

# RUSSIAN FEDERATION

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

### 2010 SPECIAL 301 REPORT ON COPYRIGHT ENFORCEMENT AND PROTECTION

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

**Executive Summary:** In 2009, Russian law enforcement officials continued to engage in criminal enforcement activity, including raids against warehouses and retail establishments, and some optical disc production facilities. However, for the past two years, the total number of actions undertaken by enforcement officials has been on a decline. Still, the business software industry has seen – over the past five years – a significant decline in piracy (including a 19% drop in the last four years). This is due to a combination of commercial success, and the unique nature (among the copyright industries) of effective criminal and civil enforcement for software publishers, namely activity directed against end-user piracy. The commercial successes in the business software industry are in large measure the result of the 2008 decision of the Russian Ministry of Education to legalize software in Russian schools, entailing the government-funded purchase and distribution of licensed copies of both Russian and non-Russian software products throughout the country. The enforcement successes have come because of a combination of industry enforcement programs, along with cooperation on criminal enforcement from relevant government authorities.

However, the business software industry is the only industry with an overall positive story in Russia in 2009. The majority of copyright industries – motion picture, recorded sound, entertainment software, music and book publishing – experienced another year of disappointment in Russia in 2009, because of the smaller number, size, and scope of enforcement actions undertaken by the enforcement authorities, a lack of focus by Russian authorities on the growing threat of Internet and other forms of piracy, with ongoing high piracy rates – for hard and digital copies – keeping legitimate markets from achieving their full potential. While Russia's law allows for enforcement against hard goods piracy, it is inadequate for addressing Internet piracy and must be amended to provide for ISP liability.

The record industry is particularly concerned about the continued operation of various pay-per-download services that have taken the place of the infamous allofmp3.com, as well as peer-to-peer piracy. The pay-per-download websites are operating under "licenses" granted by collecting societies that have no authority to issue such licenses. These rogue collecting societies continue to plague the Russian market now two years after Russian Civil Code amendments went into force which, among other things, clarified that these types of activities by both websites and collecting societies are illegal. Recent activities to accredit legal societies are fraught with problems even though the accreditation process was supposed to curtail illegal activities. In fact, the accreditation of a single collecting society (VOIS) to collect on an extended license basis on behalf of performers and record companies has resulted in market confusion and serious questions about its compliance with the Russian law, and international norms concerning the fair representation of foreign rightsholders, as well as, proper transparency, accounting and governance rules. IIPA calls upon the Russian government to take an active role in ensuring that reasonable agreements are reached with VOIS (or any other accredited society) that permit the effective representation of U.S. rightsholders.

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<sup>1</sup> For more details on Russia's Special 301 history, see IIPA's "History" appendix to this filing at <http://www.iipa.com/rbc/2010/2010SPEC301HISTORICALSUMMARY.pdf>. See also the previous yearly country reports at <http://www.iipa.com/countryreports.html>.



All the copyright industries concur that Russia needs to significantly improve its criminal enforcement activity well beyond current levels, including the imposition of deterrent penalties, as well as improving the quality of investigations and prosecutions. Optical disc piracy remains a very serious problem for some industries – notably, the motion picture and entertainment software industries, even as changes in the marketplace have resulted in a modest decline in physical (hard copy) piracy for some of the copyright industries. In addition to the rapid rise in Internet piracy, other forms of piracy – for example, unauthorized camcording of motion pictures in theaters, and unauthorized access to journals online, have plagued the growth of legitimate markets and investment. In fact, camcord piracy exploded in Russia in 2009, with Russia becoming the world's leading source of illicit full-video recordings of films from theaters.

The IIPA encourages the Obama Administration to continue to work with the Russian Government to make further and faster progress on intellectual property rights (IPR) issues. In 2009, the U.S. and Russian Governments signaled a "fresh start" to U.S.-Russia relations, and in concert, various new mechanisms to further cooperation (including a new U.S.-Russia Presidential Economic Commission). IIPA welcomes these developments and continues to offer its cooperation to improve the marketplace for all the copyright industries in Russia. As President Obama recently noted, the "insufficient protection for intellectual property rights" (citing as examples the piracy of everything from "DVDs to very sophisticated software") is a priority "at the highest levels of foreign policy" for his Administration because it promotes technological advances, increases exports and open markets, and results in more jobs.<sup>2</sup> Russia has also expressed interest in promoting technology, better markets, and jobs. For example, in January 2008, then-presidential contender Dmitry Medvedev told a Moscow City forum of non-governmental organizations that "disregard for the law" must be stopped, and that a national program to combat IPR piracy was needed. A roadmap for success exists for this scenario, namely for the USG and Russian authorities to ensure the full implementation of the November 19, 2006, IPR Agreement between the Governments of Russia and the United States.<sup>3</sup> The IPR Agreement was entered into in the context of Russia's efforts to accede to the World Trade Organization (WTO) and it 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. As the U.S. Government has consistently noted, Russia must meet the IPR Agreement obligations on protection and enforcement as part of its entry into the WTO. Russia's full compliance with the IPR Agreement should be considered in the Special 301 context, as well as during its review under the General System of Preferences (GSP) program. Compliance with the IPR Agreement will help to significantly reduce piracy, which harms all creators – U.S. and Russian alike – and should be appropriately reflected in Russia's Special 301 status. After a delay, the U.S. and Russian IPR dialog rooted in the 2006 agreement, was re-started in 2009. This is a positive step, but only if it leads to an enhanced and detailed dialog on mutual IPR matters. As such, the copyright industries continue to offer support for the Obama Administration in this endeavor, to reinvigorate technical support as appropriate, and to pursue a priority and activist work plan.

This past year, there was little change regarding the market conditions under which the copyright industries operate in Russia. Thus, top copyright industries priorities still include:

Enhancing the growth of digital markets for copyrighted works by eliminating the operation of illegal pay-per-download Internet sites and illegal peer-to-peer services. Stopping the illegal Internet sites and peer-to-peer services that illicitly distribute copyrighted content can be achieved, in large measure, by enforcement actions against the rogue societies illegally offering "licenses" that they have no authority to grant, as well as against the websites operating in concert with these rogue societies. Amending Russia's Civil Code to provide for ISP liability and

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<sup>2</sup> White House Press release of January 22, 2010, of a transcript of remarks by President Barack Obama during a town hall meeting at Lorain County Community College, Elyria, Ohio.

