Russian Films Going International: Certain Hints for International Co-Producers and Distributors Acquiring Rights to Russian Films*

ALLA NAGLIS
COUNSEL (MOSCOW), HOGAN & HARTSON LLP

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Over the last couple of years, the interest in film production in Russia has grown dramatically, and all of a sudden the very idea of Russian production appears quite attractive and competitive, in line with more "traditional" slots in Eastern Europe. As a result, Hollywood majors now happen to be looking to Russia with the view of setting up joint ventures to produce films in Russia for international distribution or to acquire a 100 per cent "made in Russia" product.

However, it is no secret that the market and film production as such in Russia are in fact much closer to the Western standard of expectations than the applicable regulation and, consequently, film production documents that the international distributor dealing with the Russian producer is likely to face.

This article briefly summarises the author's firm's experience in helping their clients in structuring their relationship with Russian partners and identifying some of the key issues that are likely to arise in the relationship between an international company and a Russian producer.

Co-production v distribution

From a practical perspective, the co-operation between a Russian producer and an international company in most cases follows one of two patterns, i.e. (1) an international company acts as a co-producer of a motion picture to be produced in Russia at the outset, or (2) upon the release of a Russian picture demonstrating a capability for box office success, the international distributor comes into the picture to acquire rights in the completed product.

While it is of course a commercial decision to make (and in some cases, it may be simply impossible to opt for the first one for a number of reasons), the first option is more favourable for the international party from a purely legal perspective. The international co-producer would have the advantage of the right to introduce certain drafting models and standards for the Russian producer to follow that would not otherwise be observed, being simply uncommon in the Russian legal system. Otherwise, if the international distributor is to acquire a ready product, it will mean that all the relevant paperwork is already in place, and whether or not it meets the criteria necessary for international distribution may only be determined in the course of the chain of title analysis. If the analysis identifies any defects in the chain of title, having the Russian producer clear the defects is in most cases quite a time-consuming effort, as it would require amending a number of already existing documents to make them compliant with Western standards. Another difficulty may be that in a number of instances, a specific term or provision raising concern may result from relying on the specific wording of Russian laws, thus being quite legal and valid in Russia, but simply not customary from the international standpoint, and such misunderstandings may be successfully resolved by a little elaboration of the contractual wording, leading to a result meeting both parties' expectations.

Copyright v right to use

The framework of the Russian legal regulation of rights in a motion picture is the Law of the Russian Federation No.5351-1 "On Copyright and Neighboring (Related) Rights", dated July 9, 1993, as amended (the "Copyright Law").[1]

In respect of copyright and, specifically, its transfer, the Russian law follows the continental legal system in that copyright: 1 (is) always vested in an individual; and (2) cannot be assigned or transferred in full. Individual authors always retain so-called "personal non-property" rights (or moral rights), such as, for example, the right to name and the right to protect the work from distortion (as opposed to reworking), which are non-assignable.

Consequently, what can be assigned are only the rights of commercial use of the work, which by no means form an unbreakable unity. Any right transferred by the author must be specifically listed in a written copyright assignment agreement. If not expressly listed as being assigned, a right is deemed to be retained by the author (or a right holder, in case of a subsequent assignment).[2] Needless to say, any transfer of rights must expressly be defined as exclusive or non-exclusive.

There is in fact only one exception to the general rule described above, being naturally the copyright in a work made for hire. By force of law, if a copyrightable object is created in the

* *This comment is an outline of only some of the questions that arise in connection with film production, rights acquisition and distribution agreements in respect of motion pictures produced under Russian law. For more details, and in the case of questions, please contact Alla Naglis in the Moscow office of Hogan & Hartson LLP at +7 495 797-9900 or at: anaglis@hhlaw.com.*

1. The Copyright Law is to be replaced by the relevant Pt 4 of the Civil Code of the Russian Federation that is expected to be adopted soon; however, the basic concepts are not expected to be significantly affected.
2. Art.31(2) of the Copyright Law.

course of performance of the employer's assignment, all rights in the work (save for the personal non-transferable rights) belong to the employer.[3]

Another tricky issue causing a lot of misunderstanding is the requirement set forth by the Copyright Law that any copyright assignment agreement must specify the term for which the rights are granted,[4] which in fact makes the whole concept closer to a licence, rather than assignment, although the term "assignment" is used in the Copyright Law. In the absence of a specified rights assignment term in the contract, the author may, upon the expiration of five years from the copyright grant date, terminate the grant of rights. Thus it is essential to make sure that the time period is defined in the agreement (the recommended language would be to refer to the maximum term of the copyright protection under Russian law[5]).

Authors of a motion picture

In respect of a motion picture (an audiovisual work, as defined under the Copyright Law), Art.13 lists only the following individuals as its authors and initial right holders:

- director;
- screenplay writer;
- composer (only to the extent the music composition was specifically created for the motion picture, i.e. not pre-existing).

