

# INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

## 2008 SPECIAL 301 REPORT

### RUSSIAN FEDERATION

**Special 301 Recommendation:** IIPA recommends that the Russian Federation be retained on the Priority Watch List.<sup>1</sup>

## EXECUTIVE SUMMARY

Russia is at a critical juncture in the development of its IPR regime. On November 19, 2006, the Governments of Russia and the United States entered into a IPR Bilateral Agreement (“IPR Agreement”) in the context of Russia’s efforts to accede to the World Trade Organization (WTO).<sup>2</sup> The IPR Agreement reflects Russia’s acknowledgment of the numerous legal reforms and enforcement steps it needs to undertake to modernize and improve its copyright system for the benefit of Russian and foreign authors, performers and producers. The U.S. Government has consistently reiterated its position that Russia must provide protection and enforcement of IPR consistent with the requirements of the IPR Agreement before the U.S. would support Russia’s entry into the WTO. Russia’s full compliance with the IPR Agreement’s obligations is essential, and should be considered in the Special 301 context, as well as during its review under the General System of Preferences (GSP) program.

Clearly, the priority for IIPA members in Russia is to step up enforcement activity well beyond current levels, including the imposition of deterrent criminal penalties as well as improving criminal investigations and prosecutions. By certain measures, Russia is undertaking more enforcement actions than in prior years and there are particular areas where improvements have been accomplished, especially pertaining to business software. Nonetheless, much remains to be done to achieve adequate protection in Russia and to secure compliance with the IPR Agreement, particularly with regard to optical disc (“OD”) and Internet piracy.

Compliance with the IPR Agreement will help to significantly reduce piracy, which harms all creators, U.S. and Russian alike. Improvements in Russia’s IPR regime will aid in the development of a flourishing market and a creative community in Russia.

It is with great sadness that IIPA notes the recent assassination of the head of one of the few legitimate collecting societies in Russia. In mid-January 2008, the managing director (Vadim Botnaruk) of the Russian Phonographic Association (RPA) was brutally attacked outside his apartment and died shortly thereafter (this was the second attack against him in three months). While his death is still being investigated, it comes as various collecting societies are seeking to be certified by the Russian Government as authorized societies under a provision of Part IV of the Civil Code that went into effect on January 1, 2008. Clear support from the Russian Government for the rule of law and the rights of legitimate rightholders should be demonstrated by immediate action to investigate and prosecute the criminals behind this particular action, and to cultivate an environment in which intellectual property rights

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<sup>1</sup> For more details on Russia’s Special 301 history, see IIPA’s “History” appendix to filing at <http://www.iipa.com/pdf/2008SPECIAL301HISTORICALSUMMARY.pdf>. Please also see previous years’ reports at <http://www.iipa.com/countryreports.html>.

<sup>2</sup> The IPR Agreement (the details of which are contained in an “IPR Side Letter”) was signed by Russian Minister Gref and Ambassador Schwab. It is known formally as the U.S.-Russia Bilateral Market Access Agreement on Intellectual Property Rights and is at [http://www.ustr.gov/Trade\\_Sectors/Intellectual\\_Property/Russia/Section\\_Index.html](http://www.ustr.gov/Trade_Sectors/Intellectual_Property/Russia/Section_Index.html).

are vigorously defended by the state, and where rightholders are not exposed to intimidation and violence.

## **COPYRIGHT ENFORCEMENT IN RUSSIA**

### **Criminal Enforcement in General**

Russian criminal enforcement is the priority for IIPA and its members. In 2007, the Russian Government conducted some significant raids and seizures and the Russian police stepped up enforcement against copyright infringers, particularly with respect to street vendor piracy and companies involved in the installation and use of pirated software.

Russian Ministry of the Interior statistics illustrate an increase in police activity in the number of IPR (copyright and trademark) criminal cases opened – close to a tripling in the past three years: in 2005, the Ministry recorded a total of 2,924 crimes under Article 146 of the Criminal Code of Russia (for copyright infringement); in 2006, this figure doubled to 7,423 recorded crimes. In the first eleven months of 2007, 7,578 such crimes were recorded.

In addition, some deterrent sentences and prison terms have been applied by Russian courts, including a handful (albeit too few), aimed at serious repeat offenders. One case of note involved a sentence imposed against two individuals in Rostov-on-Don for duplicating DVD-Rs and selling the discs in their kiosks. Some IIPA members further report an increase in the number of administrative and criminal penalties imposed against vendors.

There is evidence that these enforcement activities are improving the conditions for certain businesses in Russia. The business software industry reports an increase in the number of civil actions commenced by rightholders that have had a deterrent effect on illegal activities to the benefit of legitimate software distributors. The motion picture industry reports that stepped up enforcement activity in combination with market changes has led to an increase of legitimate DVDs sold in Russia over the last three years. DVD sales for Russian and Motion Picture Association of America (MPAA) members' titles have increased from 24 million in 2005 to 67 million in 2007.

The music industry emphasizes the need for criminal, rather than civil, enforcement directed at optical disc piracy – namely against the criminal enterprises dedicated to the manufacture, distribution and sale of pirate materials, as well as against Internet piracy in which Russia holds the dubious distinction of being a world leader. Addressing commercial-scale piracy through criminal measures is identified as an obligation of WTO members for a reason — it is only nation states that have the capacity to deal with these problems. Civil measures are intended for “civil” actions — better understood as disagreements between parties. Massive and organized criminal activity is most fundamentally not in the nature of a disagreement, and civil measures are not capable of delivering the requisite level of deterrence.