<sup>3</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).

establishing a specialized Internet IPR Unit within the Ministry of Interior are of utmost priority if Russia is to be able to respond to President Medvedev's call to improve the effectiveness of IPR protection on the Internet.

Improving the certification process and implementing fair representation by legitimate collecting rights societies – as required in Part IV of the Civil Code (under the authority of Roshrankultura) – is also a priority. This includes the ability of foreign rightsholders to be fairly represented in practice and consistent with law, by a collecting society of their choosing, and that the state (e.g. VOIS) adopts open, transparent and responsible policies that comply with international treaties and norms on practices for fair representation, accounting and governance, to determine the conditions for the use of their works, phonograms and performances.

Moreover, it is a priority that the Government of Russia take steps against illegal camcording of motion pictures in theaters.

The Russian Government must also undertake coordinated criminal actions against organized criminal syndicates that dominate some of the copyright industry markets, especially the video game, music, motion picture, and book industries, as well as actions against businesses using unlicensed software. Legislative reforms to provide for the criminal liability of corporate entities are also necessary.

Last, it is imperative that prosecutors: (1) coordinate their efforts with the police; (2) bring more IPR cases; and (3) conduct expeditious investigations. One step that would significantly improve criminal enforcement in Russia is the need to update the existing methodology (adopted in 2004) for the investigation and prosecution of copyright and related rights infringements. Russian criminal law has undergone several amendments in recent years, making the existing methodology prepared by the General Prosecutor's Office outdated. IIPA recommends that the Ministry of the Interior, the General Prosecutor's Office, and the Investigational Committee jointly prepare – with all rightsholders (as was done in 2004) – a new official uniform methodology, including a methodology for the treatment of Internet piracy cases. The absence of such a methodology has resulted in prosecutorial investigators refusing to initiate many criminal cases that, under the existing criminal law, should be prosecuted.

## **COPYRIGHT ENFORCEMENT IN RUSSIA**

**Criminal Enforcement in General:** Criminal enforcement in Russia remains a priority for IIPA and its members. In 2009, the Russian Government conducted some significant raids and seizures and the Russian police continued to take actions against copyright infringers, particularly with respect to street vendor piracy and companies involved in the installation and use of pirated software. However, the overall number of raids, seizures, and criminal cases commenced, was reportedly down from previous years.

In 2009, 7,147 criminal copyright cases were initiated (that is, investigations were commenced), 5,270 criminal cases were sent to court, and approximately 3,800 individuals were convicted. In 2009, the first criminal case in Russia was initiated against a pirate Internet site, as well as the first criminal case against an illegal camcorder. Although no 2009 statistics were made available by the Russian Ministry of the Interior (MOI), they reported a total of 4,088 criminal convictions in 2007, 7,423 in 2006, and 2,924 in 2005 (and a total of 7,578 and 6,960 cases in 2007 and 2006, respectively, were commenced in each of those years). The reduction in the number of initiated criminal cases is a concern to U.S. industry which is worried that this may indicate a reduction of police activity in the area of IPR enforcement.

As in recent years, there were some deterrent sentences and prison terms applied by the Russian courts, including a handful aimed at serious repeat offenders. There were also a considerable number of administrative and criminal penalties imposed against illegal hard-copy vendors. For example, there have been improvements at the Gorbushka market according to the motion picture industry (which regularly inspects the market). As a result, it now appears that pirated products are not sold as openly as they once were at this market (in part, because the

Gorbushka market operators are now cooperating with rightsholders by terminating lease agreements with detected pirate traders).

Thus, there is evidence that enforcement activities against physical piracy and street vendors (as opposed to online piracy) are improving the conditions for some businesses in Russia. Unfortunately, any successes will be short-lived if the recent trend of diminished enforcement activity continues. For example, the business software industry reported fewer end-user raids and Internet infringement actions, fewer criminal cases commenced, and thus fewer convictions in 2009, than in previous years.

The motion picture industry reports that enforcement activity in the past few years, especially in Moscow and St. Petersburg, has remained relatively consistent. Given the economic crisis, the theatrical market declined by approximately 12% in 2009.

The music industry continues to emphasize the critical need for criminal, rather than civil, enforcement directed against Internet pirates – websites and illegal collecting societies. Criminal enforcement needs to be directed as well against optical disc piracy – namely against the criminal enterprises dedicated to the manufacture, distribution and sale of pirate materials. As set out in previous reports, addressing commercial-scale piracy through criminal measures is an obligation of WTO members, because only governments can effectively deal with these problems. In contrast, civil measures are intended for “civil” actions, that is, disagreements between parties. Massive and organized criminal activities are not civil disputes, nor are civil measures capable of delivering the requisite level of deterrence.

Criminal actions are necessary because civil actions remain problematic due to the very limited scope of available relief. Civil enforcement inadequacies include: remedies generally limited to the seizure of specific repertoire that is the object of a lawsuit 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 (which is the only way to bring proceedings in cases where bogus companies operate); and the absence of the notion of contributory liability under the Russian civil law system dealing with copyright infringements. Physical piracy enforcement is also hampered by the requirement that exemplars be collected only by state officials (or jointly with rightsholders), and by a statutory reliance on government expert reports, which both cause trial delays. Thus, effective action against massive and organized illegal activities often is only possible by way of criminal enforcement.

In general, the copyright industries report that deterrent criminal penalties are still not being imposed against optical disc plant owners or, with few exceptions, against plant operators. Even more troubling, as the markets move to the Internet, is that deterrent criminal penalties are rarely, if ever, imposed against owners of commercial Internet operations. One practical problem that has surfaced recently, is that police and prosecutors have had difficulty applying the criminal law thresholds to Internet crimes which has resulted in very few such cases commencing and even fewer ending in court rooms. The IIPA is unaware, in all of the years of optical disc piracy, of a single plant owner who was convicted under the criminal law, and only a handful of plant operators (i.e., plant managers or employees) have served jail time or been given suspended sentences. Far fewer criminal cases were initiated against optical disc plants in 2009 than in previous years, a downward trend in fact, of the past several years; in addition, many older cases have languished for a long time.