The principal distinction of the statutory regime of the authors of a motion picture, as opposed to contributors (authors of independent copyrightable works used in the picture) is that the authors of the film, apart from rights in their respective contributions, such as a screenplay or score, are deemed to collectively own (however, are not required to collectively exercise) the right of commercial use of the motion picture as a whole. Thus any agreement with the film author has to expressly specify the rights in the film that are assigned.

In addition, there are certain peculiarities related to the scope of rights of some film authors that frequently raise questions or misunderstanding.

Screenplay writer

A motion picture may be created on the basis of an original screenplay or may be a cinematographic adaptation of the existing literary work. If the screenplay is original, in some cases it may happen that the producer takes a screenplay already published as a literary work, and thus it is not the writer's contribution created specifically for the motion picture in question. If this is the case, a question that frequently is asked is: does the screenplay writer still have all the rights of one of the film authors?

Another situation slightly different from what is described above takes place if the motion picture is a remake, in which case the prior screenplay may be taken without modification, or, alternatively, another writer (i.e. not the author of the original screenplay) is hired to adapt the original screenplay to another location or time (this is particularly typical for sitcoms "travelling" across borders). Then the following questions may be asked: (1) whether or not the author of the original screenplay is also treated as one of the authors of the remake? and (2) does the author of the adapted version of the screenplay have all rights of the author?

Within the statutory framework of the Russian law, all these questions should be answered in a way that any person who creatively contributed to the screenplay writing is treated without differentiation as one of the authors of the picture. It does not, however, mean to say that all such authors are equal in all respects. The value of each specific contribution would be rewarded in accordance with the agreement between the author and the film producer. However, the above makes it only more important for the producer to foresee each possible development and likely use of the film to include the relevant clauses dealing with each specific case in its agreement with the screenplay writer.

Cinematographic adaptation of a literary work

If the picture is to be based on a pre-existing literary work, the very first step in its creation would be to obtain the screen adaptation rights from the writer. Unlike the screenplay writer, the author of the literary work (if he/she is not also a screenplay writer) is not an author of the film. However, the future film distribution and future uses of the motion picture are dependent on the detailed elaboration of such an agreement.

One of the most common defects one may see in a screen adaptation agreement with the writer is the limitation of the scope of the rights granted by the author with the rights to the actual cinematographic reworking of the original literary works.

However, in reality, in line with the Berne Convention for the Protection of Literary and Artistic Works (1886; Paris, 1971) to which the Russian Federation adhered in 1995, the writer has an exclusive right to permit not only the initial screen adaptation of the literary work, but also any subsequent adaptation of the original motion picture based on such literary work.[6] In other words if a decision is made with respect to production of a new version of the film ("remake") or if a film is under any reworking, then the consent of the author of the literary work is also required.

Life story

A life story technically is not protected by copyright laws. However, it can happen that a life story (which is effectively more of a privacy protection right) "conflicts" in certain ways with copyright. By way of example, there has been a case where two groups were rivalling to produce a film based on real events. The first group had acquired screen adaptation rights in the memoirs of one of the participants in those events, while the other group, in its turn, had the consent of a number of other participants to use their names and recollections of events, although the recollections were

3. Art.14 of the Copyright Law.
4. Art.31(1) of the Copyright Law.
5. By way of reference, the copyright protection term under Russian law is currently the lifetime of the author or, in case of several co-authors, of the last one to survive, plus 70 years thereafter.
6. Art.14 of the Berne Convention.

not embodied in a copyrightable work. Eventually, the first group won the picture, but the names of the key figures were changed in the film.

Producer and grant of rights

A separate reference is made by the Copyright Law to a producer of the motion picture, who is defined as an "individual or the legal entity bearing the initiative and responsibility for the production of such works".[7] It is striking that the definition used in the Copyright Law effectively limits the role of the producer to the actual production, which, against the historical background, may be used to lead to a conclusion that by "producer" the Copyright Law means principally film production companies, while the function of the producer is broader than that.

By comparison, another definition of the producer can be found in Art.3 of the Federal Law "On the State Support to the Cinematography in the Russian Federation" (the "Law on Cinematography"),[8] which refers to a film producer as "an individual or a legal entity that undertook the initiative and the responsibility with respect to the financing, production and distribution of the film". This is certainly closer to the customary practice of the producer engaging production companies (and in many instances, more than one) to create a picture.

The regulation of the relationship between the producer and the authors of the picture, as it is set forth under the Copyright Law, has certain specifics. In particular, pursuant to the Copyright Law, the mere fact of conclusion of an agreement between the producer and each of the authors implies, by force of law, an automatic transfer to the producer of certain rights of commercial use, irrespective of whether such rights are explicitly listed in the agreement. It should be borne in mind, however, that in a situation where the producer contracts with a production studio, which, it its turn, enters into agreements with each of the authors, the rights are transferred automatically only to the latter, while a subsequent transfer of rights to the producer still has to be agreed on very specifically and in full detail in the production agreement.

