Ownership in Russia

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NOTE: At the time of publication, the author was affiliated with Yeshiva University. Currently, February 2008, he is a faculty member of the Annenberg School for Communication at the University of Pennsylvania.

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Ownership in Russia

Abstract
The broad strokes of Russian media ownership policy are relatively easy to identify: a commitment, expressed in statutory form, to mass media pluralism, marked by both state and private ownership. Beyond that however, the lines become blurred, as policy formulation becomes subject to competing demands. State domination and control gives way, but not without complex relationships to the past. In this chapter, we examine the process of change by attempting to identify the key elements of this hybrid system, focusing on several aspects of transformation, each of which, in some way, is connected to ownership. We shall first place these matters in historical context, and then describe the framework within which key decisions are made: the sources of law and policy.

Comments
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THE BROAD strokes of Russian media ownership policy are relatively easy to identify: a commitment, expressed in statutory form, to mass media pluralism, marked by both state and private ownership. Beyond that, however, the lines become blurred, as policy formulation becomes subject to competing demands. State domination and control gives way, but not without complex relationships to the past. In this chapter, we examine the process of change by attempting to identify the key elements of this hybrid system, focusing on several aspects of transformation, each of which, in some way, is connected to ownership. We shall first place these matters in historical context, and then describe the framework within which key decisions are made: the sources of law and policy.

The structure and process for defining ownership rest upon an unstable foundation: most media organs, state-owned and private, print and electronic, are beset by severe financial pressures, but of perhaps even greater consequence for media policy as a whole is the infancy and plasticity of the regulatory framework. Broadcasting ownership policy is political, in that personal and political rivalries appear as greater arbiters of ownership issues than do decisions made in a regulatory structure.

A limited legal framework for decision-making exists, but is largely unavailable as a means of harnessing the flow of events so as to establish conditions of stability. The Government has the contradictory goals of weaning state broadcasters from severely-limited budgets while at the same time retaining forms of ownership control. Intense struggle between governmental branches and agencies are facilitated by the
absence of transparency and predictability in regulation. Because a coherent structure is lacking, the voices of policy articulation are diffuse. Up to now, the President’s voice has been heard most loudly, but consensus is lacking.

**Dynamics of ownership and control, 1991-1995**

Only six tumultuous years ago, media ownership and control were exclusively in the hands of the Soviet state and Communist Party, the latter acting as a powerful interlocutor to suppress rivalries between governmental branches. Following the enactment in March 1990, of constitutional amendments which stripped the Party of its political monopoly and extra-legal role as supervisor of governmental functions, Soviet lawmakers initiated reforms which shaped the basic outlines of the hybrid media ownership policy to the present day: the acceptance of both private and state forms of ownership.

The foundations of this hybrid ownership policy — this “diversity principle” — were first established in June 1990, with enactment of the USSR’s first law, to explicitly outlaw censorship and monopoly ownership in all mass media. Article 7 of the 1990 Press Law declared that the right to establish media outlets belonged not only to governmental legislative and administrative bodies, but to a variety of public organisations and individual adult citizens, as well.

The 1990 Law is no longer in effect as a result of the dissolution of the USSR in December, 1991. However, its successor statute, the Mass Media Law which became effective in February, 1992 (which we refer to here as the 1992 Mass Media Law), and which remains in effect today, reaffirmed this diversity principle. Article 7 of the 1992 Mass Media Law, entitled ‘Founder’, reads as follows: ‘[t]he founder (co-founder) of a

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mass media outlet may be a citizen, an association of citizens, an enterprise, institution, organisation, or state organ.

The first manifestation of broadcasting diversity came in the dying days of the USSR not with private ownership, but with creation of a second state-owned channel, Russian Television, as the voice of the Russian Republic and Boris Yeltsin rivalling the powerful all-USSR first channel known popularly as 'Ostankino'. Since that time, the story has been one marked by two predominant themes: the clash between governmental branches over control of state-owned mass media, and the gradual development of a private sector. The latter included the emergence of private advertising and production entities which did considerable business with Ostankino, despite its ownership by the state.

In the first years of post-Soviet Russia, however, it was not the development of a private sphere which took centre stage. Instead, reallocation of control of the media, especially television, became the harsh focus of blood, inter-institutional struggle and political division. Nothing in the 1992 Mass Media Law dealt explicitly with the allocation of power between branches of government, between the President and Parliament. But as the intense division among competing forces for public loyalty took place, the media was a flash point, one that ultimately resulted in President Yeltsin's calling for new elections, the closing down of the Parliament, armed combat for control and the storming of Ostankino.

Newspapers, freer than broadcasting, were nonetheless an arena for battles for control. In the post-Soviet period, as paper and printing costs reached world levels, government subsidies became necessary for survival for most papers. The pattern of ministerial subsidies for mass media, under proposed Parliamentary action, would be subjected to scrutiny, and a legislative standard regarding the amount of circulation would be established for such subsidies, but the suspicion always remained that distribution of subsidies had political implications.

