



February 18, 2004

Mr. Steven Falken
Executive Director for GSP
Chairman, GSP Subcommittee
Office of the U.S. Trade Representative
1724 F Street NW, Room F-220
Washington, DC 20508

Re: Russian Federation GSP Petition for
Review
Case: 019-CP-02

To the GSP Subcommittee:

We take this opportunity to update and supplement the public file with respect to the IIPA's petition and the U.S. government's review of the Russian Federation's intellectual property rights practices under the GSP trade program.

Attached please find IIPA's 2004 Special 301 report on the Russian Federation, which we filed with USTR today. This report is also available online at the IIPA website, www.iipa.com.

We request that the Subcommittee recommend the suspension of the Russia's GSP benefits for the reasons stated in the filing and at the U.S. government's hearing on this matter last year.

Sincerely,

Eric J. Schwartz
Vice President and Special Counsel
International Intellectual Property Alliance

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2004 SPECIAL 301 REPORT

RUSSIAN FEDERATION

EXECUTIVE SUMMARY

Special 301 recommendation: IIPA recommends that the Russian Federation remain on the Special 301 Priority Watch List in 2004,¹ and that such listing be coupled with a 60 day out-of-cycle review, after which (on July 1, 2004) barring significant progress on the list of benchmarks below, the United States government would suspend Russia's duty-free trade benefits that it enjoys under the Generalized System of Preferences (GSP) program. Russia's copyright piracy problem is one of the most serious of any country in the world, and the performance of the Russian government over the past decade can only be summed up as representing a legacy of failed commitments on IPR obligations (noted in the list below). Russia is now one of the world's largest producers and distributors of illegal optical media material. This production has devastated the domestic market, and the export of pirated optical discs from Russia threatens markets for American copyrighted works throughout Europe and the Middle East. Russia's criminal enforcement system has failed to stem persistent commercial piracy. Overall copyright industry losses have well exceeded \$6 billion for the past seven years. Russia's law and enforcement regime is neither in compliance with the 1992 Bilateral NTR Trade Agreement nor with the Berne Convention.

IPR benchmarks: The three highest priority problems in Russia are: (1) the explosive growth of illegal optical media plants run by organized crime syndicates with widespread distribution networks; (2) inadequate enforcement, in particular, the lack of deterrence in the Russian criminal enforcement system to address persistent commercial piracy; and (3) the critical need for legal reforms.

In order to address these problems effectively and in a timely manner, **IIPA proposes the following benchmarks.** Failure to show substantial progress on these issues by the conclusion of a short out-of-cycle review (July 1, 2004) should result in the immediate suspension of Russia's GSP benefits. In addition, the United States must continue to condition Russia's accession to the World Trade Organization on full compliance of its copyright regime, both from a legislative and enforcement standpoint, with the WTO TRIPS obligations.

The benchmarks that need to be undertaken by July 1 by the Russian government are:

1. To immediately commence plant inspections and close plants producing pirate product using existing law—especially by withdrawing licenses for plants operating on government property, as well as by undertaking effective border measures to stop the export of illegal product. The Russian government must

¹For more details on Russia's Special 301 history, see IIPA's "History" appendix to filing at <http://www.iipa.com/pdf/2004SPECIAL301HISTORICALSUMMARY.pdf>. Please also see previous years' reports at <http://www.iipa.com/countryreports.html>.

separately introduce a comprehensive optical media regulatory and enforcement scheme.

2. To show significant improvement in the number and disposition of criminal investigations and raids against pirates engaged in commercial manufacture or distribution (and take administrative procedures against street piracy).
3. To significantly improve the number of major cases that prosecutors bring against major commercial pirates. The Russian government must also initiate investigations into and prosecutions of the organized criminal syndicates that control piracy operations both in the country, and from within Russia to markets outside of Russia. Separately, the Russian government must indicate to the judiciary that it expects the courts to impose deterrent criminal penalties.

In addition, the Russian government must make it a high priority to push for the necessary legal reforms in the copyright law (failed again, in November 2003), the criminal code, the criminal procedure code, and administrative code detailed in this and previous Special 301 reports, to facilitate stronger and more effective enforcement compatible with WTO TRIPS and the WIPO digital treaties.

The Russian Government's Legacy of Failure on IPR Commitments: The Russian government has an unfortunate history of failing to meet its commitments to the U.S. government with regard to copyright protection and enforcement. A history of the most significant failures, and the dates upon which the (still unfulfilled) commitments were first made, includes:

1992: In the Bilateral NTR Trade Agreement, the Russian government committed to provide protection for pre-existing works and to meet its obligations in this agreement no later than December 31, 1992.

