

# RUSSIAN FEDERATION

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

### 2011 SPECIAL 301 REPORT ON COPYRIGHT ENFORCEMENT AND PROTECTION

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

Priority Recommendations in Russia – Key Legal Reform and Enforcement Actions: There are many legal reforms and enforcement steps that we detail in this filing. Here is our list of priorities that we recommend to the Government of Russia for 2011:

- Undertake effective actions against Internet piracy – including:
  - (a) takedowns of pay-per-download websites and actions against cyberlockers, BitTorrent sites, unauthorized music services, and Internet cafes, with criminal actions commenced (and deterrent penalties) against owners and operators of such sites; and
  - (b) establishment of a special IP Unit in Department K (and confirming the Department's jurisdiction over copyright infringement cases).
- Amend the Civil Code, Part IV, to:
  - (a) fully implement the WIPO digital treaties – the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT);
  - (b) provide: (i) incentives for Internet Service Providers (ISPs) to cooperate with rights holders to effectively deal with Internet piracy – in civil and criminal law; (ii) rules that clarify the illegality of providing services that are intended to promote the infringement of copyright and related rights; (iii) injunctive relief and a duty on ISPs to provide information to law enforcement agencies and rights holders; and
  - (c) implement notice and takedown procedures for websites hosting illegal material.

A set of amendments to the Civil Code, Part IV, was recently prepared by the Center for Private Law – the draft falls far short of implementing the digital treaties, or effectively addressing Internet piracy.
- Bring deterrent levels of criminal actions against retail chains that sell pirated entertainment software, movies and music, businesses using unlicensed software, and organized criminal syndicates involved in piracy.
- Ensure that state approved monopolies for the collective administration of rights operate in a fair and transparent manner and that copyright owners maintain the right to exercise their rights with respect to Internet distribution as they deem appropriate, free from compulsory licensing or other limitations on the free exercise of rights.
- Undertake effective measures against illegal camcording of motion pictures in theaters.

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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/2011/2011SPEC301HISTORICALSUMMARY.pdf>, as well as the previous years' reports, at <http://www.iipa.com/countryreports.html>. For a summary of IIPA's 2011 global issues, see our cover letter at <http://www.iipa.com/pdf/2011SPEC301COVERLETTER.pdf>.



- Revise the 2004 methodology on the investigation and prosecution of copyright and related rights infringements to ensure that prosecutors fully understand how to and are adequately encouraged to initiate criminal actions, and that there is a consistent and uniform approach to these cases throughout the country.
- Amend the Criminal Code to provide for the establishment of criminal liability against legal entities, including for IPR crimes.
- Adopt optical disc (OD) regulations and proper enforcement actions against these and other production facilities of hard copy materials.
- Strengthen the Administrative Code to establish more deterrent penalties by, for example, setting: (a) fixed fines for violations by legal entities and individuals; (b) fines proportionate to corporate revenues (e.g., as is done for anti-monopoly violations); or (c) a fixed fine for each illegal copy.

Executive Summary of IPR Issues: In 2010, 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 three years, the total number of actions undertaken by enforcement officials has been on a decline, and little, if any, action has been undertaken against a key priority in Russia – Internet piracy. The business software industry has seen a significant decline in piracy rates (a 20% drop from 2005 to 2009), due to a combination of commercial success (driven by government software purchases to legalize the education sector), and effective criminal and civil enforcement directed against end-user piracy. Progress in driving down software piracy rates appears to have stalled over the past year due, in part, to more rapid PC growth in the higher-piracy consumer sector.

However, the business software industry is the only industry with an overall positive story in Russia the past few years. The majority of copyright industries – motion picture, recorded sound, entertainment software, music and book publishing – experienced another year of disappointment in Russia in 2010 because of a lack of focus by Russian authorities on the growing threat of Internet and other digital forms of piracy; ongoing high piracy rates – for hard and digital copies; and fewer enforcement actions undertaken by the authorities in number, size, and scope. While Russia's law allows for decent enforcement against hard goods piracy, it is wholly inadequate for addressing Internet piracy and must be modernized. Even more threatening to the copyright industries are notions circulated in 2010 as private drafts to amend the copyright law to: (a) exempt from copyright liability all third parties – including ISPs even if a piracy problem resulted from the ISPs own design and making, and (b) excuse almost all online infringing activity as “private” copying.