An example of the struggle for control was the status of the major newspaper Izvestia. Founded by the Supreme Soviet of the Soviet Union as its organ, under its direction and control, the newspaper had been accountable to those in control of the political body.

With the dissolution of the Soviet Union, the question of succession arose. Journalists voted to claim the paper for themselves, invoking the

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4 Now VGTRK or All-Russian Television and Radio Company.
5 See below for a discussion of its transformation into Russian Public Television.
spirit, if not the letter, of the 1992 Media Law. The Russian Parliament claimed that as inheritor of the mantle of the Supreme Soviet, it was the publisher, and, as such, controlled the assets and editorial direction of the paper. The issue became particularly important because, at a critical moment in the constitutional life of the nation, the influential paper seemed to favor the President over the views articulated by the Parliament and its Speaker, Ruslan Khasbulatov. 'Freedom of the Press,' became a rallying cry for those supporting the journalists and opposing greater parliamentary power. The journalists succeeded, and the victory was marked as a tribute to greater press autonomy; in fact, the outcome was also a measure of shifting political power.6

The battles between the President and Parliament over control of the electronic media helped precipitate the great and convulsive governmental crisis of 1993. The anger, or at least struggle, between Parliament and the President concerning the machinery of media regulation remained intense, ugly and censorious, though never so much as in the first two years of post-Soviet Russia. This basic tension remains unresolved today.

Meanwhile, with less controversy, the second strain of the diversity principle — private ownership — has been increasing. It is now necessary to look at the legal framework within which mass media operate before examining in more detail the forms of state ownership, 'public' broadcasting, and private ownership.

Framework: sources of law and policy

A broad range of ownership forms now exists in Russian mass media, pursuant to the statutory diversity principle.7 However, beyond the explanation of this principle in Article 7 of the Mass Media Law, the sources of substantive law and policy are diffuse, and clear lines of authority are lacking. So far, the dominant role on ownership issues has been and remains the executive, which has the constitutional authority to issue decrees which have the force of law8 and to veto legislative action. Within the government are agencies established to oversee the print media9 and television and radio broadcasters10.

7 This includes not only broadcasters, cable television and print media, but also numerous private production studios.
8 Presidential decrees carry the force of law under Article 99 of the 1993 Russian Constitution.
9 The Federal Committee on the Press. A major function of the Committee is the dispersal of budgetary subsidies to various print media.
As indicated, the Russian Parliament has long taken an intense interest in mass media ownership issues. The Parliament has debated and generated numerous legislative proposals on a broad range of issues, including 1995 legislation on broadcasting regulation, privatisation of state broadcasters, and state financial support for the mass media. Because it plays an important role in approving the state budget, the Parliament also makes crucial determinations as to the amounts and allocation of funds for state broadcasters and print media subsidies.

The judiciary has been virtually absent from the debate: although the 1993 Russian Constitution contains broad guarantees for the exercise of free expression, including freedom of the mass information media, these indeterminate provisions have thus far not received interpretation or direct application in the courts and cannot be considered an effective source of law.

The fundamental statute remains the 1992 Mass Media Law. In addition to articulating the basis for a pluralistic ownership system, it seeks to define the rights and duties of the various component parts of mass media enterprises. Thus, like many of the first generation of media laws throughout the region, it was a time-based monument to the idea of new freedoms and transformation. These laws, as a group, were idealistic in construct and celebrated as an artefact of the new order. In the brutal year after dissolution of the Soviet Union, during adjustment to new realities, perspectives on the nature and function of law were substantially altered. The 1992 law was largely about press immunity from Government intervention, focusing on the rights of journalists against their publishers and editors, and with the rights of citizens and journalists against the state.

The law did not reveal the power relationships among competitors: would there be an all-powerful state broadcasting authority with private entities only at the margin? Could government assure ‘diversity’ in terms

10 The Federal Service on Television and Radio Broadcasting, A major function of the Federal Service is licensing of broadcasters, which is assigned to a federal Licensing Commission. According to a Russian language publication, as of June 1995, the Federal Service had issued some 250 television licences.


12 See Article 29 of the Constitution. What its provisions mean, if anything, in concrete terms for matters of ownership, and perhaps even more importantly control, has not been determined. Thus, at this stage, Russia offers a sharp contrast to the type of active judicial supervision associated with, for example, the German Constitutional Courts.
of an imposed outcome in which many voices are guaranteed to be heard? Or would the solution be market-oriented, in which the state withdraws and has little assurance as to the organic composition of the resulting economic circumstance? The law itself, like many media statutes, was tantalising concerning these questions, but not sufficiently detailed to allow the neutral observer to predict what would occur. We turn to the patterns that have emerged.