1992: In the Bilateral NTR Trade Agreement, the Russian government committed to provide effective criminal penalties and enforcement. In 1996, Criminal Code amendments were adopted (after a 1995 veto) but a deficient provision (a "grave harm" threshold) prevented effective enforcement; in 2003 an amendment to "fix" the grave harm provision was finally adopted, but implementation of these criminal provisions remains a matter of concern, and there is a critical need for effective enforcement.

1992: In the Bilateral NTR Trade Agreement, the Russian government committed to pass a strong copyright law without interference from a separate Civil Code (Chapter 4). Notwithstanding this commitment, the U.S. government and members of the IIPA were forced to spend much of the past decade fighting against a variety of proposals for civil code reforms that would have further eroded copyright protection in Russia. Ongoing civil code reform continues to threaten to undermine the copyright law.

1993: During passage of the copyright law (in force August 1993), the Russian government committed to extend protection to pre-existing sound recordings (and for works, including filmed entertainment). The 1993 Implementing Decree denied such protection to foreign works (pre-1973) and recordings.

1995: Russia acceded to the Berne Convention but failed to comply with Article 18 to provide protection for pre-existing works.

1995: Russia acceded to the Geneva Phonograms Convention but provided no protection for pre-existing foreign sound recordings prior to the accession date of March 13, 1995.

1995: The Russian government agreed to provide the police and prosecutors with proper authority to confiscate illegal material and ex officio authority to commence criminal investigations. The 1996 Criminal Procedure Code reversed that authority, and

required rightholders to formally press charges to commence investigations in some instances, thus thwarting effective enforcement.

1995: The Russian government agreed to provide ex parte search provisions; these were adopted in part in the Arbitration Procedures Code in 2002 but were never implemented and are absent from the Civil Procedure Code adopted in 2003.

1996: IIPA and USG first identified optical disc plant production as a problem to the Russian and U.S. governments and suggested the need for an enforcement “action plan” to address this problem, including legislative reforms. Two optical disc (“OD”) plants were identified in the IIPA’s February 1996 Special 301 Report. There are now 32 OD plants (with a total plant capacity of 371.6 million discs/year but a legitimate market capacity approximating only 30 million discs/year). At all levels of the Russian government there have been promises to address this problem (starting in 1999) including a pledge, never met, in 2002 to issue an “action plan”—but to date, there has been virtually no action taken against the plants, no comprehensive plan of action issued by the Russian government, and no legislative reforms have even been introduced.

RUSSIA
ESTIMATED TRADE LOSSES DUE TO PIRACY
(in millions of U.S. dollars)
and LEVELS OF PIRACY: 1999 - 2003²

INDUSTRY	2003		2002		2001		2000		1999	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Motion Pictures	275.0	75%	250.0	80%	250.0	80%	250.0	90%	250.0	90%
Records & Music	405.0	64%	371.9	66%	285.0	64%	250.0	70%	200.0	70%
Business Software Applications ³	NA	NA	370.0	89%	90.6	87%	89.0	88%	134.5	89%
Entertainment Software	NA	80%	NA	90%	173.6	90%	NA	94%	241.1	95%
Books	40.0	NA	40.0	NA	48.0	NA	48.0	NA	48.0	NA
TOTALS⁴	NA		1031.9		847.2		637.0		873.6	

² The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA’s 2004 Special 301 submission at <http://www.iipa.com/pdf/2004spec301methodology.pdf>.

³ BSA’s 2003 piracy statistics were not available as of February 13, 2004, and will be made available in the near future and posted on the IIPA website at <http://www.iipa.com/>. BSA’s statistics for 2003 will then be finalized in mid-2004 and also posted on the IIPA website. 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 reflect losses to (a) all software publishers in this country (including U.S. publishers) and (b) losses to local distributors and retailers in this country.

⁴ In IIPA’s 2003 Special 301 submission, IIPA estimated that total losses to the U.S. copyright-based industries in Russia were \$755.8 million. IIPA’s revised loss figures are reflected above.