The record industry is particularly concerned about the continued operation of infringing music services, such as the one operated by vKontakte, as well as various pay-per-download services that have taken the place of the infamous allofmp3.com. Peer-to-peer piracy is a major concern in Russia, as it is globally. The government's activities to accredit legal collecting societies have been fraught with problems even though the accreditation process was supposed to curtail illegal activities. The accreditation of only one collecting society (VOIS) to collect on behalf of performers and record companies has resulted in market confusion and serious questions about the government's compliance with Russian law and international norms concerning the fair representation of foreign rights holders. This situation can only be resolved by the Government of Russia which pledged that U.S. rights holders would be fairly represented. Two recent court orders annulling the accreditation (for neighboring rights and blank tape levies) reveal serious problems in the accreditation process; the orders are not yet binding as the cases are on appeal.

The independent film and television segment of the motion picture industry (IFTA) reports that online and physical piracy remain a significant export constraint for independent producers and distributors, the majority of which are small to medium sized businesses. Independent producers partner with local authorized distributors to finance and distribute their films and programming. These authorized distributors find it almost impossible to compete with the pirates and report that piracy in Russia has reached disastrous levels. Producers and distributors confirm that

DVD sales have been particularly impacted since pirated digital copies are offered for free online and with the same quality viewing experience as a DVD. Unable to compete with free, legitimate distributors cannot commit to distribution agreements, or alternatively, they offer drastically lower license fees which are inadequate to assist in financing of independent productions. As a result, piracy is undermining and may permanently damage legitimate distribution networks essential to reaching the consumer and leaves little confidence for investment in intellectual property.

Overall, Russia's enforcement remains deficient – in particular, its criminal enforcement. To curb piracy, it is essential that the Government of Russia pursue an increased number of investigations, particularly against large-scale infringers, and that prosecutors seek, and judges be encouraged to administer, deterrent criminal penalties.

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 many of the copyright industries. But it is the rapid rise in Internet piracy and other forms of piracy – for example, unauthorized camcording of motion pictures in theaters, and unauthorized access to journals online – that are stunting the growth of legitimate markets and investment. In fact, camcord piracy has exploded in the past two years, making Russia the world's leading source of illicit full-video recordings of films from theaters.

A roadmap for success exists: 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>2</sup> The IPR Agreement reflects Russia's acknowledgment of the numerous legal reforms and enforcement steps it needs to undertake to accede to the World Trade Organization (WTO), and 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 (assuming the program is reauthorized). In 2010, Russia benefited from over \$553 million in unilateral duty free Generalized System of Preferences ("GSP") benefits in the U.S. market. 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.

## COPYRIGHT ENFORCEMENT IN RUSSIA

**Criminal Enforcement in General:** Criminal enforcement in Russia remains a priority for IIPA and its members – and unfortunately, almost all criminal enforcement activity by the government was geared toward physical piracy and little, if any, toward digital piracy enforcement, which is a significant and growing threat in Russia today. As a result, few criminal cases have been pursued against illegal website operators. Russian authorities must step up efforts to investigate Internet piracy of business software, 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.

In 2010, the Government of Russia continued to conduct some significant raids and seizures against hard copy pirates, 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 down – again – from previous years. 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. Some examples include: a Saratovskaya regional court sentencing a defendant to

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<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).

two and a half years imprisonment (September 2010); a regional court in Voronezhskaya sentencing a defendant to two years imprisonment (December 2010); an Ivanovo city court sentencing a defendant to 2.5 years imprisonment (December 2010); a Bryansk city court issuing a 2 year (suspended) sentence against a distributor of software via a Bit Torrent tracker (October 2010); a Saratov city court issuing sentences against members of an organized crime group (December 2010) – with the head of the group getting a four year sentence, another member of the group over 3.5 years, and a third a 2 year sentence, as well as assessing fines.

