COPYRIGHT, DEFAMATION, AND PRIVACY IN SOVIET CIVIL LAW

by
SERGE L. LEVITSKY

No. 22 (I)

LAW IN EASTERN EUROPE

A series of publications issued by the Documentation Office for East European Law University of Leyden

General editor: F. J. M. Feldbrugge

COPYRIGHT, DEFAMATION, and PRIVACY IN SOVIET CIVIL LAW

De lege lata ac ferenda

by

SERGE L. LEVITSKY

STATUS JURIS: August 1978

SIJTHOFF & NOORDHOFF 1979
Alphen aan den Rijn The Netherlands
Germantown, Maryland USA

ISBN 90 286 0139 2

Copyright © 1979 Sijthoff & Noordhoff International Publishers B.V.,
Alphen aan den Rijn, The Netherlands

All rights reserved. No part of this publication may be
reproduced, stored in a retrieval system, or transmitted, in any
form or by any means, electronic, mechanical, photocopying,
recording or otherwise, without the prior permission of the
copyright owner.

Printed in The Netherlands.

# LAW IN EASTERN EUROPE
22(I)

LAW IN EASTERN EUROPE

A series of publications
issued by the
Documentation Office for East European Law
University of Leyden

General Editor

F.J.M. FELDBRUGGE

No. 22(I)

SIJTHOFF & NOORDHOFF 1979
Alphen aan den Rijn The Netherlands
Germantown, Maryland USA

此为试读,需要完整PDF请访问: www.ertongbook.com

To A.

"La dispietata mente, che pur mira
di retro al tempo che se n'è andato . . ."

Dante

PREFACE
(in guise of an Introduction)

I

Since the publication in 1964 of my *Introduction to Soviet Copyright Law* (vol. 8 of *Law in Eastern Europe*), two unrelated developments have exerted an undeniable influence upon the direction in which Soviet copyright law was to move. A third development, just as unrelated, influenced my own choice of the manner in which the system of Soviet copyright norms was to be approached and presented in the present study.

(a) In the 1960's, when the union republics of the USSR were enacting new copyright statutes as separate Chapters in their civil codes, fourteen republics provided, within these specialised Chapters, for a "right to one's own image" (Section 514 in the RSFSR Civil Code of 1964), and two republics (Kazakh and later also Uzbek), included in their own copyright provisions the right to the confidentiality of one's personal letters, diaries, notebooks, and other private writings. Soviet jurisprudence was quick to point out that the rights "to one's own image" and to protection of one's private writings were more closely related to civil defamation (defined in the civil codes of all fifteen republics as the "right to protection of one's honour and dignity"), than they were to copyright itself: For not unlike the right to the protection of one's honour and dignity, the two pseudo-copyright provisions, designed as they were to protect an individual's "intimate, private sphere," clearly belonged to the category of "personal non-property rights *not* connected with property rights." In contrast, all "personal rights" in the rest of the copyright provisions were *connected* with property rights.

There can be no doubt that since the mid-1960's, the system of "personal non-property rights not connected with property rights," first introduced into Soviet civil legislation in 1961, *and not copyright law*, constituted that larger context within which the rights to "one's own image" and to protection of one's private writings – although both were formally norms of copyright law – became more easily intelligible. Within the context of the copyright law itself, on the other hand, the distinctive legal nature of these two rights warranted hardly more than a footnote.

(b) The second development which was to have a significant impact upon Soviet copyright was the accession by the Soviet Union to the Universal Copyright Convention in 1973. This step entailed important revisions of the municipal Soviet law in order to bring it into conformity with the provisions of the UCC, accompanied by the

creation of appropriate new institutions, as well as other changes, particularly in the area of authors' contracts and schedules of remuneration.

(c) After 1977, it was no longer possible to treat the rights "to one's own image" and to the protection of one's private writings as mere footnotes to the copyright statutes. A new Constitution had been enacted which elevated the right to "protection by law" of the "private life of citizens" to the rank of a "fundamental," a constitutional, right (Article 56), along with the rights to "judicial protection" of the citizens' "honour and dignity" (Article 57), and "protection by the State" of other "rights of authors" (Article 47). In the domain of *Soviet civil law*, the rights to "one's own image" and to protection of one's private writings were the only means with the aid of which the provisions of Article 56 of the new Constitution could be brought into play; just as "civil defamation" was the only institution capable of implementing the "guarantees" of Article 57. For in spite of the apparent differences in the manner of protection, inaccurately implied by the language of the Constitution, the remark made in 1955 by the late Reinhart Maurach continued to apply to Articles 56 and 57: They were "nichts anderes als eine Verweisung auf die einschlägigen Vorschriften ausserverfassungsrechtlicher Normen."[1]