The lengthy investigative process must also be examined and redressed, particularly at the provincial level. As the government continues to rely on its own experts in investigating, examining and prosecuting IP violations, it should take measures to increase the number of so-called experts and consider the appointment of a specialized unit of investigators and prosecutors, adequately trained and provisioned to effectively address IP crimes. Due to the lack of adequate staffing and the high volume of work, examinations of products seized take months. For example, in a case involving the seizure of a large quantity of pirated video game material in Novosibirsk, it has taken more than

two years for the experts to finalize their seizure report. Delays result not only from a lack of experts, but also from a lack of subject matter expertise, particularly as it relates to video games. When experts are available, they all too often lack the type of training necessary to adequately perform their duties. For instance, an Entertainment Software Association (ESA) member company reports receiving an examination report from a government expert indicating that the expert was unable to conclude whether a seized shipment of video game product was legitimate as a result of a lack of subject matter experience. ESA members have provided training materials and offered assistance to Russian law enforcement experts to familiarize them with issues specific to the video game industry, but law enforcement officials have not demonstrated an interest in obtaining information related to forensic examination.

Improvements should also be made with respect to court procedure, particularly with how a court dispenses with the seized pirated products. IIPA recommends that courts regularly include an order for destruction of the goods in its verdict – currently, such an order is included, sometimes, but not always, in final judgments. Additionally, the criminal procedures generally require that a rightsholder request the destruction of the seized goods (or moves for recovery of damages) in a separate proceeding before the Arbitration Court – which unnecessarily lengthens the process and makes enforcement even more difficult.

Although there were fewer criminal cases in 2009 than in prior years, there were some significant cases. Unfortunately, as in recent years, most cases continue the trend of not applying deterrent penalties as a final disposition. Plus, many of the cases highlight the role of organized syndicates, as for example, a December 22, 2009 report of the arrest of three Bulgarian nationals in Moscow, charged with making and distributing pirated discs. A criminal investigation has commenced in that matter.

As was highlighted in previous years, 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. It is crucial that the Government of Russia improve its IPR criminal enforcement focusing, in particular, on the thus-far inadequate actions aimed at Internet piracy. One way to accomplish this would be through the central coordination of law enforcement. In November 2009, President Medvedev announced his intention to improve the effectiveness of Internet enforcement (and tasked Prime Minister Putin to lead this effort) – that is a positive step. We continue to recommend high-level public announcements by the government that IPR enforcement – including in particular, 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 the 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. It is also essential that the Government create a specialized IPR unit to fight against Internet piracy in Department K of the MOI. Another recommended measure is the appointment of IPR special prosecution investigators and police officers at both the federal and regional levels throughout Russia. In September 2007, the General Prosecutor's Office was reformed and reorganized: 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. The copyright industries are willing to continue their assistance in this regard with training programs for judges and other law enforcement officials. Some copyright industries report that in recent training programs, MOI officials (and its copyright crimes investigators) were, unfortunately, unable to participate in IPR enforcement seminars. IIPA recommends that MOI and its investigators continue to work with all IIPA members on future training programs.

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. Criminal procedure changes which placed copyright infringement cases into the category of serious crimes have enabled – at least in theory – Russian law enforcement agencies to conduct thorough and comprehensive investigations of copyright infringement activities

of plant owners and executives (rather than mere plant operators). Regarding Internet piracy, although the notorious allopmp3.com remains down, other similar (in fact, nearly identical) sites are operating, and must be closed, along with the commencement of criminal investigations against the site operators and the rogue collecting society operators who are illegally conducting business under the 2008 Civil Code. 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. To date, there has not been a single criminal conviction against an Internet website operator. One roadblock to effective enforcement is that the police and prosecutors have had difficulty applying the criminal law thresholds to Internet crimes which has resulted in very few such cases commencing. This needs to be addressed and corrected. In addition, a lack of an updated (since 2004) methodology for prosecutorial investigations (for all IPR crimes including Internet ones), the lack of technical knowledge (as well as the absence of ISP liability and cooperation) are key factors in the failures of the criminal enforcement regime.

More and improved criminal proceedings in general, along with speedier investigations and trials are needed – against hard copy and digital copy pirates. Last, we recommend that the General Prosecutor's Office (along with the Ministry of the Interior and the Investigative Committee of Prosecutors) appoint a government liaison with IP rightholders to more effectively bring criminal investigations and trials to successful conclusions.

IIPA encourages President Medvedev to fulfill his promise to combat IPR piracy with criminal enforcement – a problem he properly identified. IIPA members are concerned by the recent reconfiguration of the IPR Commission – by a decree of December 30, 2009. Under that decree, the RFG IPR Commission was abolished and replaced by a sub-commission, thus, a demotion for IPR enforcement issues. Further, the new sub-commission will be led by the Ministry of Trade and Industry, which lacks jurisdiction in IPR matters. IIPA continues to recommend a high-level coordinated government focus to IPR criminal enforcement.

**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, and declined for the second straight year. In 2009, there were 409 raids, down from 499 raids in 2008 (and 589 in 2007). As in recent years, enforcement of IPR is inconsistent, with some cities and regions, such as St. Petersburg and the Siberian region (Kemerovo, Irkutsk and Omsk), being 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), the Investigative Committee of Prosecutors, and the General Prosecutor's Office in relation to implementation of Article 146 of the Criminal Code. In 2009, the police ran more raids against chain retail stores (1,063, up from 740 in 2008), and increased warehouse inspections. Also, in 2009, the police initiated 97 criminal cases against end-user pirates (down from 154 cases in 2008, and 200 in 2007); some of these included raids against some larger companies. Criminal cases, if initiated (and this is very rare in St. Petersburg), are frequently terminated by investigative authorities. For example, an advertising company in St. Petersburg was raided and found to contain BSA member illegal software (over \$22,000 worth). A criminal case was initiated but then terminated twice for formal reasons (appeals were unsuccessful).

There were a total of 55 end-user court verdicts in 2009, down from 71 in 2008 (and from 83 in 2007). There were 496 criminal cases initiated against channel pirates, up from 427 in 2008 (and 378 in 2007); there were 276 court verdicts in channel cases compared with 234 in 2008 (and just 131 in 2006). Further, the business software industry reported that one of the reasons for the significant drop in piracy rates the past several years, is the effectiveness of end-user enforcement activities overall, which has resulted in a broadening of public education (for businesses especially) about legal versus illegal activities, and the resulting legal licensing of software at many companies and government entities. In addition, the business software industry (BSA) continued to report good cooperation with the police and Ministry of the Interior and Department K officials (including joint participation at training conferences in 2009 for hard copy piracy programs, as in recent years). However, there has not been the same level of cooperation (for example, with Department K) for on-line programs. Even with the significant activity taken against business software piracy, the Business Software Alliance reported, as preliminary figures, that it lost \$1.869 billion in Russia in 2009, and the piracy rate was 68% (albeit, a significant decline in the past several years).

