

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE



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GSP Subcommittee
Trade Policy Staff Committee
Office of the U.S. Trade Representative
600 17th Street NW, Room 518
Washington, DC 20508

Re: Request for Review of the Intellectual Property Rights Practices of the Russian Federation in the 2000 Annual GSP Country Eligibility Practices Review, 65 Fed. Reg. 41514 (July 5, 2000)

To the Subcommittee:

The Trade Policy Staff Committee (TPSC) of the Office of the United States Trade Representative (USTR) published in the July 5, 2000 Federal Register a notice announcing the 2000 Annual Generalized System of Preferences (GSP) Country Eligibility Practices Review. USTR indicated that "interested parties may submit petitions to have the GSP status of any eligible beneficiary developing country reviewed with respect to any of the designation criteria listed in subsections 502(b) or 502(c) of the Trade Act (19 U.S.C. 2462(b) and (c))." See 65 Fed. Reg. 41515.

The International Intellectual Property Alliance (IIPA) hereby submits its request that the eligibility of the Russian Federation as a GSP beneficiary developing country be reviewed, and that its GSP benefits be suspended or withdrawn, in whole or in part, if requisite improvements are not made by Russia to remedy the deficiencies (outlined below) which adversely affect U.S. copyright owners. In 1999, Russia exported goods valued at \$417.0 million to the U.S. which received preferential duty-free treatment under the GSP Program, which represented approximately 7.3% of U.S. imports for consumptions from Russia, according to U.S. government statistics available from the International Trade Commission.

Petitioner and its Interest: The International Intellectual Property Alliance

IIPA is a coalition of seven trade associations that collectively represent the U.S. copyright-based industries -- the motion picture, music and recording, business and entertainment software,

and book publishing industries. IIPA's member associations are the Association of American Publishers (AAP), AFMA (formerly the American Film Marketing Association), the Business Software Alliance (BSA), the Interactive Digital Software Association (IDSA), the Motion Picture Association of America (MPAA), the National Music Publishers' Association (NMPA) and the Recording Industry Association of America (RIAA).

These member associations represent over 1,450 U.S. companies producing and distributing works protected by copyright laws throughout the world -- all types of computer software including business software and entertainment software (such as videogame CDs and cartridges, personal computer CDs and multimedia products); motion pictures, television programs, home videocassettes and DVDs; music, records, CDs and audiocassettes; and textbooks, tradebooks, reference and professional publications and journals (in both electronic and print media).

These U.S. copyright-based companies are the leading edge of the world's high technology, entertainment, and publishing industries. According to Copyright Industries in the U.S. Economy: The 1999 Report, prepared for IIPA by Economists, Inc., the core copyright industries accounted for \$348.4 billion in value added to the U.S. economy, or approximately 4.3% of the Gross Domestic Product (GDP) in 1997 (the last year for which complete data is available). In 1997, the total copyright industries accounted for \$529.3 billion in value added, or approximately 6.53% of GDP. The "total" copyright industries include the "core" industries plus those that, under conservative assumptions, distribute such products or other products that depend wholly or principally on copyrighted materials. The "core" copyright industries are those which create copyrighted materials as their primary product. The U.S. copyright industries are also among the nation's most dynamic and fast-growing economic sectors. The core copyright industries' share of the GDP grew more than twice as fast as the remainder of the U.S. economy between 1977 and 1997 (6.3% vs. 2.7%). Employment in the core copyright industries grew three times the rate of national employment growth between 1977 and 1997 (4.8% vs. 1.6%). More than 6.9 million workers were employed by the total copyright industries, about 5.3% of the total U.S. work force, in 1997. The core copyright industries generated an estimated \$66.85 billion in foreign sales and exports in 1997, an 11.1% gain over 1996 and larger than the foreign sales and exports of the food, tobacco, apparel, textile, and aircraft industries combined. Preliminary estimates for foreign sales and exports for 1998 are \$71.0 billion. For more detailed information on the IIPA and its members, visit www.iipa.com.

The U.S. creative industries represent one of the few sectors of the U.S. economy that regularly contributes to a positive balance of trade. It is essential to the continued growth and future competitiveness of these industries that our trading partners provide free and open markets and high levels of protection to the copyrights on which this trade depends. Inexpensive and accessible reproduction technologies make it possible for U.S. copyrighted works to be pirated -- stolen -- in other countries, and including specifically for the purposes of this petition, Russia. However, the copyright industries represented in IIPA lose an estimated \$20-22 billion annually due to piracy outside the United States. These staggering losses, if not halted, could reverse this path of growth in these sectors, threaten the high wage employment that these industries bring to the U.S. economy, and damage U.S. competitiveness. In addition to the worldwide problem of piracy, several foreign countries have erected market access barriers to U.S. copyright products. To combat these dual problems in developing countries, the U.S. copyright-based industries joined with the Administration and Congress to fashion new legislation and negotiating tools. IIPA and its members have supported various trade tools with IPR provisions over the years, including the GSP

Program, Special 301, Section 301, the Caribbean Basin Economic Recovery Act, and the Andean Trade Preferences Act.

Action Requested by Petitioner

Pursuant to the Trade Act of 1974, as amended (19 U.S.C. 2461 et seq.), IIPA, on behalf of its seven trade association members, hereby petitions the President to review the eligibility of Russia as a GSP beneficiary developing country, and if requisite improvements are not made by Russia, then IIPA requests the President to suspend or withdraw GSP benefits of Russia, in whole or in part, for its failure to provide adequate and effective copyright protection for U.S. copyright owners and its failure to provide equitable and reasonable access to its markets.

Legal Authority for this IPR Petition in the GSP Statute

A full discussion of the legal authority for this petition, and the specific IPR provisions and legislative history of the GSP programs is found in Appendix A. To summarize, in the GSP Renewal Act of 1984, Congress specified conditions that GSP beneficiary countries must meet in order to gain and maintain their preferential trading status. In particular, one of these express conditions (which Congress also delineated as one “purpose” of the GSP Program) was to encourage developing countries “to provide effective means under which foreign nationals may secure, exercise, and enforce exclusive intellectual property rights.”¹ The legislation required the President to apply mandatory and discretionary criteria with respect to IPR protection as a condition to a country achieving “beneficiary” status under the GSP Program. When the GSP Program was reauthorized in August 1996, the language of the IPR discretionary criterion for GSP eligibility in Section 502(c)(5) was simplified slightly and now requires the President to “take into account the extent to which such country is providing adequate and effective protection of intellectual property rights.”²

Russia Fails to Provide “Adequate and Effective Protection” of U.S. Copyrights

To the best of petitioner’s knowledge, much of the information describing the deficiencies in Russia’s legal and copyright enforcement regime has been presented previously to members of various U.S. governmental interagency groups, including the Special 301 interagency group, several members of the GSP Subcommittee, as well as the Trade Policy Staff Committee, in the context of USTR’s Annual Special 301 Review.

On February 18, 2000, IIPA presented its annual Special 301 submission to Assistant USTR for Services, Investment and Intellectual Property Joseph Papovich; this submission was widely distributed among the interagency for its internal consideration in the 2000 Special 301 Annual Review.³ In that submission, IIPA outlined the numerous enforcement and legal deficiencies our members associations and their companies continue to face in Russia. The levels of piracy in

¹ See Section 501(b)(9)(B) of the GSP Renewal Act of 1984.

² GSP Renewal Act of 1996, Title I, Subtitle J, of the Small Business Job Protection Act of 1996, Pub. L. No. 104-188 (codified at 19 U.S.C. 2462(c)(5)).

³ IIPA’s 2000 Special 301 report on Russia is available on our website at www.iipa.com.