There were also a considerable number of administrative and criminal penalties imposed against illegal hard-copy vendors. The motion picture industry noted improvements at the Gorbushka market (which it regularly inspects). As a result, it now appears that pirated products of motion pictures are not sold at this market (in part, because the Gorbushka market operators are now cooperating with rights holders by terminating lease agreements with detected pirate traders). Although the Entertainment Software Association (ESA) reports that frequent police patrols have resulted in a decrease in the number of small vendors selling infringing game product in many other Moscow markets, sales of pirated games at the Gorbushka market remain a significant problem.

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 Alliance (BSA) reported raids and criminal cases below 2008 levels. There were fewer criminal cases in 2010 (78) than in 2008 (154) against end-users, and in “channel” cases (pre-installed hard disk piracy) about the same – 491 in 2010 versus 496 in 2009. BSA reported that there were 41 verdicts involving end-user piracy, 325 involving “channel” piracy and three involving Internet piracy. The Government of Russia (Ministry of Internal Affairs, MVD) reported 6,118 crimes under Article 146 of the Criminal Code in 2010 – including all intellectual property cases. There were 4,703 criminal investigations and 4,365 cases sent to the courts. Of these, 3,406 individuals were prosecuted, with fines of approximately 1 billion rubles (\$34.1 million). Unfortunately, this reflects overall, a 15% decline in the number of copyright criminal cases from 2009.

The local motion picture industry (Motion Picture Association, MPA) reports that enforcement activity in the past few years, especially in Moscow and St. Petersburg, has remained relatively consistent. They report that 2010 was the first time that the Russian theatrical box office exceeded \$1 billion (reaching \$1.25 billion).

The music industry continues to emphasize the critical need for criminal, rather than civil, enforcement and that such enforcement should be directed against Internet piracy, as well against optical disc piracy – namely against any criminal enterprises dedicated to the manufacture, distribution and sale of pirate materials. Although the notorious [allofmp3.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.

The entertainment software industry reported a decline in the number of criminal actions initiated. It has been suggested that the 2010 reorganization of the Investigative Committee (in charge of IP crimes) may be a factor in the overall decline, in addition to the market shift to, and lack of effective enforcement against, Internet piracy. Also of concern is the reluctance on the part of police to pursue *ex officio* actions against major distributors and manufacturers of pirated entertainment software products. Although police continue to initiate enforcement actions against low-level targets, such as game club owners and individual sellers, these actions generally result only in small to medium quantities of pirated product being seized; the police are not enforcing against major infringers, most notably the owners of retail chains that sell infringing products or the manufacturers of pirated product.

All the copyright industries are being harmed by commercial-scale piracy, which can only be addressed through criminal measures. Civil measures are not capable of providing the requisite level of deterrence. In general, civil enforcement inadequacies include: remedies usually 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.

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. 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 against owners and operators of piratical operations. However, 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. Deterrent criminal penalties are still not being imposed against optical disc plant owners or, with few exceptions, against plant operators (no plant owner has ever been convicted and only a handful of plant managers or employees).

The lengthy criminal 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 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. Enforcement is also hampered, and trials delayed, by the requirement that exemplars be collected only by state officials (or jointly with rightholders), and by a statutory reliance on government expert reports. Delays also result from a lack of subject matter expertise in some cases, as well as a reluctance to use or rely on rights holder expertise on forensic matters (and worse, some local authorities refuse to share any information on cases with rights holders at the investigative stage, impeding the success of these cases). These present arcane and outdated rules relating to expert evaluations create unnecessary delays and costs in litigation. Industry experts should be fully integrated into the judicial process, so we recommend that the rules be modernized for greater efficiency. One way to accomplish this would be for the Supreme Court to issue new guidelines on the admissibility of the testimony of private experts. ESA reports delays in examination reports from government experts, due to a lack of technical expertise – in one case, difficulty in identifying infringing console products. This remains so, even after 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. As an example of the slow pace of enforcement, one case from 2007 (involving 800 pirate discs) was still under investigation at the end of 2010.

Improvements should also be made with respect to court procedure. The criminal procedures generally require that a rights holder request the destruction of the seized goods (or move for recovery of damages) in a separate proceeding before the Arbitration Court – which unnecessarily lengthens the process and makes enforcement even more difficult.