The body of the Soviet statutory copyright provisions must thus be divided into two categories: Those which ensure the implementation of the constitutional right of "privacy" (the right to "one's own image"; the right to protection of the confidentiality of one's private writings); and those which implement, in the area of civil law, the constitutional right to the protection of other "rights of authors" (Article 47). While the latter can be studied and analysed within their own context, the former become more meaningful when studied in conjunction with the remaining third "personal non-property right not connected with property rights," namely the right to protection of one's "honour and dignity" (civil defamation). The pairing of defamation and privacy permits the analyst to address himself to two important questions relating to the rights of citizens: (1) while copyright statutes have been "borrowed" to implement, in the area of civil law, the constitutional right to the protection of "citizens' private life," to what extent is Soviet law (or Soviet jurisprudence) moving closer towards recognition of the concept of a *general* "right of privacy"?; and (2) having recognised the citizen's right to protection of his own image, of the confidentiality of his private writings

---

1. Reinhart Maurach, *Handbuch der Sowjetverfassung*. Munich 1955, p. 379.

(albeit in only two republics), *and* of his "honour and dignity", what attitude does Soviet law (or Soviet jurisprudence) adopt towards the concept of an *allgemeines Persönlichkeitsrecht*? For the Constitution of 1977 itself carefully avoids providing a common denominator for these separate rights, but neither does it limit the legislator in the number of new "personality" rights which he can add to those expressly recognised in Soviet civil law.

The structure of the present study reflects all these considerations. In the first volume, two separate constitutional rights are dealt with, as they relate to *civil law*: In *Part One*: "Defamation"; in *Part Two*: "Privacy." Together, the two Parts provide a detailed analysis of the three "personal non-property rights not connected with property rights" which are at present recognised in Soviet civil law. The first (protection of one's "honour and dignity") is found in the General Part of the Principles of Civil Legislation (1961) and of the individual civil codes; the remaining two continue to be treated as part of copyright statutes. In this study, each of the three rights is analysed separately in its civil-law setting, and all three are assessed as a common category in civil law.

Part Three of the study deals with those other "rights of the author" which are referred to in Article 47 of the Constitution of 1977. They, too, are analysed from the point of view of Soviet civil law only. Part Three comprises a separate second volume of the present study.

II

Serious Western interest in Soviet copyright law coincided with the accession of the USSR to the Universal Copyright Convention. The first serious Western confrontation with the Soviet institution of "civil defamation", on the other hand, occurred only in 1978, when the Soviet State Committee for Television and Radio brought a libel suit against two American correspondents accredited in the USSR. As for the civil-law implications of the new constitutional right of "privacy", they have remained thus far unexplored even in Soviet jurisprudence. Keeping in mind these different circumstances, I have adopted a somewhat different approach in dealing with each of the rights and institutions discussed in the present study. In regard to copyright proper, the focus of the discussion and analysis is upon the most recent trends, but I have endeavoured not to neglect the elements of continuity. In discussing civil defamation I have tried to provide a complete analysis of the landmark case *Gosteleradio SSSR* v. *Whitney* and *Piper* (1978), and assess the relative merits of the plaintiff's and the defendants' cases, as well as dissect the institution of civil libel and slander itself, upon which this law suit was based.

Finally, in discussing the protection of "privacy" in Soviet civil law,

I have looked for a larger context beyond and outside Soviet law:

Protection under Soviet civil law of an individual's right "to his own image", and of the confidentiality of his personal letters, diaries, notebooks, and other private writings, is a very narrow topic for which I should have been hardly justified in claiming the reader's attention, particularly since there is no case law to illustrate how the law is applied. I am painfully aware that the author of a legal analysis with scholarly pretensions, in Mérimée's words, "... risque de fatiguer l'attention de son lecteur en lui présentant des sujets assez peu dignes d'occuper son attention."[2] Has the topic been "shamefully neglected" by Western students of Soviet law as well as in Soviet jurisprudence? But it is not easy to get around the objection made by John Fowles in *The French Lieutenant's Woman*, that this is "a familiar justification for spending too much time in too small a field."[3]

But I had not meant to apologise for my topic. For it is part of a broader theme and of a more important problem: Where does an "author's privacy" end and "public interest" begin? I have used the "problem" itself as the larger context within which the immediate topic can be more intelligently understood and meaningfully discussed. Within this broader context, too, the Soviet contribution to the solution of the problem can be more objectively evaluated and assessed.

