it for the period of the rent agreement. After that period, the lease enterprise would either surrender the formerly state property it still retained back to the state or, with the permission of the state, begin the process of privatization. Articles 16(4) and 21(1) of the Fundamental Principles on Leasing (*Osnovy zakonodatel'stva Soyuza SSR i soyuznykh respublik ob arende*) makes this point clearly. In particular, Article 16(4) refers to the lease enterprise as the "recipient" (*preyemnik*) of the ownership rights of the predecessor state enterprise, indicating that a complete transfer of those rights takes place. Article 21(1) further stipulates that all products created by the lease enterprise and all of its receipts will belong to the founders of the lease enterprise even after its obligation to return property to the state matures.

*27 In particular, intellectual property rights transferred to the lease enterprise were not leased, but rather fully owned by the lease enterprise. The lease enterprise had the right to enter into long-term licensing agreements and, within the limits of Soviet law of the time, outright transfers of intellectual property, subject only to the limitation that, at the end of the term of the lease enterprise, its successor would assume the rights and obligations of any contracts into which the lease enterprise has entered. Article 498 of the Civil Code of the R.S.F.S.R., as it was in effect in 1989 and following years, deals with the ownership of intellectual property rights. This provision uses the same word as does Article 16(4) of the Fundamental Principles in addressing what happens upon the reorganization of the rights' owners. Article 498 states that, upon the reorganization of an enterprise, ownership of intellectual property rights passes to the "recipient" (*preyemnik*). There is no question that the conversion of a state enterprise into lease enterprise constitutes a reorganization within the meaning of Article 498.

See Decl. of Paul B. Stephan of Sept. 12, 2000 [hereinafter "First Stephan Decl."], Ex. 12, attached to Decl. of Julian Lowenfeld, ¶¶ 5-9.

FSUESMS's expert, Professor Maggs, contends that there was never a legitimate transfer of the copyrights from the state enterprise to the lease enterprise, and in the alternative, even if there were, that the expiration of the lease term in 1999 would have effectuated the return of any transferred copyrights to the state. The lessor named in the preamble to the lease is not the state enterprise Soyuzmultfilm but rather Goskino, which, Professor Maggs explains, is not because Goskino is the owner of Soyuzmultfilm's assets but because Goskino "at that time had the right to assign the management of this state property from one organization (the State Enterprise) to another organization (the Lessee Organization)." Maggs Decl. ¶ 24. But the "key question," as Professor Maggs puts it, "is what was the state property, rights to management of which GOSKINO assigned by the lease." *Id.* ¶ 25.

In this connection, Professor Maggs cites the opinion of the Federal Arbitrazh Court for the District of Moscow of August 18, 2000, which is one of the two opinions that vacated lower court decisions and remanded for further consideration in light of the premise that "[l]egal succession of enterprises is determined by the composition of the property, rights, and duties transferred by the statement (balance sheet) of property, rights, and obligations." Maggs Decl. ¶ 30. "According to the lease contract of December 29, 1989, of the Soyuzmultfilm Film Studio," the court wrote, "the fixed and circulating assets were transferred for leased use for a term of 10 years. The question of the transfer of copyrights to the films created in the studio's past were [sic] not decided by the owner in this contract."

Id.

*28 According to Professor Maggs, the court was clearly directing the attention of the lower court on remand to Article 1.1 of the Lease Contract, which provides:

Lessor grants and Lessee Organization receives in lease the basic and circulating assets (equipment, stock-in-trade, and other goods-material items of value) that are on the balance sheet of the Soyuzmultfilm Film Studio at the time of entry of the present contract into legal force and also receipts from centralized sources in accordance with the plans of capital construction and material-technical support for the 12th and 13th five [year] plans.

Id. ¶ 31. It is unclear whether or not film copyrights appeared on the lease enterprise's balance sheet, if such a document ever existed, and plaintiffs have not offered it as an exhibit despite being repeatedly challenged to do so by Professor Maggs and FSUESMS. [\[FN32\]](#)

Professor Maggs offers two alternatives. If the copyrights do appear on the balance sheet, then they remained state property pursuant to Article 1.2 of the Lease Contract: "[t]he property granted in lease shall remain in state ownership. It shall be under the economic management of the Lessee Organization. The lessor may not alienate this property." *Id.* ¶ 34. The first paragraph of Article 9 of the Fundamental Principles on Leasing suggests a similar outcome: "The grant of property in lease shall not entail the transfer of the right of ownership to this property." *Id.* If, on the other hand, the copyrights do not appear on the lease enterprise's balance sheet or if, as the plaintiffs suggest, there is no balance sheet, then Professor Maggs suggests that the lease enterprise, and therefore, the joint stock company plaintiff, would have no way of proving that the copyrights were ever transferred from the state enterprise Soyuzmultfilm. *See id.* ¶ 35-6.

Professor Maggs then proceeds to cast doubt upon the applicability of Article 16(4) of the Fundamental Principles on Leasing, relied upon by Professor Stephan in his description of Perestroika reforms, *supra*, and providing that "[a] leased enterprise shall become the legal successor of the property rights and duties of the state enterprise assumed in the lease, including also its rights of use of land and other natural resources," *id.* ¶ 37, by arguing that the language of the lease contract did not state that the enterprise itself was being leased but rather transferred only those assets that were included on the balance sheet as of December 20, 1989. *See id.* ¶ 38.

Moreover, even if the lease had been for the enterprise as a whole, Professor Maggs argues that the rights transferred under Article 16(4) would have reverted back to the lessor, the state, after the expiration of the lease term. *See id.* This is because the "General Provisions" of the Fundamental Principles, applicable to the whole statute unless specifically disclaimed, according to Professor Maggs, provide that the lease shall be for "fixed term possession and use." *Id.* Also, paragraph 2 of Article 7 of the Fundamental Principles requires the lessee to "return the property after the termination of the contract, a provision which would make no sense if Article 16(4) were read to grant a perpetual transfer of rights from a state enterprise to a lease enterprise." *Id.*

*29 Of course, having made this argument, Professor Maggs must account somehow for what is expressly stated in Article 16(4), namely, that the lease enterprise shall succeed to the property rights and duties of the state enterprise. In his view, Article 16(4) has the purpose not of transferring anything beyond what is included on the balance sheet but of overcoming a general rule against assignment of rights in certain types of property, such as land. *See id.* ¶ 39. Land was typically "not under the 'operative management' of state enterprises, but rather was used by the state

enterprise under a non- assignable right of use." *Id.* By referring to the lease enterprise as a "successor" and not as an "assignee," Article 16(4) manages to overcome the prohibition on assignment and effect a temporary transfer of rights; but the transfer was never intended to exceed the length of the lease term. *See id.*

Professor Maggs claims that a nonsensical result would follow from plaintiffs' reading of Article 16(4). "Rights of land use" are explicitly mentioned among the rights which a lease enterprise succeeds to when it steps into the shoes of a state enterprise. Consistent with plaintiffs' reading of the article, this succession would have to be perpetual.

Yet, in the case at bar, the physical property--the church building and land under and around it on which the state enterprise Soyuzmultfilm Studio and its successor, the lease enterprise Soyuzmultfilm Studio, conducted their affairs--were returned to the state after the expiration of the lease term in 1999. This is undisputed, and it is, in fact, the very reason that FSUESMS was able to occupy the Church of St. Nicholas the Enlightener pursuant to the Stepashin decree in 1999. SMS had moved out to a Krasnogorsk location, taking with it only its claims to the film library that had accumulated over the many decades of the state enterprise Soyuzmultfilm Studio's existence.

Professor Maggs contends that SMS had no choice but to leave its premises: "I believe [the building and land] were returned because the law was absolutely clear that they could not be retained." *Id.* "To show how ridiculous Plaintiffs' theory is," Professor Maggs writes, "the theory would mean if a state farm enterprise (which under Soviet law had the right to use, but not other rights in the state land that it farmed) were leased, then the Lessee Organization, at the end of the lease, would have to give back the tractors but keep the farm land forever." *Id.*

Even if the lease enterprise had obtained the right to use the copyrights to the pre-1989 films, Professor Maggs continues, it would not have been able to license them to FBJ. *See id.* ¶ 41. Article 18 of the Fundamental Principles on Leasing permits transfer only of "material valuables," which intellectual property is not. *See id.* ¶ 42.

Professor Maggs also faults Professor Stephan's analysis insofar as the latter refers to the lease enterprise as a "bridge to privatization." *Id.* ¶ 61. "[Professor Stephan] fails to point out that under Article 10 of the Fundamental Principles [on Leasing] there were two types of leasing arrangement, those where the contract of lease did and those where it did not provide for a buyout by the Lessee Organization. The lease contract in the present case had no right of buyout. So it did not provide a 'bridge to privatization.'" *Id.*

*30 Professor Newcity responds to Professor Maggs' theory of the lease transfer (or lack thereof) by arguing that Professor Maggs has gone about his analysis in an entirely misguided manner:

Professor Maggs devotes a substantial portion of his Declaration to a discussion of the question whether ownership of the copyrights in the films was transferred from the State Enterprise to the Lease Enterprise by the Lease Agreement. However, he completely ignores the fact that upon reorganization of the State Enterprise the ownership of these copyrights transferred from the State Enterprise to the Lease Enterprise by operation of law. As such, this transfer was not dependent on the provisions of the Lease Agreement and much of Professor Maggs' analysis is irrelevant.