Russia for all the copyright industries remain extremely high. Raiding by the police and the municipal authorities is continuing; however there has been no effective enforcement "follow-up" and deterrent penalties have not been assessed to effectively combat the high piracy problems. There have been a few huge seizures of pirate product indicating the size of the problem but so far these raids have not been followed by aggressive public prosecutions that would have the deterrent effect necessary to make a difference. Russia's legal regime is still deficient, despite a relatively good copyright law adopted in 1993. Retroactive protection for pre-1995 U.S. (or other foreign) sound recordings is still not provided nor is protection for pre-1973 works as required by TRIPS. A number of critical amendments to the criminal, civil and administrative codes still need to be adopted to improve enforcement. Although some of these amendments have been drafted, adoption has languished in the Duma and the government has given them no support. On the other hand, there remains the threat of deleterious amendments to the Civil Code; these are amendments that would seriously undermined the existing copyright law. Russia's copyright regime remains TRIPS-incompatible both substantively and with respect to enforcement. The City of Moscow needs to repeal its stamp tax and Russia as a whole must adopt optical media regulations if it wants any chance to control growing pirate productions and imports.

USTR also continues to highlight enforcement issues in Russia. With respect to copyright-related issues, Ambassador Charlene Barshefsky stated the following in her May 1, 2000 Special 301 announcement in which she kept Russia on the "Priority Watch List":

A number of the intellectual property laws, especially the patent, copyright and data protection laws, and the enforcement regime of the Russian Federation do not comply with the TRIPS Agreement or the intellectual property provisions of the U.S.-Russian Federation bilateral trade agreement signed in 1999. Despite a significant number of police raids, and commendable official efforts to improve the enforcement climate, criminal enforcement of intellectual property rights remains minimal in Russia. As a consequence, production of unauthorized music CDs and CD-ROMS containing business and entertainment software, and now VDCs [sic] and DVDs, remains serious and growing problems, as does lack of protection for well-known marks. Russia's ineffective criminal enforcement system and the lack of any border control not only have allowed the domestic market to become saturated by Ukrainian and Asia-origin pirate products, but have also resulted in the development of Russia into a major transit country for counterfeit products destined for European markets."⁴

1. Because of inadequate and ineffective copyright protection and enforcement in Russia, the U.S. copyright industries suffered an estimated \$870 million in losses last year.

Piracy levels in all copyright sectors in Russia exceed 70% of the market and are as high as 95% in one industry. Powerful and organized criminal syndicates continue to control much of the pirate market in Russia. As predicted, Russia has a growing optical media piracy problem. It has both domestic production (though not yet on the scale of its neighbor Ukraine) and is a major destination and transshipment point for pirate optical media product from Asia and from Ukraine and other markets.

⁴ Press Release 00-30, Office of the United States Trade Representative, "USTR Releases Super 301, Special 301 and Title VII Reports," May 1, 2000.

ESTIMATED TRADE LOSSES DUE TO PIRACY
(in millions of U.S. dollars)
and LEVELS OF PIRACY: 1995 – 1999

INDUSTRY	1999		1998		1997		1996		1995	
	Loss	Video Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Motion Pictures	250.0	90%	312.0	85%	312.0	85%	312.0	95%	312.0	99%
Sound Recordings / Musical Compositions	200.0	70%	170.0	75%	165.0	65%	170.0	70%	180.0	73%
Computer Programs: Business Applications ⁵	134.5	89%	196.1	92%	174.5	89%	298.2	91%	216.9	94%
Computer Programs: Entertainment Software	241.1	95%	240.8	97%	225.8	95%	223.0	93%	189.9	91%
Books	48.0	NA	45.0	NA	45.0	NA	45.0	NA	45.0	NA
TOTALS	873.6		963.9		922.3		1048.2		943.8	

Attached as Appendix B is the methodology used by IIPA members to calculate estimated losses due to copyright piracy. This methodology was also submitted to USTR in IIPA's 2000 Special 301 submission.

Optical media production in Russia is on the rise

The capacity to produce pirate optical media product (music CDs, videogames, VCDs and reportedly DVDs) has grown significantly. It is now estimated that the 10 Russian plants now operating have at least a 90 million unit capacity. This translates into a street value at pirate prices of \$450 million, but losses at legitimate prices exceed \$1 billion. Russia is also one of the largest "destination points" for pirate optical media product – most smuggled in from neighboring states like Ukraine and from pirate operations throughout Southeast Asia (Malaysia, Thailand, Hong Kong, Macau, etc.).

1999 saw the first large seizures of pirate optical media product, and was indicative of this growing problem. In July 1999, there was a major seizure involving an estimated 650,000 units, mostly of CD-ROMS containing pirate videogames. It was reported that all this product was produced in Russia. In another major raid on a Moscow warehouse, the police (together with recording industry experts) seized over 800,000 music CDs and around 1 million pirate inlay cards.

In September 1999, the recording industry, assisted by the Ministry of the Interior and other agencies, seized over 12,000 mostly music CDs on the Belorussian border which were destined for shipment to Poland. This then led to the first-ever raid on a CD plant, Disk Press MSK, located in the Moscow region, that had begun operations in 1998 without the required license. This plant's production capacity was about 5 million units annually. The investigation started with a raid on a large distributor, CD Haus, where 5000 music CDs and 2000 CD-ROMs with pirated software and games were seized. This led to the discovery that the product was manufactured by DPMSK. The search conducted at the plant netted over 100,000 pirate music and other CDs, 9 large containers with polycarbonate and ink and 500 stampers of popular U.S. and other musical artists. Two members of the reported "criminal gang" responsible were arrested. The investigation is still in progress.

⁵For business software, BSA has provided its final estimates for 1999; these estimates were not available in time to be included in IIPA's February 2000 Special 301 report.

While the majority of pirate optical media product continues to be smuggled, domestic Russian pirate production is increasing at an alarming rate. Illegal VCD, DVD and CD-R product is showing up in markets with increasing regularity. The VCDs are of the prerelease variety, which is typical in Asia. More troublesome are the pirate DVDs which have been "ripped" and Russian language tracks inserted. This process points to sophisticated clandestine mastering facilities operating in, or targeting, the Russian market. While these seizures from major distributors of optical media product and the CD plant are a positive sign, they must be followed by a vigorous campaign accompanied by convictions with deterrent penalties as well as an effective regulatory regime to control further pirate production.

Levels of piracy remain high for all the copyright industries

Piracy levels in Russia declined marginally in 1999. Video piracy around Moscow is down to an estimated 60%, with the local anti-piracy organization RAPO conducting almost 700 raids. But piracy outside Moscow remains over 90%. Organized criminal gangs control the duplication and initial distribution of pirate videos. Distribution occurs through selected wholesalers that operate in large outdoor markets and through private "stores" that act as warehouses to replenish retail stock in a defined territory. Major blockbusters continue to hit the streets within hours or days of US theatrical release. Titanic was reported to generate over \$2 million to pirates before the legitimate video sales began. The newest Star Wars was on the street within hours of theatrical release. Videos sold for 60 rubles (\$2.25), significantly eroding that legitimate market for the film.

Sustained raiding at the Gorbushka market has moved retail pirate video distribution underground but both this market and the Mitino market remain centers for distribution to other retainers in Moscow. However, both markets continue to remain major sale centers for nonvideo pirate product. Furthermore, the increased availability of legitimate videos has resulted in demand for higher quality video product and counterfeits of good quality have begun circulation in Moscow. Prices of this product come close to legitimate prices.

Some progress has been made in controlling broadcast piracy and the Ministry for Press, TV and Radio Broadcasting and Mass Communication (formerly the Federal Service for Television and Radio [FSTR]) has been receptive to requests for assistance from RAPO. Together they have addressed about 10 stations for illegal broadcasts, resulting in fines and temporary suspensions of broadcast licenses. RAPO has also used the Ministry's evidence in its criminal prosecutions. The main problem is that the Ministry only acts when violations are brought to their attention and RAPO does not have the means to monitor broadcasts. The same situation does not pertain in the cable business, where the Moscow regulatory authority has failed after numerous requests to act on clear evidence of cable piracy.