In regard particularly of the individual's right to protection under civil law of his "private writings",

(a) I have had recourse to *history*: (1) to show that the "problem" has existed in Russian copyright law, in virtually identical terms, since 1830; letting individual jurists speak for themselves during this century and a half, I have tried to make the reader a judge of the intellectual quality of jurisprudential arguments, "then" and "now", in relation to an analogous problem; (2) to illustrate the constant "swings" in the balance between "privacy" and "public interest," as well as the changing legal nature of the individual's right in his "private writings," from *res*, to an "intellectual property" right, to a "personality" right. In Russia, these changes had come about long before the Soviet State has come into existence.

(b) I have drawn amply upon *literature*: (1) because literature is often a faithful mirror of the problems confronting the jurist, and serves as evidence to support or disprove his arguments; in the

---

2. Cf. R.C. Dale, *The Poetics of Prosper Mérimée*. The Hague/Paris 1966, p. 45, note 11.

3. John Fowles, *The French Lieutenant's Woman*. Boston/Toronto 1969, p. 46.

pages of literary journals, legal issues are discussed or enacted which will never reach a court of law; (2) to show not only the intensity of the debate, but the "universality" of the "problem" itself – that it is unconnected with socialism or with Soviet law, but has preoccupied wise men even in the days of Cicero, just as today it still constitutes a challenge to the jurist and the man of letters alike, regardless of juridical or literary tradition to which they belong.

(c) I have used *comparative law*: (1) to provide contrasts and to point out parallels and similarities in discussing the solutions proposed by Soviet law and Soviet jurisprudence; (2) to show the influence upon Soviet law of the legislations of other East European countries, and to suggest intellectual connexions with the currents and trends in Western jurisprudence; (3) to assess the relative originality of Soviet arguments and solutions.

(d) I have, in the final analysis, left to the reader the task of judging the merits of the Soviet claim that protection by law of an individual's right to the confidentiality of his private writings, just as the legal protection of all other "personality" rights, is predicated upon the completion of socialism in the USSR; and I have left it up to the reader to speculate *why* Soviet jurisprudence has been unable to come up with a theoretical foundation for the various "privacy" and "personality" rights "derived" from the ethos of a collectivist society.

III

A word about my use of *footnotes* may now be in order. I am aware how numerous they are. I am also aware of Mérimée's warning against the tendency of some authors to allow details to become more important than the narrative.[4] But my footnotes were not meant either to impress or to depress. Nor were they intended to become the literary equivalent of Filene's bargain basement in Boston. Their purpose is quite different. In *Either/Or*, Søren Kierkegaard had referred to "...the relation we sometimes see in the theatre between the forestage scene in the regular acting area and a scrim scene projected behind it."[5] In the main, such is the intended relationship between my text and the footnotes, particularly in the pages dealing with "privacy":

(a) If an "independent action" sometimes appears to take place in

---

4. Cf. Dale, *op. cit.*, p. 44.

5. Søren Kierkegaard, *Either/Or*. Vol. I. Transl. from the Danish. Princeton University Press, 1971 edit., p. 302.

此为试读,需要完整PDF请访问: www.ertongbook.com

the "Notes", seemingly unrelated to the "action" in the main text, on the "main stage" as it were, this may be merely an illusion. The framers of the new U.S. Copyright Revision Act of 1976 have concluded that there was "clearly no way" to satisfactorily reconcile within one legislative act two contradictory interests: That of the individual and that of the public.[6] In the present study, I have tried to preserve a certain "balance" between "privacy" and "public interest", in relation to writings of a private character, by quoting in my footnotes arguments which often contradicted those expressed in the main text. Thus, an argument in favour of the posthumous protection of an author's private letters against their divulgation not authorised by him during his lifetime, cited in the main text, may be accompanied by a footnote showing the literary value of these same letters for posterity.

(b) Footnotes were often used to preserve a comparative approach to a given topic, when comparison might have been intrusive within the context of the main narrative.

(c) There were cases when I have used footnotes to provide *literary* examples to illustrate the *juridical* arguments used in the main text.

