

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE



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Via electronic submission: fr0052@ustr.gov

Steven Falken
Chair, GSP Subcommittee
Office of the U.S. Trade Representative
1724 F Street, NW
Washington, DC 20508

Re: GSP Country Practices Review,
019-CP-02, Russia,
Pre-hearing Brief and Request to Appear at the
GSP Public Hearing

To the GSP Subcommittee:

The International Intellectual Property Alliance (IIPA) hereby submits this Request to Appear at the public hearing on the GSP country practices review of the Russian Federation, on October 7, 2003. As you know, IIPA was the original petitioner of the GSP review of Russia's intellectual property rights practices in the 2000 GSP Annual Review. Attached to this letter is IIPA's Pre-Hearing Brief.

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Thank you.

Sincerely,

Eric J. Schwartz



**Pre-hearing Brief
of the International Intellectual Property Alliance
in the GSP Review of the Intellectual Property Rights Practices of Russia**

Before the GSP Subcommittee
Case 019-CP-02, Russian Federation
September 26, 2003

The International Intellectual Property Alliance (IIPA) appreciates this opportunity to provide the GSP Subcommittee with this brief summary of the ongoing problems that the government of Russia must address in its efforts to update and properly enforce its copyright laws. In sum, we believe that the Russian Federation continues to fail to provide “adequate and effective” copyright protection and enforcement, as required by the GSP trade program.

I. Interest of the IIPA in this GSP IPR Review

The International Intellectual Property Alliance is an “interested party” in this GSP review. IIPA represents associations and companies that have a significant economic interest in the adequate and effective protection of copyrights in Russia. Specifically, the IIPA is a private sector coalition formed in 1984 to represent the U.S. copyright-based industries in bilateral and multilateral efforts to improve international protection of copyrighted materials. The IIPA is comprised of six trade associations: the Association of American Publishers (AAP), AFMA, the Business Software Alliance (BSA), the Entertainment Software Association (ESA), the Motion Picture Association of America (MPAA), and the Recording Industry Association of America (RIAA).

These member associations represent over 1,300 U.S. companies producing and distributing materials protected by copyright laws throughout the world – all types of computer software including business applications software and entertainment software (such as videogame CDs and cartridges, personal computer CD-ROMs and multimedia products); theatrical films, television programs, home videos and digital representations of audiovisual works; music, records, CDs, and audiocassettes; and textbooks, tradebooks, reference and professional publications and journals (in both electronic and print media). The copyright-based industries are a vibrant force in the American economy.¹

¹ According to Copyright Industries in the U.S. Economy: The 2002 Report, prepared for the IIPA by Economists, Inc., the core U.S. copyright industries accounted for 5.24% of U.S. GDP or \$535.1 billion in value-added in 2001. Between 1977-2001 (24 years), the core copyright industries’ share of GDP grew at an annual rate more than twice as fast as the remainder of the economy (7.0% vs. 3.0%). Also over those 24 years, employment in the core copyright industries more than doubled to 4.7 million workers (3.5% of total U.S. employment), and grew nearly three times as fast as the annual employment growth rate of the economy as a whole (5.0% vs. 1.5%). In 2001, the U.S. copyright industries achieved foreign sales and exports of \$88.97 billion, a 9.4% gain from the prior year. The copyright industries’ foreign sales and exports continue to be larger than almost all other leading industry sectors, including automobiles and auto parts, aircraft, and agriculture. IIPA’s 2002 economic report can be accessed in its entirety at http://www.iipa.com/copyright_us_economy.html.

Inadequate copyright laws and ineffective anti-piracy enforcement adversely affects employment, job creation and revenues, both in the United States as well as abroad. With many of these U.S. companies increasingly relying on foreign licensing and sales revenues, piracy combined with inadequate enforcement, has become a major impediment to this continued revenue growth and has become the major market access barrier for the copyright industries. As the GSP Subcommittee is aware, the challenges faced by the copyright industries and national governments to enforce copyright laws grow exponentially as the forms of piracy shift from hard-goods and toward digital media and unauthorized electronic transmissions.

In August 2000, the IIPA filed a petition with the U.S. government to initiate a review of Russia's eligibility to participate in the GSP program due to its failure to provide adequate effective copyright protection for U.S. copyright owners, as required by Sections 502(b) and 502(c) of the 1974 Trade Act.² Hearings were held in March 2001 in Washington, D.C.

IIPA believes that without clear and unambiguous improvement in Russia's legal and enforcement copyright regime in the near future, especially including immediate steps to curtail the production and export of pirate optical discs, that the U.S. government should suspend Russia's eligibility to participate in this trade program given its lack of compliance with the requirements of the GSP program to provide adequate and effective copyright protection. Russia's copyright piracy problem is one of the most serious of any country in the world. Overall copyright industry losses exceed \$1 billion per year—totaling \$6 billion in losses for the past six years.