Some business software publishers have also employed technological means to improve enforcement of their rights. For example, in December 2009, Microsoft Corporation launched a new program in Russia to protect Internet users against pirated software by deploying an (optional) software application that notifies users if their on-line software system interfaces are genuine or not. The aim is to make Internet users aware of illegal software resident on their machines and the problems such systems can cause (such as viruses), in order to encourage them to purchase legal products.

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).

Effective January 10, 2009, a Federal Law on Police Activities was adopted and it is reported that the police are undertaking *ex officio* investigations. The copyright industries continue to monitor the implementation of this law because there were some concerns that it might limit the ability of police to undertake raids and to secure evidence, especially against commercial enterprises. As a result of 2006 amendments to the Criminal Procedure Code, and until this law went into force, the police had broad authority to commence investigations *ex officio*, even though in practice, cases were nevertheless delayed by prosecutorial investigators. The 2009 law was implemented with guidelines from the Ministry of the Interior. IIPA recommends that the Ministry additionally promulgate regulations that will not delay police actions in IPR investigations until after a criminal or administrative case has been initiated; such delays would create a further hindrance to effective enforcement. In sum, the on-going prosecutorial delays and certain of the noted police activities, highlight the lack of effective enforcement coordination between prosecutors (including the General Prosecutor's Office and the regional investigative offices), 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 corporate 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. Regarding corporate liability, Russia's current law allows for corporate entities to be found criminally liable for infringement only upon a showing that a corporation's director had a direct intent to commit the infringement. Such a showing is virtually impossible, especially when seeking to impose liability on the corporate owners of a retail outlet known to be selling pirated product. As a consequence, verdicts are issued against only the individual retail staff found selling pirate products at the time of a seizure or raid, rather than against the corporate owner. Such a scenario provides for little deterrence, as the owner of the retail establishment is seldom punished in any capacity.

There were a considerable number of important raids against pirate warehouses in 2009 and there were a number of large seizures of copyrighted materials at these warehouses. In total, the copyright industries reported 11 large raids against warehouses resulting in the seizure of over 10 million CDs and DVDs.

The motion picture industry (MPAA) reported on several of these raids undertaken by Russian enforcement authorities, many with the cooperation of the Russian-Anti Piracy Organization (RAPO). One continuing concern has been the diminishing role of the Federal Service (FSB) police; all IIPA members had hoped that there would be increased FSB engagement in 2009. However, FSB did work in close cooperative work with RAPO in 2009 in several raids. RAPO continues to operate its own forensic lab, housed at the Ministry of Culture's Federal Press and Mass Media Agency (Rospechat). Some examples of important raids in 2009 included: a raid at Tupolev, an aviation research institute near Moscow, where several storage units containing approximately 1.75 million pirated optical discs were seized. Another raid in 2009 was conducted against Transconteyner, which is near three railway stations in the center of Moscow. This raid resulted in the seizure of more than a half-million pirated optical discs, which were destined for distribution across Russia by train. According to the documents seized in the raid, this warehouse –

which was re-stocked with pirate product – weekly had been in operation for at least five years. FSB also raided a very large warehouse in St. Petersburg, named Meduza, seizing about 3.5 million pirated DVDs; six people were convicted in that case, resulting in 3 to 5 years imprisonment sentences (albeit, suspended) in early 2010.

In 2009, in Moscow and St. Petersburg, RAPO took part in a number of raids. In 2009, the Moscow Police and RAPO organized 386 raids, from which 249 criminal cases were initiated, in addition, about 2,000 inspections were conducted. In St. Petersburg, the local RAPO office and the police organized 156 raids, including the initiation of 135 criminal cases, and about 1,300 inspections were conducted. There were many other raids and resulting cases undertaken by the police (without RAPO participation). In total, inspections revealed that over half of the product in retail outlets in Moscow is pirated material. The results of similar inspections in St. Petersburg revealed that more than 60% of material in their retail outlets was pirated, and in other major cities the percentages were as high as 75% to 80% pirated product. While these raids are positive, the Russian courts have not imposed deterrent sentences against the owners or operators of warehouses, falling short of Russia's IPR Agreement obligation to criminally prosecute cases of piracy on a commercial scale.

Unauthorized camcording in Russian theaters exploded in 2009. There were 43 full video camcords illegally recorded in Russian theaters in 2009; this represents a 152 percent increase over 2008. In 2009, a camcorder for the notorious Russian and Ukrainian piratical film release group Elektria4ka, was caught camcording a local movie in a Moscow theater. The camcorder admitted to working for the website Uniongang.ru and to uploading the content from his home computer, which content was available on that website within hours. A criminal case was initiated against this individual. This is the first criminal case in Russia against a camcorder under the new amendments of Part IV of the Civil Code.

According to the Entertainment Software Association (ESA), video game piracy remains significant in Russia, with pirated products still widely available on the street, in underground venues and at markets. Thus, hard copy piracy remains a problem as domestic factory replication remains widespread (although there continue to be some imports from Ukraine) with highly sophisticated pirated video game products being manufactured in Russia. Pirate distributors of hard copy material remain well versed in circumventing government regulation and enforcement. For instance, government regulation requires that information on game packaging identify the source of the product, such as the place of manufacture and all authorized distributors. ESA member company investigations reveal that such information is typically falsified and the companies/distributors named are non-existent. Although the piracy situation in Moscow has improved somewhat in that large retail chains no longer carry pirated products, the same cannot be said for other Russian cities, such as St. Petersburg, where pirated products continue to be openly sold in the largest retail chains. Piracy at Internet game clubs or cafés (where the establishment is either using pirated or unlicensed video game software on the café computers), continues to be problematic, although action against such cafés appears to be routinely undertaken by law enforcement. Rightsholders are typically asked to support such cases and to provide information with respect to the pirated video game titles and the damages incurred. Online piracy is also a growing concern for the entertainment software industry. ESA estimates there to have been approximately 118,211 infringing copies made of ESA members' computer and video games through P2P file sharing by ISP subscribers in Russia during December, 2009.<sup>4</sup> These figures do not account for downloads that occur directly from hosted content, such as games found on "cyberlockers" or "one-click" hosting sites which continue to account each year for progressively greater volumes of infringing downloads.