First Newcity Decl. ¶ 54. Article 498 of the 1964 R.S.F.S.R. Civil Code is the law to which Professor Newcity is principally referring. *See id.* ¶ 55. That article, it might be recalled, provided that "[i]n case of the reorganization of the organization which owns it, the copyright is transferred to its successor in title, and in case of its liquidation, to the state." *See id.* This provision accords with Article 37 of the Civil Code, which appears in the General Principles

of the Code:

Article 37. Dissolution of a Juridical Person

A juridical person can be dissolved by means of liquidation or reorganization (merger, division, and accession). In the case of merger and division of juridical persons, the property (rights and obligations) passes to the newly constituted juridical persons. In the case of accession of one person to another, its property (rights and obligations) passes to the latter. The ownership passes on the day of signature of the transfer balance, unless other provision is made by the law or decree for reorganization.

The method of liquidation and reorganization of a juridical person is laid down by legislation of the USSR and by decrees of the Council of Ministers of the RSFSR.

Id. ¶ 56.

According to Professor Newcity, "the reorganization of the State Enterprise into the Lease Enterprise in 1989 represented a transformation of the enterprise as provided for by the Law on State Enterprises (Associations)." *Id.* Professor Stephan expands upon this point:

To effectuate the policy of encouraging direct economic incentives for producers, the [Fundamental Principles on Leasing] permitted a complete transformation of a state enterprise into a lease enterprise, resulting in the disappearance of the state enterprise and the emergence of the privately owned lease enterprise as its legal successor. The assets of the lease enterprise would consist of both property leased from the state (not from the former state enterprise, which ceased to exist) and of assets belonging to the former state enterprise that passed through rights of succession under Article 498 of the Civil Code of 1964, rather than through the lease. Articles 9 and 10 of the [Fundamental Principles on Leasing] specify the ownership of property leased from the state and stipulate that at the end of the lease the state property must either revert to the state or be bought out by the lease enterprise. But Article 16, which recognizes that ownership of other property could pass to the lease enterprise through succession rather than by lease or purchase, indicates the legislature's acceptance of the proposition that a lease enterprise could acquire interests under the normal operation of the rules of the Civil Code outside the scope of the lease contract. Rights to which a lease enterprise could succeed under Article 498 include copyrights, which belonged to the state enterprise rather than its supervising agency and which, pursuant to the legislation of perestroika, included the right to derive hard currency earnings from foreign exploitation.

*31 Professor Maggs claims that copyrights could pass to a lease enterprise only if specified on the balance sheet of the state entity that was transformed into the lease enterprise. This is incorrect. Neither the Law on the State Enterprise nor the Fundamentals on Leasing give such conclusive effect to the balance sheet; indeed, the Fundamentals do not refer to the balance sheet at all. Article 4 of the Fundamentals states that the right to lease property belongs to the owner of that property. The lease between Goskino and [the lease enterprise Soyuzmultfilm Studio] therefore covered only property under the management of Goskino, and had no bearing on those interests belonging to [the state enterprise Soyuzmultfilm Studio] in its own right. The land occupied by the studio and other material assets (such as film stock) was under the operative management of the higher bureaucratic agency, Goskino. [The lease enterprise Soyuzmultfilm Studio] obtained only such an interest in those assets as Goskino conveyed by lease. But as to other rights--the copyrights, contracts with the skilled employees of the studio, the

know-how on which a creative enterprise rests, past awards and the reputation that went with them, indeed almost everything that would make a film studio valuable--[the lease enterprise Soyuzmultfilm Studio] obtained ownership by stepping into the shoes of its predecessor pursuant to Article 498 of the Civil Code, not by lease based on the Fundamentals.

Second Stephan Decl. ¶¶ 7-8.

Professor Maggs, as Professor Stephan points out, seeks to avoid this result, viz., the passing of the copyrights by operation of law to the lease enterprise Soyuzmultfilm Studio upon the reorganization of the State Enterprise Soyuzmultfilm Studio, by suggesting that the state enterprise Soyuzmultfilm Studio and FSUESMS are one and the same. *See* Maggs Decl. ¶ 11. The state enterprise continued to exist between 1989 and 1999, the argument would go. The consequence of such a state of affairs would be that the state enterprise Soyuzmultfilm Studio held a reversion interest in the film copyrights which vested at the end of the lease term. *See* Stephan Decl. ¶ 9. Professor Maggs never makes this argument explicitly and at no point offers any reason whatsoever to think that the state enterprise Soyuzmultfilm Studio continued to exist in some quiescent form after the 1989 creation of the lease enterprise. The most Professor Maggs does claim is that the reason the state enterprise was forced to register an amended charter in 1999 as a federal state unitarian enterprise was due to changes in the law which abolished the state enterprise form. *See* Maggs Decl. ¶ 11. But those changes, namely the adoption of the Civil Code of the Russian Federation, First Part, came in 1994. *See id.* The state enterprise Soyuzmultfilm ceased all operations in 1989 when the lease enterprise came into existence and registered its amended charter in 1999, five years after the adoption of the 1994 law which allegedly created the necessity for the amendment. Professor Maggs can point to not so much as a single act to suggest signs of life on the part of the state enterprise during the period 1989 to 1999. Professor Stephan adds: "The belated attempt of [FSUESMS] to declare itself the successor to [the state enterprise Soyuzmultfilm Studio] does not accord with Russian law in any respect." Stephan Decl. ¶ 10. This understanding finds recent support in the June 4, 2001 decision of the Federal Arbitrazh Court for the District of Moscow.

*32 In his reply declaration, Professor Maggs attempts to cast doubt upon the notion that the lease enterprise was the legal successor of the state enterprise. The lease enterprise's charter, he notes, did not indicate that it was the state enterprise's successor, which, he says, was in contravention of the "universal practice in the drafting of charters in the Soviet Union and Russia when [a] new enterprise claims to be the legal successor of a prior enterprise." Maggs Reply Decl. ¶ 4. In addition, nothing in the charter indicates a claim to the ownership of the state enterprise's copyrights. *See id.*

Professor Maggs also places much stock in a September 28, 1999 Information Letter of the High Arbitrazh Court. *See id.* Information Letters, Professor Maggs explains, are documents through which the High Arbitrazh Court regularly gives guidance to lower courts by stating the facts and holdings of cases correctly decided by the lower courts. *See id.* The lower arbitrazh courts are expected to follow the guidance offered or risk reversal. *See id.* This particular Information Letter involved the 1990 transfer of physical assets and personnel from a film studio to an entity created by a reorganization. *See id.* ¶ 6. The principal question was whether copyrights previously made by the film studio were transferred as part of the reorganization. *See id.*

According to Professor Maggs, the Information Letter "indicated that the argument that there was automatic

succession 'is contrary to law, since legal succession of enterprises is determined by the content of the property, rights, and obligations transferred by the statement (balance).' " *Id.* ¶ 7. This language, Professor Maggs writes, "refutes the statement in Paragraph 51 of Michael Newcity's Declaration, 'Under Article 498, in the event that a state enterprise that owns a copyright is reorganized, its copyrights are transferred to its successor.' " *Id.*

The relevance and import of the Information Letter, which, if it truly meant what Professor Maggs insists it means, would be devastating to plaintiffs' case, is questioned by both Professor Newcity and Professor Stephan. Professor Newcity writes:

Professor Maggs refers extensively to an Informational Letter from the Higher Arbitrazh Court, dated September 28, 1999, which relates to the transfer of ownership from a state enterprise-film studio to a new legal entity. Professor Maggs cites this Informational Letter for the proposition that the copyright in films produced by a state enterprise was not automatically transferred to "an entity created by a reorganization." This Informational Letter, however, is not applicable to the situation in this case because it relates to a fundamentally different and inapplicable form of reorganization.

As I explained in my Declaration, Soviet law recognized several different forms or reorganization of state enterprises. When the State Enterprise was reorganized as a lease enterprise, the form of reorganization followed was a "transformation" (in Russian, *preobrazovanie* ...) under which the original enterprise was reorganized into a new enterprise. Under a transformation the old enterprise ceased to exist and was succeeded by the new enterprise. This is the process that occurred when the State Enterprise was transformed into the Lease Enterprise; the State Enterprise ceased to exist and, under Article 498 of the RSFSR Civil Code, the Lease Enterprise succeeded by operation of law to the ownership of the now-defunct State Enterprise's copyrights.

*33 This is not the form of reorganization that occurred in the case discussed in the Informational Letter. As a result, the Informational Letter is wholly inapplicable to the present case. The first line of the text of the Informational Letter specifies that the form of reorganization that occurred in that case was a "separation" or "spin-off" (in Russian, *vydelenie* ...). This form of reorganization is provided for in Article 23(1) of the Law on State Enterprises (Associations), which was adopted on June 30, 1987, and in later Soviet legislation. In this form of reorganization, discrete units within an enterprise are spun-off from an existing enterprise. One of the important features of this form of reorganization is that the parent enterprise does not cease to exist. Thus, after this form of reorganization occurred, the parent enterprise and one or more daughter enterprises would exist simultaneously. In such a reorganization it was obviously essential that there be a clear agreed-upon delineation of which assets of the parent enterprise were being transferred to the daughter enterprise(s). There was no automatic succession by the daughter enterprise to the ownership of the parent's assets since the parent continued in existence. For this obvious reason, the provisions of Article 498 of the RSFSR Civil Code, which relate to succession of ownership of copyright when one enterprise ceases to exist and is succeeded by another enterprise, did not apply. Thus, the situation described in the Informational Letter is completely different from the reorganization that occurred when the State Enterprise was reorganized into the Lease Enterprise. Consequently, this Informational Letter has no bearing on this case.

