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**RE: Case # 005-CP-07 IPR-Russia: IIPA Responses
to USG Questions from the GSP Hearing**

To the GSP Subcommittee:

The International Intellectual Property Alliance (IIPA) offers the following additional information in response to the questions posed by the U.S. Government (USG) at and following the GSP Country Practice Hearing (Oct. 4, 2007).

Questions that were asked during the hearing

Question #1:

The IIPA brief notes that Russia has made some progress on IPR enforcement and protection, but that the progress has been insufficient in scope and late in terms of timing. Does IIPA see any risk to the progress we have seen, if GSP benefits were limited or terminated?

IIPA Response:

The IIPA believes that limiting or terminating Russia's GSP benefits will not risk IPR enforcement progress. Indeed, we recommend such a designation because we think it is appropriate to spur further progress, which is the goal of IIPA members. In a number of instances, the suspension or threat of suspension of GSP benefits, has caused recipient countries to take meaningful steps to improve IPR protection and enforcement. In 2004, for example, the Russian government passed long-delayed copyright law amendments when withdrawal or limitation of GSP benefits was part of the bilateral discussion. Providing full GSP benefits should serve as an incentive for those in Russia working to implement the IPR Agreement and to speed legal and enforcement reforms in order to improve Russia's IPR regime.

The test of Russia's GSP benefits should ultimately be one of the "rule of law" – that is, whether Russia is fully complying with the U.S. trade law's GSP eligibility requirements, including its bilateral and multilateral IPR commitments. Moreover, in 2006, Russia received benefits of over \$500 million in GSP trade preferences, while IIPA members suffered piracy losses in Russia of over \$2 billion.

In sum, Russia is at a critical juncture in the development of its IPR regime as a result of the Bilateral IPR Agreement of November 19, 2006 ("IPR Agreement") and IIPA believes the GSP process can serve as a beneficial tool to aid in fully implementing the IPR Agreement.

Question #2:

Your submission details criminal prosecutions, including against vendors and warehouses, where there has been considerable progress. Please describe what private (civil) actions your industry is taking to protect its IP in Russia. For example, how many civil actions has the music and film industries taken in the past year in Russia?

IIPA Response:

The problems of enforcement in Russia – especially against optical disc and Internet piracy – are problems involving sophisticated organized syndicates that can only be addressed by criminal, not civil, actions. That is why IIPA has focused attention on the need for more cooperation with and better results from Russian criminal enforcement authorities, including the imposition of deterrent penalties. In no country in the world where large-scale commercial piracy exists are rightholders left to depend on civil actions for relief from this problem.

As detailed in our filing, there are many "gaps" in the current IPR (civil) legal regime in Russia involving: (1) procedural delays and problems securing judgments and interim relief (such as injunctions); (2) the lack of transparency in optical disc licensing and production (i.e., who to sue); (3) weaknesses in the law regarding juridical entity liability (one improvement, allowing "liquidation" of assets, goes into force in 2008), and (4) no clear rules governing third party liability. Thus, most civil actions would not be productive to improve IPR protection, if commenced.

That said, there have been numerous civil cases brought against software (especially end-user) infringers and against some optical disc plant owners and operators by rightholders in the recording industry, and they are now being contemplated by motion picture rightholders for actions against Internet pirates.

The business software industry, (BSA) reports that civil cases have been initiated against software end-user infringers with materials gathered in criminal investigations (and verdicts), as well as administrative actions. Unfortunately, civil *ex parte* searches have not been successful in Russia, nor resulted in the necessary interim relief or the proper securing of evidence because of procedural hurdles.

Investigations of software end-users require the participation of Russian enforcement agencies. Such investigations are the only way to collect evidence for the filing of civil lawsuits against legal entities (infringers). Civil lawsuits based on prior (criminal or administrative) verdicts can be successful. But, civil lawsuits based on materials gathered in raids where a criminal case is not initiated, especially because of weak, inadequate, or poorly gathered (criminal) evidence is unlikely to succeed. This has, unfortunately, been the result in several cases aimed at general managers or IT specialists at known-pirating companies. BSA is working with its enforcement experts to try to improve the evidentiary-gathering practices of Russian enforcement officials to assist with these cases. In 2007, BSA filed nine lawsuits: four were based on prior (criminal or administrative) verdicts and were successful; two cases settled; and, the other three are pending in arbitration courts (and are based on evidence gathered at raids).