The book and journal publishing industry reports that though hard copy piracy – commercial photocopying, unauthorized translations or misappropriation of an author's work or unauthorized use of elements of a book (such as illustrations) in locally published scripts – continues to be problematic, the predominant problem now facing the

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<sup>4</sup> This figure is representative only of the number of downloads of a small selection of game titles. Consequently, this figure is under-representative of the overall number of infringing downloads of entertainment software made during the period.

industry is online piracy in its many forms. Popular works subject of online infringements include reference works, textbooks and commercial bestsellers. Journal articles are also subject to piracy by pharmaceutical companies, which produce and distribute unauthorized copies of the articles. Unfortunately, law enforcement authorities have done little to address rampant book piracy occurring in the market, and universities, where unauthorized photocopying of academic textbooks predominantly occurs, have shown no interest in addressing the problem.

On February 1, 2009, the Moscow Government ordered all kiosks and shops selling pirated optical disks to be closed within pedestrian subways and metro stations. In order to accomplish this, the government established a special enforcement unit (RAPO is included), which is responsible for stopping sales of audiovideo products in pedestrian subways and metro stations. Further, the government ordered all shops closed in metro passages, as well as shops within a 25 meter (82 feet) radius from metro stations. The order to undertake this action was signed by the Minister of the Government of Moscow, Vladimir Malyshev, who is responsible for all trade in Moscow. This is an important and positive enforcement step to reduce the availability of pirated DVDs in Moscow. A similar regulation has been very successful in combating street vendor and kiosk piracy and IIPA recommends that similar regulations be undertaken in other cities with significant street piracy problems.

**Raids Against Optical Disc Plants:** Although optical disc piracy is no longer the highest priority for IIPA members in Russia, according to the Russian police, about 70 million discs were replicated in Russia in 2009, with an estimated retail price of approximately \$630 million.

In November 2009, the enforcement authorities undertook a series of raids against seven illegal optical disc replication plants and warehouses in Russia. The raids resulted in a total of 25 replication lines (16 DVD lines and 9 CD lines) and 60,000 stampers being confiscated (in six different raids). The operation involved more than 250 law enforcement officials – police and special forces – along with 15 RAPO investigators. The initial November raids were undertaken in 30 hours with additional raids against two additional labs carried out several days later; preparation for the raids was done in close cooperation with the new department of “Anti Corruption” at the Ministry of Interior (MOI).

The optical disc enforcement regime continues to lack effectiveness evidenced by the continued operation of many of the raided plants. For example, in February 2007, the Poliplast plant was raided, but its license was not suspended. This plant continues to operate. In another matter, two criminal cases were initiated against the Victoria plant, which has been raided several times over the past few years, yet the plant continues to replicate. In April 2008, its license was extended five years despite the open criminal cases pending in relation to its operations. The Moscow Vostok-D plant, already noted, which was raided in 2007 was only in operation because it had lines belonging 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 three times in 2007, is an example of a plant that, once raided, did finally cease its operations.

The cases generally highlight the weaknesses that must be addressed if Russia is to meet the IPR Agreement’s obligations for effective optical media regulation. It is estimated that about 7 optical disc plants were closed in 2009. However, it is more difficult now to gauge the number of plants in operation in Russia because there are many that have licenses, but are not known to be operating, and also because of the migration of piracy into smaller operations. The U.S. Government estimated that at least 30 optical disc plants remained in operation in 2009 (although the November 2009 raids may have closed at least one plant). IIPA continues to push for additional and effective enforcement to deter illegal activities. Such enforcement needs to be called for from the highest levels within the Russian Government.

**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). Internet and wireless

access by Russian citizens is growing rapidly – by some accounts, Russia will soon have the second largest Internet population in Europe, behind only Germany, and it is currently the fourth largest market worldwide for mobile telephones. According to the ITU, there were 45,250,000 Internet users as of June 2009 in Russia – a 32.3% penetration.

The recording industry reports that paid download sites remain one of the largest sources of piracy in Russia. In addition to the rampant peer-to-peer services, there are also “cyber-lockers” in Russia that serve as a source of pirated music.

All the copyright industries agree that the fundamental enforcement shortcoming is the lack of authority and jurisdiction (and willingness) of Department K to act against copyright infringement crimes occurring on the Internet.

In June 2007, the most notorious website, [allofmp3.com](http://allofmp3.com), was taken down, and has not resurfaced at that Internet address. However, there are now in excess of 30 similar sites based on the same business model as the original [allofmp3.com](http://allofmp3.com). The user-interface of these sites looks very professional and can easily deceive users into believing the sites are legal (some offer “give away” incentives to get more users; some sell albums for as little as \$1). Some of the sites use up to 30 different domain names (but the same user interface).

In 2009, 7,551 infringing addresses (uniform resource locators, URLs) were taken down compared with 2,541 infringing URLs in 2008 according to industry statistics, but that is still too small a number which only accounts for less than half of the URLs identified and requested to be taken down. Moreover, Russia is also host to a number of major BitTorrent indexing sites such as [torrentz.ru](http://torrentz.ru), [torrentreactor.net](http://torrentreactor.net), and [BTmon.com](http://BTmon.com) (which includes materials from many copyright industries), which are popular channels for illegal peer-to-peer downloading, catering to English speaking audiences and with very high Alexa rankings. Another particularly problematic site is GameTorrent, a BitTorrent tracker and online pirate discussion forum that is owned by a Russian national, but is currently hosted in Estonia. Neither the hosting ISP nor the website owner have complied with takedown requests. Additionally, since Russia is the fourth largest mobile phone market, the number of Russia-hosted “WAP” websites offering pirated video game products for mobile phones is of great concern. The response to takedown notices sent by video game publishers to these site operators and to the ISPs hosting these sites, have had mixed and largely inconsistent results.