Newcity Reply ¶¶ 14-16 (footnote and citations omitted).

Professor Stephan is in agreement. According to him, Professor Maggs has failed to note that the Information Letter

is a "straightforward application of Article 37(6) of the U.S.S.R. Law on Enterprises, enacted June 4, 1990, as well as the almost identical Article 37(7) of the R.S.F.S.R. Law on Enterprises and Entrepreneurial Activity, enacted December 25, 1990." *Id.* ¶ 10. The U.S.S.R. law reads:

Should one or several new enterprises be detached from the enterprise, the property rights and obligations of the reorganized enterprise shall be transferred, in the appropriate proportions, to each of them, by means of the act of division (balance).

Id. By way of contrast, the U.S.S.R. Law goes on to state, in article 37(7), that if "one enterprise is transformed into another, all property rights and obligations of the previous enterprise shall be transferred to the newly created enterprise." [\[FN33\]](#) *Id.*

"The September 29, 1999, information letter explicitly deals with a split-up situation, not with a legal transformation. The conversion of [the state enterprise Soyuzmultfilm Studio] into [the lease enterprise Soyuzmultfilm Studio], by contrast, was a legal transformation." Stephan Reply Decl. ¶ 11. Professor Stephan adds, "Both the U.S.S.R. and R.S.F.S.R. statutes made clear that transformations were different from split-ups, that different rules applied to the former, and that no balance or similar contract-type document was necessary to achieve a transfer of immaterial rights in the case of transformations." *Id.* ¶ 11.

*34 The first sentence of the High Arbitrazh Court's Information Letter is, indeed, very clear in delineating the form or reorganization to which it applies: "If, in the separation of a new enterprise from an enterprise that is the possessor [\[FN34\]](#) ... of copyrights, the question of the transfer of copyrights to the new legal entity is not decided, then the latter may not be recognized as holder of these rights." Information Letter, Ex. 1, attached to Reply Decl. of Robert W. Clarida. Professor Maggs' response to this point in his Sur-Reply Declaration is that Professor Newcity--and, by implication, Professor Stephan--err in applying "a common law mode of analysis in a civil law jurisdiction, by trying to narrow the holding of the case summarized in the Informational Letter to its exact facts." Maggs Sur-Reply Decl. ¶ 4. "In the Russian civil law tradition," he continues, "lower courts look to broad legal principles stated by the higher courts. They do not engage in the nice distinctions between 'holding' and 'dictum' that are characteristic of the common law." *Id.*

Unfortunately for Professor Maggs' argument, the plaintiffs' position with respect to the Information Letter has the distinct virtue of making perfect sense. As Professor Newcity explains, while there is every reason to itemize the property conveyed in a partial transfer, that is, a spin-off or separation, the same need does not exist to itemize everything that is transferred in a full transformation, where one enterprise steps into the shoes of its predecessor, since the totality of the first enterprise's assets would be transferred to its successor. Surely, Professor Maggs cannot mean to suggest that the Information Letter, although it very clearly and unambiguously states, "If, in the separation of a new enterprise from an enterprise that is the possessor ... of copyrights ..., " will be read by lower courts to apply to situations that do not involve the separation of a new enterprise, but rather, the reorganization of one enterprise into another. Such a reading would not only fail to account for the court's very specific language but would give license to broaden virtually any holding to facts clearly beyond its scope.

Not only, therefore, is Professor Maggs' position on this issue hardly sustainable on its face, implying, as it would, that a lower court would apply a higher court's decision to facts to which that decision is not addressed and clearly

irrelevant, but it is rendered even less sustainable in light of the fact that Professor Maggs himself engaged in the very kind of distinction between holding and dicta that he has claimed Russian courts do not honor in attempting to diminish the importance of the December 26, 2000 decision on remand by the Moscow Region Arbitrazh Court, which, more or less, adopted virtually every aspect of plaintiffs' theory of the case. After noting that the Moscow Region Arbitrazh Court "holds that [FSUESMS has] no standing to complain of the transfer of property from the Lessee Organization to the Joint Stock Company, even if [FSUESMS has] valid claims that the transfer lists includes property belonging to [it]," Professor Maggs goes on to say that "[t]he decision also contains a great deal of discussion about why the court believes [FSUESMS has] failed to prove that [it] had any rights, but this discussion is rendered largely irrelevant by the court's decision on lack of standing." Maggs Reply ¶ 12. This "great deal of discussion," which most readers would take for the central holding of the case, is thus dismissed as dicta by Professor Maggs. [\[FN35\]](#) Not only is his analysis on this point not convincing, but it has the additional drawback of casting doubt upon the proposition that he now advances, viz., that Russian courts do not distinguish between holding and dicta. The upshot of this discussion, in short, is that the Information Letter adduced by and heavily relied upon by Professor Maggs is all-too-obviously irrelevant to the case at bar.

*35 Professor Maggs does offer a second argument in favor of the applicability of the Information Letter, namely, that plaintiffs' experts are assuming their conclusion by assuming the lease enterprise to be the legal successor to all the rights of the state enterprise as opposed to just some of the rights. *See* Maggs Sur-Reply ¶ 4. These assumptions, according to Professor Maggs, "are contrary to the now admitted fact that the most valuable rights claimed by the lessee enterprise--the copyrights, were not included in the balance sheet incorporated by reference in the contract." *Id.*

Professor Maggs argument is quite circular, however. His proposition to be proven is that the copyrights had to be included on the lease enterprise's balance sheet to have been legitimately transferred. In support of this proposition, he adduces the Information Letter, which applies only in those instances where there is a partial as opposed to a complete transfer of interest from an enterprise to its successor. To prove that the transfer of interest in the case at bar is not complete, Professor Maggs summons to mind the fact that the balance sheet contains no mention of the copyrights, which were, therefore, not transferred. But, of course, the notion that the failure to include the copyrights on the balance sheet implies that they were not transferred is precisely the proposition to be proven. Hence, the circularity. Professor Maggs has still not offered a single fact that would stand in the way of this court concluding that the state enterprise Soyuzmultfilm Studio was fully transformed into the lease enterprise bearing, for good reason, the same name.

Professor Stephan also disputes Professor Maggs' claim that the inclusion of the fact that an enterprise has succeeded to the position of another enterprise has been a universal practice in the drafting of charters in the Soviet Union and Russia. "This assertion is simply untrue," he says. Stephan Reply Decl. ¶ 3. "Assertions in the Charter cannot change the property rights of the enterprise. The implication of Professor Maggs' argument is that documents generated by a Soviet-era enterprise ... have the capacity to determine what that enterprise owned." *Id.* "This assertion, if true, would imply that Soviet law of the perestroika erased the boundaries between property and contract law by allowing essentially contractual documents to dictate property rights. Soviet law did no such thing."

Id.

Professor Maggs' response to this point in his sur-reply is more credible than his arguments with respect to the Information Letter. He notes that he is in complete agreement with Professor Stephan that assertions made in an organization's charter cannot alter the underlying property rights held by that organization. Maggs Sur-Reply Decl. ¶ 5. The point to be made is not that such assertions have legally binding effect but rather that, in his opinion, it is a universal practice to note in the Charter when an enterprise is the legal successor of a former enterprise. *See id.* The absence of such a notation would, then, be suggestive as an evidentiary matter. But Professor Stephan has also denied that it is a universal custom to include this information in the Charter. *See* Stephan Reply Decl. ¶ 3. Having no further basis for knowing who is right, the court will have to content itself with leaving the issue, which, in any case, is not dispositive, open.

*36 The same need not be said, however, about the broader issue of the transfer of copyrights from the state entity Soyuzmultfilm Studio to the lease entity Soyuzmultfilm Studio. It is apparent that the disputed copyrights passed by operation of law, viz., Article 498 of the 1964 Civil Code of the R.S.F.S.R., from the state entity to the lease entity upon the transformation of the former into the latter. FSUESMS's and Professor Maggs' half-hearted suggestions that FSUESMS is the same entity as the defunct state enterprise Soyuzmultfilm Studio amount to a transparent attempt to revive a disinterred corpse and give it all the cosmetic accoutrements of the living. Unfortunately, the enterprise's ten-year sojourn through limbo has left its unmistakable mark and rendered the attempt to claim it as an amended form of the state enterprise a futile exercise in reincarnation. This is a determination that has been explicitly made by Russian courts in the April 3, 2001 decision upholding the registration of FSUESMS and the April 20, 2001 decision by the Federal Arbitrazh Court for the District of Moscow upholding the April 3 decision. These decisions found that FSUESMS was a new entity created in 1999 and that the state enterprise Soyuzmultfilm Studio had ceased to exist in 1989, when it was transformed into the lease enterprise. [\[FN36\]](#)

The legislation of the Perestroika period gave substance to the germinal copyrights awarded to the state enterprise Soyuzmultfilm Studio under Soviet law and transferred those copyrights to the lease enterprise that succeeded it. As the Moscow Region Arbitrazh Court wrote in its opinion on remand on December 26, 2000:

[FSUESMS'] argument that the copyrights to the animated films belong to [FSUESMS] has no foundation, based on the submitted documents and oral arguments of both sides in the lawsuit, because, pursuant to Articles 23, 37 of the RSFSR Civil Code and Article 11 of the Fundamentals of Civil Legislation USSR and Republics, a state enterprise, after leasing out an enterprise and complex of facilities and property, could not exist anymore, and could no longer be a legal person at the same time because it did not have its own property and legal capacity.