Another recommended measure is the appointment of IPR special prosecutions, investigators, and police officers at both the federal and regional levels throughout Russia. The appointment of specialized IPR 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. IIPA recommends that the Investigations Committee (IC), and the Ministry of the Interior (MOI) and its investigators, continue to work with IIPA members on future training programs. Last, we recommend that the General Prosecutor's Office (along with the MOI and the IC) appoint a government liaison with IP rightholders to more effectively bring criminal investigations and trials to successful conclusions. One enforcement set back: the Duma is expected to pass legislation in 2011 to reduce police personnel across Russia by 20%, and to reorganize Russia's police force.

Internet Piracy Enforcement: The 2006 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) and to investigate and prosecute companies that illegally distribute objects of copyright or related rights on the Internet.” Internet and wireless access by Russian citizens is growing rapidly; according to the ITU, there were 59.7 million Internet users as of June 2010 in Russia – which represents 42.8% of the population (and an increase of 10% since 2009).

One way to accomplish improved criminal Internet enforcement would be to centrally coordinate law enforcement: thus, in addition to bringing more IPR cases and conducting expeditious investigations, prosecutors should coordinate their efforts with the police (as should the investigative departments of the MOI, the Federal Security Service of the Russian Federation (FSB), and Customs, now that they all can initiate criminal cases). 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. A draft is being prepared by the General Prosecutor's Office, but unfortunately, without rights holders' input, to date.

The fundamental enforcement shortcoming is the lack of authority and jurisdiction to act against copyright infringement crimes occurring on the Internet. 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). Although the Federal Department K has equipment and expertise, there is not a single person in the department assigned to the sole task of combating IP crime – which is why IIPA continues to recommend 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 K) within the Ministry of the Interior even though they have occasionally taken action. So, Department K's authority and responsibility to act in cases of online infringement should be clarified and strengthened.

In addition to the pay-per-download and other hosted sites, Russia is home to a number of major BitTorrent indexing sites such as rutracker.org, torrentreactor.net, and BTmon.com (which includes materials from many copyright industries), which are popular channels for illegal peer-to-peer downloading. One 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 (and neither the ISP nor website owners respond to takedown requests). There are also cyberlockers and hosted download sites for films, video games and music.

vKontakte, the most popular online social network in Russia (93 million registered members worldwide) is the largest single distributor of infringing music in Russia, and one of the largest in the world. It has a functionality specifically designed to enable members to upload music and video files, which includes hundreds of thousands of unlicensed copyright works and recordings. It also has a dedicated content search engine that enables other members to search and instantly stream infringing content; plus, some third party software developers have distributed “apps” to enable non-members to search and download the content available on the site. While vKontakte will generally take down specific content when notified, that is an inappropriate enforcement mechanism for a problem of vKontakte's own making. Although vKontakte added a dedicated music feature, it has no licenses to distribute musical content – it either must eliminate this service, or license it properly. Besides vKontakte, there are a number of other Russian-based sites targeting users outside of Russia. For example, Kino.to is a site that features illegal film and TV materials (mostly in German); it has over 300,000 TV shows and over 66,000 movies – all illegal (and was described in one German magazine as “the biggest German language portal for pirate films” – with revenue of about \$3.5 million Euros a year). To date, cease and desist letters to Kino.to have yielded no results.

The response to takedown notices overall in Russia have had mixed and largely inconsistent results with some ISPs cooperating and moving to takedown pirate sites once identified, but most ISPs not willing to cooperate (absent a court order), even with clear evidence of piracy. This is why ISP cooperation, and clear third party liability, are essential. As one example, the ESA reports only one hosted site (narod.ru) generally complied, at all, with its takedown requests, while other sites ignored such requests; still, ESA reports that Russia has risen to one of the top five piratical downloading sources in the world. During 2010, ESA vendors detected 2.92 million connections by peers participating in unauthorized file sharing of select member titles on peer-to-peer networks through ISPs located in Russia, placing Russia tenth in overall volume of detections in the world.<sup>3</sup>

The recording industry reports that paid download sites remains an important source of piracy in Russia along with the peer-to-peer services, and cyberlockers. Although the most notorious website, allofmp3.com, was taken down (in 2007), and has not resurfaced at that Internet address, there are now in excess of 30 similar sites based on the same business model as the original 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). The pay-per-download websites remain a major problem for the music industry. The only solution is to take down the sites, and to criminally prosecute the site operators. Three years after the Russian Civil Code amendments went into force which, among other things, clarified that these types of activities are illegal – with regard to both websites and the rogue collecting societies – they remain unabated.