The problems of civil actions are further exacerbated by the very limited scope of available relief. Civil enforcement inadequacies include: remedies generally limited to the seizure of repertoire in any specific instance; the failure to award preliminary injunctions, or to freeze assets and evidence; low damage awards, which, like all awards, are also very difficult to enforce; burdensome evidentiary requirements, including rights ownership information; the absence of personal liability for the directors of infringing companies or enterprises; and, inadequate contributory liability. Physical piracy enforcement is also hampered by the requirement that exemplars be collected only by state officials (or jointly with rightholders), and an unnecessary reliance on government expert reports, which both cause trial delays.

In general the copyright industries report that deterrent criminal penalties are not being imposed against optical disc plant owners or, with few exceptions, against plant operators and owners of commercial Internet operations. In fact, in the years since the adoption of the criminal penalties (Article 146), we are not aware of a single plant owner who has been convicted, and only a handful of plant

operators (i.e., plant managers) have served jail time or been given suspended sentences. Far fewer criminal cases were initiated against optical disc plants in 2007 than in 2006, and, many cases have languished for a long time.

Importantly, the copyright industries report that although more criminal cases have been commenced than in prior years, most cases do not result in deterrent penalties as a final disposition. There have been some notable and important exceptions: in April, in a raid in Krasnodarsky Kray a jail sentence was imposed; and in May, in St. Petersburg, the first-ever jail sentence was imposed against a DVD/software shop owner (an 8-month sentence). Unfortunately, these examples remain the exception to the general practice of non-deterrent sentencing. Examples of plant operators who received suspended sentences include UVK Stimul, ROFF, Simplex, DataMedia, Disc Press MSK, and Atya plants. The exception is the operator of the Mediasystem plant who was convicted and received a 3-year suspended sentence in December 2005 and is currently in prison awaiting the conclusion of a second criminal; investigation. The longest prison sentence imposed to date for copyright infringement is four and a half years against two DVD-R replicators in Rostov-on-Don (the case cited above).

Piracy rates continue to be very high. Thus, improved criminal enforcement is a necessary and important step to establishing legitimate markets for the benefit of Russian and foreign rightholders. In sum, IIPA recommends that the Government of Russia improve its IPR criminal enforcement by including rightholder cooperation in its enforcement and OD (surprise) plant inspection operations, and by the central coordination of law enforcement. This should include a high-level announcement by the government that IPR enforcement – including Internet piracy – is a priority. IIPA recommends that prosecutors: (a) coordinate their efforts with the police (as should the investigative departments of the Ministry of Interior (MOI), the Federal Security Service of the Russian Federation (FSB), and Customs now that they all can initiate criminal cases); (b) bring more IPR cases; and (c) conduct expeditious investigations. The development of instructions by the MOI and the General Prosecutor's Office with an updated and detailed methodology for investigations of copyright infringements would help to increase the quality and effectiveness of IPR enforcement activities. Another recommended measure is the appointment of IPR special prosecution investigators and police officers at both the federal and regional levels throughout Russia. On September 7, 2007, the reform and reorganization of the General Prosecutor's Office and all prosecutorial bodies was completed: prosecutorial bodies are now divided into prosecution offices and investigative committees. The appointment of specialized IPR prosecutorial investigators could, if utilized correctly, significantly increase the efficiency of IPR criminal investigations.

An intensification of criminal investigations and criminal convictions against principals of organized commercial pirates is sorely needed, especially directed at Internet and optical disc operations. There needs to be a focus on criminal enforcement targeted against organized crime syndicates. Regarding Internet piracy, although the notorious allop3m.com is not currently in operation, other similar (in fact, nearly identical) sites are operating, and must be closed, along with the commencement of criminal investigations against the site operators. The ability of wrongdoers to simply modify their Internet sites and continue to operate in violation of the law manifests a clear need for reform. More and improved criminal proceedings in general, along with speedier investigations and trials are needed. Last, we recommend that the General Prosecutor's Office needs to appoint a government liaison with IP rightholders to more effectively bring criminal investigations and trials to successful a conclusion.

In a widely reported story, Russia's 2008 presidential contender, Dmitry Medvedev, even told a Moscow City forum of non-governmental organizations (on January 22, 2008) that "disregard for the law" must be stopped, and that a national program to combat IPR piracy was needed. We hope that this ambition will soon be realized.

## **Raids Against Optical Disc Plants**

Raids have been undertaken at some optical disc plants, including two at the end of 2006 and seven plants in 2007. Six of the 2007 raids were of licensed plants: Victoria (twice), U-2, Poliplast and Mukhametdinova, and Vostok-D; three were of unlicensed plants: Gamma (three times) and Laser LTD.

However, the optical disc enforcement regime continues to lack effectiveness evidenced by the continued operation of all the raided plants. For example, the Poliplast plant was raided in February and its license was not suspended. The Victoria plant, raided in March and again in August, is back in operation and its license has not been suspended. The Mukhametdinova plant in Tatarstan was raided in October; the raid netted three DVD and four CD lines, together with about 610,000 pirate discs in the connected warehouse, but the license for the plant was not suspended. The Laser LTD plant, located on a former government defense plant site, was raided in October; the raid netted two CD/DVD lines, together with about 60,000 pirate discs, 165 stampers and close to 50 tons of polycarbonate (used for CD/DVD production). The Moscow Vostok-D plant was raided in November and netted two DVD lines, one of which is capable of replicating HD DVDs, together with about 100,000 pirate discs. The Vostok-D lines belonged to a formerly-licensed plant named Atya located near Moscow, which was raided in 2005. The Atya plant director received a 2-year suspended sentence and the plant owners changed their name with the licensing authority. They then voluntarily asked for the cancellation of Atya's plant license, and began operations as Vostok-D. The Gamma plant, raided in March, September, and November, remains in operation despite two criminal prosecutions. Worse, after each successive raid at the Gamma plant, fewer operational lines were discovered – nine in March, five in September and only two in November – indicating that the lines were being dismantled and moved to another location. This highlights both the ineffectiveness of the optical disc enforcement regime in ceasing production at offending plants, and also the role of corruption, as the lines were never properly secured by the police as is required after a raid.