Although the recording industry conducted around 500 raids against music pirates in 1999 and seized over 1.2 million CDs and the same amount of inlay cards and equipment with a total value of around \$19 million, music CD and audiocassette piracy levels hover at around 70%, despite this major raiding activity and the expenditure of major resources by IFPI. Moscow and its region are accountable for over 60% of the nation's pirate market and constitute a key transshipment point. During 1999, the piracy level for international repertoire has increased in reaction to the 1998 financial crisis, when prices and spendable income went down dramatically. Audiocassettes are still the dominant format, but the CD market is growing. The prices of pirate audiocassettes are now practically the same as prices for legitimate product. In the market for local

music the price of pirate CDs is close to the legitimate price; however, for international repertoire, there is still a price differential between pirate and legitimate product.

Retail and wholesale piracy of business software continues to be a problem, with little progress here. It is estimated by the local software association that 1.5 million units of pirate software alone are sold each month in just one market -- the Gorbushka. For example, Russian version of Windows 2000 hit the market prior to its official introduction by Microsoft. In addition, street sales of CD-ROMs contain compilation of software of different copyright holders abandon. End-user piracy, where the packaged software industry suffers its largest losses, remains the largest problem for the Business Software Alliance.

Piracy of videogames is rampant despite vigorous enforcement attempts and large seizures (as noted above). Follow-up and court action with deterrent penalties remain the central problem, the same as with piracy of other copyrighted products. The piracy rates in the area of videogames is estimated at 95%. Russian pirates also export a large quantity of the videogames localized in the Russian language to Israel. Because of the high penetration of computers and the Internet in Russia, online piracy of music and sound recording in the MP3 format is growing, as is on-line piracy of games. There is also a large number of hacker rings in Russia that have caused problems, particularly for the videogame industry.

Book piracy continues to flourish in the difficult Russian economy. While bestsellers were the target of the pirates in the early 90's, they have now turned to reference works and textbooks, a large market in Russia. U.S. textbooks are the victims of unauthorized translation and reproduction. Targets include books on computer science, medicine and law. Increasingly, the pirate book business is controlled by the Russia Mafia. The "hidden print run" or "overrun" problem, where printers of legitimate editions deliver additional unauthorized copies to Mafia distributors before delivering books to legitimate publishers remains. Pirate books and translations continue to be imported into Russia from Ukraine and Belarus. In addition, the Moscow Government recently established a specified police department (Department 21) for IP protection within the Division for Economic Crimes of the Moscow police. This department is expected to be staffed with 31 policemen and divided in three units specializing in video, audio and computer piracy.

2. Criminal copyright enforcement actions by Russian authorities remain inadequate, and piracy remains widespread.

Inadequate criminal enforcement cutting across all copyright industries remains the most glaring deficiency in the Russian copyright system. It is this lack of effective criminal enforcement that has kept piracy levels at unprecedented high levels (see chart). The federal police and the new IP unit plus Unit "R" in the Ministry of the Interior have been generally cooperative in running raids against major pirates. At the retail level, however, it is now clear that anti-piracy actions must be conducted by municipal authorities and in these cases pirates are subject to administrative, not criminal, remedies.

Raids taken by the police fail to have a tangible impact on reducing piracy

To assist in combating piracy, a new Alliance for IP Protection was formed recently with IFPI Moscow, RAPO, BSA and RASPA (representing the videogame industry) joining together. In 1999 both RAPO and IFPI undertook many raids in Moscow with close cooperation between RAPO and IFPI (which both signed cooperation agreements with Moscow enforcement authorities); outside Moscow, anti-piracy actions are undertaken mostly by the police. RAPO raided 42 video duplicating facilities in 1999, seizing 2964 VCRs. These factories were using from 22 to 365 VCRs to produce pirate videos. Over 600,000 videocassettes, plus sleeves and counterfeit holograms, were seized. 85% of the titles seized were MPA titles. These numbers do not include seizures by police outside Moscow, which are done without the presence of RAPO investigators. In all 1999 there was only one jail term meted out for video piracy (discussed below). The chart immediately below summarizes the activities of RAPO for 1999 and first half of 2000. It appears that the number of investigations, raids, legal actions and court decisions are on a similar pace as that of 1999. However, the quantities of pirate video product and equipment so far in 2000 are below the pace set in 1999.

RAPO Actions	1999	First Half 2000
Total Number of Investigations	1,107	558
Total Number of Raids	696	408
Number of VCRs Seized	2964	700
Numbers of VHS Tapes Seized	896,400	130,828
Number of Legal Actions Initiated:		
Administrative:	497	237
Criminal	259	111
Favorable Court Decisions:		
Administrative:	495	224
Criminal:	76	48

Large-scale raids by the recording industry also were conducted in and outside of Moscow. Activities in Moscow, St. Petersburg, Rostov-na-Dony and Kaliningrad resulted in closing 8 recording studios, 20 wholesale outlets and warehouses, and around 60 retail outlets. Large numbers of these actions were initiated regionally. An underground audiocassette factory in Rostov-na-Dony was closed down in 1999; it produced more than 150,000 units per month. In 1999, the industry assisted enforcement authorities in about 900 cases of product testing related to 93 investigations. However, only 11 criminal cases were initiated and, while several of these cases were submitted to court, there were no convictions.

BSA large-scale raids leading to criminal prosecution also achieved only minimal success (see chart).

IDSA member companies also undertook raids of larger targets looking to criminal prosecutions. In the raid in which 650,000 game CDs were seized, there was no prosecution; the defendants merely denied they owned the goods!

Few criminal cases are prosecuted

Unfortunately, while this raiding activity was significant, only a few cases actually made it to the prosecutorial level. There were 82 criminal convictions (see chart), all but one with suspended sentences and small, non-deterrent fines. In March 1999, two video pirates arrested in a duplication facility containing 116 VCRs were convicted and for the first time given non-suspended 6-month sentences under the criminal provision of the Copyright Law, Article 146. These two were, however, released after only two months after appealing the judgment. RAPO secured a second conviction in February 2000 in which a jail term was given. A pirate was arrested using 70 VCRs and was given a six month, non-suspended sentence. He will not serve that sentence, since the raid took place prior to the amnesty decree issued in June 1999.

The inadequacy of the criminal system in the criminal area is best illustrated by the following table showing that deterrent penalties are almost never imposed.

**CRIMINAL COPYRIGHT
 ENFORCEMENT STATISTICS: 1999**

ACTIONS	MOTION PICTURES	SOUND RECORDINGS	BUSINESS SOFTWARE	1999 TOTALS
Number of raids conducted	NA	NA	20	
Number of cases commenced	259	11	6	276
Number of defendants convicted (including guilty pleas)	76	0	6	82
Acquittals and dismissals	83	NA	NA	83
Total number of cases resulting in jail time	1	0	0	1
1 to 12 months	1			
13 to 24 months				
25 to 36 months				
37 to 60 months				
Over 61 months				
Number of cases resulting in criminal fines	76	0	2	78
Total amount of fines levied	NA	NA	\$2,000	
Comment	Fines at non-deterrent levels			

Clearly, these results will not succeed in significantly reducing piracy levels in Russia for some time. Any reduction that does occur will be achieved only through the massive use of resources to take product off the streets through raiding activity without the concomitant deterrence of prosecutions and deterrent penalties.