COPYRIGHT ENFORCEMENT

Illegal Optical Media Production and Distribution

The greatest threat to the copyright sector in Russia is the manufacturing, distribution, and sale of pirated optical media products (music CDs, videogames, VCDs and, increasingly, DVDs) from Russia's growing number of uncontrolled optical disc plants. Russia's 32 known CD plants, including at least 16 DVD (that is, audiovisual) lines, are wreaking havoc on the Russian domestic market. In addition, illegal discs exported from Russia have been found in over 25 countries worldwide. Organized criminal enterprises are involved in many aspects of optical disc piracy in Russia, and they run operations in other countries as well. This is not a matter that can otherwise be left to private parties to resolve, but instead requires the help of governments, particularly in this area of law enforcement. With profits rivaling or exceeding those made through the distribution of illegal drugs, it requires a similar commitment by governments to clean up criminal syndicates running piracy operations.

IIPA has documented the problem of optical disc production and distribution in Russia since 1996 when there were two known plants. Over the past 8 years of inaction by the government of Russia, the problem has been allowed to mushroom to today's 32 known plants. The steady growth of optical disc production has been documented (in numerous IIPA filings) as follows: In 1996, there were 2 known plants; in 1998, 3 plants; in 1999, 6 plants with a capacity of 60 million discs; in 2000, 10 plants with a capacity of 90 million discs; in 2001, 13 plants with a capacity of 150 million discs; in 2002, 17 plants with a capacity of between 150 and 183 million discs; and, in 2003, 26 plants, including 5 DVD plants, with a total capacity exceeding 300 million discs. In addition to the 32 known plants today, there are several additional plants in the process of coming on line. IIPA's evidence indicates that at least 18 of the 32 plants are engaged in illegal activity.

To address optical disc production, the Ministry of Press and Information is using reproduction and licensing regulations (issued in June 2002) to provide licenses for replication facilities for optical discs and analog tapes. The regulations allow for unannounced inspections of replication plants and for the suspension (but not withdrawal) of operating licenses of facilities found to be in breach of the regulations. Last year, the Ministry reported the issuance of 150 such licenses. 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 12 optical disc plant licenses in 2003. The existing law and regulations pertaining to plant licensing fall far short of IIPA's model optical disc legislation (provided to the government of Russia), and 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, these regulations must be used as a starting point for action. In the long run, a comprehensive series of legal reforms is needed. These include legislative and regulatory steps—proposals that IIPA gave to the Russian government in 2002.

Raids and Seizures in 2003

The copyright industries can report some successful raids and seizures (including the first at a DVD plant in 2003). However, these activities have not resulted in any appreciable reduction in the amount of pirate optical disc product being produced in Russia, nor in any

criminal convictions. Pirate manufacture continues unabated and the pirates are getting more entrenched.

In 2003 as in prior years, the federal police and the IP unit in the Ministry of the Interior were generally cooperative in running raids against major pirates (although the Unit "R" has had IPR enforcement jurisdiction taken from it). However, the raids run by the police and the municipal authorities were not always followed up by prosecutors and the courts. The pattern of successful raids without successful prosecutions (with a few exceptions) has been a recurring problem for years.

There were successful raids and seizures in 2003 against some optical disc plants and warehouses. A large raid in April 2003 resulted in the closure of a DVD factory in Zelenograd, near Moscow (reported to be the source of up to one third of the pirate DVDs on the Russian market). A criminal case was initiated and remains "pending" in this matter. In September, the Organized Crime Police conducted a major raid against an optical disc factory in Moscow, which resulted 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. Unfortunately, the case against the plant was closed, apparently as a result of pressure on the authorities to drop the case. Russian police have also raided a number of other optical disc plants including the UVK Stimul plant, and plants in Korolov and the Unitechno Plant (Lobnia). None of these three plants are currently in operation and criminal cases have been initiated against all three.

In total, major warehouse raids have resulted in the seizure of close to half a million pirated optical discs this year. In a raid on November 5 in St. Petersburg, the Organized Crime Police seized over 185,000 pirate DVDs from a warehouse. About half of the DVDs contained two feature films (the first time this activity has been known to occur in Russia). No criminal case was initiated, reportedly because of the "disappearance" of the owners of the warehouse.

It is estimated that 75% of the pirate product seized in raids finds its way back into the marketplace through either the Veteran's Fund or the Trade Houses in the Ministry of Justice, which both claim the right to sell the pirate discs on the open market. The government of Russia must put a stop to these practices.

The film industry's anti-piracy organization, RAPO, seized over 226,000 pirate DVDs in raids on warehouses and outlets across Russia in 2002; in 2003, this number exceeded 1 million DVDs.