II. Inadequate and Ineffective Copyright Protection in Russia

Russia's legal and enforcement regime is not in compliance with the 1992 Bilateral NTR Trade Agreement even though Russia agreed to implement it by December 31, 1992—over 10 years ago.

Russia is not in compliance with its Berne Convention obligations; this, over eight years after its accession in March 1995.

The Russian IPR regime is nowhere close to compliance with the WTO TRIPs obligations. As a consequence, the U.S. government should not assent to Russia's accession into the World Trade Organization until its copyright regime, both legislative and enforcement related, is brought into compliance with the WTO TRIPs obligations.

The copyright legal deficiencies listed below must be addressed by the Russian government, for compliance with multilateral treaty and bilateral agreement obligations, and to establish the foundation for effective enforcement.

The inadequate and ineffective copyright protection in Russia includes the following serious deficiencies:

- ❑ The absence of an effective legal and criminal enforcement regime to stop the widespread production and distribution of optical media produced in Russia and distributed throughout the world.
- ❑ Copyright law shortcomings that fail, among other things, to protect pre-existing works and sound recordings as required by international (Berne, WTO) and bilateral (NTR) agreements with the United States. The copyright law must be amended to comply with the WTO TRIPs obligations in a number of areas. In addition, Russia must adopt laws to meet the now ever-

² The intellectual property rights provisions in the GSP statute appear at 19 U.S.C. §§ 2462(b) and (c).

present digital piracy problem, including accession to and implementation of the 1996 WIPO Copyright Treaty and WIPO Performers and Phonograms Treaty.

- ❑ Criminal code provisions that fail to provide proper deterrents to fight copyright piracy. These provisions are essential to stop the rampant organized criminal syndicate activity engaged in commercial piracy in Russia, and which is spreading pirate material to at least 25 other countries. Current Article 146, amended in April 2003, fixed the previously ambiguous "grave harm" standard but the April amendments added a threshold amount of harm that is too high to trigger a criminal case, and as a result, is rarely used.
- ❑ Criminal procedure code provisions that further frustrate the ability of police and prosecutors to effectively use the law to deter piracy. The code was amended in 2003 to provide *ex officio* authority to allow prosecutors, but not police, to properly commence and investigate criminal cases.
- ❑ Customs code provisions that fail to provide the necessary, proper, and internationally recognized, authority to customs officials to undertake border measures to stop the trafficking in illegal materials entering and leaving Russia, particularly providing customs officials *ex officio* authority to seize infringing materials.
- ❑ Civil procedure code provisions that prevent effective *ex parte* search provisions necessary to deter certain types of piracy, especially end-user business piracy of software. Such a provision was incorporated into the Russian Arbitration Procedure Code, but has yet to be implemented (in a dispute over whether this should lie within the jurisdiction of the court bailiffs or police).
- ❑ Administrative code shortcomings that prevent effective closure of illegal vendors, retailers and others engaged in commercial piracy, and that provide *de minimis* fines even where applicable, that fail to deter piratical activities.

III. Inadequate and Ineffective Copyright Enforcement in Russia

As noted in the section above, many reforms must be adopted to provide the adequate legal framework for effective copyright protection. But even under the existing legal regime, Russia is not doing nearly enough to meet its bilateral or multinational obligations for comprehensive effective enforcement.

Without question, the most serious threat to the copyright industries in Russia is the explosive growth of optical media production facilities and distribution systems that are currently operating unabated. At present there are 28 known optical disc plants, at least 5 of which have DVD (audiovisual) capacity. There was half this number just two years ago—which is the reason for the urgent need for action by the government of Russia. IIPA members have evidence implicating at least 18 of the country's optical disc plants in the production of pirated materials. Immediate cessation of illegal production using existing law (including withdrawing licenses for plants operating on government property), and adopting a comprehensive optical media regulatory and enforcement scheme is the number one priority for the copyright industries.

Years of inaction have allowed the optical disc problem to mushroom. The existence and location of the plants—some of them operating on land leased from the government, have been known for some time to the Russian authorities, yet little or no meaningful action has been taken until very recently. While the Government of Russia has taken certain positive steps of late that are detailed below, the fact remains that these are too few and far between, and they have thus far done little to stem the rising tide of pirate production.