3. Administrative enforcement measures by Russian authorities also remain inadequate, and fail to deter piracy.

Retail cases are increasingly handled under administrative machinery, resulting in very small fines, or none at all. While pirate product is generally confiscated, shop operators are normally not the owners and the latter seldom get caught and fined. The recording industry and

the motion picture industry both report that administrative raids have been positive. However, the number of kiosks and other small outlets in Moscow is overwhelming. It remains difficult to organize the kind of effective raids with the municipal police that will make a lasting difference. Statistics below show the significant number of cases but the de minimis penalties.

**ADMINISTRATIVE COPYRIGHT
 ENFORCEMENT STATISTICS: 1999**

ACTIONS	MOTION PICTURES	BUSINESS SOFTWARE	TOTALS
Number of raids conducted	NA	1	1
Number of cases brought	497		497
Number of defendants convicted (including guilty pleas)	497	0	497
Number of cases resulting in administrative fines	495	0	495
Total amount of fines levied	\$2982 to \$7455	NA	\$2982 to \$7455
Comment	Fines of \$6 to \$15 each case		

4. Civil enforcement efforts, which rely on the efforts of private copyright holders, have resulted in non-deterrent remedies imposed by the Russian judiciary.

According to BSA, the US software industry has brought both hard disk loading and end-user cases. The results have been less than breathtaking.

Below is the record in the civil area.

**CIVIL COPYRIGHT
 ENFORCEMENT STATISTICS: 1999**

ACTIONS	1999 MOTION PICTURES	1999 BUSINESS SOFTWARE	1999 TOTAL
Number of civil raids conducted	3	11	14
Post-search action			
Cases dropped			
Cases settled		4	4
Cases adjudicated			
Value of loss as determined by Court (\$USD)			
Judgment amount (\$USD)	See comment		
Settlement amount (\$USD)		\$6,500	\$6,500
Comment	155 VCRs to complainant; \$80,000 but uncollectable; third case NA		

Enforcement objectives and benchmarks outlined by the IIPA

In IIPA Special 301 submissions for the last two years, IIPA outlined a series of benchmarks which the U.S. government has periodically provided to the Russian government on improvements needed in Russia's enforcement system. To date, these have not been implemented but would go far to moving the enforcement regime forward.

In addition to taking more forceful and consistent enforcement actions in 2000, the Russian government needs to take a number of structural and political steps to make progress against the massive levels of piracy threatening the very existence of their own copyright industries. The following recommendations were made in 1997, 1998 and 1999. Unbelievably, the Russian government has seen fit not to implement any of these obvious measures which remain fully valid:

a. The President and the Prime Minister should issue a decree or internal directive making copyright enforcement a high priority.

A newly formed Inter-ministerial Task Force (the previous one is now moribund) and all enforcement agencies must be directed to treat commercial copyright infringement as a serious crime that should be dealt with ex officio by all enforcement authorities. Customs should be taking actions to enforce copyright laws at the border. The Public Prosecutor's Office must be tasked to vigorously prosecute copyright offenses; this is critical, since police officials often refuse raiding requests on the grounds that prosecutors will not follow-up with prosecutions. Such directives should be issued by the President and/or Prime Minister in order to obtain the attention of the various ministries.

b. The Supreme Court and Supreme Arbitration Court should issue an explanatory instruction to the lower courts concerning copyright enforcement.

The Supreme Court and Supreme Arbitration Court should base such instruction on their review and analysis of existing court practice in the area of IPR enforcement. The instruction should contain clarifications of certain points of law that are currently subject to debate among judges, prosecutors and law enforcement officials. Judges should be instructed to consider infringements of copyright and neighboring rights as serious crimes.

c. A permanent inter-ministerial task force on enforcement should adopt a binding plan to coordinate nationwide enforcement by all relevant agencies.

There are currently no clear governmental strategy and no clear lines of authority for copyright enforcement in Russia. The Ministry of the Interior already has the lead responsibility as the major criminal enforcement agency in Russia, working with other agencies, like the Anti-Monopoly Ministry, Customs, and the Ministry of Justice, playing their appropriate roles. The Task Force should meet at least once per month and deal separately with copyright matters focusing on those issues causing the largest losses for Russian and foreign right holders. It should be headed by one of the deputy prime ministers.

d. Enforcement (police and customs) and prosecutorial pools should be established in each major city and region.

Piracy enforcement requires specialized knowledge and focused resources. Piracy rings are sophisticated and often have international connections. Only organized enforcement authorities can successfully curb the illicit activities of organized crime syndicates. Antipiracy actions targeted at the Russian Mafia could boost government and public confidence that economic crime can be dealt with. For example, the Economic Crime Units (at both the militia and federal levels, i.e., Interior Ministry) specializing in IPR cases should be properly manned and counterparts should be set up in other major cities outside Moscow. Customs should also be involved. In addition, IIPA recommends that prosecutors be brought fully into this system; it is imperative that prosecutors develop more specialized knowledge about IPR cases.⁶ Without deterrent financial penalties and imprisonment, experience shows that piracy, indeed economic crime in general, cannot be brought under control.

e. A plan should be formulated and commenced for the training of judges, prosecutors, magistrates, and police as a regular part of ongoing enforcement efforts.

The US and EU governments and the private sector, including IIPA members, stand ready to assist this objective. A comprehensive training program has been proposed by the U.S. government to the Russian government and one or two sessions have been held. This program, which also relies on IIPA members, must be continued and more training undertaken if the full benefits of these initial training programs are to be realized.

5. Legal deficiencies in the Russian copyright law, the criminal code, the criminal procedural code and the administrative code result in inadequate and ineffective copyright protection.

While adoption of the criminal code amendments in 1996 (and discussed in previous submissions) was a critical step forward, these amendments were not altogether satisfactory and further amendments are necessary. Furthermore, it is critical that Russia extend full retroactive protection to all sound recordings and works. These are clear TRIPS requirements.

In our 1997-1999 Special 301 submissions, IIPA reported on amendments to Russia's copyright law, and to the criminal code, criminal procedure code and its administrative codes that increased penalties for copyright infringement and added some improved enforcement procedures. However, some of these provisions are not TRIPS-compatible. After two years, it appears that there may be some progress in the Duma in achieving amendments to correct these deficiencies. Following is a history of the amendments and their deficiencies.

Further legislative problems were introduced by the Duma in the December 1996 amendments to the Criminal Procedure Code (CPC). These were supposed to be technical amendments to align the CPC with the June amendments to the Criminal Code, but the amendments changed two key provisions, making enforcement more difficult. In 1995, the CPC was amended to place copyright violations under police jurisdiction (Article 126) and to provide for ex officio copyright infringement actions (Article 27). The 1996 revisions returned primary

⁶We are told that because prosecutors and judges are not part of the executive branch of government, they do not normally participate in any groups or pools with police, customs, etc.

jurisdiction to investigate copyright infringement to the prosecutor's office, and required a formal complaint by the copyright owner to initiate a case. The former change will limit copyright enforcement because prosecutors have fewer resources than police and because copyright enforcement will now depend on the different priority given to infringement by each district's prosecutor. The latter change will limit copyright infringement complaints to the number that copyright owners can make and follow up, a number unlikely to be sufficient to address the magnitude of the piracy problem. Enforcement outside Moscow will be difficult where copyright owners do not have representatives. Industry and the U.S. government must press to reinstate the 1995 provisions of the CPC.

Very recently IIPA has learned that an interagency working group has been established within Rospatent to prepare recommendations to improve both the Russian copyright law and its international cooperation in the area of copyright and neighboring rights. Apparently it is this group which will craft amendments to the copyright law.

For the last few years, IIPA has recommended that the following actions be taken immediately, and include moving forward on the proposals now before the Duma. We hope that this new working group considers and implements our recommendations.

a. Introduce an amendment and/or adopt a decree to provide retroactive protection.