There was one bright spot: the MPAA reported that in May 2009, enforcement authorities raided a web-based pirate (of pre-release films) – Interfilm which operated the site [Interfilm.ru](http://Interfilm.ru). Dozens of law enforcement officials took part in the raid, including officers from Department K, special forces, investigators from Investigating Committee of the MOI, as well as RAPO investigators. There were several arrests, including the head of Interfilm. The Interfilm website was hosted in the Netherlands at Leaseweb, which took down the site after the raid. This is the first ever criminal raid against a pirate website in Russia since the [allofmp3](http://allofmp3.com) case several years ago (and is the first ever raid on a film or TV pirate website).

For the recording industry, the most vexing Internet piracy problem in Russia is the pay-per-download websites operating under “licenses” granted by collecting societies that have no authority to issue such licenses. The websites need to be taken down and their operators criminally prosecuted. With regard to these rogue collecting societies, they are still in business two years after the Russian Civil Code amendments went into force which, among other things, clarified that these types of activities – by both websites and collecting societies – are illegal; the amendments to the law were supposed to put an end to these piratical activities. In lieu, the accreditation of a single collecting society (VOIS) to collect on an extended license basis on behalf of performers and record companies has resulted in significant problems for the recording industry because VOIS represents a very small fraction of foreign rightholders. Most U.S. record companies have entrusted the administration of their rights to RFA, a society which has been in operation for some time and which complies with international standards in terms of accountability and transparency. However, the Russian government decided to accredit a different society known as VOIS, which has very little legal representation of non-Russian rightholders. In order for U.S. rightholders to be properly represented

in Russia, it is essential that VOIS operate in a transparent manner that reflects the interests of the broader community for which it is now responsible, requiring an integration of non-VOIS members into their governing bodies, and reasonable agreements between the respective societies. The IIPA and the RIAA urge the Government of Russia to take an active role in ensuring that reasonable agreements are reached with VOIS (or any other accredited society) that permit the effective representation of U.S. rightholders.

Publishers report that Internet piracy affecting academic and professional textbooks and reference books continues unabated. In particular, a group of sites – including [download-ebook.in](http://download-ebook.in), [download-ebook.org](http://download-ebook.org) and [ebooknetstore.com](http://ebooknetstore.com) – continue to decimate the market for academic and professional materials. Other sites include [pdfchm.com/](http://pdfchm.com/) and free-file host providers like [Paid4share.net](http://Paid4share.net), [Icefile.info](http://Icefile.info) and others. Takedown notices have gone unheeded (non-compliant ISPs include: [relcom.ru](http://relcom.ru), [agava.ru](http://agava.ru) and [delfan.net](http://delfan.net)). IIPA urges immediate action against the operators of illegal sites, in particular, the afore-mentioned sites. Commercial bestsellers are also widely available for download on multiple websites. There are also a growing number of phishing sites hosted in Russia that purport to offer instant downloads of free ebooks (along with other copyrighted content) for a minimal membership fee. However, once a customer provides his/her credit card information, no files are actually delivered and thereafter, unauthorized charges begin appearing on the supplied credit card account. These phishing sites advertise on many popular P2P sites.<sup>5</sup>

Few 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.

The business software industry (BSA) reported only six raids against Internet users or services in 2009 (compared with 25 in 2008), which resulted in the commencement of only one criminal case (compared with 15 in 2008). There were only two convictions (seven in 2008) – all against individuals in the distribution of illegal copies of software offered via peer-to-peer networks. Some copyright industries report that some Internet Service Providers (ISPs) will cooperate and will move to take down pirate sites once identified, but many ISPs will not cooperate – even with clear evidence of piracy – absent a court order. This is the reason why ISP cooperation, and clear third party liability, is essential.

Given the growing threat of Internet piracy, Russian authorities are allocating far too few resources to fight it and the process to access these limited resources is also very difficult. IIPA members report that Internet piracy is a very low priority for the Ministry of the Interior's Department K (the department with responsibility for combating technological crimes and Internet fraud, but not, *per se*, Internet copyright piracy) which is an issue of major concern. 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, and according to industry statistics, less than 1% of the cases they pursued in 2009 were related to copyright infringement on the Internet. 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. At present, jurisdiction for Internet piracy is ill-defined. For example, combating copyright violations on the Internet such as the dissemination of music through illegal pay-per-download sites and illegal peer-to-peer services, does not clearly fall within the current jurisdiction of the Computer Crimes Department (Department

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<sup>5</sup> Examples include: [nowdownloadall.com](http://nowdownloadall.com), [idownloadall.com](http://idownloadall.com), [10xdownloads.com](http://10xdownloads.com), [idownloadunlimited.com](http://idownloadunlimited.com), and [nowfreedownloads.com](http://nowfreedownloads.com).

K) within the Ministry of the Interior even though they have occasionally taken action. Department K's authority and responsibility to act in cases of online infringement should be clarified and strengthened.

**Administrative Enforcement:** The business software industry (BSA) reported only 11 administrative court decisions against infringing end-users and 11 against channel pirates in 2009. This is compared with the 40 administrative court decisions that were resolved in 2008 – 37 against end-users, three against channel pirates (compared with 35 and five, respectively, in 2007). 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 need for legal software in the government. In October 2007, a resolution was adopted that will result in the Ministry of Education purchasing legal software programs – from Russian and foreign vendors – for all Russian schools (kindergarten to 12th grade); this major step has ensured that the schools are using legitimate software, thus eradicating piracy in a large segment of the public service sector. The program is probably the largest software distribution project in history. Every public school in Russia – some 65,000 schools in total – received a package with 56 disks containing software from 30 vendors (both Russian and non-Russian). 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 2010, and the software industry is ready to carry this remarkable progress into other sectors of the Russian economy.

**Enforcement Training:** The copyright industries report that they have participated in many training seminars over the past year with enforcement agencies and judges on how best to fight against Internet piracy, as well as hard-copy piracy, and remain ready to continue this cooperation. Most of the programs, however, were directed toward hard-copy piracy. Program participants included: the Interactive Software Association of Europe, the Business Software Association, the Motion Picture Association, and the International Federation of the Phonographic Industry. For example, they participated (again) in a cross-industry training seminar, jointly organized by the European Commission (through its Technical Assistance and Information Exchange, TAIEX, program), the General Prosecution Office, and the Investigation Committee of Russia in December 2009. That program was the third of its kind and a follow-up to the training commitments outlined in the EU-sponsored IPR roundtable that took place in Russia in October 2007. Topics addressed included hard-copy piracy and Internet piracy, as well as the sharing of investigative best practices from enforcement officers from several EU countries. A number of copyright industry representatives participated in training programs for prosecutors in 2009, as well. One other notable program was a series of seminars organized by the investigative department of the MOI in St. Petersburg, Kazan, Krasnodar and Ekaterinburg (each with about 200 attendees.).