These cases highlight the weaknesses that must be addressed if Russia is to meet the IPR Agreement's obligations for effective optical media regulation. With an estimated 50 plants in operation, raids at a handful of plants, and surprise inspections at very few, IIPA believes there is ample evidence that additional effective enforcement is needed to deter illegal activities, and that such enforcement needs to be called for from the highest levels within the Russian Government.

## **Raids Against Businesses Using Pirate Products**

The Business Software Alliance (BSA) reports the overall quantity of end-user raids against businesses remained high, but that the number and quality of the raids was uneven nationwide. There were improvements in 2007 (589 raids up, from 550 in 2006), but enforcement of IPR is inconsistent throughout Russia. In some regions, such as, Saratov, Voronezh, Krasnoyarsk, Lipetsk, Kursk, Krasnodar, Orenburg, Barnaul, and Izhevsk, there was a marked increase in the number of regular police raids. In other regions, such as, Novosibirsk, the police commenced end-user raids, and in St. Petersburg regular retail piracy store (so-called "channel piracy") raids were undertaken – until 2007, these two locations were largely ignored by the police. The continued inconsistency in the number and quality of raids stems from the lack of a uniform methodology promulgated by the Ministry of Interior (MOI) and the General Prosecutor's Office in relation to implementation of Article 146 of the Criminal Code. In 2007, the police ran more raids against chain retail stores (621, up from 572 in 2006), and increased warehouse inspections. Also, in 2007, the police increased their initiation of criminal cases against end-user pirates (200 cases, up from 114 in 2006) and, for the first time, raided some larger companies. There were a total of 83 end-user court verdicts in 2007, up from 50 in 2006. There were 378 criminal cases initiated against channel pirates, up from 288 in 2006; there were 216 court verdicts compared with just 131 in 2006.

However, in general, the police continue to be reluctant to conduct raids against many medium and large-scale targets; when raids are conducted, the police tend to seize fewer than 10 personal computers ("PCs") on average. This problem is related to the experts' inability to examine large quantities of PCs, a problem connected to the fact that the MOI has not issued an internal order instructing the MOI Expert-Criminal Centers on how to properly conduct software examinations (although some of these centers do prepare expert examinations, this is not their official function). These problems highlight the lack of effective enforcement coordination between prosecutors, police, and rightholders.

## Raids at Storage Facilities and Piracy at Retail Outlets

Several copyright industries continue to report that raids, while undertaken, are not ultimately successful in stopping criminal activity because of: (a) the absence of criminal liability for legal entities; (b) the failure of the police to comply with the Criminal Procedure Code; and (c) the general reluctance of prosecutors to initiate criminal cases.

Raids against pirate warehouses increased in 2007 and there were a number of large seizures of copyrighted materials at these warehouses including a huge stamper warehouse. Major raids were conducted in April, May, June, August, October and November. The Russian government reported that in 2007, it raided a total of 28 warehouses, seizing 7 million illegal optical discs.

The motion picture industry (MPAA) reports that on August 7, the Moscow Organized Crime Police raided a warehouse located in the premises of a clothing manufacturer situated in a special production zone in Moscow. A total of 2 million optical discs on spindles were seized. This is the largest seizure ever from one single warehouse. A criminal case was initiated. On November 1, close to fifty officers of the FSB, accompanied by Russian-Anti Piracy Organization (RAPO), raided seven retail shops and warehouses located in the Krasnodar region. The raid resulted in the seizure of 160,000 pirated music and audiovisual discs, as well as the arrest of the two owners of the company (Nikitin). According to the FSB, the crime syndicate involved in these activities had been in operation for five years and a former head of the local police was behind the syndicate. FSB's activities had diminished in recent years and IIPA members hope that this raid indicates increased FSB engagement. There are reports it is now difficult to find pirate DVDs in this region of Russia as a result of the raid. Even after the initial raid, additional action by the FSB resulted in the seizure of 800,000 more pirated discs. The forensic analysis conducted by RAPO's own lab, housed at the Ministry of Culture's Federal Press and Mass Media Agency (Rospechat), showed that the discs seized matched exemplars from the U-2 optical disc plant in Krasnodar. These forensic examinations have been forwarded by RAPO to the FSB and to the newly established "Federal Service for the supervision of mass communication and the protection of cultural legacy" (Rossviazokhrankultura) in order to have the company's license suspended.

In the third quarter of 2007, RAPO took part in a week-long, nationwide series of actions against music and movie pirates coordinated by the MOI. The operation ('Operation Counterfeit') targeted the production, storage, distribution and retail outlets of pirate CD and DVD pirates throughout the Russian Federation. All divisions and sub-divisions of the Economic Crime Police participated in the actions. These raids formed part of the largest-ever such operation by the Russian authorities. According to the MOI, a total of 29,670 premises were visited and the authorities seized 3.7 million pirate discs containing film and music repertoire of both international and Russian origin. The MOI estimates that the retail value of the recovered product was 147 million rubles (US\$5,993,394). In total, 73 criminal and 39 administrative cases were initiated on behalf of RAPO/MPA member companies. The Fall campaign was widely covered by the national media.

While these raids are positive, the Russian courts have not imposed deterrent sentences against the owners or operators of warehouses, falling short of its IPR Agreement obligation to criminally prosecute in cases of piracy on a commercial scale.

According to the Entertainment Software Association (ESA), video game piracy remains significant in Russia. While raids at the retail level are being undertaken by the law enforcement, there are far too few prosecutions occurring following such raids. While there has been some improvement in the Moscow-city area, the piracy situation in outlying areas and other Russian cities remains problematic.