In October 2002, the Russian cabinet established an Interministerial Committee on enforcement to combat piracy to be headed by Prime Minister Kasyanov. The Committee was authorized to issue recommendations to all the Russian enforcement bodies, including the Federal Security Service (FSB), the

Organized Crime Police, and Customs. To date, the Commission has taken some steps to address legislative reform, retail piracy, and optical disc production. However, the pace and level of reform have not yet been sufficient to make a serious dent in the massive piracy problem. There were reports following a September 16, 2003 meeting of the Committee about additional plans to address optical disc piracy, but the details of the Committee's proposals were not available prior to this filing.

For the software industry, the priority is still the need to address the problems of end-user and hard-disc loading piracy.

To address retail piracy, the Press Ministry introduced a legal ban on the street sales of audio and audiovisual products, for example, at kiosks. This was a promising step that resulted, at least in the short term, in a significant reduction in the availability of pirated home video entertainment, especially on the streets of Moscow. However, the ban has been irregularly enforced and music CDs remain widely available. As in past years, the copyright industries report that copyright enforcement in the form of street raids by the police and the municipal authorities continues. However, there is not the necessary follow-up by prosecutors and the courts to impose deterrent penalties after such raids are conducted. Retail cases have resulted in some administrative fines, but these are generally of a *de minimis* nature.

To address optical disc production, the Press Ministry is using a September 2002 licensing law (that falls far short of an effective optical disc licensing law), to provide replication licenses to optical disc and analog tape replication facilities. The Ministry reported the issuance of 150 such licenses, and that its Inspection Commission had conducted a total of 53 inspections of replication facilities, noting 45 infringements of the licensing regulations. It further reported the suspension (but not revocation) of six licenses. The existing law and regulations pertaining to plant licensing is demonstrably inadequate—evidenced by the fact that the existence of these regulations has done little to stem, or even slow, the production of pirate discs in the country's optical disc facilities. In the absence of a comprehensive scheme, however, it must be used as a starting point for action.

IIPA urges the U.S. government to continue to insist on the adoption of a more effective licensing scheme, and one that links criminal sanctions and plant closures to noncompliance. That is why the U.S. government and IIPA have sought the adoption of legal reforms to provide a more comprehensive enforcement authority. Over a year ago, the U.S. government provided the Russian government with a proposal for a comprehensive optical disc regulatory regime to address this problem, including tough enforcement provisions to control import, export, and the manufacture of optical discs and related raw materials and equipment. To date, the Russian government has not moved to adopt a comprehensive regulatory regime for optical disc replication.

During the past few months, the Russian Government has taken some enforcement measures against optical disc plants and warehouses. A large raid in April 2003 resulted in the closure of a DVD factory in Zelenograd, near Moscow. On September 13, 2003, the Organized Crime Police conducted a major raid against an optical disc factory in Moscow. At the time of this filing, no criminal case has yet been initiated; the raid did, however, result in the seizure of hundreds of thousands of pirated discs. Eight CD replication lines were found on the premises even though the plant had declared the existence of only six lines to the Press Ministry and despite the fact that the Ministry had suspended (but not revoked) this factory's license to replicate CDs following an inspection of the plant in August. In total, major warehouse raids have resulted in the seizure of close to half a million pirated optical discs this year. While encouraging first steps, enforcement officials need to act on all outstanding complaints filed by industry against pirating plants.

Unfortunately, these measures fall far short of an effective and comprehensive program to halt the widespread production and distribution of piratical optical discs.

Linked with the optical disc production problem, is the need for the enactment and enforcement of effective border measures to stop the export and import of illegal material. Russia is also a major

transshipment point for illegal product. Coupled with illegal production from Russia, border enforcement to stop the shipment of illegal material to the other 25-plus countries receiving this material is therefore another priority for the copyright industries. President Putin signed a new Customs Code on May 29 (effective January 1, 2004) providing for measures to prevent the trade of counterfeit goods across borders. Unfortunately, the law fails to provide for *ex officio* enforcement authority. Thus, even if customs officers discover shipments of obviously infringing products, they will not be able to act on their own authority, but will instead be limited to act, as now, only in those cases where rightsholders have filed written applications to suspend the release of suspect goods.

The only way to combat the organized crime syndicates engaged in optical disc production and distribution, as well as the other forms of piracy that they conduct, is by effective criminal enforcement. Unfortunately, the criminal enforcement system in Russia is the weakest link in the Russian copyright regime. This deficiency has resulted in extraordinarily high piracy levels and trade losses. The federal police and the IP unit in the Ministry of the Interior have generally been cooperative in running raids against major pirates. At the retail level, however, anti-piracy actions must be conducted by municipal authorities (even though the criminal police have the authority—they just do not use it), and in these cases pirates are subject to administrative, not criminal, remedies that have proven ineffective.