Protection must be afforded to pre-1995 US sound recordings and pre-1973 U.S. works. The U.S. WTO accession team has told Russia that it will be obligated to do so under TRIPS, both as a substantive matter and under its national treatment obligations (for both works and sound recordings) and for works under Article VIII(3) of the 1992 U.S.-Russia Trade Agreement. It remains unclear whether legislation is required or whether a decree would be sufficient to accomplish this objective, though most experts suggest that legislation is required. IIPA understands that this problem was acknowledged by the Russian delegation during its first round of negotiations on TRIPS regarding WTO accession (Geneva, December 1995), and at every subsequent meeting, but no further progress has been made. The absence of retroactive protection for pre-1995 sound recordings and pre-1973 "works" adversely affects all enforcement efforts. Drafting and introduction of these measures must occur in 2000.

b. Adopt amendments to the criminal code and the criminal procedure code

The new Article 146 of the criminal code deals with infringement of copyright and neighboring rights. It provides for fines (200 to 400 times the minimum wage, or US\$700 to US\$1400) or two to four months of the defendant's income, correctional labor (from 180 to 240 hours), or imprisonment (of up to two years) for unlawful acts which cause "grave harm"/"significant damage." Fines and jail terms are higher (doubling the fines, and up to five years) when the infringing acts are committed repeatedly or by an organized group. These fines and jail terms entered into effect on January 1, 1997. The Duma should consider and adopt these amendments in 2000.

1. Adopt amendments to define the standard of "significant damage"/"grave harm" in Article 146.

This standard must be defined to cover all cases in which the retail value of the pirated works exceeds a minimum amount. IIPA is told that other articles in the criminal code contain a

“significant damage” standard and a monetary amount defining the standard is provided expressly. For example, the general theft provision in the new criminal code defines “significant damage” as 500 times the minimum wage (about US\$1,750). IIPA believes this general threshold is too high for copyright piracy and should be much lower. Not only is such a low threshold important for identifying infringing acts under the criminal law, it also provides critical guidance for the police when they are conducting the initial raids and must assess the situation and determine whether the case should be brought under the criminal code or the administrative code.

IIPA has recently been informed that a Duma IP Working Group that no longer exists may have agreed to amend this provision to lower the threshold to 50 times the minimum wage, or US\$175, but no legislation is currently pending.

In July 1995, Russia adopted administrative measures to enforce the copyright law. However, Article 150-4 of the administrative code also contains a reference to the “significant damage”/“grave harm” standard found in Article 146 of the Criminal Code. The uncertainty around this standard must be resolved if both criminal and administrative enforcement is to be effectively implemented in Russia.

2. Introduce and adopt amendments to add specific substantive and procedural provisions to the criminal code which would grant police the authority and legal basis to confiscate infringing goods, materials, and the equipment used to produce such items.

Before passage of the criminal code amendments, the copyright industries lobbied to include a provision on confiscation in the IPR provision of the criminal code; this was supported by a number of Russian enforcement agencies, including the Ministry of Interior. Legislators felt that because no other criminal code article contained such a specific confiscation provision, it was not possible to add it to Article 146.

There are general provisions in the Russian Criminal Procedure Code providing that the “objects (or tools) of crimes” can be destroyed by court order or by the decision of the investigator only when the criminal case is closed (often the investigator is entitled to do so only with the approval of the prosecutor). The criminal code also provides for the confiscation of personal property of a convicted defendant as a type of sanction. However, copies of infringing works or sound recordings very often do not constitute the personal property of a convicted person. As a result, confiscation of personal property as a sanction under the criminal code does not cover illegal copies. The 1995 amendments to the administrative code also provide for the seizure of pirate goods and equipment, but these seizures are only available for administrative offenses. Amendments made in July 1995 to the 1993 Copyright Law required mandatory confiscation of infringing works and sound recordings (Article 49) and allowed confiscation of equipment and materials used for their production. There do not appear to be any procedures or guidelines in effect on how to treat goods once seized. Both the civil and criminal laws need to provide procedures for police, prosecutors, and courts to hold onto confiscated goods for use at trial. IIPA is unaware of any amendments pending on these issues.

3. Introduce and adopt amendments to increase levels of fines because they are too low and therefore inadequate to deter commercial piracy.

For example, the cost of a single business application program for engineers ("AutoCAD") costs approximately \$4,000. A commercial pirate of such a program will view low fines as a cost of doing business. These amendments must provide for increased penalties for copyright infringement. IIPA is told that a former Duma's IP Working Group was considering amendments to increase the maximum jail term to 7 years and to make copyright infringement a "most serious crime" which purportedly would trigger special attention by the enforcement authorities. We urge the US to press for such provisions and for increased fines as well.

4. Introduce and adopt an amendment to the Criminal Procedure Code to return jurisdiction over criminal violations to the police authorities from the prosecutors.

The June 1996 amendment to the Criminal Procedure Code (in effect after December 25, 1996) was a serious setback to copyright enforcement. The 1995 amendments put criminal violations under police jurisdiction. The 1996 amendments returned jurisdiction to the prosecutors; the police may no longer be able to act ex officio without the consent of the prosecutors. Furthermore, the amendment removed from the category of a public crime any copyright offense other than that conducted by an organized group, necessitating a formal complaint. It is reported that the Duma's IP Working Group is considering legislation that would delete from Article 27 of the Criminal Procedure Code the reference to copyright crimes, resulting in the repeal of a requirement that a private complaint be filed before a criminal case can begin. Also needing amendment is Article 126 of the CPC, which allows actions once taken directly by the police not to be subject to prosecutorial authorization. The US should press for passage of these changes.

c. Introduce and adopt amendments to the Civil Procedure Code or Arbitration Procedure Code or the copyright law to provide ex parte search authority.

While the current Civil Procedure Code in Article 134 and 136 appears to permit imposition of liens on property to secure potential future enforcement of rights, there is no ex parte relief available under current law. This is a critical deficiency, particularly for the software industry. Russia must correct this omission to permit right holders to obtain civil ex parte searches against suspected infringers if Russia is to accede to the WTO. The availability of civil ex parte searches is required by Article 50 of the TRIPS agreement. Amending this provision is not, and should be, a topic being considered in the Duma's IP Working Group.

d. Adopt amendments to the Customs Code to ensure full authority to seize pirate product at the border and to bring Russia's border controls at least into compliance with Articles 51-60 of TRIPS.

Imports of pirate optical media product continue from Eastern Europe (Czech Republic), from other countries of the CIS with production capacity (Ukraine and Moldova), and from Asia. We understand amendments are pending but have no recent reports on progress.

e. **Oppose including any copyright provisions in the Civil Code other than a simple cross-reference to the Law on Copyright and Neighboring Rights.**

The effort to include detailed copyright provisions as part of comprehensive civil code reform was fortunately dormant in 1998, but has now returned with the approval of a 50-article amendment by the Ministry of Justice, to be sent to the Duma shortly. It is imperative that copyright provisions be deleted from this reform project. The most recent draft IIPA has seen continues to contain numerous provisions incompatible with the bilateral Trade Agreement, Berne and TRIPS. At a minimum, Russia should do what Belarus has done, merely referring to the existing statutory law in its (brief) IP civil code section.

6. Efforts to amend the Russian Civil Code to have it revert back to Socialist-era provisions on copyright protection must be halted.

As mentioned above, this civil code reform is a serious threat to supporting high levels of copyright protection in Russia.

In addition to the problems with these existing amendments, the Private Law Institute of Russia, a project within the President's office, continues to attempt further consideration of amendments to the Civil Code containing detailed provisions on copyright, and intending to undo many of the gains made in the 1993 Copyright Law. If adopted, they would create significant ambiguities and risks, as courts would attempt to determine which of two competing and inconsistent laws governs. The draft being proffered would also seriously undermine Russia's already faulty enforcement regime. The U.S. government has always vigorously opposed these dangerous and Berne-incompatible amendments, and must continue to do so.