The book and journal publishing industry continues to report concerns about hard-copy piracy, although online infringement was the primary concern in 2007, and remains so in 2008 (as noted in the section on Internet piracy, below). Popular target works include reference works, textbooks and commercial bestsellers. Illegal commercial photocopying of academic materials is also a problem, necessitating vigilance by universities and schools in monitoring use of legitimate materials on campuses.

## **Internet Piracy Enforcement**

The IPR Agreement obligates Russia to combat the growing threat of Internet piracy “with the objective of shutting down websites that permit illegal distribution of content protected by copyright or related rights” (and especially for websites whose servers are situated in Russia). The Russian Government reports that it has identified 166 offending sites and closed 72 of them. In June 2007, the most notorious website, [allofmp3.com](http://allofmp3.com), was taken down, and has not resurfaced at that Internet address. However, a nearly identical site, apparently owned and operated by the same company has sprouted up in its place, and the illegal distribution of copyrighted material continues there, as well as on many other sites.

Publishers report continuing problems with Internet piracy affecting academic and professional textbooks and reference books. In particular, a family of sites – including <http://ebook-mega-store.com>, <http://download-ebook.org>, <http://download-ebook.in> and <http://www.ebooknetstore.com> – continues to decimate the market for academic and professional materials. Takedown notices have gone unheeded. IIPA urges immediate action against the operators of these sites. Commercial bestsellers are also widely available for download on multiple websites.

Few, if any, criminal cases have been pursued against illegal website operators, or against those who, in furtherance of a criminal conspiracy, purportedly license such sites having no authorization to do so. Russian authorities must step up efforts to investigate Internet piracy of business and entertainment software, books, music, and film material, by a variety of technical means, and there needs to be an increase in the number and disposition of effective criminal investigators.

Given the growing threat of Internet piracy, Russian authorities are allocating far too few resources to fight it. IIPA members report that IP crime is a very low priority for the Ministry of Interior’s Department K (the department with responsibility for combating technological crimes). Although Department K has equipment and expertise, there is not a single person in the department assigned to the sole task of combating IP crime. For many years, rightholders have recommended the establishment of a sub-unit within Department K to deal exclusively with IP Internet cases, and to ensure it is properly staffed, equipped, and trained with detailed methodologies to combat these copyright crimes, especially for the maintenance of evidence.

## **Administrative Enforcement**

The business software industry (BSA) reported 40 administrative court decisions were resolved in 2007 – 35 against end-users, 5 against channel pirates (compared with 38 and zero, respectively, in 2006). There were also a total of 48 end-user settlements and 22 channel piracy settlements. Over the past few years, the average administrative fine imposed has been about 3,680 to 4,906 rubles (US\$150 to \$200) per case.

## **Software Legalization**

BSA reports that the Russian Government has responded seriously to the strong market demand for legal software in the Russian education system. Important steps were undertaken in 2007 to implement a school (kindergarten to 12th grade) desktop legalization program that should eliminate piracy in this important sector. The Russian Government is also taking steps to work with BSA member companies to make technology more relevant, accessible and affordable for Russian schools and pupils. BSA anticipates that these programs will yield noticeable reductions in software piracy in 2008.

## **Optical Disc Plant Licensing and Inspections**

The lack of clear authority for optical disc licensing and inspections in 2007 was a significant setback in the enforcement of optical disc production and distribution in Russia. The transition period

between the old licensing authority (Roshrankultura) and the newly established “Federal Service for the supervision of mass communication and the protection of cultural legacy” (Rossviazokhrankultura) is over. Rossviazokhrankultura has not yet commenced regular inspection of plants or the suspension of raided licensed plants.

The lack of regular surprise inspections of all the production facilities exacerbates Russia’s optical disc piracy problem, and is in contravention of Russia’s IPR Agreement obligations. Instead, according to IIPA’s information, in 2007, Russian authorities inspected only three (out of about 42) licensed, and three unlicensed manufacturing facilities. Only one of the plants operating without a license was closed.

Now that both the optical disc plant licensing authority (Rosokhrankultura, now Rossviazokhrankultura) and the Economic Crime Department of the Ministry of Interior have completed their reorganizations, we hope that they will address their present lack of adequate staffing and be able to engage in the kind of monitoring contemplated by the IPR Agreement. More training and more resources need to be available to conduct the promised effective enforcement. In addition, the problem of optical disc piracy in Russia has moved from major production facilities to smaller “burning” operations which require more flexible enforcement mechanisms and resources. The Russian Government is also not prosecuting the “persons and enterprises” involved in the manufacturing, storage and/or distribution of optical discs as required by the IPR Agreement. Nor is the Russian Government initiating investigations to determine and prosecute the owners, distributors and manufacturers of these optical disc products as required by the IPR Agreement.

On a positive note, the Russian Government has taken steps to address the problem of the Russian State owned Restricted Access Regime Enterprises (“RARE”) that house or run optical disc plants. The Russian Government reported in the Fall of 2007 that there were ten of these RARE plants, that is, OD plants on government controlled military-industrial sites, and that it was taking steps against nine of the ten such plants to cancel their leases. This is a positive step. IIPA continues to recommend that, in addition to lease cancellations, any plant engaged in the production of illegal optical disc material should also be the subject of a criminal investigation, closure, and the prosecution of those involved. IIPA members report that at year’s end, there were seven such RARE plants still in operation.