To address retail piracy, the government of Russia 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. Retail cases have resulted in some administrative fines, but these are generally of a *de minimis* nature.

In 2003, the recording industry (IFPI) assisted in the investigation, and in raids and seizures on a number of suspected producers and distributors of illegal recorded material. Only a handful of cases made it to the courts and even then, the disposition was disappointing because the operators received neither deterrent penalties nor imprisonment. A total of 371 police raids were carried out with the participation of the Russian offices of the IFPI. These

resulted in the seizure of: 413,200 CDs, 43,800 cassettes, 6,000 CD-ROMs, 24,100 DVDs, 5,100 stampers, 53 units of recording equipment (plus 7,300 blank cassettes), and 316,000 CD inlays (the printed material for the jewel boxes); the total value of the material seized was US\$5.4 million.

In 2003, the business software industries focused their enforcement activities on the prevention of hard disc loading and the illegal use of software by corporate end users. There were 36 raids on hard disc loading operations, and 34 end-user raids conducted in various parts of Russia in 2003. Unfortunately, to date, only a small number of the hard disc loading cases, and none of the end-user cases, resulted in criminal convictions. The hard disc loading cases take more time and likely won't be heard until some time in 2004. In the end-user prosecutions, ongoing problems persist, including the necessity to prove intent, and the absence in Russian law of a way to impart criminal liability onto corporations, meaning that natural defendants must be selected and tried in these cases. As a result, most end-user matters are disposed of as administrative misdemeanors.

RASPA, a Russian anti-piracy organization, continues to conduct raids on behalf of some Entertainment Software Association (ESA) member companies, but these are mostly seizures of street market inventory. ESA believes that the Russian government must take action against the organized criminal syndicates that run these piracy operations. The massive overproduction is destroying not only the Russian market, but also markets in many other countries. These organized criminal syndicates are believed to control distribution of pirate entertainment software products in Russia, as well as in much of Eastern Europe. One example of the ease of shipment of the material is the fact that almost all of the pirate cartridge material in Russia is imported from China, and of the console game material, half of certain manufacturer's material is imported from Malaysia.

Continued High Piracy Levels and Other Problems

Very high estimated piracy levels in all copyright sectors accompany massive losses as noted in the chart above. These high piracy levels cost the Russian economy millions of dollars in lost jobs and lost taxes. For example, the motion picture industry alone estimates lost tax revenues on DVDs and videos in Russia was \$130 million last year. In another study undertaken by the software industry, it was estimated that if levels of piracy could be reduced to regional norms (that is, realistic levels), ten of thousands of jobs and several hundred million dollars in tax revenues would be realized from that sector alone.

The only way to bring down these piracy levels and losses is for Russian authorities to use deterrent criminal penalties against the crime syndicates. Instead, Russia continues to mete out low penalties and only a small number of jail sentences for piracy.

The recording industry reports that the closure of the former Gorbushka market resulted in the migration of illegal sales to the nearby building of the Rubin Trade Center (La-La Park), where most of the dealers sell pirate audio products. Audiocassette piracy levels remain very high (at about 57.3%) despite major raiding activity and the expenditure of major resources by IFPI. Overall losses in the recording industry were \$405 million in 2003.

The level of piracy for entertainment software is at 80% of the market. Russian syndicates control 100% of the production in Russia of PlayStation® video and personal computer games. About half of certain PlayStation® games (such as PlayStation2® games), come from Malaysia, while for other materials such as PlayStation1® and certain personal

computer games, 90% of the illegal material is made in Russia with the rest imported from Ukraine. Cartridge-based video games (like Nintendo Game Boy products) continue to be imported from Asia, particularly China. There are currently 5,500 Internet cafes in the country, few of which use licensed entertainment software products. The retail markets in St. Petersburg and Vladivostok are all full of pirate videogame product.

One 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 Russia, 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. Given these circumstances, it becomes imperative that the criminal code is utilized against organized criminal syndicates, and that the Interministerial Committee focuses its attention on a course of action to fight piracy by the criminal syndicates.

Book piracy continues to flourish in Russia. Although a few years ago, increased licensing of legitimate product resulted in some improvement in the piracy rates, those rates have remained static since that time. While bestsellers were the target of the pirates in the 1990s, they have now turned to reference works and textbooks, a large market in Russia. Unlicensed imports of pirated reprints from the Ukraine and Belarus, pirated reference books and medical texts still abound. A new wrinkle seems to be the unlicensed translations of fiction bestsellers that are available for download on websites in Russia. This phenomenon is appearing in a number of the C.I.S. countries, but more often in Russia than in any of the other countries. Increasingly, the Russia crime syndicates control the pirate book business. The “hidden print run” and “overrun” problems remain, where printers of legitimate editions deliver additional unauthorized copies to crime syndicate distributors before delivering books to legitimate publishers. The Association of American Publishers (AAP) estimates losses in Russia in 2003 were \$40 million.