For all these reasons, footnotes should be therefore considered as an integral part of the present study.

IV

Two individuals and three institutions deserve a special mention before I surrender my book to the reader. Prof. mr. F.J.M. Feldbrugge, scholar of renown and Director of the Documentation Office for East European Law, was my gracious host at the University of Leyden in 1978, where a large portion of the present study was written. To his efforts I also owe the generous grant provided for the completion of the work by the *Nederlandse Organisatie voor Zuiver Wetenschappelijk Onderzoek* (*Z.W.O.*). The entire staff of the Documentation Office has contributed to making my stay in Leyden a most happy one. And when several documents were urgently needed, the Amerikaanse Bibliotheek of the U.S. International Communication Agency in Amsterdam has cheerfully gone out of its way to provide the needed assistance.

To William B. Simons, *Jur. Doc.*, I should like to record my special gratitude. His friendship, efficiency, and dedication have made it easy for me to achieve a quick transition from an endless exile, in

---

6. *Copyright Revision Act of 1976* (P.L.94-553, as signed by the President, 19 October 1976): Law; Explanation; Committee Reports. Chicago, Ill. 1976, p. 7.

Heinrich Heine's definition,[7] to what had become a happy home in Rembrandt's charming birthplace.

The book now belongs to the reader. In stepping back, the author claims for himself that aspect of the "right of privacy" which he values most: *Le droit à l'oubli.* His book must now speak for itself.

Leyden, 1978
The Netherlands

Serge L. Levitsky

7. Cf. A.I. Sandor, *The Exile of Gods: Interpretation of a Theme, a Theory and a Technique in the Work of Heinrich Heine.* The Hague/Paris 1967, pp. 26, 28.

TABLE OF CONTENTS

PREFACE xi

Part One: Defamation

INTRODUCTORY REMARKS 3

I. SECTION 7 PROVIDES FOR PROTECTION OF PERSONAL NON-PROPERTY INTERESTS . . 7

II. PROTECTION CONSISTS IN RESTORATION OF THE *STATUS QUO ANTE* 15
1. Traditional Soviet view concerning *moral injury.* Punitive damages. Compensation for material injury, 15. *2.* Proposals to recognise *moral injury* and to provide for compensation thereof, 18. *3.* Retraction, injunctions and restraining orders, 20. *4.* No "right of reply", 21.

III. THE COURT MAY IMPOSE FINES FOR NON-PERFORMANCE OF ITS DECISION ORDERING RESTORATION OF THE *STATUS QUO ANTE* . 23

IV. CONDITIONS NECESSARY FOR SECTION 7 TO APPLY 24

A. Circulation of Statements 24
B. The Statements must be Defamatory to the Honour and Dignity of the Plaintiff 30
1. What is defamatory, 30. *2.* Facts and comments, 44. *3.* "Fair comment" in Anglo-American and in Soviet law, 49. *4. Filimonov* v. *Chaikovskaia* and "*Izvestiia*", 54.
C. The Statements Circulated by Defendant must be Untrue 57

V. QUESTION OF FAULT. STATUTE OF LIMITATIONS. PROCEDURE 65
1. Neither malice nor fault required, 65. *2.* No time limit for actions, 67. *3. Onus probandi*, 68. *4.* Pre-trial hearings and settlement out of court, 76. *5.* Minors, mentally incompetents, and deceased. Suits in the absence of direct personal interest, 78. *6.* Who is the

defendant, 83. *7.* Republication of slander and libel, 92. *8. Venire,* 93. *9.* Anonymous and pseudonymous libel in the press, 94. *10.* Legal nature of actions under Section 7, 98. *11.* Civil action and opinion of "mass organisations", 100. *12.* Methods of retraction, 105. *13.* Enforcement of *facere* obligations, 108. *14.* Court costs and counsel fees, 112.

VI. PROTECTION OF HONOUR AND DIGNITY IN CIVIL, CRIMINAL, AND COMRADES' COURTS: SOME DIFFERENCES 114

A. Defamation as a Crime and as a Tort 114
B. Defamation before People's Courts and before Comrades' Courts 120

VII. THE SOVIET PRESS *vs.* SECTION 7. DEFAMATION AND "LETTERS OF COMPLAINT" . . 127
1. Campaign in the Soviet press against alleged abuses of Section 7, 127. Trial by press of unsuccessful plaintiffs, 128. *2.* Trial by press of successful plaintiffs, 132. *3.* Party committee of Riazan' supports the press, 135. *4.* Beliavskii's criticism of the press and his defence of Section 7, 137. *5.* Means available to the courts to discourage *mala fide* actions under Section 7, 140. *6.* Defamation and "citizens' letters of complaint", 142. *7.* Anonymous "letters of complaint" and their effectiveness, 145.