There are key legislative reforms still needed to improve optical disc enforcement. Russia has not yet enacted a sound optical disc licensing, revocation, and recordkeeping regime as described in the IPR Agreement. This essential IPR Agreement obligation had a June 1, 2007, deadline and is key to addressing many of the current OD piracy problems – both the manufacturing and distribution of pirate material. Rosokhrankultura, to its credit, tried to apply such measures in a *de facto* manner during the reorganization in 2007, but the absence of clear statutory authority limited its success. IIPA is concerned that there is no known timetable in the Russian Government to meet this obligation. The current combination of the federal law on (optical disc) licensing, the Administrative Code, and government regulations on the licensing of the reproduction of discs (including audiovisual works), does not allow the regulatory body to suspend (or revoke) a license at all. 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 2007, Russian manufactured pirate ODs, which were forensically matched to 13 individual replication plants, were found in the following countries: Ukraine, Hungary, Lithuania, Moldova, Poland, Germany, Latvia, Serbia and New Zealand, and pirate optical discs suspected to be of Russian origin were found in a variety of additional countries, including the United States.

## **Implementation of the IPR Agreement**

The IPR Agreement has the status of an international agreement under U.S. and Russian law. In addition to the optical disc issues and obligations discussed above, the IPR Agreement (in the Side Letter) also requires the Russian Government to:

1. Address the need for effective criminal enforcement, focusing in particular on piracy “committed for purposes of commercial advantage or private financial gain” by referring “to the Supreme

Court of the Russian Federation a proposal for it to pass a resolution of the Plenum of the Supreme Court” to clarify for the courts their practices so that they impose stiff penalties for IPR violations, and requiring that judges “take into account the high degree of public harm from such infringement.”

2. Address the need for effective border enforcement by “significantly increas[ing] the percentage of export shipments inspected” and to provide information to “appropriate authorities for investigation and prosecution.” Also, the government will seek to enact legislation (by June 1, 2007) “strengthening Customs officials’ authority to take actions *ex officio* with respect to suspected exports and imports of pirated or counterfeit goods” and “encourage Customs officials to use such authority.”

3. Address the need to combat the growing threat of Internet piracy “with the objective of shutting down websites that permit illegal distribution of content protected by copyright or related rights” (and especially for websites whose servers are situated in Russia (which in a footnote specifically says “[s]uch as allofmp3.com”) by:

A. Taking actions “against the operation of websites...that promote illegal distribution of content protected by copyright or related rights, such as phonograms (sound recordings).”

B. “[I]nvestigat[ing] and prosecut[ing] companies that illegally distribute objects of copyright or related rights on the Internet.”

C. Enacting by June 1, 2007, legislative amendments to “provide that collecting societies may act only on behalf of right holders that explicitly authorize such action” and the “provisions needed to implement the World Intellectual Property Organization (WIPO) Copyright Treaty [WCT] and WIPO Performances and Phonograms Treaty (WPPT).”

4. Adopt legislation to “fully implement the TRIPs Agreement and other IPR-related international agreements” to which the United States and Russia are already parties (as well as “fully implementing the WCT and WPPT”). Ensure that any legislative, regulatory or other measures made prior to accession, i.e. Part IV of the Civil Code, will not “result in a lesser degree of consistency than exists on this date” (November 19, 2006) with the TRIPs Agreement or any other international IPR agreement to which the U.S. and Russia are parties.

5. Ensure on-going dialog and work to implement the obligations above through a Bilateral Working Group, as well as to provide appropriate training to Russian enforcement officials.

The IIPA continues to recommend several additional measures to improve enforcement in Russia. These include:

1. Making certain that the optical disc licensing regime includes: (a) stricter controls on the importation of polycarbonate and machinery; (b) mandatory seizure and destruction of machinery used to produce pirate materials (regardless of the ownership of the machinery, and the relationship of the “owner” of the machinery to the infringement); and (c) the introduction of criminal penalties for the owners of such plants. Plant inspections must be undertaken regularly and exemplars tested jointly with rightholders. In addition, any plant licensing regime should extend in scope to the operators of telecine machines and mastering laboratories used to pirate audiovisual works.

2. Announcing from the office of the President, that fighting copyright piracy is a priority for the country and law enforcement authorities and instructing the Inter-Ministerial Commission, headed by the First Deputy Prime Minister, to deliver reports every three months to the President on what steps have been taken to address the problem. Also, it is imperative to establish a central coordinating body for law enforcement authorities with wide powers, derived directly from the President, to combine the efforts of the Economic Crime Police, Department K (the New Technologies Police), and the Police of Street Order.

3. Amending the relevant code(s) so that legal entities can be subject to criminal liability (a bill to do so was considered, but never adopted by the Duma in 2007).

4. Using the existing authority to take down websites offering infringing copyright materials of films, music, business and entertainment software and books, and to criminally prosecute those responsible, including unauthorized collecting societies (such as ROMS, FAIR, ROUPI and FOSP) that purport to grant licenses for rights that they do not possess, as well as introducing clear provisions to establish liability in civil and criminal cases for ISPs that fail to operate in a responsible manner, and for services that effectively promote, contribute or otherwise induce infringement.

5. Using the improved border enforcement authority to stop the import of optical grade polycarbonate used to produce illegal product, in addition to the export of shipments of product abroad.

6. Initiating investigations into and criminal prosecutions of organized criminal syndicates that control piracy operations in Russia (including operations that export pirate material to markets outside Russia).

7. Encouraging the Economic Police (including the Anti-Fraud Department) to substantially increase the number of anti-piracy raids, especially against large-scale targets, and to extend their actions to the distribution networks supplying illegal street sellers as well as to bring more cases to the prosecutors.