Criminal Enforcement

The criminal enforcement system in Russia remains the weakest link in the Russian copyright regime resulting in the extraordinarily high piracy levels and trade losses. At the retail level, there is no practical alternative for running anti-piracy actions other than using the 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. In 2003, there were legislative efforts undertaken to “fix” the Criminal Code, but as noted, implementation of these provisions remains troubling.

Three years ago, to assist in combating piracy, an Alliance for IP Protection was formed. It combined the forces of IFPI Moscow, RAPO, BSA and RASPA—thus combining the representatives of the recording, motion picture, software, and entertainment software industries.

In the last five years, only one-third of the criminal cases were even heard by the courts, with the other two-thirds of cases dismissed for a variety of reasons. In only 20% of the criminal cases were the offenders punished at all (often with suspended sentences).

Administrative Enforcement

As in past years, 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. As in past years, the recording, business software, and motion picture industries report that administrative raids have been positive. However, it was also reported that these matters were less effective than in prior years because the new administrative code is more complicated, requiring the involvement of attorneys. In 2003 the IFPI reported that 362 raids against audio pirates were undertaken and 605 administrative cases were initiated. In 564 cases, fines were imposed (for a total of US\$26,466). This averages only US\$47 per case, which is obviously not a deterrent penalty. RAPO reported that it is able to average nearly 10 administrative court decisions a week against pirate retailers that order illegal product to be confiscated and the imposition of small fines (on average less than US\$200). Market seizures continue to involve the employment of huge resources, since administrative penalties remain totally inadequate to deter over the long term. The recording industry reported that although the law makes liable those who distribute material, the sources and channels of illegal material are rarely pursued. In lieu of this, most administrative actions against shop owners and sellers require payment of an average US\$200.

Civil Enforcement

Again in 2003, the business software industry filed separate lawsuits in the arbitration court, rather than pursue civil claims as an adjunct to a criminal prosecution. As a result, several significant cases were won against software system builders installing illegal copies of business software onto sold computers as well as corporate end-users that used illegal copies of software in their business operations. However, deficiencies in the copyright law still make it very difficult to apply civil remedies in end-user piracy cases.

In 2003, the recording industry (IFPI) commenced its first civil claim against an optical disc plant in Russia, claiming damages of over \$1.3 million, a prohibition against production of the pirate CD titles named in the suit, and seeking confiscation of the machinery and equipment used by the plant. This was the first time that a civil cause of action was commenced in Russia against an optical disc plant.

Russia judges have repeatedly voiced opposition to giving standing to foreign non-governmental organizations to represent copyright owners, and to granting national treatment to foreign persons, in Russian courts. In short, the government of Russia must train its judges to respect foreign rightsholders as is required under international treaties, and to take IPR cases seriously.

Border Enforcement

Russia must significantly improve the lax border enforcement that permits the easy trafficking of illegal material into and out of Russia. The government of Russia should instruct

Russian customs officials to address this issue and to provide them with the necessary resources to allow effective enforcement.

Russian Government Efforts to Address Piracy

The government of Russia took an important step in October 2002 to address the growing piracy problem by establishing an interministerial commission to combat piracy. The commission meets quarterly and is headed by the Prime Minister; the acting chair is Press and Information Minister Lesin. To date, the commission has taken small 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 dent in the massive piracy problem. The commission has set a number of important goals for 2004, including: consideration of a comprehensive optical media law; identifying a solution to the problem of optical disc plants situated on government property; curtailing piracy by street vendors and kiosks; and revisiting the question of a federal stamp for optical disc products.