When leasing out an enterprise (state property) [takes] place in accordance with paragraph 4, Article 16 of the Fundamental Principles on Lease, which established full succession of rights to the state enterprise assumed by the [l]ease [e]nterprise, then according to Article 37 of the RSFSR Civil Code [,] this action shall constitute an actual reorganization of a state enterprise.

See Dec. 26 Dec.

It might appear, on the face of it, that the holding and reasoning of the December 26, 2000 decision would have been undermined by the April 20, 2001 Federal Arbitrazh Court for the District of Moscow. Several important factors

weigh heavily against any such notion, however. First, there is the September 19, 2000 response by the Higher Arbitrazh Court of the Russian Federation to the Federal Arbitrazh Court's initial August 18, 2000 decision to vacate and remand previous lower court rulings. Professor Stephan describes the significance of the high court's statement:

*37 A suggestion that the Higher Arbitrazh Court does not endorse the reasoning of the intermediate court can be found in its September 19, 2000, ruling regarding the appeal of the intermediate court's August 18 opinion. Normally the Higher Court, in declining to accept an appeal, states only that "a basis for accepting an objection is not presented," a formulation that is as standardized as our Supreme Court's statement that "the petition for certiorari is denied." In its September 19 ruling, however, the Higher Court went out of its way to state that the intermediate court's decision "does not constitute an evaluation of the evidence in a new hearing in this case or represent the conclusions of the court regarding whether [the claim] is subject to satisfaction or not." In simpler terms, the Higher Court stated what it normally does not say, namely that the decision of the intermediate court to remand a case for further proceedings should have no bearing on what the lower court should do upon remand. Only after making this observation did the Higher Court indicate that its intervention at this time would be premature. In context, this statement is a strong signal to the lower arbitrazh court that it should not regard itself as bound by any of the speculations contained in the August 18 opinion of the intermediate court. Accordingly, on remand the lower court on December 26, 2000, confirmed its earlier determination that [the lease enterprise] owned the copyrights at issue in this litigation and thus had the capacity to transfer them in 1999 to its legal successor, the joint stock company. Second Stephan Decl. ¶ 15 (footnote omitted).

Professor Maggs points out that this is not a "ruling" but an "unpublished informal letter from a court official suggesting that a formal filing of an objection would be futile, since such an objection would be rejected on the ground that the Joint Stock Company would have the chance to present its evidence to the trial court on remand." Maggs Reply Decl. ¶ 11. He proceeds to say that he does not believe that "any Russian court would give such an informal letter any weight whatsoever in determining what the substantive law might be--the letter gave only informal advice on a procedural matter--whether a decision was ripe for review." *Id.* Nevertheless, Professor Maggs does not dispute that the Higher Arbitrazh Court's letter, however informal it might have been, was an unusual means of proceeding, whereas the usual "a basis for accepting an objection is not presented" would have been sufficient to inform the parties that the case was not yet ripe for review. The implication, in other words, is that the Higher Arbitrazh Court may have a different view of the case than does the Federal Arbitrazh Court for the District of Moscow, and now that the latter court has issued a binding opinion, the time for review may have arrived. Even more telling than such speculation, however, is the actual opinion issued by the Federal Arbitrazh Court for the District of Moscow. The opinion is, in a word, incoherent and, more important, irrelevant to the issue of copyright transfer. The court's reasoning does not support the conclusion that it reaches. "According to the property transfer act, there was transferred to the joint stock company the *tangible* assets owned by the state for separate accounting as state property in accordance with Annex No. 2," the court writes. Apr. 20 Dec. at 6 (emphasis added). "The transfer of state property was made in violation of Article 209 of the Civil Code of the Russian Federation, which provides that only property owner has the rights of ownership, use and disposal of its property." *Id.* "The consent of the owner of state property [i.e. the state] was never obtained," the court continues. *Id.* "Therefore, the leased

enterprise, in violation of the aforementioned legal requirements, disposed of the state property by transferring it to the joint stock company." *Id.*

*38 The problem with this line of reasoning is that the tangible property, the land and equipment, etc., was returned to the state upon the expiration of the lease term. This is precisely why SMS moved out of the Church of St. Nicholas the Enlightener and into its new Krasnogorsk location. But what about the intangible property, SMS's most valuable asset, the most important asset underlying the dispute between the two companies claiming to be Soyuzmultfilm Studio? Shockingly, the court says absolutely nothing about this. In fact, Article 498, the crucial provision relating to the transfer by operation of law of copyrights and other intellectual property from the lease enterprise to the joint stock company, is nowhere mentioned in the April 20 opinion. The closest the court comes is writing, in summarizing what it takes to be the lower court's opinion, that the lower court found that "[b]ecause the succession to the rights is based in law (Article 486 of the Civil Code of the former Russian Soviet Federative Socialist Republic, [\[FN37\]](#) Article 58 of the Civil Code of the Russian Federation), it cannot be limited by lease agreement." *Id.* at 4. The court at no point returns to this discussion, nor does it explain why the lower court's conclusion was incorrect.

All in all, then, the entire opinion seems absolutely irrelevant to the issue of whether the film copyrights were properly transferred, which, although important to the dispute at bar, was not legally dispositive on the issue of the validity of SMS's registration. The court never claims them to have been state property (rather, it is careful to specify that the *tangible* property belonged to the state); it never claims that they were transferred by way of the lease; it never protests that the owner's consent to their transfer was not obtained; they are, in short, absent from the opinion which, as a whole, may be reconstructed as follows: (1) the tangible property transferred to the joint stock company belonged to the state; [(2) but, of course, the tangible property was returned to the state upon the expiration of the lease term;] (3) the state did not consent to its transfer; (4) therefore, the joint stock company did not properly receive its assets, and its registration should be nullified. [\[FN38\]](#)

It may be safely concluded, then, that the reasoning of the December 26, 2000 opinion emerges not only unscathed but unexamined. Even if this court might question the basis for the April 20, 2001 ruling, therefore, there is no need to fly in the face of a Russian court decision, because the case at bar presents the issue of copyright ownership, which had nothing to do with the holding of the April 20, 2001 decision. [\[FN39\]](#) The copyrights were passed by operation of law to the lease enterprise, which then conveyed them to the joint stock company.

This conclusion also finds ample support in the Russian court decisions in the case filed by SMS against FSUESMS, namely the April 3, 2001 decision of the appeals court and, even more significantly, the June 4, 2001 decision of the Federal Arbitrazh Court for the District of Moscow affirming the April 3 decision. This last decision was issued by the same court that invalidated SMS's registration in the April 20 decision and, moreover, post-dated that decision. Both courts, although recognizing the validity of FSUESMS's registration, clearly and unequivocally stated that the state enterprise ceased to exist in 1989 when it was reorganized into the lease enterprise and that the lease enterprise was then transformed into the joint stock company SMS. *See* Excerpts from these decisions *supra*. Both courts, further found that, while the state property mentioned in the lease enterprise's balance sheet, i.e., the material assets, were returned to the state in 1999, upon the expiration of the lease term, the other rights and assets of the lease

enterprise, which, of course, included copyrights, were transferred to the lease enterprise when the state enterprise ceased to exist in 1989 and were transferred, in turn, to SMS in 1999. [\[FN40\]](#) Whether or not FSUESMS will be ultimately successful in holding on to its registration as a legitimate organization in its own right and laying claim to the physical property of the Church of St. Nicholas the Enlightener is a question not before this court. However, as far as the copyrights of the state enterprise Soyuzmultfilm go, to these FSUESMS has no claim.

(4)

*39 Having resolved the issue of the transfer of film copyrights from the state enterprise to the lease enterprise, it would seem that it remains now to be determined whether or not the international distribution rights to the films were legitimately transferred from the lease enterprise to plaintiff FBJ. FSUESMS argues that "[p]laintiffs have ... failed to satisfy the requirement of § 204(a) of the U.S. Copyright Act, 17 U.S.C., which provides that 'a transfer of copyright ownership, other than by operation of law, is not valid unless an instrument of conveyance, or a note or memorandum of the transfer, is in writing and signed by the owner of the rights conveyed or such owner's duly authorized agent.'" FSUESMS's Cross-Mot. at 8.

According to FSUESMS, "Plaintiffs have produced *no* documents that even purport to constitute a transfer of copyright ownership from the State, either to (1) Soviet [Soyuzmultfilm Studio] or to (2) its alleged legal successor, the lease enterprise, or to (3) the lease enterprise's alleged successor, JSC." *Id.* FSUESMS expands upon this argument:

The one document of transfer upon which plaintiffs do rely, the 1992 "exclusive distribution agreement" between FBJ and the lease enterprise, fails to establish a transfer of any subsisting rights to plaintiff for two reasons. First, it purports to grant rights which the lease enterprise did not have the power to convey. Second, even assuming that the lease enterprise had the power to grant exclusive distribution rights in the Films during the term of its ten- year lease from Goskino, that power did not and could not extend beyond the term of the lease, which ended in December 1999. *Id.*

FSUESMS's arguments are flawed insofar as they implicitly depend on assumptions that have already been rejected by this court. First of all, because the copyrights in the films never belonged to the state to begin with, [\[FN41\]](#) there was no requirement that a conveyance instrument explicitly transfer the copyrights from the state to the lease enterprise, especially in light of the fact that the copyrights were transferred to the lease enterprise by operation of law. For that same reason, the expiration of the lease agreement between Goskino and the lease enterprise Soyuzmultfilm did not end the assignment of copyrights to FBJ. As the Moscow Region Arbitrazh Court put it in its decision on remand:

Copyrights were not and could not be transferred by the lease agreement because they had been transferred by operation of law and cannot be limited by an agreement.