Ownership patterns: full state ownership, the competition for control
The state itself, and government branches and agencies, continue to own important disseminators of information and entertainment, such as Russian TV [the second channel], a number of radio stations, and a number of newspapers. In this regard, it is particularly noteworthy that in a country of Russia’s enormous breadth and recent centripetal tendencies, that many regional and local media organs are owned by their respective regional and local governmental agencies.

For example, the Moscow city-owned cable television channel, which has exerted its muscle via rigorous enforcement of laws against independent cable television studios, initiated full services to some seven million city residents in November 1995, with service to reach all residents in January 1996. Moreover, and of great importance to the question of control, is the fact that the state continues as the exclusive owner of vital means of distribution, such as the transmission of television and radio signals, as well as production, such as newsprint and printing facilities.

Ownership is a clue, in another vital way, to analysing the effect of the media in shaping national identity. Should the government, directly or indirectly, be able to establish and operate an instrument of mass information? One could conceive the answer to this question as a hallmark determinant about the nature of the state and its potential for shaping public opinion and fostering loyalties. Most Western democracies have had state-controlled, or heavily state-influenced broadcasters; in a sense, that is what public service broadcasting has been. The United States has been relatively unique in its historic policy of

13 The distinction here is that the state, as the ultimate legal entity, is the legal owner of the assets of certain enterprises which are financed directly as line items from the state budget. The government branches and agencies, on the other hand, act as 'founders' — the concept examined below — and finance their mass media organs out of their budgetary allotments. By 'branches,' we refer to the executive and legislative organs, and by 'agencies,' to governmental bodies such as the Ministry of Communications.

14 Until April 1995, the powerful first channel was also owned entirely by the state. Since that time, it has been converted to a purportedly public channel (see infra), but with the state retaining 51 per cent ownership.
ambivalence toward all but the private. The Russian law would permit, in Article 7, any ‘state organ’ to found a mass media outlet. The statute denotes continuity with the environment of the past, a situation in which great powers in the society — ministries, unions, even Parliament — can be founders of newspapers.

The simple fact of state ownership, however, has not meant the absence of fierce divisions within the Government over the direction and ultimate control of mass media organs. On the contrary, in the tense political climate since 1992, the state-owned mass media, particularly television, have been a central battleground between the presidential and legislative forces. Much of that struggle has centred on claims to the unique legal concept of the ‘founder’: a concept linked to the vital concern with control.

Ownership patterns: concept of the founder
For those mass media involved in the dissemination of information and ideas, the 1992 Mass Media Law presupposed a formal structure for each mass media entity, which is to include three distinct components: a founder, an editor-in-chief, and a journalists’ collective. The concept of ‘founder’ is itself an interesting artefact of free speech theory: In the Soviet period, all mass media were organs of the Government or of the Party; the transition to another form of collective ownership had to take place through the creation of sponsoring organisations, not private publishers. Consequently, the device of ‘founder’ was invented, a kind of intermediary between Government and Party on the one hand, and journalists on the other.16

The 1992 Russian Federation Law on Mass Media illustrates this concern with control, specifying the relationship between the ‘founder’ and the staff for most ‘mass media.’ Together, the editor-in-chief and the journalists’ collective are known as ‘the editorship.’ Article 19 of the Mass Media Law states that the editorship performs its tasks ‘on the basis of professional independence,’ and Article 18 states that the founder cannot interfere with the editorship except as the founder and the editorship have agreed. A status agreement is required to cover a number of extremely important points (Articles 16 and 20).

For example, it sets forth the circumstances under which the owner may close the newspaper. The document must also set forth how the editor—

16 See Article 7, supra note — and accompanying text.
16 Interview with Professor Yuri Baturin, author of the Union Press Law, in Moscow (3 Feb. 1993).
in-chief is appointed and, presumably, how he or she is removed. The agreement would specify what powers the journalists' collective possesses and what happens if there is a proposed change in ownership or constituency. Under Article 22, the founder and the editor are also to agree as to the very important financial side of producing an instrument of mass information. For example, they should agree on 'ensuring proper education and social domestic living conditions and labour conditions for the editorial office associates.'

The authority of the 'founder' or the existence of an emergency become important analytical tools. In normal circumstances, the law requires government to follow certain extremely important procedural requirements if it is acting to enforce terminate the activity of a mass media outlet's activity pursuant to Article 4 of the Mass Media Law. These procedural safeguards stipulate that a mass media outlet may be terminated or suspended but only upon judicial review and only after proof of multiple violations during the prior 12 months and the prior issuance of written warnings. But, and this is the magic of law, these procedural safeguards do not apply if the action is taken by the 'founder'.