GENERALIZED SYSTEM OF PREFERENCES (GSP) PROGRAM

Even with piracy rates and losses among the highest in the world, Russia continues to receive trade benefits from the U.S. government. As such, in August 2000 IIPA filed a petition, accepted by the U.S. government in 2001, to examine whether Russia should continue to be eligible to receive duty-free trade benefits under the Generalized System of Preferences program. That petition is still pending; hearings were held in October 2003 (to supplement those in March 2001). The U.S. government now must decide whether to fully or partially suspend GSP benefits for Russia. In 2002, \$380.1 million worth of Russia's imports to the United States benefited from the GSP program, accounting for 5.7% of its total exports to the U.S. During the first 11 months of 2003, \$376.6 million worth of Russian goods (or 4.9% of Russia's total exports to the U.S. from January to November) entered the U.S. under the duty-free GSP code. While Russia was receiving these benefits, losses to U.S. industries from copyright piracy in Russia in 2003 amounted to well over \$700 million dollars. The IIPA recommends that, absent compliance with the suggested benchmarks by July 1, these GSP benefits should be suspended until Russia improves its copyright enforcement regime.

DEFICIENCIES IN THE RUSSIAN LEGAL REGIME

Overview of Legal Reforms

There are a number of critical legal reforms that Russia must undertake to improve copyright protection and enforcement, as well as to ensure accession into the World Trade Organization.⁵ These reforms include the need to adopt:

- Proper optical media regulations to address (with criminal sanctions) the protection and distribution of optical discs and the equipment and machinery used to produce them;

⁵ A more detailed discussion of each of the proposed legal reforms including the necessary changes to the Copyright Act, and the problems related to the draft Civil Code, discussed in this section, can be found in previous filings, available on the IIPA website at <http://www.iipa.com/rbc/2003/2003SPEC301RUSSIA.pdf> at page 13.

- Amendments to the copyright law to fix a number of deficiencies and to make it WTO TRIPS and WIPO digital treaty compatible (as well as to accede to these treaties)—in particular to ensure the protection for preexisting foreign works and sound recordings;
- Amendments to the criminal procedure code to provide proper *ex officio* authority;
- Amendments to strengthen the implementation of the code on administrative misdemeanors;
- Amendments to the customs code (to provide *ex officio* seizure authority).

Further amendments to the criminal code may be needed if the new Article 146, when implemented, remains a problem.

The criminal code was amended in 2003 to provide *ex officio* authority to allow prosecutors, but not the police, to commence and investigate certain IPR criminal cases.

A new customs code went into force on January 1, 2004, providing for measures to prevent the trade of counterfeit goods across borders. Unfortunately, the law fails to expressly provide for *ex officio* enforcement authority. Thus, even if customs officers discover shipments of obviously infringing products, they may not be able to act on their own authority, acting as now, only in those cases where rightsholders have filed written applications to suspend the release of suspect goods. A proposal to fix the *ex officio* authority problem was rejected by a key Russian Duma committee in April 2003.

The threat of deleterious amendments in the Russian civil code pertaining to IPR protection remains, with the possibility of the latest draft being considered by the Duma in April 2004. In addition, there is at present a separate law on the protection of computer programs and databases, which are also protected in the copyright law. Amendments added in the Computer Program Law of 2002 weakened enforcement for computer programs; the software industry would like to see the 2002 law repealed and all software-related provisions consolidated into the copyright law. The Russian government must not allow any amendments to be adopted that would weaken or interfere with the implementation of the copyright law.

Optical Media Regulations

To address the problem of the unlicensed optical disc plants in Russia in a comprehensive manner, effective laws must be enacted and utilized. Two relatively minor licensing laws, and one set of regulations, have been enacted in this area of law in the past few years. But neither law nor the regulations resulted in effective action undertaken against the illegal plants. In short, regulations are needed to: (1) close plants that are caught illegally producing copyrighted material; (2) seize infringing product and machinery; (3) introduce criminal liability for infringing these regulations; (4) monitor the importation of raw materials (optical grade polycarbonate) used in the production of optical disc media; and (5) require plants to adopt source identification (SID) codes so that the source of illegally produced discs can be traced. Finally, the proper authority must be delegated to agencies and officials to undertake effective enforcement and to implement these regulations. Details of the laws and of IIPA's proposal for addressing the problem in a comprehensive fashion can be found at the IIPA website, <http://www.iipa.com/rbc/2003/2003SPEC301RUSSIA.pdf>, at page 14.

In the immediate term, the government of Russia must use its existing authority to withdraw the licenses of illegal plants and stop their production, especially of those plants operating on government soil.

Copyright Law Amendments

Since the passage of the copyright law in 1993, IIPA, its members, and the international copyright community have been anticipating amendments to fix (and now to update) that law. It is essential that in the first half of 2004, these efforts will prove successful, after attempts failed to consider the amendments at the second and third readings scheduled in November 2003.