VIII. USE OF SECTION 7 AGAINST FOREIGN JOURNALISTS DURING THE POST-*DÉTENTE* ERA . 151
1. Gosteleradio SSSR vs. *Whitney* and *Piper,* 151. *2.* Comments upon the plaintiff's case, 157. *3.* Comments upon the defendants' case, 161. *4.* Comments upon Judge L. Almazov's rulings and decision, 165. *5.* Inherent weaknesses of Section 7, 169. *6.* Legal context *vs.* political context, 172.

Part Two: Privacy

INTRODUCTORY REMARKS 181

I. THE RIGHT TO ONE'S OWN IMAGE 184

A. Creation and Publication of a Work of Pictorial Fine Arts 186
1. Consent necessary for publication, not for creation

of the work, 186. *2.* Does protection extend only to works created "by the artist's hand"?, 188. *3.* Works not protected under Section 514, 190. *4.* Method of publication not relevant, 190.

B. The meaning of "Consent" 192
1. De lege ferenda, 192. *2. De lege lata,* 196. *3.* Procedural implications, 199.

C. Exceptions to Protection 206
1. Publication in the interest of State or society, 206. *2.* Publication in a higher artistic interest, 209. *3.* Works of photography, 211. *4.* No protection in the Kazakh civil code, 218.

II. COPYRIGHT AND THE RIGHT TO ONE'S OWN IMAGE 219

III. THE RIGHT TO PROTECTION OF ONE'S PRIVATE WRITINGS 222

A. Evolution of the Soviet Legislation 222

B. Legal Nature of the "Right to" Private Writings . 228

1. It can be a copyright 228
Animus domini test rejected, 228. Other extrinsic criteria rejected, 230. Intrinsic merits of the work determine its copyrightability, 232. "Legal criteria" of intrinsic merits, 234. Expert testimony, 236. Determination by publishing houses, 236. "Literary materials", 239.

2. It is not a property right 241
No copyright is conferred under Section 491 and 540-1 themselves, 242. No property right is conferred in the tangible objects in which the private writings are embodied, 244. No property right is conferred in the intangible contents of private writings, 245.
English and American law, 245. French law, 248. German law, 251. Pre-revolutionary Russian law, 253. Soviet law (Kazakh and Uzbek), 257.

3. It is a "personality" right. 262
Comparative law and antecedents, 262.
English and American law, 262. French law, 267. German law, 272. Debates in late 19th-century Russia: Literary, 276; jurisprudence, 298.
Russian Copyright Act of 20 March 1911, 320.
Debates in the Committee on Judicial Reforms, 321. Amendments in the State Council, 323. "Privacy" prevails over "public interest" in the

State Duma, 335. The debate continues, 338. Soviet law, 352.

C. Peculiarities of the "Right to" Private Writings . . 370
1. Legal nature of the relationship between writer and addressee, 370. *2.* Beyond "legitimate self-defence" of the addressee, 374. *3.* Legal nature of the protection of "third persons", 379. *4.* Which "writings" are protected?, 381. *5.* What is "publication"?, 382. *6.* Sanctions and remedies, 389. *7.* "Posthumous protection" revisited, 400. *8.* Only natural persons possess the right, 415. *9.* Foreigners, 415.

IV. IN SEARCH OF THEORETICAL FOUNDATIONS 420

A. Problems of Methodology 421
1. A question of classification, 422. *2.* The pitfalls of semantics, 423. *3.* Once again: "Protection" *vs.* "regulation", 425. *4.* "Rights" *or* "interests"?, 427. "Interests": The purpose or the contents of "subjective rights"?, 431. From "legally protected interests" to constitutional rights, 433. *5.* "Honour" *and* "dignity", 438.

B. A Larger Context and its Limits 446
1. Defamation and privacy, 446. *2.* USSR Constitution of 1977 and after, 450. The "rights of the personality", 451. The right to a "private sphere", 458.

INDICES
Names 471
Subjects 479

ABOUT THE AUTHOR 489

此为试读,需要完整PDF请访问: www.ertongbook.com