The powers and problems of asserting 'foundership' can be found in the take-over and reorientation of the newspaper Rossiiskaia Gazeta, a paper for which the Parliament had been the founder, during the tense days on the eve of the October 1993 events. In late September, the Government installed a new editor-in-chief, Natalia Ivanovna Polezhaeva, who initiated radical changes in personnel and editorial directions. These actions brought her into conflict with the journalists of the paper who, in a 27 September meeting voiced their unanimous objection to the take-over and claimed that the substitution of founders had been illegal.

In the American context, one does not ordinarily think of government as ordering a particular design for the internal structure of a newspaper organisation or a television network. There is no guarantee in American law that an editor will be 'independent' of the publisher. To the extent that an editor is independent, it is a result of tradition, not a constitutional or statutory right. It is also rare, unless reflected in the ownership structure, for journalists, as a body, to have rights independent of collective bargaining agreements.

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18 Ibid., Article 16.
19 Such agreements usually deal with the economic terms and conditions of employment.
From this perspective, looking at the shards of the Russian law, a perverse statism appears. The architects seem to over define freedom, stamping out any interference with the journalist, whether by the government or by the publisher. Accordingly, the legislation must posit how an instrument of mass information should be organised by imposing limits on how the editor is hired and fired, as well as by providing both the journalists and the editor with specific rights concerning the financial and editorial management of the publication. The authors of the law — the architects of the building we are trying to reconstruct — considered these provisions as additional guarantors of freedom.

But the law is strangely limiting. It discourages foreign investment and is dependent on the state to sanction internal agreements. Consequently, it is likely to lead to less diversity and innovation than might otherwise be the case. The greater the opportunities for disputatious friction between publisher and editor, the more likely the state will be called in as arbiter.

Ownership patterns: toward privatisation? Russian public broadcasting

In a stunning demonstration of executive power, President Yeltsin has with two decrees21 fashioned a concept which is rapidly becoming the model for privatisation of Russian state broadcasters — the novel concept, perhaps unique — of Russian 'public' broadcasting with its somewhat cramped conception of 'the public.' Since 1991, there has been considerable discussion, much of it fuelled by the desire to wean state broadcasters away from shrinking budgets, about the transformation of Russia's national channels into joint stock companies, with more of a corporate existence and diverse ownership.

However, such plans have collided with the competing and contradictory goal of retaining state control. Under Yeltsin's formula — an attempt to reconcile these seemingly incompatible interests — the characteristics of public broadcasting have begun to take shape: sale of

20 In an earlier draft of the statute, the broadcast licensing authority could require at least a statement of how much time will be devoted to foreign programmes and to transmissions from any Commonwealth-wide entity. Article 33(f) would have allowed a requirement that the licensee distribute 'information and materials of organs of government power and leadership.'


22 Much of this driven not only by capital expenditures, but also by enormous distribution and transmission costs.
state assets, abandonment of state budget funding, reliance on advertising revenues, infusion of private capital, but with the state retaining a majority of the assets.

The first step in development of this concept came in President Yeltsin's decree of 30 November 1994. He ordered conversion of the powerful first channel — 'Ostankino'. A study of that transformation, leading to a new entity — Russian Public Television, or ORT — is particularly instructive in demonstrating the difficulties of transition.23

The 'privatisation' of ORT had several important features: first, the President determined which companies would become shareholders in the new network. Second, the Government determined (perhaps with the assistance of the companies) what the price of their shares would be. There was no auction, either to determine who would become investors or what the value of the shares should be. Indeed, it is likely that there was no 'price' for becoming a shareholder except for the very likely burden of covering losses incurred during the next several years.

Another feature of the change in ownership was that, after it was announced, the Duma sought to cancel it and, ultimately, demonstrated a sufficient strength of objection that the new, 'privatised' ORT was, at least initially, hobbled by a mandatorily imposed relationship with aspects of the shell of Ostankino.

Thus, some of the economies that might have been available to an unimpeded private entity were foregone. ORT was required to take and broadcast certain productions of Ostankino, as an example. The Duma's objections were not, however, that the absence of auction meant that the Government was cheated. Rather, for many in the Duma, it was wrong for the Government to give up much of its control over television. Some contended, furthermore, that the President was 'privatising' the network by giving it to his supporters in industry rather than have it open to intervention from opposing politicians, including opposing candidates in the 1996 elections.

The path of ORT could be said, also, to reflect changes in the distribution of power in the society. The banks and other companies that became the chosen shareholders in ORT were the new decision-makers, the adjuncts to government power, if not government itself.

23 Unlike many other state assets, broadcasting was excluded from statutory privatisation schemes, presumably because of its perceived social value. This gave Yeltsin more room to formulate his own programme in this area.
Also vital was the fact that 'privatisation' of ORT meant retaining 51 per cent of the stock in the new company in government hands. Part would be in the Government itself, and part in the state property committee. The authority to determine who would be the operating head of ORT also remained, de facto, if not de jure, in the hands of the Government, probably of the President.