8. Taking action to undo the situation in St. Petersburg, where legitimate video and DVD markets have been effectively lost due to the activities of a collective management organization known as the Association of Collective Management of Authors' Rights which falsely claims to represent MPA member companies and which, incredibly, enjoys the support and protection of local officials, and requires (in violation of federal law) the application of a pirate hologram on all products sold with its license. Similar organizations have proliferated in Russia, including MAS (Interregional Authors Partnership), ROSA, and MO UIPKO (Interregional Union for Collective Management of Rights). The recording industry (Recording Industry Association of America, RIAA, and International Federation of the Phonographic Industry, IFPI) reports that the only legitimate market for selling international repertoire (and most Russian music) is in Moscow. Elsewhere in the country – for example, in St. Petersburg, Novgorod, Yekaterinberg, Rostov-on-Don, and the Krasnodar region – the market is flooded with pirated music. In St. Petersburg, musical disc distribution is controlled by an unauthorized organization (OKO) that requires retailers to pay “membership fees” in order to sell optical discs in that city.

9. Developing effective measures to criminalize the camcording of motion pictures in theaters, since this is the primary source for illegal DVDs.

## **The IPR Agreement Obligations: Status Report**

As noted, since the signing of the IPR Agreement in November 2006, some steps have been undertaken, but much remains to be done. One notable “positive” step that simultaneously illustrates the weakness of the Russian legal/enforcement system is the closure of the notorious website [allofmp3.com](http://allofmp3.com) and the surprising acquittal of the former CEO Denis Kvasov. Although IIPA and its member are obviously pleased that [allofmp3.com](http://allofmp3.com) was itself taken down, we note that a nearly identical site is now in operation that is apparently owned and operated by the same or related parties – illustrating the need for corporate criminal liability and the criminal sentencing of principals of pirate operations, as well as the need for better information about and the investigation of these juridical entities. As noted, Russian enforcement authorities have undertaken plant and warehouse raids, and seized large quantities of illegal material. Russia has been meeting quarterly with the U.S. through the U.S.-Russia Working Group, which is also a positive step toward ensuring that dialog and work to implement the IPR Agreement continue.

IIPA is disappointed that the June 1, 2007, deadlines were not met, with Russia still needing to: (1) address the problem of illegal optical disc manufacturing; (2) effectively enforce criminal laws with deterrent penalties for IPR violations (especially focusing on larger enterprises – and whether committed for purposes of commercial advantage, private financial gain, or resulting in substantial economic harm); (3) combat Internet piracy; (4) implement international IPR agreements, up to the WTO-TRIPs levels; (5) enact legislation (Article 393 of the Customs Code) to provide Customs officials with the authority to take actions *ex officio*; and (6) implement and ratify the WIPO “digital” treaties (the WCT and the WPPT).

# **DEFICIENCIES IN THE RUSSIAN LEGAL REGIME**

## **Overview of Legal Reforms**

Effective enforcement is itself predicated upon the existence of a comprehensive and modern IPR legal regime, elements of which continue to be absent in Russia. Russia has made progress on legal reforms. Here are some of the recent highlights:

- The Criminal Procedure Code was amended in 2006 to allow Russian police, in addition to prosecutors, to initiate criminal investigations.
- The Criminal Code was amended in January 2007 (in force April 9, 2007) to increase IPR penalties from 5 to 6 years imprisonment and to reclassify “grave crimes.” This latter change allows prosecutors and enforcement authorities to use investigative measures far exceeding those under the prior “medium gravity” threshold.
- The Supreme Court, on April 26, 2007, adopted a resolution detailing IPR (Articles 146 and 180) enforcement practices. This directive was aimed at the lower courts to provide guidance to them for IPR enforcement (along with a similar June 2006 resolution directed at civil IPR cases).
- Amendments to the Administrative Code were adopted on April 9, 2007, with a new Article 14.33 on unfair competition. This change means that the introduction of illegal goods into markets can result in fines on either individuals or legal entities (as an administrative liability). Article 14.33 provides for additional sanctions only after the facts of copyright infringement have been established. This is why this provision does not pertain to or require the seizure or forfeit of pirate product. The Administrative Code was positively amended in late 2006 by revising the timetable for administrative investigations which now permits up to two months (the old provision, was two days), and, the statute of limitations was extended to a year. There were also penalty increases, with further revisions in July 2007 (changing the sanctions from multiples of the minimum monthly wage to ruble equivalents) which now provide sanctions of 30,000 to 40,000 rubles (US\$1,225 to \$1,634).
- Amendments to the Code of Administrative Misdemeanors were adopted in 2005 and entered into force in January 2006. These amendments add administrative liability for copyright infringements and the confiscation of such products.
- Amendments to the Civil Code (in force, January 1, 2008) provide as a remedy for infringement, the “liquidation of a legal enterprise” – if used effectively against illegal companies (including optical disc producers) this should improve enforcement.
- Administrative amendments (Resolution #185, March 27, 2007) extended the existing street sale ban – applicable to street vendors and kiosks – from music and audiovisual material, to software and database materials as well.

These legal reforms are a step in the right direction toward meeting the IPR Agreement obligations, and other essential steps are pending government review or Duma adoption. But, there are many other essential legal reforms, some required by the IPR Agreement, that have yet to be adopted.

Most important are the long-promised optical disc regulations which would: properly regulate the licensing of plants and their equipment and raw material used in production; provide for the surprise inspection of plants; and, provide for closure of illegal plants and the imposition of sanctions – 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.