## Optical Disc Plant Licensing and Inspections

The continued lack of clear authority for optical disc licensing and inspections in 2009 remains a significant set-back in the enforcement of optical disc production and distribution in Russia. In 2007, as part of a government reorganization, there was a transition period while the licensing authority was transferred from one agency (Roshrankultura) to a newly established "Federal Service for the supervision of mass communication and the protection of cultural legacy" (Rossviazokhrankultura). In May 2008, the Russian Government was again reorganized. The former Ministry of Economic Development and Trade (MEDT) was divided in two: into a Ministry of Economic Development (MED) and a Ministry of Industry and Trade (MIT). Copyright policymaking was not affected – it remains within the Ministry of Culture (and Rospatent retained its primary responsibility for trademark and patent policy). However, the former Rossviazokhrankultura was reorganized into two entities: Roshrankultura (ROK) and Rossvyazcomnadzor (which as of January 2009, was named Roskomnadzor (RKN) – the name change did not indicate any change in authority). Roshrankultura, a part of the Ministry of Culture, retains its role as the chief enforcement agency for copyright matters. However, optical disc plant licensing is now under the authority of Roskomnadzor (now part of the Ministry of Communications and Mass Media); unfortunately, it has to date been

awaiting authorization and resources to commence its work. As a result of these reorganizations, Rossvyazcomnadzor (now, Roskomnadzor) has not undertaken regular inspection of plants or the suspension of raided licensed plants for the past two years, as is required under the IPR Agreement. That is because ROK does not have the authority to do so, and RKN, which has the formal authority for inspections, has neither the staff, resources, nor, it seems, interest, in undertaking proper inspections. Additionally, a new concern has developed: Federal Law 294-FZ (December 27, 2009) – a general anti-corruption measure – prohibits commercial enterprises from being inspected by governmental bodies more than once every three years, unless ordered to do so by a prosecutor.

The lack of regular surprise inspections of all the production facilities exacerbates Russia's optical disc piracy problem, and is not consistent with Russia's IPR Agreement obligations.

Both the optical disc plant licensing authority (Rosokhrankultura, now Rossviazokhrankultura) and the Economic Crime Department of the Ministry of the Interior have completed their reorganizations. It was hoped that, as a result, they would address the present lack of adequate staffing and be able to engage in the kind of monitoring contemplated by the IPR Agreement – but, that did not occur in 2009. More training and more resources need to be available to conduct the promised effective enforcement. For some copyright industries (especially recorded sound), the problem of optical disc piracy in Russia has migrated, in part, from major production facilities to smaller “burning” operations which require more flexible enforcement mechanisms and resources. The motion picture industry continues to see optical disc plant produced pirate product in Russia. In sum, the Russian Government is 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. The demotion of IPR enforcement from the IPR Commission to a sub-commission is also likely to delay coordinated activities against optical disc (and other) pirates.

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 at the June 2008 Working Group meetings with U.S. Government officials the following: in 2007, there were ten reported RARE plants – that is, OD plants on government controlled military-industrial sites. In mid-2008, only five such plants – on four RARE sites – remained in operation. At present, there are four such plants on four RARE sites still in operation. The Russian Government has reported in the past (in 2008) that it would close the remaining plants by cancelling their leases. While the closure of some plants 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.

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. Although this problem has declined in recent years, the recording industry reported that in 2009, that Russian manufactured pirated optical discs were forensically matched in several countries outside of Russia and that moreover, there remains a significant Ukraine-Russia transshipment problem of optical disc material.

## Implementation of the IPR Agreement

The IIPA continues to recommend several key measures to improve enforcement in Russia and in order to fully implement the IPR Agreement. These include:

1. Announcing from the office of the President, that fighting copyright piracy is a priority for the country and law enforcement authorities. In order to have effective (criminal) enforcement, 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.
2. 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).
3. 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. This includes taking down the pay-per-download sites and criminally prosecuting their operators as well as stopping the unauthorized collecting societies (such as ROMS, FAIR, ROUPI and FO SP) that purport to grant licenses for rights that they do not possess. It also means criminally prosecuting peer-to-peer and BitTorrent operators.
4. Ensuring that collecting societies can only operate within the scope of the mandate that they receive from rightsholders – after direct contractual negotiations with rightsholders – and that such societies operate with proper transparency, accounting, and governance rules in accordance with international norms.
5. 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.
6. Effectively enforcing measures that criminalize the camcording of motion pictures in theaters, since this is the primary source for illegal DVDs and much of the illicit content online.
7. 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 rightsholders. In addition, any plant licensing regime should extend in scope to the operators of telecine machines and mastering laboratories used to pirate audiovisual works.
8. 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.
9. 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).
10. 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.
11. Adopt guidelines (in the Ministry of the Interior) that continue the broad *ex officio* authority by police to commence IPR investigations and to seize evidence as provided in the 2006 amendments to the

Criminal Procedure Code. A new Federal Law on Police Activities – effective January 10, 2009 – could, if it is not properly implemented, limit this ability by police, until after a criminal or administrative case has been initiated, which would hamper the collection of evidence and the effective prosecution of (or administrative actions undertaken against) IPR infringers.

**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* and the surprising acquittal of the former CEO Denis Kvasov. Although IIPA and its members are obviously pleased that *allofmp3.com* was itself taken down, we note that numerous nearly identical sites are now in operation 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. Although there was a pause in 2008 during the Russian Government reorganization, in 2009, the U.S.-Russia Working Group meetings resumed, which IIPA members view as a positive step toward ensuring that dialog and work to implement the IPR Agreement continue.