The list of founders of Public Russian Television (PRT) designed to take over Ostankino television as of April 1, 1995 was published in Sovetska Rossiya, No 30, pp. 1–2, March 14, by Deputy of the State Duma Vladimir Isakov:

<table>
<thead>
<tr>
<th>Name</th>
<th>Contribution to authorised capital (Roubles '900)</th>
<th>Per cent</th>
</tr>
</thead>
<tbody>
<tr>
<td>RF Goskomimushchestvo [state Property Committee of the Russian Federation]</td>
<td>3,600,000</td>
<td>36</td>
</tr>
<tr>
<td>Ostankino State Television and Radio Co.</td>
<td>900,00</td>
<td>9</td>
</tr>
<tr>
<td>Television Technical Centre [state enterprise]</td>
<td>300,000</td>
<td>3</td>
</tr>
<tr>
<td>ITAR-TASS news agency</td>
<td>300,000</td>
<td>3</td>
</tr>
<tr>
<td>Association of Independent TV Companies joint-stock company</td>
<td>300,000</td>
<td>3</td>
</tr>
<tr>
<td>LogoVAZ joint-stock company</td>
<td>600,000</td>
<td>8</td>
</tr>
<tr>
<td>Intombank</td>
<td>500,000</td>
<td>5</td>
</tr>
<tr>
<td>Menatep Bank</td>
<td>500,000</td>
<td>5</td>
</tr>
<tr>
<td>National Credit Bank</td>
<td>500,000</td>
<td>5</td>
</tr>
<tr>
<td>Silichny Bank</td>
<td>500,000</td>
<td>5</td>
</tr>
<tr>
<td>Alpha-Bank</td>
<td>500,000</td>
<td>5</td>
</tr>
<tr>
<td>Obyedinenny (United) Bank</td>
<td>800,000</td>
<td>8</td>
</tr>
<tr>
<td>Microdin joint-stock company</td>
<td>500,000</td>
<td>5</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>10,000,000</strong></td>
<td><strong>100</strong></td>
</tr>
</tbody>
</table>

24 PRT Board of Directors: A. N. Yakovlev — Chairman, Ostankino Russian State Television and Radio Co.; Chairman of the Board, B. Berezovsky — Director-General, AVVA joint-stock Co.; Deputy Chairman of the Board; Board Members: O. Boiko — Chairman of the Board, National Credit Bank; V. Vinogradov — President, Intombank; V. Gorokhov — Director, Television Technical Centre; A. Yefanov — President, Microdin joint-stock Co.; S. Zhukov — Director-General, LogoVAZ joint-stock Co.; V. Ignatovsko — Director-General, ITAR-TASS news agency; K. Ignatov — Chairman, RF State Duma Subcommittee on TV and Radio; L. Levenevskaya — Chairman of the Board, Association of Independent Television Companies; A. Smolensky — President, Silichny Bank; S. Tarpishchev — Chairman, RF State Committee for Physical Culture and Tourism; M. Friedman — Chairman of the Board, Alpha-Bank; M. Khodorkovsky — Chairman of the Board, Menatep Bank; A. Chubais — First Vice-Premier of Russian Federation government.
Not surprisingly, in the wake of the murder of Vladislav Listyev, ORT's first director-general, on 1 March 1995, the future of the entire Ostankino privatisation plan was subject to greater scrutiny and became more politically volatile.

The Chair of the Duma Committee on Labour and Social Support, Sergei Kalashnikov, had, three weeks before Listyev's murder, urged establishment of a commission to examine the privatisation of Ostankino, calling it probably the most mysterious reorganisation of the past three years. He criticised the privatisation as outside the President's authority and also without any tender or investment competition. In his view, Ostankino was preposterously undervalued in terms of the contribution required of private investors for the shares they received in the new entity's assets. Furthermore, the regulations stipulate that none of the shareholders has the right to sell any share without the permission of the council of directors and without the permission of the Government.

In March 1995, the Duma was only 28 votes short of passing a nationalisation of much of Russian television. The action was headed by Vladimir Zhirinovsky who called his initiative another velvet revolution. Instead, the Duma passed a moratorium on privatisation at the first reading.

Later, the Duma passed an anti-privatisation bill which Yeltsin vetoed. In a clear illustration of the political nature of the confrontation, voting on this legislation broke down almost evenly along party lines, with very few supporters of the President voting for it.

Further articulation of the public broadcasting concept came in October 1995, with President Yeltsin's decree calling for privatisation of the Ostankino production centre and creation of public entities from among a number of Russia’s radio broadcasters.

Despite their demonstration of raw presidential power, however, the Yeltsin decrees do little to define the contours of Russian media ownership policy. They contain considerable substantive ambiguity. What does it mean to say that the affairs of Ostankino will be 'wound up'? Left unanswered are a host of questions:

• which state entities will be chosen for conversion to public status?