As noted, the accreditation of VOIS as the only collecting society (it is collecting on the basis of an extended license – i.e., on behalf of record companies and performers who have not authorized that society to collect for them) has resulted in significant problems for the recording industry. The situation remains in flux because of the recent court decisions overturning the accreditation of VOIS. Most U.S. record companies have not entrusted the administration of their rights to VOIS, because the society has not demonstrated compliance, thus far, with international standards in terms of accountability and transparency. In order for U.S. rightholders to be properly represented in Russia, it is essential that VOIS (or whatever society is ultimately accredited) to 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 with reasonable agreements between the respective societies. The Government of Russia must take an active role to ensure this happens. The recent closure of Rosokhrankultura (ROK), and the transfer of its functions (including copyright and related rights administration) to the Ministry of Culture, raises new legal concerns and uncertainties about the existing accreditation of VOIS, and whether the Ministry of Culture or a new federal service under the Ministry of Economic Development (MED) will have the accreditation authority going forward.

Independent film producers are especially concerned about Internet piracy because of its harm to legitimate online distribution platforms and services – harming consumers and rights holders alike. Revenue from these platforms and services, which is licensed country-by-country, is critical to financing the development of new creative works worldwide, since piracy in one territory, harms other markets instantly. The independent film production sector cannot shift easily to new business practices that might otherwise limit piracy. For example, worldwide same day release (referred to as “day and date” release) may prove an effective method to curb or delay piracy for the major studios, which control their own worldwide distribution, but for independents, whose national distributors release on their own schedule, this technique is impossible.

There was one bright spot: the MPAA reported that in August 2010, Russian enforcement authorities took action against filehoster.ru – an infringing cyberlocker and torrent site. The police seized the server and identified 1,112 MPAA-member company titles stored in the site’s library and available for download; old titles were available

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<sup>3</sup>These figures do not account for downloads that occur directly from hosted content, such as games found on “one-click” hosting sites, which appear to account each year for progressively greater volumes of infringing downloads. These figures likely underestimate the level of peer-to-peer activity surrounding files with Cyrillic file names. These high levels of file sharing activity are estimated notwithstanding the country’s comparatively low broadband penetration.

for download for free, and new titles were offered for download for \$2 (with high-speed downloading offered for an additional \$.60). It is hoped that last year's Interfilm.ru case will start soon – the Russian Ministry Investigation Committee filed criminal charges against the site operator (for \$1.25 billion in damages); the site reappeared in the Netherlands (Leaseweb) and remains operational.

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, download-ebook.org and ebooknetstore.com – continue to harm the market for academic and professional materials. Other sites include pdfchm.com/ and free-file host providers like Paid4share.net, Icefile.info and others. Takedown notices have gone unheeded (non-compliant ISPs include: relcom.ru, agava.ru and 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. 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>4</sup>

The business software industry (BSA) reported only fourteen raids against Internet users or services in 2010 (compared with 25 in 2008), which resulted in the commencement of only four criminal cases (compared with 15 in 2008), and only three convictions (seven in 2008). One bright spot: as a result of cooperation between the MOI Department K and BSA, in October 2010, the first criminal proceeding against an administrator of a website (www.macintosh.cd), that offered DVDs loaded with illegal software, resulted in an injunction and the site being taken down; the operator received a four-year suspended criminal sentence (and in a companion civil case, ordered to pay fines of about US\$27,000).

**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 continued to lag behind levels just a few years ago. In 2010, there were 436 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, only starting to develop enforcement activities. 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 Russia, and the General Prosecutor's Office in relation to implementation of Article 146 of the Criminal Code, although efforts to update the methodology were underway in 2010. In 2010, the police ran more raids against chain retail stores (1,098, up from 1,063 in 2009, and 740 in 2008). A majority of the raids against businesses using illegal software never result in the initiation of an investigation (even where the evidence is strong). The investigators do not consider evidence collected by police during raids as sufficient, but they have been unable or unwilling to provide police with guidelines for evidence collection. Thus, criminal cases, are frequently suspended by investigative authorities or terminated by prosecutors; if they do go forward, they merely go after easy (small) targets like vendors, and not organized criminal enterprises.