In 2003, the recording industry (IFPI) commenced civil claims against some of the optical disc plants in Russia, seeking damages of millions of dollars, and a prohibition against production of the pirate CD titles named in the suits. This was the first time that civil causes of action were commenced in Russia against optical disc plants. IFPI brought these cases after strong suggestions by the Russian Government which argued (then and now) that civil procedures would prove effective. There were a total of 16 IFPI civil claims lodged against two plants. One of the plants settled and the other fought the suit in the courts. Instead of this course proving effective, the case was bogged down with procedural hurdles, and by the time the court ruled against the plant (and ordered it to pay 500,000 rubles to each plaintiff, or about US \$150,000 total — a fraction of the actual losses) the plant had disbursed all of its assets. The plaintiffs never recovered anything from the defendants primarily because the court refused to issue an order, requested by the rightholders, aimed at securing the judgment.

In 2007, local members of IFPI launched a series of civil actions against some illegal Russian websites (operating under the guise of the rogue collecting societies – the law banning such practices goes into force on January 1, 2008). These civil cases are in addition to the two criminal cases pending against the notorious allofmp3.com site – the criminal cases are still pending after almost two years of criminal investigations.

Thus, the local recording industry has recently initiated five civil lawsuits – based on local repertoire (to make the evidence of ownership easier to prove). So far, the defendants have used procedures to delay the cases and continue to illegally operate. All attempts by the plaintiffs to get interim relief, such as injunctions or orders prohibiting the sale of assets, have been thwarted. Even if the cases are ultimately successful, rightholders fear that the awards will be small, difficult to enforce (and collect on), and be limited to the titles named in the complaints, and will thus not deter or limit the overall illegal activities of the defendants.

In sum, civil enforcement has generally not been effective, against hard copy or Internet piracy, at present, because: (1) the required filings have undue evidentiary burdens (such as exhaustive chain of title documents), and because courts refuse to rely on presumptions of copyright ownership (even though it is spelled out in the copyright law) – the courts, in lieu, make both parties “prove” ownership; and (2) even successful court decisions are limited to specific titles, rather than a rightholder’s catalog of titles. The civil law system does not permit industry groups (such as IFPI) to file cases for its members, nor does it permit class action suits

against the rogue collecting societies. Last, as noted, civil enforcement is totally ineffective against criminal syndicates since they are not corporate entities and have no place of business to be properly served. These same problems confront rightholders wishing to commence suits against illegal websites, since false business names and addresses are often listed (in the absence of a proper registration system), and no known place of business can be identified for the purpose of serving a complaint and filing suit.

Additional Questions

Question #3:

You detail that the regulatory agency responsible for licensing OD plants is currently in transition and that inspections are not occurring. Given that these are licensing inspections by a regulatory body, what effect does this have on the Russian Ministry of Internal Affairs to continue their criminal inspections?

IIPA Response:

First, to be clear on the division of authority, only the Ministry of Interior Affairs (MoIA) can commence criminal investigations, not the licensing authority Rossvyazokhrankultura (otherwise known as “RSOK”). RSOK, once re-organized, will have the authority to: (1) issue optical disc plant licenses (including the undertaking of initial inspections before granting licenses); (2) monitor license holders once issued a permit by undertaking regular and surprise inspections; (3) undertaking joint raids with the regular and tax police against the optical disc plants; and (4) using administrative sanctions (set out in the Administrative Code) to sanction plant operators and to close (de-authorize) illegal plants.

Certainly while the inspection authority is being re-organized two things are not happening in Russia. First, the long-promised comprehensive surprise inspections of all the plants by RSOK cannot take place (due to the lack of authority). Also, even when the authority is restored, lingering problems of understaffing and resources will remain – there are only two or three RSOK staff at present with plant licensing, raid, and inspection authority. Second, during this inspection authority re-organization, MoIA (and the prosecutor’s office) have not been moving criminal investigations forward against any new illegal plants or their owner/operators. But, that does not mean that criminal cases that are pending – and there are many of these – cannot continue.

More important for proper inspectional licensing and criminal enforcement is the IPR Agreement pledge to enact legislation in Russia (by June 1, 2007) to: “strengthen the licensing regime for optical media plants” by including “grounds to deny applications for licenses and to suspend, and then immediately seek revocation by a court of, licenses of persons whose production premises are found to be manufacturing pirated product; enhanced recordkeeping requirements; and government monitoring of production.” This legislation – not yet enacted – is supposed to ensure that “each licensee will verify that the customers for whom it produces optical media bearing content protected by copyright or related rights have authorization from all relevant right holders[,]” and that “licensees mark optical media with data that identifies the

licensee and the license number[,]” and “that licensees use additional markings, such as source identification codes.” This obligation is key to addressing many of the current OD piracy problems – both the manufacturing and distribution of pirate material. IIPA is concerned that there is no known timetable in the Russian Government to meet this obligation. Russia should include the monitoring of high-grade polycarbonate material used to manufacture optical discs in its OD enforcement regime, especially its border enforcement.