- what factors will determine the method (auction, tender, privilege) or the goals of privatisation?
- to whom will offers of participation be made available, and why?
- who exactly owns companies such as ORT?
- what does 'private' ownership mean, where the power to transfer such right is prohibited without permission of government agencies?

Thus, perhaps the private 'owners' of Russian Public Television are similar to broadcast license-holders under US law, who are, at least sometimes, viewed as trustees rather than owners of the government benefit and who must obtain permission of the Federal Communications Commission to transfer that license.26

Moreover, adding to the confusion, is the fact that the alleged driving force behind privatisation at all — budgetary relief — at the present time is frustrated. ORT still operates out of the state budget. As the noted former Information Minister, Mikhail Poltoranin, has said: 'They will be financed out of the state pocket, but it won't be a state company'.

In the end, it may be concluded that much of this ambiguity stems from the contradictory goals of Russian public broadcasting. Poltoranin is, again, an interesting commentator: 'a state that has many television channels and many radio channels, and also has such colossal budget deficits must look for some options, but at the same time retain its state control because they are like atom bombs'.

As to an institutional base, public broadcasting in Russia is but a manifestation of presidential policy, a result of Yeltsin decrees. Reflecting this fact is his veto of the Parliament's anti-privatisation legislation.27 The concept shows no particular signs of evolution, and without any basis in legal principles it could be altered or done away with at any time: If such were to happen, it is unclear what property rights, if any, the private shareholders would have. In this regard, the Constitutional Court in November 1995 declined to rule on the merits of a Parliamentary petition to review the President's 30 November 1995 ORT decree. In doing so, the court chose not to take the opportunity both to rule on the institutional conflict between executive and legislature, but also to provide some specificity and applicability to the free expression guarantees in Article 29 of the constitution. As to process, this episode shows little.

26 Article 310(d), Federal Communications Act (47 USC sec. 310(d)).
27 See footnote 11.
Private ownership

Substantial elements of Russia’s mass media outlets are privately owned, including the widely-viewed NTV and TV6, a variety of more local broadcasting and cable outlets, and many print media outlets. All mass media outlets, under the 1992 Mass Media Law, are subject to a registration regime, and operation of a broadcasting station requires licenses, as well.28

We have mentioned the provisions for the registration and internal management of mass media.29 A statute that requires pre-publication registration with discretionary approval makes some statement about the potential role of the state. A registration scheme can be non-threatening by limiting the discretion of the registration authority.

The 1992 Mass Media Law tries to accomplish this by constraining the power of the registering authority to grant or deny registration. Because there are limits on who can establish the mass media outlet, a registration could be refused if the ownership or structure is improper. More troublesome is the power to deny a registration of the applicant where the registering authority knows that the content to be produced would violate the law (for example, that it would foment class or national intolerance).30

National power to register — to legitimise — implies a power to deregister, to close, to ‘delegitimise’. The relationship between a publication and the state, and the capacity of the state to influence content (often not so subtly) is a function of this harshest of sanctions: the power of the Government actually to close down a mass media outlet. One could conceive of a statutory scheme that gave no such power, relying, if necessary, on the ordinary authority of the state to punish individuals for criminal acts, or to collect taxes, or to impose damages for injury inflicted. The Russian law has the beguiling appearance of liberalisation, but also an implied sense that the Government can step in

29 Ibid., Articles 7–24.
30 Ibid., art. 13. The registration authority could have established separate fees for registrants based on the following: 1) fees for instruments of mass information that specialises in the production of advertising or erotic material could be higher, while; 2) publications for children, youths, invalids, and for education and culture could be lower. This power is an important one because it would give an agency the need to decide on a discriminatory fee structure and some authority to decide what constitutes a publication in each category.
when something is dreadfully wrong. Article 16 governs the power to close down the mass media.\textsuperscript{31}

The statute, because it undertakes to regulate the internal working of the press and because it would confer special privileges on the press, must define the press. This leads to a hypothesis worth testing in construing draft media legislation: from a statute’s definition of the press, one can infer a definition of the state. There could be a corollary: from a statute’s definition of the powers of the state, one can infer the nature of the press.

In the United States, one unusual and intriguing aspect of First Amendment jurisprudence is that, over time, definitions of 'the press' have almost disappeared, even though the amendment specifically prohibits Congress from abridging 'freedom of speech and of the press.' There has been the understanding that the press is freer if it has the rights of mere speakers in society than if it has more specific rights that come from a defined status. Under the Russian law, the 'press,' referred to as a 'mass medium,' has a defined status; each publication has a stated purpose and a stated range of publication, each registers, and each has an announced internal structure.

A registration scheme often conditions permission to publish on the proper kind of ownership, and ownership restrictions provide one of the most important insights into the national tendencies of a media law.