The business software industry reported that one of the reasons for the significant drop in piracy rates in recent years, has been 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, BSA continued to report good cooperation with the police and investigators (Investigational Committee of Prosecution, as a result of TAIEX enforcement seminars in 2009 and 2010), and with the Ministry of the Interior, although there was a leveling off of the number of raids, but the Federal Department K officials pledged better cooperation in 2011. Even with significant activity taken against business software piracy, the BSA reported, as preliminary figures, that the piracy rate for PC software in Russia was 70% in 2010 – an increase from 2009, but still down significantly from the 87% level in 2005.

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<sup>4</sup>Examples include: nowdownloadall.com, idownloadall.com, 10xdownloads.com, idownloadunlimited.com, and nowfreedownloads.com.

Based on preliminary figures, the commercial value of PC software from U.S. vendors pirated in Russia in 2010 was \$1.74 billion.<sup>5</sup>

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 amended and it is reported that the police are undertaking *ex officio* investigations using that law. A new law on police enforcement powers is under consideration in the Duma (it had a second reading on January 28, 2011). In particular, the copyright industries want to ensure that neither of these laws limit the ability of police to undertake raids and to secure evidence, especially against commercial enterprises.

**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 recommend the initiation of criminal cases. Regarding corporate liability, Russia's current Criminal Code does not allow for corporate entities to be held criminally liable. Only a natural person (usually a corporation director) can be found criminally liable for infringement and only upon a showing that he/she had a direct intent to commit the infringement. It is extremely difficult to make such a showing (for example, against the owners of a retail outlet selling pirated product), so many cases are suspended without any penalty. Thus, verdicts are issued against only the retail staff found selling pirate products at the time of a seizure or raid, rather than against a manager or corporate owner, with little deterrence against the retail establishment.

There were a considerable number of important raids against pirate warehouses in 2010, particularly in Moscow and St. Petersburg, and there were a number of large seizures of copyrighted materials at these warehouses. For example, in May 2010, in Khimki near Moscow, a warehouse was raided and 3 million DVDs were seized; a chain of shops belonging to owners of this warehouse were also raided. Also, three raids in three warehouses in the Luzniky market in Moscow resulted in the seizure of 500,000 CDs. In total, the copyright industries reported 11 large raids against warehouses resulting in the seizure of over 10.1 million optical discs.

The Motion Picture Association (MPA) 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 2010. However, FSB did work in close cooperative work with RAPO in 2010 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 2010 included: in June 2010, the St. Petersburg economic crime police raided a DVD plant, seizing three optical disc lines, and a warehouse owned by the plant owners, seizing 300,000 optical discs. And, in December 2010, the FSB in Moscow raided two warehouses over two days at a defense plant, seizing 1.5 million optical discs. In total, RAPO participated in 903 hard goods raids in 2010.

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<sup>5</sup>BSA's 2010 statistics are preliminary, representing U.S. software publishers' share of commercial value of pirated software in Russia. They follow the methodology compiled in the Seventh Annual BSA and IDC Global Software Piracy Study (May 2010), <http://portal.bsa.org/globalpiracy2009/index.html>. These figures cover packaged PC software, including operating systems, business applications, and consumer applications such as PC gaming, personal finance, and reference software – including freeware and open source software. They do not cover software that runs on servers or mainframes, or routine device drivers and free downloadable utilities such as screen savers. The methodology used to calculate this and other piracy numbers are described in IIPA's 2011 Special 301 submission at [www.iipa.com/pdf/2011spec301methodology.pdf](http://www.iipa.com/pdf/2011spec301methodology.pdf). BSA's final piracy figures will be released in mid-May, and the updated US software publishers' share of commercial value of pirated software will be available at [www.iipa.com](http://www.iipa.com).