In fact, from March 2007 until June 2007, no Russian organization or agency had the authority to inspect OD plants while the Federal Service with such authority was abolished as part of the government reorganization. The newly established Rossviazokhrankultura now has the authority to inspect OD plants, but, as discussed above, has not commenced action against the plants while awaiting further regulatory authority and more resources. In lieu of clear authority, many questions and inadequacies remain. Amendments to the 2002 Reproduction Regulatory Regulations were adopted on October 2, 2007 (further amending the April 2006 regulations). The regulations allow for unannounced inspections of replication plants and for the suspension, as well as the initiation of the cancellation, of operating licenses of facilities found to be in breach of the regulations (Article 13). Thus, Rossviazokhrankultura can issue and check licenses, and it can suspend a license, but it cannot close a plant. The regulations foresee only one regular (planned) visit every five years to each plant, absent information about piracy at a plant. The current regulations seem only to have resulted in further confusion about the ability of Rossviazokhrankultura to suspend a plant license without a court order. In addition, there are no provisions for properly seizing evidentiary material under the administrative procedures (which time-out after two months). And further, the Federal Service was not granted such authority under the Administrative Code after the reorganization, thus denying administrative remedies. Overall, this is not what the IPR Agreement calls for to effectively enforce optical media production and distribution, and criminal (and other remedial) relief for infractions. Rather, there needs to be clear authority in regulations (or legislation) to license optical disc production, suspend (without court order) licenses of violators, and to permanently close illegal plants, as well as to commence criminal and other enforcement actions. Thus, although IIPA members welcome the fact that the new Federal Service is in operation, we are concerned that it is still operating under the existing, inadequate, plant licensing and inspection regime, without the needed and promised comprehensive and more effective regime.

One other legislative recommendation made in 2007 would mark a step backward if adopted. The proposal, if enacted, would require copyright product labels (or stickers) as individual identifiers on all legitimate product sold in Russia. This proposal, made in the past by the Moscow City government and others in the federal government (with purported new proposals for 2008), however well intentioned, will have the practical effect of hampering the dissemination of legal product, while illegal product, with counterfeit labels, is freely distributed.

Other priority legal reforms that need to be adopted and that are IPR Agreement obligations include: (1) the Criminal Code which needs to be amended to make legal entities liable for IPR crimes; (2) the Customs Code which must be amended to add *ex officio* authority (amendments were introduced in the Duma but never enacted in 2007); and (3) the complete and proper implementation (in the Civil Code) and ratification of both digital treaties – the WCT and the WPPT.

One particular concern, pertaining to ensuring that collecting societies can only operate within the scope of the mandate that they receive from rightholders, was presumably corrected in Part IV of the Civil Code and went into force on January 1, 2008. We look forward to effective implementation of this critical provision. Since its adoption, IIPA and its members have commented on two major overarching concerns with the new Civil Code: first, that there are many unclear provisions (including legal terms and definitions) whose context and relation to other provisions in the Civil Code lacks clarity. One example is Article 1326 which does not explicitly clarify that the making available right (Article 1324(2)(4)), or any other interactive use, is covered by the statutory license in Article 1326(a). These ambiguities may cause challenges to enforcement efforts. Second, there are administrative law principles throughout the Civil Code that likely cannot be enforced by civil or criminal procedures.

In 2007, IIPA made several recommendations to address some of these problems and to improve enforcement generally. These included a recommendation for the introduction into the Civil Code of a clear definition of "Internet Service Provider" ("ISP") and confirmation of clear third party liability in civil and criminal law for facilitating Internet piracy, as well as a duty to provide all necessary information to law enforcement agencies in Internet piracy cases. In addition, to stem the rise in Internet piracy that is

harming many of the copyright industries – including the book, business and entertainment software, movie and music industries – Russia should undertake steps to address and implement notice and takedown procedures for websites hosting illegal material.

As part of our comments earlier in the year, IIPA recommended that, in order to comply with TRIPs and the WIPO digital treaties, Russia should amend the Civil Code, Part IV by addressing the following:

- Article 1229, the Civil Code's "three-part" (fair use) test is far too broad and must be narrowed. It does not currently comply with Article 9(2) of the Berne Convention, Article 13 of WTO/TRIPs and Articles 10 and 16 of the WCT and the WPPT, respectively. The "three-part" test must be re-stated in its entirety in Article 1229. Further, in Article 1274(3), any taking of a work for the purposes of parody, should be limited to that portion of the work necessary for this purpose (one suggestion is to delete paragraph 3, if it is not so limited in scope, and allowing the three-part test to govern this use).
- Articles 1273 and 1306 in the Civil Code contain an overly broad exception for copying for "personal needs" (or alternatively, translated as "personal purposes"). IIPA recommends that the best way to "fix" this exception would be to clearly apply the "three-part" test to narrow the scope of the exception as well as to apply it only to specific instances (and to clearly, as it does now, exclude some activities from these personal use exceptions, such as camcording and telecine copying).
- Article 1280(4) of the Civil Code violates the "three-part" test for permissible exceptions, and needs to be significantly narrowed.
- Articles 1299 and 1309, respectively for works and objects of neighboring rights in the Civil Code fail to provide WCT (Article 11) and WPPT (Article 18) compliant levels of protection – because they are too narrow, and do not provide adequate remedies for technological protection measures (TPMs).
- Articles 1270(2)(1), 1317(2)(4) and (6), 1324(2)(5) and (6), and 1330(2)(2) contain definitions of "reproduction" that fail to adequately cover the creation of temporary copies because they explicitly state that temporary copies that constitute "integral and essential" parts of processes conducted with the sole purpose of lawfully using or bringing works or objects of neighboring rights to the public do not qualify as reproductions.
- Articles 1232-38, 1240, 1286, and 1307-08 over-regulate contractual relations in connection with copyright and neighboring rights (including the application of general rules on assignments and licensing of exclusive rights).
- Articles 1281, 1282, 1318, and 1324 fail to clarify that the Civil Code provisions apply equally to pre-existing works. (By one reading – a cross-reference to Articles 5 and 6 with Articles 1281 and 1282 – the Civil Code does apply to pre-existing works – but this should be clarified).
- Article 1231 fails to clarify whether non-Russian works and objects of neighboring rights receive national treatment (i.e., that foreign works are protected the same as Russian works).
- Article 1231 mixes copyright, patents, trademarks and other IP together, where it should be differentiated; separately, the right of remuneration needs clarification.
- Steps need to be taken to make certain that essential – treaty required – remedies for IPR infringements found in the Criminal Code, the Criminal Procedure Code, the Administrative Code and the Customs Code will continue to apply in light of the adoption of the new Civil Code and the repeal of the copyright law.