Therefore the copyrights of the lease enterprise are not related to the issues of the lease agreement and the expiration of that agreement does not cause the copyrights of the [l]ease enterprise "Film Studios Soyuzmultfilm" to expire.

At the time of the transformation of the [l]ease enterprise into a [shareholding] company the lease enterprise had the copyrights to its animated film by law. *40 Dec. 26 Dec.

This is sufficient to address FSUESMS's arguments about the invalidity of the transfer insofar as they depend on the

need for a document conveying upon the lease enterprise the right to alienate its copyrights. However, insofar as FSUESMS's argument about the invalidity of the transfer to FBJ is premised on any lack of formalities under [17 U.S.C. § 204\(a\)](#) in the distribution agreement between the lease enterprise Soyuzmultfilm and plaintiff FBJ, there is no need to determine whether or not the strictures of [§ 204\(a\)](#) have been satisfied. The reason is that neither defendants nor FSUESMS have standing to contest the validity of the transfer. [\[FN42\]](#)

In [Eden Toys, Inc. v. Floral Lee Undergarment Co.](#), 697 F.2d 27 (2nd Cir.1982), an infringer attempted to contest the validity of a copyright transfer between a grantor and grantee. See [id. at 36](#). The plaintiff grantee had not complied with the formalities of [17 U.S.C. § 204\(a\)](#), which provides that a grant "is not valid unless an instrument of conveyance, or a note or memorandum of the transfer, is in writing and signed by the owner of the rights conveyed...." *Id.* Despite essentially acknowledging that the transfer would have failed under [§ 204\(a\)](#) had it been challenged by the transferor, the court refused to hold the transfer invalid under that provision because there was no dispute between the transferor and transferee as to the validity of the transfer. [\[FN43\]](#) See *id.* Specifically, the court wrote that in light of the fact that "the purpose of the provision is to protect copyright holders from persons mistakenly or fraudulently claiming oral licenses," "[i]n this case, in which the copyright holder appears to have no dispute with its licensee on this matter, it would be anomalous to permit a third party infringer to invoke this provision against the licensee." *Id.*

Eden Toys has been followed repeatedly in this circuit and in others. See *Arthur A. Kaplan Co., Inc. v. Panaria Int'l, Inc.*, 1998 U.S. Dist. LEXIS 14360 at *6 (S.D.N.Y.1998) (refusing to analyze the validity of assignment agreements at the behest of the defendant where the assignor and assignee were in agreement that an assignment had taken place); *Intimo, Inc. v. Briefly Stated, Inc.*, 948 F.Supp. 315, 318 (S.D.N.Y.1996) (finding that plaintiff had standing to pursue copyright infringement action based on an amended assignment signed just a few days before the trial was to begin); *Hart v. Sampley*, 1992 U.S. Dist. LEXIS 21478 at *4 (D.D.C.1992) ("Even if, as defendants suggest, the transfer was in some way defective, the defendants would not have standing to challenge the validity of the transfer because they were not parties to the agreement."); see also Mem. Law Supp. Pls.' Mot. Sum. J. and Opp. Defs.' Mot. Sum. J. [hereinafter "Pls.' Sum. J. Mot."] at 18 (listing further relevant cases).

Defendants and FSUESMS protest that "[FSUESMS] is not an infringer or a stranger to these works, but seeks judicial recognition of its own rights in the works. The *Eden Toys* line of cases is thus inapposite, and plaintiffs' failure to provide a written 'instrument of conveyance' as required under [§ 204\(a\)](#) cannot be excused." [\[FN44\]](#) Int. Reply at 7. However, the holding and logic of *Eden Toys* cannot rationally be limited to rooting out challenges by copyright infringers to transfers between transferors and transferees. The Second Circuit in *Eden Toys* explicitly premised its holding on the purpose behind [§ 204\(a\)](#), viz., to prevent would-be-transferees from taking advantage of copyright holders. That concern simply does not apply to the facts of this case.

*41 Insofar as FSUESMS was contesting the transfer of the copyrights from the state enterprise Soyuzmultfilm to the lease enterprise Soyuzmultfilm, it was well within its rights, since it was claiming to be the state enterprise Soyuzmultfilm and had staked a claim to the film copyrights. But FSUESMS is in no position to protest the legitimacy of the assignment of rights to plaintiff FBJ, since, even if that transfer were illegitimate, the international distribution rights to the films in question would have remained with the lease enterprise and gone over to the joint

stock company SMS when the lease enterprise reorganized itself as SMS in 1999. Allowing FSUESMS now to contest the validity of the agreement between the lease enterprise and FBJ when there is no disagreement between the transferor and transferee as to the validity of the transfer would be no different than allowing an infringer to make the same challenge. Or rather, it would be even more foolhardy, since the infringer, at least, stands to benefit if a plaintiff in a given lawsuit is stripped of its standing to sue, [\[FN45\]](#) which is not true of FSUESMS, its claim of right being in no way dependent upon or related to the invalidity of the transfer. Seen another way, FSUESMS would be no closer to obtaining its proposed relief, a declaration of its status as a legitimate copyright holder, if the transfer from the lease enterprise to FBJ were declared invalid.

(6)

Defendants and FSUESMS make one final argument that must be addressed at this time. [17 U.S.C. § 410\(a\)](#) explains the significance of the certificate of copyright registration:

When, after examination, the Register of Copyrights determines that, in accordance with the provisions of this title, the material deposited constitutes copyrightable subject matter and that the other legal and formal requirements of this title have been met, the Register shall register the claim and issue to the applicant a certificate of registration under the seal of the Copyright Office. The certificate shall contain the information given in the application, together with the number and effective date of the registration.

[17 U.S.C. § 410\(a\) \(1976\)](#). [17 U.S.C. § 410\(c\)](#), in turn, explains the relevance of copyright registration to judicial proceedings: "[i]n any judicial proceedings the certificate of a registration made before or within five years after first publication of the work shall constitute prima facie evidence of the validity of the copyright and of the facts stated in the certificate." [17 U.S.C. § 410\(c\) \(1976\)](#). [§ 410\(c\)](#) applies to Form GATT registration certificates covering "restored" foreign copyrights as well as domestic works. Here, it is undisputed that the plaintiffs registered the works at issue more than five years after the date of initial publication, and defendants desire, accordingly, to put the plaintiffs to their proof, requiring them to show the validity of the copyrights.

The final sentence of 410(c), however, specifically provides that "[t]he evidentiary weight to be accorded the certificate of registration made [not within five years after first publication of the work] shall be within the discretion of the court." *Id.* As plaintiffs note,

*42 [i]t is particularly appropriate that the Court [exercise its discretion to presume the validity of the copyrights] in this action because plaintiffs presented the "Goskino certificates" exhibiting that the State Enterprise was the producer of the motion pictures, as part of the exhibits to the Declaration of Herman Sinitzyn submitted in connection with the preliminary injunction; the items in question are clearly copyrightable in that they are animated films (Skuliabin Declaration); defendants' exact copies of said videos have already been submitted to the Court in connection with the contempt proceedings and exhibit the originality of plaintiffs' works; and defendants and FSUE are not contesting the ability of someone to assert copyright ownership in said films because they are also seeking rights in the same films.

Mem. Law. Supp. Pls.' Mot. Sum. J. and Opp. Defs.' Mot. Sum. J. at 23, n.5. For substantially these reasons, the plaintiffs copyrights will be presumed valid.

Conclusion

The plaintiffs have shown, to the satisfaction of this court, that the copyrights in the state enterprise Soyuzmultfilm Studio's substantial film library passed, in 1989, to the lease enterprise Soyuzmultfilm Studio and, by agreement, have been assigned to FBJ for international distribution. The lease enterprise Soyuzmultfilm Studio received them by operation of law when the state enterprise was reorganized into the lease enterprise and ceased to exist. Accompanying Perestroika reforms gave the lease enterprise robust rights in connection with those copyrights, clearing up any ambiguity that may have existed about the division of what American jurists would think of as copyright ownership rights between the state and the state enterprise. The lease enterprise entered into an agreement with plaintiff Films by Jove, Inc. for the latter organization to enjoy exclusive rights of international distribution, which organization then expended over three million dollars to develop those rights. Later, in 1999, the copyrights themselves passed to plaintiff SMS when the lease enterprise was reformed into a joint stock company still bearing the Soyuzmultfilm Studio name.

Defendants and FSUESMS have suggested a dramatically different version of events. According to them, the copyrights belonged to the state *ab initio*, could never have passed to the lease enterprise or, in turn, to the plaintiffs and now belong to FSUESMS, which is claimed to be the same entity as the state enterprise Soyuzmultfilm Studio, returned to claim its rights after a ten-year period of hibernation. Unfortunately for FSUESMS, and for the defendants, "facts," as Josef Stalin, who would know, having gone to great lengths to obscure them, once said, "are obstinate things." *Taglines Galore*, <http://www.taglinesgalore.com/tags/f.html>. The undisputed facts--that the state enterprise did not undertake a single act, either official or unofficial, to which anyone can point between 1989 and 1999, that the state enterprise did not file its "amended" charter as a federal state unitary enterprise, which, it claimed, was an act undertaken in response to the abolition of the "state enterprise" form of organization by the Civil Code of the Russian Federation, First Part, in 1994, until a full five years later, that significantly, between 1992 and 1999, neither the state enterprise nor Goskino nor anyone else had challenged the lease enterprise's 1992 distribution agreement with Films by Jove--these undisputed facts and the law belie FSUESMS's version of the story.