As noted, the major shortcoming is the failure by the Russian legal system to use its existing criminal law provisions to impose deterrent penalties. Any street raid and/or small administrative fine imposed, pales in comparison to the size and scale of the criminal activity.

Another example of the failure of the Russian enforcement regime to work effectively is the control that criminal syndicates have over entertainment software piracy in Russia. It is believed that there are now four such groups operating in the country. These syndicates attach “logos” or “brand” names to their illegal product and localize the illegal copies they produce even before legitimate product is released into the market. These same groups control not only illegal distribution networks in the country but also in surrounding countries. It is widely believed that the Russian groups control piracy operations in much of Eastern Europe, particularly the Polish market where entertainment software products are actually localized into Polish by Russian distributors. This is why for all copyright industries, the criminal code must be utilized against organized criminal syndicates and why the Interministerial Committee must focus its attention on a course of action to fight piracy by the criminal syndicates.

As a result of these enforcement failures, there are very high estimated piracy levels in all copyright sectors accompanied by massive financial losses. The piracy levels reported by the copyright industries are as follows: the recording industry is at 66%; the motion picture industry is at 80%; the software industry is at 87% for business software and 90% for entertainment software; and the book publishing industry reports high levels of piracy, although current statistics are unavailable.

In sum, Russia is not providing adequate and effective enforcement as required by its bilateral and multilateral obligations to the United States.

IV. Estimated Trade Losses Due to Copyright Piracy in Russia

Below is a chart tracking the estimated trade losses due to copyright piracy and their estimated piracy levels in Russia. Data for this chart is provided to IIPA by its member associations. The methodology, which is basically the same used when we filed our 2000 petition, is available on the IIPA website.³ In the last five years, the U.S. copyright industries lost well over \$4.3 billion to copyright piracy in Russia according to the chart below (and an estimated \$6 billion in the last six years).

RUSSIA
ESTIMATED TRADE LOSSES DUE TO PIRACY
(in millions of U.S. dollars)
and LEVELS OF PIRACY: 1998 - 2002

INDUSTRY	2002		2001		2000		1999		1998	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Motion Pictures	250.0	80%	250.0	80%	250.0	90%	250.0	90%	312.0	85%
Records & Music	371.9	66%	285.0	64%	250.0	70%	200.0	70%	170.0	75%
Business Software Applications ⁴	370.0	89%	90.6	87%	89.0	88%	134.5	89%	196.1	92%
Entertainment Software	NA	90%	173.6	90%	NA	94%	241.1	95%	240.8	97%
Books	40.0	NA	48.0	NA	48.0	NA	48.0	NA	45.0	NA
TOTALS	1031.9		847.2		637.0		873.6		963.9	

V. Observations about Russia's WTO Accession

IIPA takes this opportunity to note the importance of Russia's WTO accession negotiations. We believe that accession candidates must ensure that they have met in full their WTO obligations prior to accession, including ensuring that their copyright laws and enforcement systems comply with the substantive and enforcement provisions of the WTO/TRIPS Agreement.

IIPA continues to urge USTR and the U.S. government as a whole to continue use the WTO accession process to encourage movement in Russia toward effective implementation of its TRIPS obligations as a member of the international trading community. However, such attention in the WTO sphere must not be undertaken at the expense of failing to hold Russia to its current multilateral and bilateral IPR obligations to the U.S. under the GSP trade program.

³ The methodology used by IIPA member associations can be accessed at www.iipa.com/pdf/2003spec301methodology.pdf.

⁴ In IIPA's February 2003 Special 301 filing, BSA's 2002 estimates of \$93.9 million at 87% were identified as preliminary; BSA finalized its 2002 numbers in mid-2003, and those revised figures are reflected above. BSA's trade loss estimates reported here represent losses due to piracy which affect only U.S. computer software publishers in this country, and differ from BSA's trade loss numbers released separately in its annual global piracy study which reflects losses to (a) all software publishers in this country (including U.S. publishers) and (b) losses to local distributors and retailers in this country.

VI. Conclusion and Request for Action

Copyright law and enforcement in Russia clearly fails to conform to the “adequate and effective protection” standard demanded of our trading partners in our GSP trade law. Russia has been on-notice for years that it must take appropriate action to meet its “part of the bargain” in receiving these unilateral trade benefits. So far, its part of the bargain has not been met.

IIPA believes that unless there is clear and unambiguous improvement in Russia’s legal and enforcement copyright regime in the near future—and in particular immediate steps to curtail the production and export of pirate optical discs--the U.S. government should suspend Russia’s eligibility to participate in this trade program given its lack of compliance with the requirements of the GSP program.

Respectfully submitted,

International Intellectual Property Alliance