In short, this legislative package, once enacted, will ensure proper regulation of the licensing of plants (and their equipment and raw material used in production), the (surprise) inspection of plants, the closure of illegal plants and the sanctions to be imposed – including criminal penalties – for violations. Russia plans to address this problem with one legislative amendment: to deny licenses to plants (and individuals) whose business license was previously revoked, as well as with regulatory amendments (to the Prime Minister’s Decree of April 2006).

Ultimately, the issue of authority is expected to be rectified by the re-organization, as noted, of RSOK as a new Federal Service. The re-organization, which has now persisted for almost six months, has, for whatever reason, been combined with a slowdown in activity by the Economic Crime Department within the Ministry of Interior (MoIA).

Question #4:

The number of OD plants appears to have stabilized at approximately 40 over the past two years. Moreover, law enforcement appears to be diligent with respect to targeting unlicensed plants. Could this represent a turning point with respect to pirate OD production?

IIPA Response:

As noted in our response to Question #3, Russia has not enacted the necessary laws and regulations to undertake comprehensive plant licensing, inspection, and, criminal enforcement. In the IPR Agreement, Russia agreed to address the optical disc problem, with the objective of permanently closing down illegal plants. Russia is supposed to conduct “repeated, unannounced inspections” of all known OD plants. These inspections are to “take place regularly, without prior notice, and at any time, day or night.” Criminal proceedings are to be initiated “[i]f evidence of unauthorized production of optical media bearing content protected by copyright or related rights on a commercial scale is found...” However, Russia has not yet met this obligation. Instead, according to IIPA’s information, this year, Russian authorities have inspected only three out of an estimated 45 manufacturing facilities (while the number of plants is down slightly, the total number of production lines is the same, or even higher than we reported in our Special 301 filing in February 2007). In fact, as of September 2007, there have been a total of 17 optical disc “inspections” this year – almost all of which have been limited to the granting of licenses to new plants, and regular, but not surprise, inspections or raids. The total includes three raids undertaken against small-scale (CD-burner) replicators.

So, while the Russian Government has taken plant inspections and raids against some of the plants, until all of the plants are under proper regulations and laws, and all have been properly (and surprise) inspected, the illegal plants closed, and proper criminal penalties

assessed, the response cannot be characterized as “diligent” nor is it in compliance with IPR Agreement.

Question #5:

The Russian government has indicated, in its written comments, that it has made a number of strides in improving the protection of intellectual property. Which of those does your industry see to be the most important in terms of this case, and what are the highest priority areas for additional progress?

IIPA Response:

Clearly, the priority for IIPA members in Russia is to step up enforcement activity – well beyond current levels – to provide adequate and effective enforcement of IPR violations, including the imposition of criminal deterrent penalties. In short, Russia is undertaking some enforcement activity – and by some measure, more than in prior years, but still much more needs to be done to meet the requirements of the IPR Agreement.

The key improvements are the many legal reforms and some of the enforcement activity detailed in our Pre-Hearing Brief.

The key priorities for improvements are the list of remaining legal reforms, and most importantly, stepped up criminal enforcement targeted against optical disc and Internet piracy operations (including the use of newly enacted criminal sanctions by Russian law enforcement agencies). These enforcement priorities also include regulating the rogue collecting society activities (ROMS, FAIR, ROSP, ROUPI etc.), and accrediting legal societies, such as RAO and RPA.

Question #6:

Can you discuss the progress that you foresee of IPR enforcement and how the lack of inspections affects criminal investigations.

IIPA Response:

Optical disc enforcement is one of the two IIPA priorities in Russia – the other being Internet piracy enforcement. The progress that we foresee is the adoption of key (missing) legal reforms – to the Customs Code, the Civil Code (Part IV) and the Criminal Code (to make legal entities liable for IPR crimes). Proper inspections of optical disc plants is important – as noted in Question #4 – for implementation of the IPR Agreement priority of optical disc plant enforcement. Absent proper licensing and inspections, criminal cases against illegal plant operators, and the closure of plants, cannot proceed.

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Please let us know if you have any further questions or comments about our filings. Thank you again for the opportunity to testify and to fully describe our concerns regarding IPR enforcement in Russia.

Respectfully submitted,
/s/
Eric J. Schwartz
On behalf of IIPA