IIPA has heard that a new draft Civil Code will be presented for Duma's consideration in Spring of 2001. The U.S. government, including the U.S. Embassy, and the local and international industry must remain vigilant in determining whether these amendments are likely to move into the Duma.

7. The Moscow City Stamp Tax interferes with the distribution of legitimate copyrighted products.

On January 19, 1999, the Moscow City Government adopted Ordinance No. 33, requiring all video and audio cassettes, optical discs and computerized information carriers to have a "protective identification mark" (i.e., a stamp tax). Audiovisual products were required to have the stamp as of July 1, 1999; audio and business software products are required to affix the stamp by December 1, 1999.

Administered by "Informzaschita" (a state-owned company established to administer the tax), the cost of the stamp is 3.5 rubles per cassette (or US\$0.13). While the cost does not appear to be prohibitive, it is an additional cost that the legal video distributors must endure in the face of high rates of piracy, the 70% tax on video rental profits and the difficult economic conditions. Because there are no profit margins to speak of, the entire cost has to be passed on to the

consumer, which just underlines the tax nature of this measure. Video and software distributors are forced to go along with the sticker for fear of having all their product seized.

The stamp tax is also a source of additional expenditures and impediments to distribution of software products. Because the stamp tax applies only to the city of Moscow, all imported software has to be separated out into the software products destined for Moscow and those for the rest of Russia, including even the Moscow region. Moreover, this tax scheme violates an article of the constitution of the Russian Federation that treats the Federation as a unified economic territory without internal barriers.

The stamps have no relation to copyright ownership, yet purport to legalize video and other product in the market. City authorities use government facilities to enforce the sticker, removing non-stickered product from the market. Counterfeit stamps are also widely available, and RAPO has already seized pirate video product affixed with the stamp. RAPO has actually seized the stickers themselves as they are being traded in the market. Moreover, the Moscow ordinance provided for the creation of a special division to enforce the tax, and that half of the revenues generated from the tax would be allocated to finance this division. To date, no such division has been created, nor has any of the money earmarked to fight piracy been used.

In addition, on July 27, 1999, the Moscow City Government imposed Ordinance No. 693, which governs the sale of audio, video and computer software products. Under the restrictions established in the ordinance, sales will be allowed only at specialized shops selected on a "competitive" basis (this could arguably preclude the sale of videos to hypermarkets, supermarkets and department stores). In addition, an Interdepartmental Committee is to be set up to "supervise" the production and distribution of video, audio and computer software products.

Collectively, these two decrees may prove to be the most serious impediments affecting market development in Russia. Other cities in Russia are considering instituting similar schemes. Some have already adopted such schemes, with the result that the markets are 100% pirate. There are considerable legal arguments that the Moscow City stamp tax is illegal and unconstitutional, given that it is a tax that only the federal government has the right to impose, and that it violates certain aspects of Russia's copyright law. However, the Moscow courts have been unwilling to review the matter, and the federal government has yet to intervene with effective action.

8. Effective optical media regulation is needed to address the problem of overproduction of optical media products, where such overproduction results in the production of unauthorized product.

At last report, there are now ten (10) CD plants in Russia, with reports that 2 new plants may be going on line in various regions in the country. With the reduction in the availability of pirate product from Bulgaria and China, there have been reports that some of these plants are increasingly involved in producing for pirates. Last year, IIPA reported that Russia is one of those countries posing an imminent threat of becoming a haven for CD pirates. In 1999, that prediction was borne out.

A new licensing law, which President Yeltsin signed on October 3, 1998, would require any plant manufacturing audio or video product on CD to obtain an operating license. Unfortunately, the scope of this provision extends to all optical media but not all copyrightable

subject matter. IIPA and its members urge the US to press Russia to implement an overall optical media regulation program, following those being proposed for many Asian and other Eastern European countries. The elements of this plan are:

- Centralized licensing of all optical media mastering or manufacturing facilities. In most cases, the government should implement a comprehensive licensing scheme on the basis of existing statutory authority in the field of business licensing.
- Centralized licensing of importation, exportation, and internal transfer of optical disc mastering or manufacturing equipment and machinery. An automatic licensing regime consistent with WTO/GATT requirements would generally be sufficient to create needed transparency. In most cases, it should be possible to utilize existing customs or import/export laws as a statutory basis for much of the regulatory regime in this field.
- Centralized licensing of importation of optical grade polycarbonate, the key raw material used in the production of optical media products. Here too, the licensing regime could be an implementation of existing customs laws, and an automatic licensing system would generally be sufficient.
- Requirement for the placement of a secure unique identifier (such as source identification code or its successor) on all masters (stampers) and finished products produced within the country, indicating the source of manufacture.
- Record-keeping requirements, including full information on all orders placed at and fulfilled by the optical disk manufacturing facility, and documentation of the order placer's right to commission reproduction of the material. Records must be preserved for a stated period; order documentation should be accompanied by a sample of the product produced pursuant to the order. These requirements create the transparency which is essential to the success of the entire regime.
- Plenary inspection authority by an enforcement agency for the examination of all records, search of all facilities, etc., for the purpose of ensuring compliance with all the preceding requirements. Surprise, off-hours inspections should be explicitly authorized. Public inspection (e.g., by right holder organizations) should also be authorized as appropriate.
- Violation of any significant aspect of this regime should be criminally punishable and lead to license revocation. Offenses should include: conducting manufacturing or mastering operations without a license; importation, exportation or trafficking in manufacturing equipment or optical grade polycarbonate without a license; production of masters or finished products without a secure identification code; failure to maintain or to permit immediate inspection of records, including orders; or interference with an inspection, search, or other official action undertaken to enforce the regime. The regulatory agency or agencies should also be granted emergency authority to immediately shut down the operations of an unlicensed facility or one otherwise shown to be operating in violation of the regulatory regime.
- While the framework outlined above should be implemented in all countries posing an optical media piracy threat, additional measures may be needed in Russia (and for selected

copyright industry sectors) in order to bring optical media piracy fully under control. These additional measures could include:

- Title verification requirements, under which producers of optical discs must clear orders for certain products with relevant representatives of right holders before beginning production;
- Imposition of controls similar to those outlined above on the importation, in-country distribution, and/or exportation of certain finished optical disc products (in addition to production equipment and raw materials).

CONCLUSION

For the reasons stated in this submission, IIPA requests that the TPSC initiate a review the GSP country eligibility of Russia for its failure to provide adequate and effective copyright protection for U.S. copyright owners and its failure to provide equitable and reasonable market access. If requisite improvements are not made in Russia to remedy these deficiencies, then IIPA requests that the U.S. suspend its eligibility or withdraw GSP benefits of Russia, in whole or in part.

Respectfully submitted,

Eric H. Smith
President
International Intellectual Property Alliance

APPENDIX A

Statutory Basis for the Country Eligibility Practice Review of the Intellectual Property Rights Practices of the RUSSIAN FEDERATION under the Criteria of the Generalized System of Preferences

The Generalized System of Preferences (GSP) program of the United States provides unilateral, non-reciprocal, preferential duty-free entry for over 4,650 articles from approximately 140 countries and territories designated beneficiary countries and territories for the purpose of aiding their economic development through preferential market access. The GSP program was instituted on January 1, 1976, and authorized under Title V of the Trade Act of 1974 (19 U.S.C. 2461 et seq.) for a 10-year period. Since 1997, an additional 1,770 items are eligible for GSP treatment for specified least developing beneficiary developing countries.