Foreign ownership

One marker of concerns about ownership involves restrictions on foreign control and limitations on foreign investment. Similar agoraphobia of national identity affected almost all of the other states in the former socialist bloc. In each, the problem of defining the new state and fashioning identities coincided with the tasks of transformation, economic change, and reordering of the media. Control of this process — power over the narrative — became a central element in the restructuring of the media.

\textsuperscript{31} Article 16 of the Russian Media Law is entitled \textit{Termination and cessation of activity}. During the run-up to the 25 April 1993 referendum, the Ministry of Information sought closure of a newspaper for 'collective fabrication of hooliganism.' \textit{Moscow Evening News} (20 Apr. 1993). The then-Minister of Information, Mikhail Poltoranin, issued a warning to \textit{Sovetskii Sotsialisticheskii}, which the newspaper was required to carry in its 27 June 1992 edition. The minister quoted an article about picketing at Ostankino, Russia's government has launched a bloody war against its own people... blood is being shed in Moscow's streets...More than two hundred people were injured. There are fatalities...The minister pointed out that the reports have been officially denied as not corresponding to the facts.' \textit{Russian Press Digest, RIA Newsline, 27 June 1992}. Subsequently, at the time of the spring 1993 crisis, the Minister of Press and Information initiated court action to close down \textit{Sovetskii Sotsialisticheskii} and another paper, \textit{Dnev'.} \textit{Press Conference of Minister of Information, Mikhail Fedotov, 23 March 1992, Fed. Info Sys. Corp., Official Kremlin Info/New Broadcast.
In Russia, these questions remain unresolved. In the Mass Media Law, a foreign citizen cannot act as a ‘founder’ of a mass media outlet, nor can persons without citizenship who do not live continuously within the boundaries of the Russian Federation. This provision has not prevented foreigners from owning mass media outlets within Russia, as is evidenced by Turner Broadcasting’s former approximately 50 per cent stake (sold at the behest of its Russian partner in 1994, not because of Government action) in private broadcaster TV6. The reason is that the 1992 Mass Media Law restricts only alien founders, and not owners. The draft broadcasting statute passed by the Parliament in 1995 did contain an ownership restriction on foreign ownership of broadcast licensees; however, President Yeltsin’s veto of that legislation left the ownership matter unresolved.

In addition, the 1992 Mass Media Law, Article 54, states that Russian citizens are guaranteed unhindered access to ‘reports and material of the foreign mass media.’ However, somewhat contradictorily, the same Article requires permission from the Russian Ministry of Press and Information (now the Committee on the Press) to disseminate periodical print publications which are not registered in Russia, do not have a Russian founder and editorial office, and which are financed by a foreign state or person. Regarding television broadcasts from outside, however, Article 54 stipulates that they may be limited only in cases specified in international agreements to which Russia is a party.

Licensing

It is clear that operation of a broadcasting outlet requires licenses from two governmental bodies — the Federal Service on Television and Radio Broadcasting, and the Ministry of Communications (or their regional branches for local broadcasters). Broadcast licensing, in any legal system, presents complex issues of who should exercise such authority and the ancillary regulatory functions which accompany it, what standards should be imposed and the nature of institutional review of such decision-making. These complexities are compounded in Russia by the

33. PMLPN, No. 12-13, at Supp. p. 6. Article 35(3) denied the opportunity to hold a broadcast license to legal entities not registered in Russia, as well as to entities owned or controlled more than 49 per cent by aliens.
34. In the United States, print media can be owned by anyone. However, the Federal Communications Act, 47 USC, sec. 310(b) prohibits the grant of a broadcast license to ‘any alien or the representative of any alien,’ places percentage limitations on foreign ownership or control of broadcast licensees, and gives the Federal Communications Commission discretion to deny a license to any corporation which is directly or indirectly controlled by any other corporation which is owned or controlled more than 25 per cent by aliens. The US alien ownership policy is under scrutiny in Congress.
newness of the system, and the absence of express constitutional or statutory commands.

In November 1995, the director of NTV, Oleg Malashenko, chastised the President of All-Russian Television and Radio, Oleg Poptsov, for the latter's reluctance to grant NTV exclusive use of broadcasting channel four. The exchange, while not in itself earth-shaking, reveals the ambiguities of a private broadcaster in Russia. A license simply lacks legal attributes — granted on presidential whim, it could be taken away just as easily. To understand the tenuous nature of NTV's license, it is necessary to examine the nature of the grant itself.

The precarious nature of NTV's authority to broadcast on any channel is illustrated by its origins in late 1993. Financed by a consortium of Russian banks, which invested some $US7,000,000 in hard currency for its operations in October-December 1993, and announced their intent to invest some $US25,000,000 for 1994 operations, NTV commenced broadcasting in October with an attractive programming format centring on news programming featuring dozens of former Ostankino and Russian TV journalists for several hours per day on St. Petersburg channel five.