IIPA is disappointed that the IPR Agreement deadlines (now three years overdue) were not met, with Russia still needing to: (1) 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); (2) combat Internet piracy – including criminal actions against the pay-per-download and fixing the rogue collecting societies problem; (3) implement international IPR agreements, up to the WTO-TRIPs levels; (4) address the problem of illegal optical disc manufacturing; (5) enact legislation (Article 393 of the Customs Code) to provide Customs officials with the authority to take actions *ex officio*; and (6) fully implement 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:

- Russia acceded to the two WIPO digital treaties – the WCT and WPPT – effective February 5, 2009. This very positive step was the result of a July 24, 2008 resolution signed by the Prime Minister to accede to the two treaties. The treaties still need to be fully implemented with legislation – including additional amendments to Part IV of the Civil Code – as detailed below.
- The Criminal Procedure Code was amended in 2006 to allow Russian police, in addition to prosecutors, to initiate criminal investigations. (As noted, IIPA continues to monitor the progress of the 2009 law and regulations from the Ministry of the Interior to ensure that this effective enforcement tool remains viable).
- 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. (To date, rightsholders’ expectations that these provisions would be used against the large-scale operators of illegal activity have not been met).
- 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). Another resolution is expected (it was not undertaken in 2009) – by the Supreme Court and Senior Arbitration Court – to set guidelines for the full implementation of the 2008 Civil Code. IIPA encourages the swift adoption of this joint resolution.

- Amendments to the Administrative Code of Misdemeanors (in force, April 9, 2007) added a new Article 14.33 on unfair competition. This provision 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 also amended in 2006 by revising the timetable for administrative investigations – the amendments permitted investigations to run for 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\$1,015 to \$1,353).
- 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.
- Amendments to the Federal Law on Licensing – making software production an activity subject to licensing in Russia – went into force on August 6, 2008.
- A Software Licensing Agreement (in accordance with Resolution #1447-R of October 18, 2007) went into force; it is applicable from 2008 through 2010, and applies to all 65,000 Russian schools (from kindergarten to the 12th grade). This is a major accomplishment of the Government of Russia, requiring the purchase and installation, from Russian or foreign vendors, of legal software in all schools.

As noted in previous reports, 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.

The priority legal reforms include: (1) the Criminal Code, which needs to be amended to make legal entities liable for IPR crimes; (2) amending the Civil Code to provide for ISP liability and sanctions (including a clear definition of an “Internet Service Provider”), clear third party liability in civil and criminal law, injunctive relief, and a duty to provide all necessary information to law enforcement agencies and rightsholders in Internet piracy cases; (3) the Customs Code which must be amended to add *ex officio* authority (amendments were introduced in the Duma but never enacted in 2007); and (4) the complete and proper implementation (in the Civil Code) of both digital treaties – the WCT and the WPPT – now that Russia acceded to the treaties (effective February 5, 2009), as well as the other Civil Code amendments (some of which were considered, but never adopted, the past few years). Plus, Russia needs to adopt the long-promised optical disc regulations.

Effective optical disc regulations 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.

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, Rossvyazcomnadzor (now, Roskomnadzor) 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 Roskomnadzor 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. Thus, although IIPA members welcome the fact that the Federal Service is in operation, we are concerned that it is still operating under the old, inadequate, plant licensing and inspection regime, without the needed and promised comprehensive and more effective regime – with clear regulations (or if needed, legislation) to license production and suspend (without a court order) the licenses of violators and to permanently close illegal plants.

One other legislative initiative (first proposed 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, however well intentioned, will have the practical effect of hampering the dissemination of legal product, while illegal product, with counterfeit labels, is freely distributed.

On March 26, 2009, the Supreme Court and the Higher Arbitration Court adopted a joint Plenum Resolution (“On issues relating to the introduction of Part IV of the Civil Code”) – to clarify the application of Part IV. Unfortunately, the resolution left many issues unresolved including: the “use” of software which is misinterpreted by judges as being not a violation of Copyright Law (when unauthorized); the determination of damages relating to the cost of (software) works; the use of works on the Internet and the “making available” right; the application of provisional measures; and, the application of civil search procedures (especially important for software piracy cases). Also as noted, the 2004 methodology on the investigation of copyright and related rights criminal cases is outdated, resulting in cases not reaching the courts. The methodology needs to be substantially revised and updated, (with rightsholder input) consistent with the existing criminal law of Russia, and in order to provide effective criminal remedies applicable to all hard copy and Internet piracy crimes.

Since its adoption, IIPA and its members have commented on two major overarching concerns with the new Civil Code. First, there are many 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). Ambiguities are causing challenges to enforcement and collection efforts. Second, there are administrative law principles throughout the Civil Code that likely cannot be enforced by civil or criminal procedures.

IIPA continues to recommend improvements to the enforcement regime of Russia. The Civil Code, Part IV amendments passed a second reading in the Duma on January 30, 2009. With the exception of one non-copyright amendment (a compulsory license for semi-conductors), the amendments are largely the same as those introduced at the first reading. Thus, our recommendations remain the same as those offered in prior years – as set forth below. The recommendations include a suggestion for the introduction into the Civil Code of a clear definition of an “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 (and rightsholders) in Internet piracy cases. In addition, to stem the rise in Internet piracy that is harming many of the copyright industries, Russia should undertake steps to address and implement notice and takedown procedures for websites hosting illegal material.

IIPA continues to recommend the following set of Civil Code Part IV amendments, in order to comply with TRIPs and the WIPO digital treaties:

- Article 1229(5), 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 restated in its entirety in Article 1229 and applied across the board to all of the exceptions in the law – to narrow the scope of all exceptions to permissible international norms. 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, as a ceiling, the (corrected, per above) three-part test to particular personal uses, to apply it only to specific personal use 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 (and rightholders) 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 confirming by means of a governmental interpretative communication that Articles 1244(4) and 1326 do indeed allow rightholders to exclude their works and phonograms from the accredited societies' extended license repertoires and can in lieu authorize their own collective societies (by direct contract).
- Article 1326(1) is limited to a statutory license for neighboring rights producers. In lieu, the Civil Code should provide a broad making available right applicable for objects of neighboring rights.
- 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, because it is the civil code, not criminal) liability for legal entities.
- Articles 1252 and 1302, which add 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 provide 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 2009, Russia benefited from over \$252.4 million in unilateral duty free Generalized System of Preferences ("GSP") benefits in the U.S. market. In 2008, Russia benefited from \$593.7 million in duty free GSP imports into the United States. The IIPA recommends that U.S. Government should continue to monitor whether the Government of Russia is complying with the eligibility requirements for GSP benefits, and if it is not, should consider terminating some or all of 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.