Unauthorized camcording in Russian theaters exploded in 2010. Camcording is particularly damaging in Russia because it fuels rampant online piracy which harms worldwide distribution and prevents the establishment of legitimate online distribution. Unauthorized camcording also threatens the continued growth of the Russian theatrical box-office marketplace. There were 75 full video camcords illegally recorded in Russian theaters in 2010, almost double the number from 2009. This problem is particularly devastating in Russia because of the exceptional quality of the materials, which consequently, is in high demand by international copyright thieves who quickly upload these illegal copies to the Internet. Since 2009, there have been 61 interdictions, mostly in Moscow, all by security in the theaters. However, these interdictions have resulted in only two criminal cases being initiated, one has already closed, so there is no deterrence to this activity.

According to the Entertainment Software Association (ESA), video game retail piracy remains significant in Russia, with pirated products still widely available on the street, in underground venues and at markets. Thus, hard copy piracy – factory replicated pirate product – remains predominant, though on a slight decrease as Internet piracy levels are increasing at a rapid pace. Pirated product is also frequently in use at cyber cafes. There is evidence that small vendors selling product in underground alleys and flea markets in central Moscow have disappeared as a result of frequent police patrols. Although pirate product is not sold in major retail chains in Moscow, it is still openly and widely sold in St. Petersburg's largest retail chains and in other cities. Examples include in St. Petersburg at Iceberg, Titanic, Playland and Dubl'Dva; as well as in Music Star (Rostov), Media Star (Zelenograd), Treck (Krasnodar) and Sphera Samara and Discomania (both in Ekaterinburg). ESA reported some successes in raids – with seizures ranging in size from 30 to 19,000 discs – at various locations, including one replication plant warehouse, and another involving an Internet site selling hard copies of pirate product. However, the police continue to focus on “easy” (smaller) targets, and while rights holder cooperation is sought and encouraged (for information on titles and damages, etc.), the cases are mostly targeting small(er) distributors. 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.

The book and journal publishing industry reports that 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, alongside the growing problem of book piracy occurring online. Popular works subject to 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 in universities, where unauthorized photocopying of academic textbooks continues to occur unimpeded, and authorities have shown little interest in proactively addressing the problem. In 2010, however, a number of booksellers, through a letter campaign to university authorities in Vladivostok, Tomsk and Chelyabinsk, succeeded in getting the universities to address piracy occurring on campus. It remains to be seen whether the universities' actions will be sustained or merely a one-off response to the bookseller's campaign. The Government, particularly the Ministry of Education, should take steps to educate their faculties and students as well as to promote the adoption of copyright laws and appropriate use policies among all institutions of higher learning.

**Raids Against Optical Disc Plants:** Although optical disc piracy is no longer the highest priority for IIPA members in Russia, large quantities of discs are still being produced there without licenses. Enforcement against optical disc production is still not effective as evidenced by the continuing operation of many raided plants. It is estimated that about 6 optical disc plants were closed in 2010. 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 2010. In 2010, BSA, MPA and the Economic Security Department of MOI, worked together on a criminal case against a large-scale group illegally producing and distributing CDs and DVDs in the Central District of Russia. BSA members were also able to win a substantial monetary damage award.

Administrative Enforcement: BSA reported only 16 administrative court decisions against infringing end-users and only 4 against channel pirates in 2010. This is compared with the 40 administrative court decisions that were resolved in 2007 and 2008 – 35 and 37, respectively, against end-users, and five and three against channel pirates. Over the past few years, the average administrative fine imposed has been about 4,482 to 5,975 rubles (US\$150 to \$200) per case. The Administrative Code (Article 7.12) provides a range of fines on natural persons (1,500 to 2000 rubles), the owners or managers of legal entities (10,000 to 20,000 rubles) and on legal entities themselves (30,000 to 40,000 rubles), as well as permitting the confiscation and destruction of pirated product. Administrative cases are filed by the police or by agencies, but the levying of fines is done by courts of general jurisdiction (natural persons) and arbitration courts (legal entities). Imposing significant administrative fines on legal entities, for example, for the illegal use of software, would have a deterrent effect (and could be imposed in instances when criminal cases end for failing to meet the high evidentiary burdens).