The GSP program has been renewed several times since its establishment. Most recently, in 1999 Congress reauthorized the GSP program through September 30, 2001.⁷ What was unique about this extension was that, for the first time in several years, Congress extended the GSP Program for more than a single year. IIPA has supported a multi-year extension of this program to support the use of the GSP program as a tool to protect the interests of U.S. copyright owners around the world.

Provisions tying intellectual property protection to trade benefits were first added to the Trade and Tariff Act of 1984 [hereinafter "TTA 1984"]. Title V of the TTA 1984, known as the GSP Renewal Act of 1984,⁸ renewed the GSP Program and specifically required the President to consider intellectual property protection in determining whether to designate a developing country as eligible for GSP benefits. While there has been a minor change in the statutory language between the GSP Renewal Act of 1984 and the GSP Renewal Act of 1996, the GSP provisions as related to IPR remain essentially the same as in 1984. The legislative history of the 1984 Renewal Act is particularly instructive on the important link between GSP benefits and strong IPR protection.

The GSP Renewal Act of 1984

In the GSP Renewal Act of 1984, Congress specified conditions that GSP beneficiary countries must meet in order to gain and maintain their preferential trading status. In particular, one of these express conditions (which Congress also delineated as one "purpose" of the GSP Program) was to encourage developing countries "to provide effective means under which foreign nationals may secure, exercise, and enforce exclusive intellectual property rights."⁹

⁷ See Extension of Duty-Free Treatment under Generalized System of Preferences, Section 508 of the Ticket to Work and Work Incentives Improvement Act of 1999, Pub. L. No. 106-170 (codified at 19 U.S.C. 2465).

⁸ See the Generalized System of Preferences Renewal Act of 1984, Title V, Pub. L. No. 98-573 (1984) (codified at 19 U.S.C. 2461-2465).

⁹ See Section 501(b)(9)(B) of the GSP Renewal Act of 1984.

The legislation required the President to apply mandatory and discretionary criteria with respect to IPR protection as a condition to a country achieving “beneficiary” status under the GSP Program. The mandatory criterion prohibited the designation of a country from becoming a “beneficiary developing country” if, for example, “such country has nationalized, expropriated, or otherwise seized ownership or control of property, including patents, trademarks, or copyrights, owned by a United States citizen or by a corporation, partnership, or association which is 50 percent or more beneficially owned by United States citizens.” See Section 503(b)(4) of the GSP Renewal Act of 1984, now codified at 19 U.S.C. 2462(b)(2)(D).

The GSP Renewal Act of 1984 added as a discretionary criterion, in determining whether to designate a developing country as eligible to receive GSP duty-free trade treatment, that

the President shall take into account ... the extent to which [each] country is providing adequate and effective means under its laws for foreign nations to secure, to exercise, and to enforce exclusive rights in intellectual property, including patents, trademarks, and copyrights.

Section 503(c)(5) of the GSP Renewal Act of 1984, codified at 19 U.S.C. 2462(c)(5). The Senate Finance Committee Report explained that:

To determine whether a country provides “adequate and effective means,” the President should consider the extent of statutory protection for intellectual property (including the scope and duration of such protection), the remedies available to aggrieved parties, the willingness and ability of the government to enforce intellectual property rights on behalf of foreign nationals, the ability of foreign nationals effectively to enforce their intellectual property rights on their own behalf and whether the country’s system of law imposes formalities or similar requirements that, in practice, are an obstacle to meaningful protection.

S. Rep. No.98-485, 98th Cong., 2d Sess. At 11 (1984). The Senate Report also noted:

In delegating this discretionary authority to the President, it is the intent of the Committee that the President will vigorously exercise the authority to withdraw, to suspend or to limit GSP eligibility for non-complying countries

Where valid and reasonable complaints are raised by U.S. firms concerning a beneficiary country’s market access policy or protection of intellectual property rights, for example, it is expected that such interests will be given prominent attention by the President in deciding whether to modify duty-free treatment for that country.

Id. at 12-13 (emphasis added). The House Ways and Means Committee stated that “countries wishing to reap the benefits of preferential duty-free access to the U.S. market must fulfill international responsibilities” in the intellectual property area. House Rep. No. 98-1090, 98th Cong., 2d Sess. at 12 (1984).

The IPR criteria are a condition, not only for obtaining GSP benefits in the first place, but also for retaining them. The 1984 Act authorized the President to “withdraw, suspend, or limit the application of the duty-free treatment accorded under Section 501 of this title with respect to any article or any country” and requires the President, when taking any such action, to “consider the

factors set forth in Sections 501 and 502(c)." TTA 1984 Section 505(a)(1); TA 1974 Section 504(a)(1), as amended; 19 U.S.C. 2464(a)(1) (emphasis added). The Act also created a system of "general reviews" to ensure that these statutory criteria are met. TTA 1984 Section 505(b); TA 1974 Section 504(c)(2)(A), as amended; 19 U.S.C. 2464(c)(2)(A); see also 15 C.F.R. 2007.3.

IIPA requests that this GSP Subcommittee follow the explicit intent of Congress, and advise the President to "vigorously exercise" his authority to withdraw, suspend or limit GSP eligibility of the Russian Federation for its non-compliance with the statutory criterion on IPR in the GSP Program.

The GSP Renewal Act of 1996

When the GSP Program was reauthorized in August 1996, the language of the IPR discretionary criterion for GSP eligibility in Section 502(c)(5) was simplified slightly and now requires the President to "take into account the extent to which such country is providing adequate and effective protection of intellectual property rights."¹⁰ The expired law specified (as discussed above) that each beneficiary country provide "adequate and effective means under its laws for foreign nationals to secure, to exercise and to enforce exclusive rights in intellectual property, including patents, trademarks, and copyrights." Otherwise, the GSP Renewal Act contains identical IPR provisions, including "mandatory" criteria denying GSP status to countries that directly or indirectly expropriate U.S. property (including intellectual property), and authorizing the President to withdraw, suspend or limit GSP privileges based on failure to meet the IPR criteria.

¹⁰ GSP Renewal Act of 1996, Title I, Subtitle J, of the Small Business Job Protection Act of 1996, Pub. L. No. 104-188 (codified at 19 U.S.C. 2462(c)(5)).

APPENDIX B

Methodology Used to Estimate Trade Losses due to Copyright Piracy And Levels of Piracy

Estimated trade losses due to piracy are calculated by the member associations of the International Intellectual Property Alliance (IIPA). Since it is impossible to gauge losses for every form of piracy, we believe that our members' statistics for 1999 (and prior years) actually underestimate the losses due to piracy experienced by the U.S. copyright-based industries. The methodology in this petition is identical to that which has been used by IIPA members in the IIPA's submissions to the U.S. Trade Representative in the annual Special 301 review.

TRADE LOSSES DUE TO PIRACY

In general, pirate production for export for the records and music, computer programs and book publishing industries is included in the loss figure for the country of manufacture, not the country of ultimate sale. For the motion picture industry, losses are generally counted in the country in which the sale of product occurs.

COMPUTER SOFTWARE: BUSINESS APPLICATIONS

The Business Software Alliance (BSA)'s calculation method compares two sets of data -- the *demand* for new software applications, and the legal *supply* of new software applications.

Demand: PC shipments for the major countries are estimated from proprietary and confidential data supplied by software publishers. The data is compared and combined to form a consensus estimate, which benefits from the detailed market research available to these member companies.

Two dimensions break the shipments into four groups. Splitting the PC shipments between Home and Non-Home purchasers represents the market segments of each country. The PC shipments are also compared to the change in the installed base of existing PCs. The part of PC shipments which represents growth of the installed base is called "new shipments" and is separated from the "replacement shipments" which represent new PCs that are replacing older PCs.