However, it was clear that this was only temporary, and that NTV sought the much more valuable use of the fourth channel, which offered expanded airtime and a far wider potential audience throughout much of European Russia. This interest set in motion a bizarre turn of events. On 23 November 1993, President Yeltsin issued a short-lived decree granting NTV's request to use the fourth channel, only to rescind it a few hours later. Reportedly, NTV had become a political football kicked between Yeltsin's lieutenants some of whom favoured the grant and others who opposed it as having been drafted in secrecy by the bankers and their lobbyists. The story, of course, did not end there. On 22 December 1993, Yeltsin re-issued the decree, ordering government agencies to issue NTV a license for use of a portion of the fourth channel within one month — a license which NTV continues to hold.

The episode, however, highlights some difficult questions about both the process and the substantive law. NTV's grant is the product of presidential fiat — a decision lacking in any form of transparency or explicated rationale. Moreover, what is the nature of the 'right' that NTV holds? As the controversy with its co-holder of the channel demonstrates, it does not extend to exclusive use of fourth channel itself,
a fact which reflects the tenuous nature of the grant itself — if so easily
given, it can easily be taken away.35

Thus, while ownership pluralism is well established, the fate of
individual broadcasters is political, rather than legal. The 1992 Mass
Media Law is too abstract, providing no guidance on this question, and
broadcasting legislation has been vetoed which would have provided a
firmer textual base for license rights. The broadcasting draft, in a section
entitled 'Guarantee of license-holders' rights', states that 'A broadcast
license is the single necessary legal basis for using a frequency... on the
territory of the Russian Federation for the purpose of radio and television
broadcasting.'36 Of even greater significance were provisions which
articulated in considerable detail the enumerated grounds for license
issuance and revocation, with explicit opportunity for appeal to the
courts.37 Meanwhile, more recently, a new licensing structure,
established by the President, has come into being. However, it lacks
structure and, probably, independence. Similarly, while the Federal
Radio and Television Service is functioning smoothly, issuing licenses,
elaborating policies, none of this exists on a solid foundation — all is
subject to change, to political manipulation and in-fighting.

Conclusion
Media policies and legislation are changing in Russia, but the causes are a
complex combination of political, institutional, market and technological
requirements. The market potential exists for change, as is indicated by
changes in programme format and the rapid growth of private
broadcasting. But the developments exist side by side: the dramatic
rhetoric and forceful regulation of the political process, the processes of
popular demand, and the introduction of independent broadcasting. Still,
the political process, the driving force for the initial thrust of diversity —
the creation of Russian TV to rival Gorbachev's USSR TV — continues to
shape the agenda as shown by the controversies and direction of public
broadcasting.

Where is national policy as to ownership in the future? Much depends on
whether vast presidential power is likely to continue and how the Duma
and the Federation Council change. Seldom does it seem that the shaping

35 This explains the recent curious observation attributed to Deputy Mikhail Poltoranin that Yeltsin
and his entourage could 'sort out NTV in an hour or so.' 'Yeltsin Issues Decree Reorganising State
Broadcasting Companies,' BBC Summary of World Broadcasts, 20 October 1995.
36 1992 Mass Media Law, Article 36.
37 Ibid. Articles 40-42, 47.
of television is far from the shaping of political forces in the post-Soviet world.

The pressure — certainly that from outside Russia — is toward the removal of major issues concerning the architecture from the daily problems of the direct political process. The building of a rule of law in media policy — and one that respects and fosters free speech principles, might be a goal which defies current Russian reality. Without a firm independent legal authority, particularly in the realm of broadcasting, policy is inherently politicised, providing little predictability.

The second point is financing: there is the hope for an independent Russian press at a time when the advertising market and other forms of support (such as subscription) are inadequate to maintain all of the existing participants. Ownership policies cannot be divorced from the question of financing — if financial support were to continue to come from the state budget, as it does now even for so-called ‘public’ broadcasting, it is difficult to foresee how an independent body could be established and maintained.

Finally, there is the possibility that the Russian judiciary might incrementally develop a body of principles for resolution of ownership issues. Of great interest will be the development of the Russian Constitutional Court. Whether it will follow the lead of its model, the German Constitutional Court, (which also stepped in to play a leading role in broadcasting, despite a highly charged political debate) is yet to be seen.

In the end, it is simply premature to talk of the development of substantive legal mass media ownership policy. The formulation of policy in this sense — as a body of principles taking shape incrementally through a series of small steps — will await in Russia the prerequisites for such development: the maturing of institutions and processes which can shape such policies. In the meantime, policy and politics concerning ownership and control of the media will remain inextricably intertwined.

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38 Eric Barendt, 'The Influence of the German and Italian Constitutional Courts on Their National Broadcasting Systems', 1991 Public Law, 93, 95–105 (discussing also the role of tribunals in Italy, Spain, the United States, and France).