The draft copyright amendments that passed the first reading in 2002 include provisions to correct the problem pertaining to the protection for pre-existing works and sound recordings. The draft law is also intended to add provisions directed at implementing the WIPO digital treaties.

Criminal Procedure and Criminal Code Amendments

Five years after pledging to do so, the Russian Criminal Code Article 146 (pertaining to infringement of copyright and neighboring rights), was finally amended in 2003 to fix the previously ambiguous "grave harm" standard. The amendments, effective December 11, 2003, added a fixed threshold amount of harm. Some of the copyright industries remain concerned that in its implementation, this threshold amount will be too high to trigger a criminal case, and as a result, will be used too infrequently. In addition, the amendments replaced the minimum fines previously triggered to multiples of the minimum wage with fixed amounts.

Article 146 provides for fines of up to 200,000 rubles (or US\$7000), or up to 18 months of the defendant's income, or correctional labor (from 180 to 240 hours), or imprisonment of up to five years for unlawful acts that cause "significant damage." The November 2003 amendments (replacing amendments adopted in April) define "significant damage" as a fixed threshold rather than scaled to the minimum daily wages. The fixed thresholds are as follows: 50,000 for the lowest level criminal violation (about US\$1750), and 250,000 rubles for the most serious criminal violation (about US\$8800). This means that any activity below US\$1750 cannot be treated as a criminal matter. The amendments unfortunately weakened the provisions pertaining to aggravated (i.e., organized crime) activities.

Some of the copyright industries remain concerned that the threshold in the newly adopted Article 146 is still too high in its definition of "significant damage" and will fail to give the police the necessary tools when they are conducting initial raids and must determine whether a case should be brought under the criminal code or the administrative code. There was, in years past, a proposal to lower the threshold to 50 times the minimum wage, or US\$150, but what was adopted was a significantly higher threshold. The implementation of Article 146 will be closely monitored by IIPA to see whether further amendments are needed.

There are several other criminal code/criminal procedure code amendments that need to be adopted.

First, the government of Russia should introduce and the Duma should adopt amendments to add specific substantive and procedural provisions to the criminal code and criminal procedure code that would grant police the authority and legal basis to confiscate infringing goods, materials, and the equipment used to produce such items. The current Criminal Code (Art. 146) *does* clearly apply to the confiscation and destruction of pirate and counterfeit goods—that is, to the illegal copies themselves. However, it does *not* explicitly provide for the confiscation and destruction of the "machinery" used in the making of illegal

copies. Local counsel advises that the criminal code theoretically could be read to apply to the “tools of the crime” such as illegal machinery, but experience shows that Russian courts have not yet applied the criminal code in this manner. Thus, as a practical matter there is no application under the criminal enforcement provisions to the “machinery” used to create illegal copies. A provision in the Copyright Law (Art. 49.4) provides civil remedies for the confiscation and destruction of “materials and equipment,” but it is not effective and is, in any case, limited to civil cases.

Second, the government of Russia should introduce and the Duma should adopt amendments to increase the levels of fines because they are too low and therefore inadequate to deter commercial piracy.

Third, some of the copyright industries remain concerned that the criminal procedure code does not give jurisdiction over criminal violations to the police authorities, as it does for the prosecutors. It is our understanding that the 2003 amendments did fix one problem by revising the 1996 CPC amendments so that it is no longer necessary to file a formal complaint for public crimes, including copyright offenses. Also as IIPA understands, prosecutors are entitled to supervise investigations conducted by the police (Article 126 of the CPC) in all cases including IPR investigations. IIPA will continue to monitor the implementation of these provisions to make certain they result in effective enforcement for all of the copyright industries.

Other Legal Reform Issues

Civil Procedure Code Amendments

A new civil procedure code took effect February 1, 2003, setting the rules for initiating and examining civil cases, including disputes pertaining to copyright and neighboring rights infringements, but unfortunately, it does not contain the necessary civil *ex parte* search procedures (required by the WTO TRIPS Agreement). These are essential tools for effective enforcement in the software industry. In 2002, an amended arbitration procedures code in Article 72 introduced civil *ex parte* search provisions in a more limited context. The software industry reports that these provisions have only been tried one time in actual practice, and that the overall procedure remains a difficult and onerous proposition. A major contributor to the problem is the lack of experience by the judges who must impose it, and the overall inefficiencies of the court-mandated bailiff system.

Customs Code Amendments

The Russian Duma must introduce and 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 WTO TRIPS. Imports of pirate optical media product continue from Eastern Europe (especially from the Czech Republic), from other countries of the C.I.S. with production capacity (i.e., Ukraine), and from Asia.