*43 Accordingly, summary judgment is granted in favor of the plaintiffs. A judgment of contempt will be entered against the defendants. Furthermore, FSUESMS's third-party plaintiff complaint is dismissed, and its request for a declaration that it has operative management over what it claims to be Russian- state-owned copyrights in the animated films created by the state enterprise Soyuzmultfilm Studio is denied. Plaintiffs shall submit a proposed judgment on notice.

SO ORDERED.

[FN1.](#) "Soyuzmultfilm Studio" (or "Soyuzmultfilm Studios," as it is referred to by some of the affiants and in certain documents) was a name used by a Soviet state enterprise in existence since 1936, a lease enterprise in existence between 1989 and 1999 and the joint stock company named as a plaintiff in this suit. Since the question of whether there is a direct line of succession from the state enterprise to the lease enterprise to the joint stock company is at the heart of this litigation, the abbreviation "SMS" will be used to designate only the plaintiff joint stock company. The other forms of Soyuzmultfilm

Studio will be referred to by the full name, along with any additional explanatory information necessary to impart clarity to the discussion.

[FN2.](#) These materials are animated films made between the years 1946 and 1991. Specifically, the titles at issue in this litigation, in Russian

and English, are: Bitva (Battle), Ptitchka Tari (Bird Tari), Kanikuli Bonifatsia (Bonifasia's Holidays), Hrabrets Udalets (Brave and Fast One), Prikluheniya Buratino (Buratino), Kentervil'skoye Privechenie (Canterville's Ghost), Cheburaska (Cheburaska), Zolushka (Cinderella), Chipollino (Cipollino), Zhuravliniye Peria (Crane Feathers), Krokodile Ghena (Crocodile Genady), Skaska Tzareh Saltan (Czar Saltan), Skaska o Mertvoy Sarevne i 7 Ragatiriah (Dead Princess and 7 Strong Men), Ded Moroz i Seriy Volk (Father Frost and Grey Wolf), V Yaranke Gorit Ogon (Flame Burns in Igloo), Foca na Vse Ruki Doka (Foca the Handyman), Tsarevna Liagushka (Frog Princess), O Tom Kak Gnom Pokinul Dom (Gnome Who Left Home), Shaibu! Shaibu! (Goal! Goal!), Zolotaya Antelopa (Golden Antelope), Skaska o Zolotom Petooshke (Golden Rooster), Koniok Gorbunok (Humpback Horse), Ibolit i Barmaley (Iboleet and Barmaley), V Nekotorom Tsarsive (In Some Kingdom), Pokhishchenie (Kidnapping), Poslednaya Ohta Akeli (Last Hunt of Akela), Parozik iz Romashkova (Locomotive from Romashkov), Match Revansh (Match Revenge), Maugli (Maugli), Rusalochka (Mermaid), Novogodnee Puteshestvie (New Year Journey), Shelkunchik (Nutcracker), Petia i Krasnaya Shapochka (Peter and Red Riding Hood), Aleniky Tsvetochuk (Pink Flower), Poni Begaet po Krugu (Pony Rides in a Circle), Mezha (Property Line / Dividing Line) Raksha (Raksha), Vozvraschenie k Ludiam (Return to the People), Shapochkiak (Shapochkiak), Pastushka i Trubochist (Shepherdess and

Chimney Sweep), Serebrianoie Kopitse (Silver Hooves), Snegorochka (Snow Girl), Snegovik-Pochtovik (Snow Postman), Snezhnaya Koroleva (Snow Queen), Duimovochka (Thumbellina), Stoikiy Olovianni Soldatik (Tin Soldier), Dvendsat Mesiatsev (Twelve Months), Ded Moroz i Leta (Uncle Frost in Summer), Dikie Lebedi (Wild Swans), Na Zadney Parte # 1 (At the Last Desk # 1), Hrabriy Olenionok (Brave Little Deer), Cheburashka Edet v Shkolu (Cheburashka is Going to School), Veselaya Karusel # 23 (Funny Merry-Go-Round 23), Meteor na Ringe (Meteor in a Ring), Miss Noviy God (Miss New Year), Moroz Ivanovich (Uncle Frost), Kogda Zazhigautsia Yolki (When Xmas Trees Light Up). *See* Pl.'s Ex. F, attached to Decl. of Joan Borsten of Jan. 25, 2001.

[FN3.](#) The notion of "operative management," akin to control without actual ownership, will be discussed more fully below.

[FN4.](#) Joan Borsten, the director of FBJ, makes the accusation that the intervention of FSUESMS at this particular point in time was not a mere matter of chance:

It is highly unlikely that [FSUESMS] legally retained the firm of Cowan, Liebowitz and Latman on August 11, 2000. Not only did [FSUESMS] not have legal standing on that day, but to the best of my knowledge it did not have

the financial means to pay the retainer. I have personal knowledge that members of [FSUESMS] lack funds to make ends meet, are reduced to moonlighting jobs, and [FSUESMS] was unable to pay salaries of its employees in August, the very same month that--as Mr. Clarida[, the Cowan, Liebowitz and Latman attorney representing FSUESMS,] told our attorney--his firm had received a \$20,000 retainer by wire transfer. I suspect that the retainer was in some way either paid by Mr. Berov or a company fronting for him.

Decl. of Joan Borsten of Sept. 22, 2000 [hereinafter "Sept. 22 Borsten Decl."], Ex. 20, attached to Decl. of Julian Lowenfeld, ¶ 26. Although a majority of Ms. Borsten's claims find support in the record--Mr. Clarida during oral argument, for example, did not deny that his legal fees were indeed being paid by Mr. Berov. *see* Tr. of Oral Arg. on June, 5 2001, I refuse to speculate about the motivations of FSUESMS in intervening in this proceeding.

[FN5.](#) Although this dispute started out purely as an infringement action by FBJ against the defendants, it has become a full-fledged dispute about copyright ownership between FBJ / SMS and FSUESMS. FSUESMS, accordingly, will be bound by any finding this court should make with respect to the ownership of the copyrights.

[FN6.](#) "State enterprises (associations), along with cooperative enterprises, are the basic unit of the single national-economic complex." The Legislation of Perestroika, Ex. 2, attached to the Decl. of Paul B. Stephan (Pl.'s Russian law expert) of Jan. 22, 2001 at 20.

At the state enterprise, the labor collective, using public property as its proprietor, creates and augments the people's wealth and ensures the combination of the interests of society, the collective and each worker. The enterprise is the socialist commodity producer; it produces and sells output, performs work and provides services in accordance with plan and contracts and on the basis of full economic accountability, self-financing and self-management and the combination of centralized management and the independence of the enterprise.

Id.

[FN7.](#) "Soyuz" is the Russian word for "union," as in "Soviet Union;" "multfilm" is the Russian word for "animated film" or "cartoon." *See* Pls.' Not. Mot. at 2.

[FN8.](#) All of the facts necessary to the conclusions reached below are either conceded or undisputed, and there is not enough evidence for a

reasonable jury to reach conclusions different from those reached by this court. In addition, the parties themselves do not point to any factual disputes that must be resolved by a finder of fact prior to a determination of this motion. Their approach to the briefing of the issues in the case consists almost entirely of experts battling over the proper legal consequences under Russian law that attach to facts which are undisputed.

[FN9.](#) The transformation was ordered on December 12, 1989 by Goskino, the Soviet State Film Committee:

In the interest of ideological and artistic and creative goals, for further strengthening of democratic principles in the management of film production, and for the purpose of further development of the principles of socialist self-administration, and full participation in initiatives, entrepreneurship and incentive of the labor collective of the [film studio Soyuzmultfilm], I hereby: ORDER to transfer [Soyuzmultfilm Studio] to lease as of December 15, 1989.

Ex. E, attached to Decl. of Sergey Skuliabin.

[FN10.](#) Goskino, meaning literally, "government film," is a government ministry generally charged, during the Soviet era, with overseeing all aspects of film production and internal distribution.

[FN11.](#) Although the papers submitted in the case do not reflect it, it emerged during oral argument that the plaintiffs actually maintain that the lease enterprise may never have expired, and this has been the subject of a different series of Russian court decisions. *See* Tr. of Oral Arg. of June 5, 2001 [hereinafter "Oral Arg."] at 17-22. Despite being requested to do so, the plaintiffs submitted no court decisions reflecting this understanding. Without more evidence, it would be impossible for this court to decide the issue. Because all of the submissions in the case, both those of plaintiffs and those of FSUESMS, seem to operate on the assumption that the lease enterprise actually ceased to exist in 1999, when the lease term expired, that same assumption will be made throughout this opinion. Moreover, a resolution of this issue is not necessary to dispose of the case.

[FN12.](#) The court recites a series of transactions wherein Soveksportfilm illegitimately transferred rights through a series of companies it controlled in part or in whole:

Granted that it is established that the Studios, writers and producers are the sole copyright titleholders under Russian law and that in light of the (worldwide?) Universal Copyright Convention of 1952 it benefits them to

apply the mechanisms of protection under French law: that [Soveksportfilm] was in any case bound to respect the contracts of mandate they had enter [sic] into with the Studios; Granted that it is established and recognized by the parties that neither the clause of the contract between [Soveksportfilm] and Cosmos, signed October 31, 1988, and which extends until October 31, 1989 the concession of rights on 20 films, nor the October 14, 1989 contract by which Cosmos ceded its exploitation rights on a catalogue of 125 films to Inter-Audio, nor the October 20, 1989 sales mandate from Inter-Audio, nor the October 20, 1989 sales mandate from Inter-Audio to UGC D.A., nor the contribution in kind made by both Inter- Audio and by [Soveksportfilm] at the time of the formation of Parimedia on November 25, 1989, nor the extension of rights granted on this occasion by [Soveksportfilm] on the catalogue of 125 films, with [Soveksportfilm] renouncing the payments that it was its legal right to receive, nor the March 19, 1993 sales mandate from Parimedia to UGS D.A. nor the ceding of rights from Parimedia to LA Copagnie Des Films on December 30, 1994, were ever mentioned to the Studios nor were ever approved by them;

Granted that on numerous occasions manifest fraud was committed against the Studios and the Films by Jove company, license holder of rights from [Soyuzmultfilm Studio].