A scale of the installed base of PCs by country compared to the number of white-collar workers was developed. PC penetration statistics are a general measure of the level of technological acceptance within a country. The level of penetration, for a variety of reasons, varies widely from country-to-country. This level is then ranked and each country is assigned to one of five maturity classes.

The number of software applications installed per PC shipment is provided by member companies, and the following ratios for the four shipment groups are developed:

Home-New Shipments
Non-Home - New Shipments
Home - Replacement Shipments
Non-Home - Replacement Shipments

For each shipment group, ratios are developed for each of five maturity classes. U.S. historical trends are used to estimate the effects of lagged technological development by maturity class.

Piracy rates can vary among applications. Grouping the software applications into three Tiers and using specific ratios for each Tier further refined the ratios. The Tiers were General Productivity Applications, Professional Applications, and Utilities. These were chosen because they represent different target markets, different price levels, and it is believed, different piracy rates.

Software applications installed per PC shipped are researched and estimated using these dimensions:

1. Home vs. Non-Home
2. New PCs vs. Replacement PCs
3. Level of Technological Development
4. Software Application Tier

From this work, a total software applications installed estimate was calculated for each country.

Supply: Data was collected by country and by the 26 business software applications. Shipment data was limited in some instances, hence, uplift factors were used to estimate U.S. and world-wide shipments.

Piracy Estimates: The difference between software applications installed (demand) and software applications legally shipped (supply) equals the estimate of software applications pirated. The piracy rate is defined as the amount of software piracy as a percent of total software installed in each country.

Dollar Losses: The legal and pirated software revenue was calculated by using the average price per application. This is a wholesale price estimate weighted by the amount of shipments within each software application category.

To develop the wholesale dollar losses for U.S. software publishers, the wholesale dollar losses due to piracy were reduced by the ratio of the software shipped by U.S. software publishers as a percent of software shipped by all software publishers.

COMPUTER PROGRAMS: ENTERTAINMENT SOFTWARE

The calculation method of the Interactive Digital Software Association (IDSA) uses market data of dedicated platform and PC entertainment software in both compact disc and cartridge

formats, and hardware shipments along with an estimate of the level of piracy in the target country. Where possible, losses due to exports and/or online piracy are included. Export losses are attributed to the source country, where possible. Here are the basic steps involved in determining losses to entertainment software publishers:

1. For each dedicated platform, the 1998 entertainment software units are divided by hardware units. This results in the number of applications per dedicated platform.
2. For each multimedia PC, the 1998 entertainment software units are divided by hardware units. This results in the number of entertainment applications per multimedia PC.
3. The number of applications per PC or dedicated platform is estimated (this varies country-to-country). The actual number of applications per dedicated platform or PC is then subtracted, resulting in the number of illegal applications per hardware unit.
4. The number of illegal applications per hardware unit is divided by the estimated number of applications per hardware unit, resulting in the estimated percentage of illegal software units in use.
5. The illegal software units per hardware unit is multiplied by the average wholesale price (which varies country-to-country) which is multiplied by the number of legitimate hardware units. This results in the dollar amount lost to piracy.

MOTION PICTURES

Many factors affect the nature and effect of piracy in particular markets, including the level of development of various media in a particular market and the windows between release of a product into various media (theatrical, video, pay television, and free television). Piracy in one form can spill over and affect revenues in other media forms. Judgment based on in-depth knowledge of particular markets plays an important role in estimating losses country by country.

Video: Losses are estimated using one of the following methods:

1. For developed markets:
 - a. The number of stores that rent pirate videos and the number of shops and vendors that sell pirate videos are multiplied by the average number of pirate tapes rented or sold per shop or vendor each year;
 - b. The resulting total number of pirate videos sold and rented each year in the country is then multiplied by the percent of those pirate videos that would have been sold or rented legitimately and adjusted to reflect the US producers' share of the market.
2. For partially developed markets:
 - a. The number of legitimate videos sold or rented in the country each year is subtracted from the estimated total number of videos sold or rented in the country annually to estimate the number of pirate videos sold or rented annually in the country;
 - b. The resulting total number of pirate videos sold and rented each year in the

country is then multiplied by the percent of those pirate videos that would have been sold or rented legitimately and adjusted to reflect the US producers' share of the market.

- 3 For fully pirate markets:
 - a. Either: (a) the number of blank videos sold in the country annually is multiplied by the percent of those tapes used to duplicate US motion pictures to equal the number of pirate copies of US motion pictures sold in the country each year; or, (b) the number of VCRs in the country is multiplied by an estimated number of US motion pictures on video that would be rented and sold per VCR per year;
 - b. The figure resulting from each of the foregoing calculations is an estimate of the number of legitimate sales of videos of US motion pictures that are lost each year in the market due to video piracy. These estimates are adjusted to reflect the wholesale price of legitimate videos, to equal losses due to video piracy.

TV and Cable: Losses are estimated using the following method:

1. The number of TV and cable systems that transmit U.S. motion pictures without authorization is multiplied by the average number of U.S. motion pictures transmitted without authorization by each system each year;
2. The resulting total number of illegal transmissions is multiplied by the average number of viewers per transmission;
3. The number of viewers of these illegal transmissions is allocated among those who would have gone to a theatrical exhibition or who would have rented or purchased a legitimate video. The number of legitimate transmissions of the motion picture that would have been made is also estimated;
4. These figures are multiplied by the producers' share of the theatrical exhibition price, the wholesale share of the video cost or the license fee per legitimate transmission, as appropriate, to estimate the lost revenue from the illegal transmissions.

Public Performance: Losses are estimated using the following method:

1. The number of vehicles and hotels that exhibit videos without authorization is multiplied by the average number of viewers per illegal showing and the number of showings per year;
2. The resulting total number of viewers of unauthorized public performances is allocated among those who would have gone to a theatrical exhibition or who would have rented or purchased a legitimate video. The number of legitimate TV and cable transmissions that would have been made of the motion pictures is also estimated;

3. These figures are multiplied by the producers' share of the theatrical exhibition price, the wholesale share of the video cost or the license fee per legitimate transmission, as appropriate, to estimate the lost revenue from the illegal performances.

SOUND RECORDINGS AND MUSICAL COMPOSITIONS

RIAA generally bases its estimates on local surveys of the market conditions in each country. The numbers produced by the music industry generally reflect the value of sales of pirate product rather than industry losses, and therefore undervalue the real harm to the interests of record companies, music publishers, performers, musicians, songwriters and composers.

Where RIAA has sufficient information relating to known manufacture of pirate recordings that emanate from a third country, this loss data will be included in the loss number for the country of manufacture rather than the country of sale. In certain instances where appropriate, RIAA employs economic data to project the likely import or sale of legitimate sound recordings, rather than merely reporting pirate sales. In these instances, projected unit displacement is multiplied by the wholesale price of legitimate articles in that market rather than the retail price of the pirate goods.

BOOKS

The book publishing industry relies on local representatives and consultants to determine losses. These experts base their estimates on the availability of pirate books, especially those found near educational institutions, book stores and outdoor book stalls. A limitation here is that experts can only gauge losses based on the pirated books that are sold; it is impossible to track losses for books which are pirated but not available for public purchase. The trade loss estimates are calculated at pirate prices which are generally (but not always) below the prices which would be charged for legitimate books. Also included are conservative estimates of losses due to unauthorized systematic photocopying of books.

PIRACY LEVELS

Piracy levels are also estimated by IIPA member associations and represent the share of a country's market that consists of pirate materials. Piracy levels together with losses provide a clearer picture of the piracy problem in different countries. Low levels of piracy are a good indication of the effectiveness of a country's copyright law and enforcement practices. IIPA and its member associations focus their efforts on countries where piracy is rampant due to inadequate or non-existent copyright laws and/or lack of enforcement.