Enforcement Training: The copyright industries reported on their continuing participation in many training seminars over the past year with enforcement agencies and judges on how best to fight Internet piracy, as well as hard-copy piracy, and remain ready to continue this cooperation. Program participants included: the Interactive Software Federation of Europe (ISFE), the Business Software Association, RAPO (motion picture producers), and the International Federation of the Phonographic Industry. For example, in a December 2010 cross-industry training seminar, jointly organized by the European Commission (through its Technical Assistance and Information Exchange, TAIEX, program), the Investigational Committee of Prosecution (ICP), and the Russian Academy of Justice Office, over 150 participants attended (including the above-mentioned industry representatives); over 50 heads of the prosecution investigational units, along with judges, investigators and police were trained on enforcement issues. There were other similar programs in March, June and September 2010. In all, there were about four such large-scale training programs in 2010 in Moscow, St. Petersburg, Belokurikha and Ekaterinburg with a total of 350 to 400 enforcement representatives in attendance.

Optical Disc Plant Licensing and Inspections: The continued lack of clear authority for optical disc licensing and inspections in 2010 remains an ongoing set-back in the enforcement of optical disc production and distribution regulations in Russia. Even though optical disc piracy is less of a problem than digital piracy, it persists as a problem for some industries. 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 2006 IPR Agreement obligations. 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.

Proper optical disc regulations would include: (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.

## DEFICIENCIES IN THE RUSSIAN LEGAL REGIME

Overview of Legal Reforms: Russia has made progress on legal reforms as detailed in previous filings; this year, for example, it added *ex officio* authority to the Customs Code (in force on December 29, 2010) to permit the interdiction of suspected counterfeit and pirated product. However, as noted in the priority list at the outset of this filing, there are many missing pieces to having an effective legal regime – especially one geared to effective Internet enforcement, where the current legal framework cannot address the problem.

The Civil Code, Part IV, in force in 2008, made some improvements, but left many reforms either incomplete (implementation of the digital treaties), or inadequate (ISP liability and the other list of deficiencies noted in previous IIPA filings). A November 2010 draft set of amendments prepared by the Center for Private Law, has some very troubling provisions pertaining to: (i) the liability of ISPs (Article 1253); (ii) technological protection measure exceptions (Article 1299(4)), and (iii) broad exceptions (Articles 1274 and 1275).

Since its adoption, IIPA and its members have commented on three major overarching concerns with the new Civil Code: (a) the lack of clarity; (b) administrative law principles throughout the Civil Code that likely cannot be enforced by civil or criminal procedures; and (c) rules that clarify the illegality of providing services that are intended to promote the infringement of copyright and related rights (for example, by ISPs and other Internet operators to stop online infringement). This latter issue is the principal challenge for IIPA: for Russia to define ISPs, encourage cooperation on Internet piracy with rights holders to effectively deal with Internet piracy – in civil and criminal law, and to adopt secondary liability provisions. If Russia is to foster legitimate electronic commerce and if the rule of law is to apply to the online world, Russia must develop a balanced system of liability provisions that incentivizes ISPs to cooperate in addressing Internet piracy. It is encouraging that Deputy Prime Minister Igor Shuvalov announced in January 2011 that the Government of Russia wants to develop Internet regulations (targeting March 2011) to guarantee compensation and effective enforcement for rights holders, and to ensure the ISPs operate in a responsible manner.

Further, it is critical that Russia amend its regime to allow for injunctive relief, especially in Internet matters. For a detailed list of IIPA comments on the Civil Code see <http://www.iipa.com/rbc/2010/2010SPEC301RUSSIA.pdf> at page 138. In addition to those already mentioned we continue to recommend steps to ensure that 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 2008 Civil Code and the repeal of the copyright law; and, last that Article 1252(5) of the Civil Code, which currently includes remedies for the seizure and destruction of materials and equipment used in infringements, be improved by deleting the exception for the sale of materials by the state for “income,” and by parallel changes in the respective procedural codes.

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 Civil Code, 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 (including the calculation of thresholds in cases where there is no equivalent of a similar legitimate license); the application of provisional measures; and, the application of civil search procedures (especially important for software piracy cases).