Id.

[FN13.](#) The leader of that faction and current director of FSUESMS, E. Rahimov, had been serving as Deputy Director of the lease enterprise Soyuzmultfilm Studio until he was fired in August, 1999. *See* Decl. of Sergey Skuliabin ¶ 6.

[FN14.](#) The accuracy of the Shilobreev Declaration has been questioned by the plaintiffs, who note that Shilobreev's first name is actually Vyacheslav, not Vitoslav, and that, despite the fact that Shilobreev speaks not a word of English, the declaration is written entirely in English and signed by Shilobreev with no Russian original having been offered. *See* Straupe Decl. ¶¶ 4-5. Shilobreev, it should be noted, is the head of the board of directors of FSUESMS. In addition, Joan Borsten, the director of Films by Jove, contends that Shilobreev

used a third party's corporate seal at the bottom of his declaration. Perhaps this detail is not significant in the U.S.[,] but in Russia corporate seals are so respected and essential to doing business that they are kept under lock and key, and misuse of a corporate seal is a criminal offense. Affixing them to a legal document is considered the ultimate confirmation of legitimacy and authentication. Mr. Shilobreev could not stamp his declaration with the corporate seal of [FSUESMS] as that company

did not legally exist at the moment he wrote his declaration as its "Deputy Director." So instead he affixed the declaration with the corporate seal registered to another company altogether, strangely enough a non-profit organization.

Sept. 22 Borsten Decl. ¶ 28.

[FN15.](#) FSUESMS was specifically contemplated by the Stepashin Order:

In view of the fact that in December, 1999 the term of the lease contract for the Soyuzmultfilm facilities and equipment belonging to the state shall expire[,], the Government accepts the proposal by the Ministry of Property of Russia to include said facilities and equipment into the base assets of newly formed state unitary enterprise Film Studios Soyuzmultfilm of Goskino of Russia.

Ministry of State Property together with Goskino of Russia shall determine the inventory of the state property to become assets of the federal state unitary enterprise Film Studios "Soyuzmultfilm."

Stepashin Order.

[FN16.](#) The defendants and FSEUSMS agree on substantially all the facts of the case and many of their submissions to the court are jointly filed. The reader should assume, except where an indication to the contrary has

been specifically noted, that there is no difference between their positions.

[FN17.](#) Various exhibits submitted by the parties refer to the Russian courts involved in the dispute by various names. Fundamentally, the system appears to have the following structure: a lower court level, an appeals court level, a second appellate level in the Federal Arbitrazh Court for the District of Moscow and a final appellate level in the Higher Arbitrazh Court of the Russian Federation.

[FN18.](#) There are actually six decisions of relevance, three in a suit initiated by SMS against FSUESMS and three in a suit initiated by FSUESMS, the Ministry of State Property of the Russian Federation and Goskino against SMS. *See* FSUESMS's Cross-Mot. at 4. Each series of decisions consisted, first, of a lower court finding in favor of SMS and a confirmation of that ruling on appeal. *See id.* Both sets of decisions were vacated by the Federal Arbitrazh Court for the District of Moscow, those in the suit by FSUESMS against SMS by an August 18, 2000 opinion discussed in the text below and those in the suit by SMS against FSUESMS by a September 25, 2000 order that gave no reason for the remand but was presumably based on grounds similar to those articulated in the August 18

decision. *See* Aug. 18, 2000 Decision, Ex. 18, attached to Decl. of Julian Lowenfeld [hereinafter "Aug. 18 Dec."]; Sept. 25, 2000 Decision, Ex. G, attached to Decl. of Decl. of Robert W. Clarida [hereinafter "Sept. 25 Dec."].

[FN19.](#) There will be instances of awkward phraseology that recur within quotations from translated text throughout the opinion. The "[sic]" designation will not be used in such instances.

[FN20.](#) All parties expressly agreed during oral argument that they did not wish to await further Russian court decisions before proceeding to decision on the motion before this court. *See* Oral Arg. at 65-67.

[FN21.](#) These decisions, rendered, respectively, on January 25, 2001, April 3, 2001 and June 4, 2001, will be addressed in detail below.

[FN22.](#) It is noteworthy that plaintiffs do not pursue their standing argument in any subsequent submissions to the court.

[FN23.](#) Technically, FBJ has an argument that the defendants, having signed the injunction, and having violated it while it was still in effect,

are now barred from contesting the ownership of the underlying copyrights. If the defendants came to believe, at any given point during the pendency of the injunction, that the copyrights were not legitimately licensed to FBJ, the proper procedure would have been to move to vacate the injunction, not ignore it. Nonetheless, I will determine the issue on the merits.

[FN24.](#) The dates are actually 1946 to 1991. *See* Pls.' Not. of Mot. and Mot. to Dis. at 8.

[FN25.](#) Where Russian law is quoted from or described, citations will often be to the declaration of an expert rather than to the law itself due to the variability of the translations that appear throughout the evidentiary exhibits submitted to the court.

[FN26.](#) These texts, it might be noted, were written before the beginning of the Perestroika period and are, therefore, uninfluenced by the copyright reforms of that era.

[FN27.](#) While it might appear that the December 26, 2000 decision has been mooted by the April 20, 2001 ruling of the Federal Arbitrazh Court for the District of Moscow, which reversed the December 26, 2000 decision, the

April ruling actually says absolutely nothing about Article 486 or why that article would be inapplicable to this case. Moreover, and even more importantly, it does not at any point say that the copyrights themselves belonged to the state rather than the state enterprise. The decision will be discussed more extensively in the section of this opinion addressing the issue of copyright transfer from the state enterprise to the lease enterprise.

[FN28.](#) The commercial power was regained through a series of acts that Professor Stephan delineates:

Soviet film studios obtained the right to market their film copyrights abroad as a result of several normative acts. In a response to an earlier determination by the Central Committee of the Communist Part of the Soviet Union, Decree 1526 of the U.S.S.R. Council of Ministers, issued December 22, 1986, gave many state enterprises the right to enter directly into contracts with foreign customers. *Sobranie Postanovleniy pravitel'stva SSSR*, No. 6, Item 24 (1987). Pursuant to this regulation, Goskino on March 14, 1988, issued Order 38, which divested Sovetskportfilm of its monopoly over exports. On March 7, 1989, Decree 203 of the U.S.S.R. Council of Ministers announced a new list of state supervisory bodies that held the right to control the export and import activity of their particular

industry. The appendix to this decree indicates that Goskino retained power over the import of foreign films, but had no rights with respect to the export of films belonging to Soviet studios. *Sobranie Postanovleniy pravitel'stva SSSR*, No. 16, Item 50 (1989). Accordingly, [the state enterprise Soyuzmultfilm Studio] on September 19, 1989,

received a license from the U.S.S.R. Ministry of Foreign Economic Relations to exploit its film library through contracts with foreign parties. In other words, as a result of perestroika the Soviet government recognized that the right to receive hard currency revenues from a film belonged to the enterprise, and not to the state, and authorized film studios generally, and [the state enterprise Soyuzmultfilm Studio] in particular, to exploit this right.

The 1987 Law on the State Enterprise (Association) further strengthened the rights of state enterprises vis-à-vis their supervising bureaucracy. It made clear that state enterprises could have economic rights against the state, which the law protected. Central to this statute was specification of an enterprise's own income that, according to Article 3(1), "is at the enterprise's disposal, it is used independently, and it is not subject to withdrawal." Article 9(3) of the Law in turn limited the rights of higher-level agencies over the enterprise and gave enterprises the right to appeal orders from those agencies to arbitration courts. It states that:

The Ministry, department or other higher-level agency may transmit

instructions to the enterprise only in accordance with its jurisdiction as established by legislation. If a ministry, department or other higher-level agency issues an act not in accordance with its jurisdiction or that violates legislative requirements, the enterprise has the right to appeal to a state court of arbitration to have the act in question declared invalid, in full or in part.

Article 19(4) recognized the rights of enterprises to engage in foreign transactions:

The right to carry out directly export-import operations (including markets in capitalist and developing countries) and to create an economic-accountability foreign trade form for this purpose may be granted to an enterprise that provides substantial deliveries of output (works, services) for export.

Article 19(6) allowed state enterprises to establish foreign currency payment accounts, which belonged to the enterprise and were protected from claims by higher organs: "Money in the enterprise's foreign-currency payments fund is not subject to withdrawal and may accumulate for use in subsequent years."