Code of Administrative Misdemeanors

In 2002, a new code on administrative misdemeanors went into force that allows administrative cases against legal entities and the imposition of fines on them in the amount from US\$900 to US\$1,200 for copyright infringements. Since its enactment, effective implementation of this law has been very limited because it falls under the competence of under

qualified municipal police. The Code on Administrative Misdemeanors also effectively limits the time period for the investigation of copyright infringements by several days even when a much longer time is necessary to investigate such cases. The code needs to be amended to provide for at least a one-month period for the investigation of copyright infringing cases, as it does so in other cases of administrative misdemeanors.

Civil Code

The effort to include detailed copyright provisions as part of comprehensive civil code reform remains a continuing threat to strong IPR protection. For over 11 years, opponents of strong copyright protection have threatened to “redo” and weaken the copyright law with provisions in the civil code. The copyright law should remain self-standing, and nothing in the civil code should undermine that detailed law or its implementation. Last, any revision of the civil code should not be used to delay in any way the speedy adoption of the copyright law amendments.

Stamp Tax and the Tax on Video Rental Profits

Effective in 2001, the Moscow city government replaced its requirements that all video and audio cassettes, optical discs and computerized information carriers have a “protective identification mark” (i.e., a stamp) tax, with another law (Ordinance No. 73) that abolished the stamps but created a registration stamp/mark in lieu. Several alternative systems, including a federal stamp, and a self-regulating system have since been under consideration. The copyright industries strongly recommend that anti-piracy systems, whether in the form of stamps or otherwise, be voluntary and left to the individual rightsholders. Mandatory systems have been shown to slow the development of legitimate markets and alternately help the pirates. The entertainment software industry reports that the current registration stamp system is causing many retail establishments to stop the sales of legitimate product for fear of running afoul of the law, while pirates continue to operate in open markets.

Also interfering with the development of legitimate markets is the high taxation system on video rentals. Since 2002, a 24% profit tax on revenue from video rentals, along with other “vice” activities such as gambling has been in effect. This tax is very high (although an improvement from the previous 70% rate). The GOR felt that lowering the tax to 24% would help the video market’s growth in Russia, but the lingering high rate combined with the growth of DVD piracy has, for the most part, overwhelmed the legitimate market for rentals.

WIPO Treaties; Electronic Commerce; Notice and Takedown Procedures

In 2002, Russia considered but decided not to accede to the WIPO digital treaties (WCT and WPPT). The copyright law amendments, postponed again in November 2003, would have moved Russia toward implementation of these treaties. It is hoped that in 2004, the Russian government will accede and that, in addition to the other legal reforms, Russia will adopt legislation that fully implements both of these digital treaties. Implementation of these treaties, whether as a part of the copyright law amendments or through another revision, is critical to Russia’s effective protection of creative content.

IIPA also understands that a federal draft law “On Electronic Trade” first submitted to the Duma in 2000 (and which had a first reading in 2001) may be considered in 2004. This draft law should be carefully watched by the industries and the U.S. government to ensure that e-commerce is not over-regulated and that liability issues for copyright infringement on the

Internet are dealt with in a manner to ensure that rightsholders can properly and effectively enforce their rights.

A particularly troublesome provision in the draft copyright law is Article 48 which would, among other things, make “notice and takedown” procedures subject to verification and confirmation by collective management organizations. This will be a very counterproductive measure, if adopted. As the U.S. experience has shown, notice and takedown, when undertaken by copyright owners directly to on-line service providers and host sites, works very efficiently and effectively. The use of an intermediary—a collective management organization—will significantly bog the process down in time delays and ministerial hurdles that will totally undermine the effectiveness and the purpose of “notice and takedown”—to have a fast, efficient and fair process. Individual copyright owners need to maintain the right to enforce their rights directly, and that is why the proposed new Article 48.2 must be deleted.

Rome Accession and Article 16 Reservation

Russia acceded to the Rome Convention on May 26, 2003. IIPA is very troubled by Russia’s decision to make an exception to its national treatment obligations and adopt the reservations permitted by Article 16 of the Rome Convention. In short, this reservation will mean that American record producers and performers will be denied broadcasting remunerations even though the U.S. is a member of the WPPT (and even after Russia accedes to that treaty). This is a very unfortunate and shortsighted decision by the government of Russia and one that IIPA hopes will be reversed.