- The Civil Code fails to clearly provide for third party liability for civil and criminal facilitation of Internet piracy, as well as a duty to provide all necessary information to law enforcement agencies in Internet piracy cases.
- Article 1244 needs to be corrected so that the Civil Code further limits the current abusive practices of collecting societies in Russia. This includes amending Articles 1244(4) and 1326, so that rightholders can freely exclude their works and phonograms from the accredited societies' repertoires and can in lieu authorize their own collective societies (by direct contract).
- Article 1326(1) should be clarified so that the making available right applicable for objects of neighboring rights is not limited by the statutory license in that provision.
- Article 1334(2) should be clarified so that any use of a protected work or object of neighboring rights incorporated into a database is clearly subject to the rightholder's exclusive rights (as otherwise limited by the general narrow exceptions of the Code).
- Article 1239 of the Civil Code provides procedures for granting compulsory licenses without specifying conditions. This type of licensing is applicable only to patents and should be so stated.

There are several positive features of the Civil Code that deserve mention, as well. These features include:

- Article 1242 which clarifies that collective administration organizations can only operate within the mandates they receive from rightholders.
- Article 1253 which adds civil (but, unfortunately, not criminal) liability for legal entities.
- Articles 1252 and 1302 which adds remedies for the seizure and destruction of materials and equipment used in infringements. However, this could be further improved by deleting the exception for the sale of materials by the state for "income," and by parallel changes in the respective procedural codes.
- Article 1261 which adds clear protection for computer programs as "literary works."
- Article 1240 and 1263 which provides proper rights of ownership and exploitation of audiovisual works.
- Article 1270(11) which provides a clear making available right consistent with the digital treaties; and, Article 1245 which provides a private (personal purpose) levy.
- Article 1301 which provides statutory damages (ranging from 10,000 to 5 million rubles).

## **GENERALIZED SYSTEM OF PREFERENCES PROGRAM**

In the first ten months of 2007, Russia benefited from almost \$404 million in unilateral, duty free benefits to the U.S. market. In 2006, Russia benefited from \$512 million in duty free Generalized System of Preferences (“GSP”) imports into the United States. In contrast, U.S. companies suffered losses in the billions of dollars due to copyright piracy in Russia.

The IIPA first filed its GSP Country Practice Petition seven years ago. Again, in 2007, IIPA testified on this petition – for the fourth time since the original petition was filed and six years after the petition was accepted by the U.S. Government.<sup>3</sup> The Government of Russia is not complying with the eligibility requirements for GSP benefits. The GSP Subcommittee should terminate this investigation with such a finding and should remove Russia’s eligibility to participate until such time as it has achieved “adequate and effective protection” of intellectual property rights as contemplated under the GSP statute.

### **RUSSIAN FEDERATION Estimated Trade Losses Due to Copyright Piracy (in millions of U.S. dollars) and Levels of Piracy: 2003-2007<sup>4</sup>**

INDUSTRY	2007		2006		2005		2004		2003	
	Loss	Level								
Motion Pictures <sup>5</sup>	NA	NA	NA	NA	266.0	81%	275.0	80%	275.0	75%
Sound Recordings & Musical Compositions <sup>6</sup>	313.0	58%	423.0	65%	475.9	67%	411.9	66%	405.0	64%
Business Software <sup>7</sup>	1075.0	75%	1208.0	80%	894.0	83%	800.0	87%	704.0	87%
Entertainment Software <sup>8</sup>	NA	79%	282.1	72%	223.9	82%	255.8	73%	NA	80%
Books	42.0	NA	42.0	NA	42.0	NA	42.0	NA	40.0	NA
<b>TOTALS</b>	<b>1430.0</b>		<b>1955.1</b>		<b>1901.8</b>		<b>1784.7</b>		<b>1424.0</b>	

<sup>3</sup> See IIPA filing in regard to the Generalized System of Preferences (“GSP”): Notice Regarding the Acceptance of Product and Country Practice Petitions for the 2007 Annual Review, 72 Fed. Reg. 51,264 (Sept. 6, 2007).

<sup>4</sup> The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described on the IIPA website at [www.iipa.com/pdf/2008spec301methodology.pdf](http://www.iipa.com/pdf/2008spec301methodology.pdf).

<sup>5</sup> MPAA’s trade losses and piracy levels for 2006 and 2007 are not available.

<sup>6</sup> RIAA’s piracy rate is estimated for physical product only and does not take into account the very serious problems connected to Internet piracy, a problem that is particularly important in Russia given the role of illegal pay-per-download sites that are virtually non-existent outside of Russia. The piracy loss decrease is the result of some decrease in the physical piracy rate – from an estimated 65% in 2006 to 58% in 2007, along with a decrease in market share for American content due to greater increased investment in, and production of, Russian repertoire.

<sup>7</sup> BSA’s 2007 statistics are preliminary. They represent the U.S. software publishers’ share of software piracy losses in Russia, and follow the methodology compiled in the Fourth Annual BSA and IDC Global Software Piracy Study (May 2007), available at <http://www.bsa.org/globalstudy/>. These figures cover, in addition to business applications software, computer applications such as operating systems, consumer applications such as PC gaming, personal finance, and reference software. BSA’s 2006 piracy statistics were preliminary at the time of IIPA’s February 12, 2007 Special 301 filing and were finalized in June 2007 (see <http://www.iipa.com/statistics.html>) as reflected above.

<sup>8</sup> ESA’s estimated piracy level for 2007 reflects a weighted average of three forms of piracy: PC piracy, console piracy and handheld piracy. See Appendix B of this report.