Rights of commercial use of a motion picture

The rights that are assigned by the authors of the picture to the producer by force of law, if there is an agreement, are as follows:

- the right to reproduce;
- the right to distribute;
- the right to publicly perform;
- the right to broadcast by air or cable;
- the right to subtitle; and
- the right to dub.[9]

The problem is that, as is clear from the above list, the list of the rights that are transferred automatically to the producer is not sufficient to enable the producer to use and distribute the picture to the maximum desired extent, particularly against the background of what an international distributor would expect to see in the right acquisition and distribution agreement. Therefore, eventually, the agreements with authors of the picture should be, and in most cases are, drafted in full detail without much reliance on the automatic statutory grant of rights. In this regard, two specific rights should be mentioned that have not found their way into the statutory list and that are indispensable for the international distribution, namely (1) the right to rework the picture (that would comprise the right to create all sorts of derivative works, such as translations, adaptations, remakes, sequels and prequels, and the creation of non-cinematographic works based on the picture, including, where relevant, novelisation of the original screenplay); and (2) the right to further assign/transfer the rights.

The right to further assign the rights is absolutely crucial to enable the producer to grant the international distribution rights to a third party, for obvious reasons. If, for any reason, any rights were transferred without the right of further assign/transfer, this would result in a deadlock, where the assignee of exclusive rights would have no right to assign them further because of the lack of the respective contractual entitlement, and, at the same time, the assignor would have no such right either, because the grant of exclusive rights precludes all parties but the assignee (including naturally the author) from exercising such rights.

Besides, there are a couple of rights that, even being listed for automatic transfer, need clarification to fully comply with the statutory requirements. For example, the right to reproduce and distribute should specify the maximum number of copies for which it is granted, pursuant to the statutory provision requiring a specific number of copies in any agreement related to reproduction if it provides for a payment of a flat fee, as opposed to a participation in proceeds.[10] From the practical perspective, if the exact number of copies or reproductions cannot be determined it is recommended to specify such a number that must by no means be exceeded.

Another language has to do with the types of media for reproduction and distribution. It is not typical in Russia to provide in the agreement that the film can be reproduced in any media "currently known or that may become known at any time in the future"; however, it can technically be done.

Contributors

Different treatment is set forth in respect of the authors of the audiovisual work (i.e. director, screenplay writer(s) and composer) and the authors of copyrightable works forming parts in the picture in the film, such as cameramen, costume designers, art directors, etc. (contributors).

The principal difference from the regime of the authors is that the rights to the contributors only extend to their respective contributions, but not to the picture in general, and thus they

7. Art.4 of the Copyright Law.
8. Federal Law of the Russian Federation No.126-FZ "On the State Support to the Cinematography in the Russian Federation" dated August 22, 1996.
9. Art.13(2) of the Copyright Law.
10. Art.31(3) of the Copyright Law.

are not entitled to impede the distribution of the picture in any way. However, to the extent that the works created by a particular contributor are supposed to be used separately from the picture (e.g. costumes or sets that may be used for promotional purposes), the full scope of the rights assignment has to be obtained in respect of such items and works, both in the context and out of context of the picture.

Another distinction is that, unlike the authors, contributors do not grant their rights to the producer automatically, which means that whatever has to be granted must be properly reflected in the respective agreement.

Pre-existing musical compositions take a special place among independent works used in the film and in many instances end up becoming a bone of contention, since the collection of a full set of necessary documents granting rights to use of a musical work or its part in an audiovisual work is not an easy task. Regarding the score (e.g. a song) or even its minimal recognisable fragment, one must make sure that the consent of the following persons is obtained:

- author of music;
- authors of lyrics (if the musical work has lyrics);
- performers (singers);
- master record owner.

As in the case of authors of independent works used in the film, it is necessary to specify the scope of the assigned rights in as much detail as possible. The difficulty here is that the scope of rights granted for one and the same score by all right holders must coincide, otherwise the score can be used only in the minimal scope being granted.

A common issue that raises concerns is that, in most cases, the right holders are only prepared to grant the rights for the use of the score in the context of the picture, but not out of context. Therefore, if a soundtrack album release is desirable, it should ideally be raised in the early stages of the production to make sure it will be reflected in the agreements with all the score right holders.

Actors and performers

The nature of the rights acquired by a producer of the film (or any subsequent right holder) in respect of the actors' performance of a role, or a musical or choreographic part in the motion picture is, for the purposes of Russian law, different from copyright and is governed by other statutory provisions (neighbouring rights), although also within the framework of the Copyright Law.

Similarly to the case with film authors, a contract between a producer and actors implies an automatic transfer to the producer, by force of law, of certain rights, being the right to broadcast or transmit the recording of the performance by cable and the right to reproduce the performance recording.

At the same time, other rights that may be important for international distribution do not appear in the above list and have to be expressly listed in the agreement, such as:

- the right to distribute;
- the right to import;
- the right to rework the performance (including the right to use the performance in remakes or sequels);
- the right to use fragments of the performance in advertising;
- the right to use fragments of the performance in merchandising;
- the right to further assign/transfer the rights.