This legislation set the stage for the 1989 Fundamental Principles on Leasing (Fundamentals). The Fundamentals did more than authorize the transfer of state property to lease enterprises (lessees) for a limited

term. Its principal purpose was to encourage the transformation of state enterprises into privately owned lease enterprises. In a 1988 speech to the Central Committee of the Communist Party of the Soviet Union, General Secretary Gorbachev spoke of the need to extend leasing relations to "all branches of the national economy," explaining that these relations "ensure the real economic independence and responsibility of workers and labor collectives, as well as a direct connection between people's earnings and the final results

of their work." *Kommunist*, No. 12, p. 23-24 (1988), translated in *Soviet Statutes and Decisions* at 12-13 (Fall 1990). There ensued what U.S.S.R. Prime Minister Ryzhkov described as a "massive conversion to leasing." *Pravda*, October 3, 1989, p. 4, translated in *Soviet Statutes and Decisions* at 13 (Fall 1990). As was true of all the perestroika legislation intended to expand the sphere of private economic activity, the state would receive compensation not only directly (i.e., rent), but, at least as importantly, through taxes paid on the lease enterprise's income. *See* Paul B. Stephan, "Perestroika and Property: The Law of Ownership in the Post-Socialist Soviet Union," 39 *Am. J. Comp. L.* 35, 49 (1991).

To effectuate the policy of encouraging direct economic incentives for producers, the Fundamentals permitted a complete transformation of a state enterprise into a lease enterprise, resulting in the disappearance of the

state enterprise and the emergence of the privately owned lease enterprise as its legal successor.

Id. at ¶¶ 4-7.

[FN29.](#) "Prinadlezhat" and "prinadlezhit" are forms of the same verb. The former is a plural form, the latter a singular.

[FN30.](#) Admittedly, Professor Maggs denies that this part of the remand opinion is central to the holding. His argument, however, is, as there will be ample occasion to argue later, unsupported and untenable.

[FN31.](#) Adding to the confusion is the fact that "prinadlezhat" is a form of a verb, meaning, literally, "belong to," while "sobstvennik" is a noun meaning "owner." *See* KENNETH KATZNER, *ENGLISH-RUSSIAN RUSSIAN-ENGLISH DICTIONARY* 731, 805 (1984). There is no noun form of prinadlezhat--at least not one that means anything like "one to whom something belongs"--and no verb form of sobstvennik. *See id.* Therefore, the two words cannot be easily substituted for one another in a sentence without reorganizing the structure of the sentence as a whole. The use of one rather than the other in any particular sentence, therefore, may be occasionally dictated less by any fine denotative distinction than by the word's location and function in

that sentence. Professor Newcity adds that "'sobstvennik' and related terms are not used in Soviet copyright legislation ... because they are not terms that are used in Russian legal drafting to refer to the ownership of copyright." Newcity Reply Decl. ¶ 10. In support of this claim, Professor Newcity advances the proposition that the word "sobstvennik" is not used in post-Soviet copyright law, viz., in the 1993 Law on Copyrights and Neighboring

Rights, even though there is obviously no longer an issue of "operative management" to navigate gingerly around. *See id.*

[FN32.](#) At oral argument, the plaintiffs explained that they have not offered a balance sheet because, to their knowledge, one does not exist, *see* Oral Arg. at 34-39, and their position, of course, is that even if there were one, and even if it purported to transfer only the material assets of the state enterprise Soyuzmultfilm to the lease enterprise, this would still not be determinative of the copyright issue, since the copyrights, under plaintiffs' theory, passed not via the lease but by operation of law.

[FN33.](#) The R.S.F.S.R. equivalent to 37(7) is 37(8). The number designations are off by one. *See id.*

[FN34.](#) Professor Newcity takes issue with Professor Maggs' translation of this word as "possessor." *See* Newcity Reply Decl. ¶ 9. The Russian original is the word "vladelets," which according to Professor Newcity, should really have been translated as "owner" or "proprietor." *Id.* According to a recent dictionary of Russian legal terms consulted by Professor Newcity, the phrase "vladelets avtorskogo prava" is specifically translated "copyright owner." *Id.* Professor Newcity implies that Professor Maggs has avoided that translation in order to evade the acknowledgment that a state enterprise could be a copyright owner. *See id.* For what it is worth, a Russian dictionary available to the court gives "owner" as the sole translation of "vladelets." *See* KENNETH KATZNER, ENGLISH-RUSSIAN RUSSIAN-ENGLISH DICTIONARY 453 (1984).

[FN35.](#) In fact, the joint reply brief of defendants and FSUESMS contains the following sentence, which makes the same dicta / holding distinction even more explicit: "Thus, Professor Maggs concludes that no Russian court would follow the *dicta* of the December 26, 2000 decision with regard to the transfer of rights, but would instead be guided by the contrary holding set forth in the Information Letter of the Higher Arbitrazh Court." *See* Jnt. Reply Mem. Law of Defs. and Third Party Pls. Supp. Their Cross-Mot. for Sum. J. [hereinafter "Jnt. Reply"] at 6

(emphasis in original).

[FN36.](#) FSUESMS attempts to label this aspect of the decisions erroneous dicta. *See* Jnt. Suppl. Mem. Law of Defs. and Third Party Pls. Further Supp. of Their Cross-Mots. for Sum. J. at 9. However, they are anything but dicta, since when the appeals court, on April

3, 2001, reviewed the January 25, 2001 decision of the lower court which had found FSUESMS's registration to be valid and succession rights to have been determined by the content of the lease enterprise's balance sheet, the appeals court specifically affirmed the holding but provided new reasoning, reversing the lower court's finding that the balance sheet determined the right of succession. Moreover, as the June 4, 2001 decision by the Moscow Arbitrazh Court for the District of Moscow states, FSUESMS specifically appealed the April 3, 2001 decision with respect to the "motivational part" of the ruling, in other words, the reasoning. If that reasoning were truly dicta, there would, of course, be no good reason to appeal it. But FSUESMS did appeal it, and that appeal was denied. Therefore, FSUESMS's current suggestion that the finding that the state enterprise ceased to exist when the lease enterprise succeeded it was just dicta is very obviously mistaken.

[FN37.](#) Article 486, as the reader might remember, has absolutely nothing to do with succession or transfer of anything but is, rather, the article that vests copyright ownership in films in the enterprise that produced them.

[FN38.](#) The opinion may be saying, simply, that insofar as SMS incorporated into its charter assets belonging to the state without the consent of the state, its charter was invalid, and it is, therefore, irrelevant that the state property might have been returned to the state thereafter, when the lease expired. It is, moreover, irrelevant that intangible assets not belonging to the state may have been legitimately passed to the joint stock company SMS in the same transfer document. The point is that the joint stock company SMS tried to transfer to itself state property, which it had no right to do, and this alone makes its registration invalid. In this case, however, the opinion would still say absolutely nothing about copyright ownership.

[FN39.](#) The parties have offered conflicting views of the role of res judicata and collateral estoppel in the Russian court system, with plaintiffs suggesting that that decision has no res judicata effect while FSUESMS and defendants argue that it does. There is no need to resolve this

issue here, since the dispute between the parties did not concern the same subject matter as the dispute here, viz., ownership of the disputed copyrights. The Russian court decisions were merely about the validity of the registration of SMS. The copyright ownership question was not necessarily decided there, as the April 20 decision's reasoning makes very clear.

[FN40.](#) The parties dispute whether the April 20 invalidation of SMS's registration has already taken effect or has not taken effect and is easily remediable by SMS. The June 4,

2001 decision, which affirmed the appeals court's April 3 decision finding that the joint stock company succeeded to the rights of the lease enterprise, seems to bolster plaintiffs' position that the registration cancellation has nothing to do with the issue of rightful succession. However, there is no need to decide the issue definitively here, since even if the joint stock company SMS was invalidly registered, the conclusion that the lease enterprise owned the copyrights at the time it concluded the licensing agreement with FBJ would remain undisturbed, because, as discussed above, those copyrights would have passed to the lease enterprise by operation of law (Article 498) when the state enterprise Soyuzmultfilm Studio ceased to exist in 1989. Thus, FBJ's rights under the agreement would still be enforceable against anyone

currently claiming ownership of the copyrights. Because this state of affairs would mean that FBJ's injunction on consent against the defendants would have been validly obtained, there is no need to go further.

[FN41](#). At most, as has been noted at length above, the state reserved to itself various exploitation rights, and even those were reintegrated into the underlying copyrights during the Perestroika era.

[FN42](#). It is worth pausing briefly to address the choice of law questions that arise in connection with the transfer of copyrights. First, while *Itar-Tass* decided the choice of law issue with respect to ownership of copyrights, it expressly excluded the transfer of copyrights from the scope of its holding: "[W]e consider only initial ownership, and have no occasion to consider choice of law issues concerning assignment of rights." [Itar-Tass](#), 153 F.3d at 91, n. 11.

Likewise, no occasion to consider choice of law issues concerning assignment of rights presents itself in the case at bar. While defendants and FSUESMS argue that the assignment of rights by the lease enterprise to FBJ is invalid because the former never had those rights to convey, this is really an argument about ownership, not about transfer, and Russian law consequently applies. Where, however, defendants and FSUESMS dispute the

effectiveness and formality of the transfer itself, there is no need to reach the choice of law issue because neither defendants nor FSUESMS have standing in this court even to make the invalidity-of-transfer arguments they are making, as will be discussed *infra*.

The parties themselves have not briefed the transfer choice-of-law issue.

[FN43](#). A subsequent formal writing by the copyright owner had also confirmed the transfer, but this fact was not essential to the court's disposition. *See id.*

[FN44.](#) It should be noted that plaintiff FBJ claims that its conveyance documents are in accordance with the appropriate formalities. "Plaintiffs believe that said agreements are clear and unambiguous. Even if there are ambiguities, the parties to the aforesaid contracts have cleared up any ambiguities." Pls.' Sum. J. Mot.

[FN45.](#) The defendants here would not even be able to enjoy this benefit, since SMS, the successor to the lease enterprise, is also a plaintiff to this action.

E.D.N.Y.,2001.
Films by Jove, Inc. v. Berov
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