

RUSSIAN FEDERATION

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

2012 SPECIAL 301 REPORT ON COPYRIGHT ENFORCEMENT AND PROTECTION

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

Priority Recommendations in Russia – Key Legal Reform and Enforcement Actions: Here is a list of IPR legal reform and enforcement priorities that IIPA recommends to the Government of Russia for 2012:

- Undertake effective actions against Internet piracy – including:
 - (a) takedowns of unlicensed streaming services including social networks, pay-per-download websites and actions against cyberlockers, BitTorrent sites, and Internet cafes, with criminal and/or administrative actions commenced (and deterrent penalties) against owners and operators of such sites, regardless of whether the servers are located in Russia or elsewhere; and
 - (b) properly staffing and resourcing 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) implement notice and takedown procedures for websites hosting illegal material;
 - (c) provide legal norms that create incentives for Internet Service Providers (ISPs) to cooperate with right holders in fighting infringement taking place over their networks or platforms, including *inter alia*: (i) legal incentives for ISPs to cooperate with rights holders to effectively deal with Internet piracy; (ii) rules that clarify the illegality of providing services that are intended to promote the infringement of copyright and related rights; and (iii) injunctive relief and a duty on ISPs to provide information to law enforcement agencies and rights holders.
 - (d) implement effective measures to address websites that are hosted outside of the jurisdiction of Russia or where the domain owner and/or website administrator are foreign entities, or where the website is registered outside of Russia, and, establish liability for domain name owners and/or website administrators regardless of the location of the servers.
 - (e) ensure that an unauthorized online distribution, communication or making available is considered an act of infringement, regardless of whether it is undertaken for profit-making purposes or other commercial benefit or advantage.

¹For more details on Russia's Special 301 history, see IIPA's "History" appendix to this filing at <http://www.iipa.com/pdf/2012SPEC301HISTORICALCHART.pdf>, as well as the previous years' reports, at <http://www.iipa.com/countryreports.html>. For a summary of IIPA's 2012 global issues, see our cover letter at <http://www.iipa.com/pdf/2012SPEC301COVERLETTER.pdf>.



- Strengthen copyright liability under the Administrative Code by:
 - (a) eliminating the for-profit requirement in Article 7.12 of the Code of Administrative Offences, and by establishing additional deterrent penalties, such as: (i) higher fixed fines for violations by legal entities and individuals; (ii) fines proportionate to corporate revenues (e.g., as is done for anti-monopoly violations); or (iii) penalties to disqualify, for one to three years, managers of legal entities; and
 - (b) ensuring that the Federal Anti-Monopoly Control uses its enforcement authority to take effective administrative actions against services that distribute protected materials without the proper authority to do so, such as, vKontakte and odnoklassniki.ru.
- 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 enforcement against illegal camcording of motion pictures.
- Establish a uniform methodology by the Investigative Committee of the Ministry of Internal Affairs (MVD) and the General Prosecutor's Office, on the investigation and prosecution of copyright and related rights infringements to ensure that prosecutors can properly investigate administrative and criminal actions, and to ensure a consistent and uniform approach to these cases throughout the country (particularly, for Internet and software end-user cases).
- Amend the Criminal Code to establish 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.

Executive Summary of IPR Issues: Russia will complete its accession to the World Trade Organization in 2012, after the Duma ratifies a final package of legislative measures. At the moment of Russia's formal accession, it is obligated to be in full compliance with the TRIPS Agreement (along with the detailed obligations spelled out in the Working Party Report). While Russia has already made many important IPR legal reforms in anticipation of WTO accession, and to comply with its other multilateral and (U.S.) bilateral IPR commitments, there remain many critical steps for full treaty and trade agreement compliance, and most importantly, to effectively address digital piracy in Russia. It is expected that the Russian Government will move expeditiously to address these matters in conjunction with its WTO accession.

For the past several years, the business software industry has been the only copyright industry that has experienced an overall positive trend in Russia. The software industry has seen piracy rates decline significantly in the past several years (a 22% drop from 2004 to the current rate of 65% in 2010), due to criminal and civil enforcement efforts directed against end-user software piracy and progress made on legalization of software purchased by the government.

For the majority of copyright industries – motion picture, music, entertainment software, and book publishing – 2011 was another year of disappointment in Russia. This was principally due to a lack of focus by Russian authorities on the very serious threat of Internet and other digital forms of piracy. The number of criminal raids, and police activity in general, declined significantly in 2011 from previous years, in large measure due to the reorganization of the police force, and a drop in resources (including a police force reduction of 20%). While hard

goods piracy remains a serious concern for some industries, Russia's laws are generally adequate for addressing this problem (although some gaps, such as optical disc regulations remain). However, this is in stark contrast to the online piracy situation where Russia's legal regime is wholly inadequate and needs modernization. Even more threatening to the copyright industries are proposed amendments to the copyright law to: (a) clearly 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.

Overall, Russia's enforcement remains deficient for most of the copyright industries – in particular, its criminal enforcement and lack of administrative actions or deterrent level administrative penalties against commercial enterprises that operate as distribution hubs for infringing content. To curb piracy, it is essential that the Government of Russia pursue an increased number of criminal and administrative actions, and strengthen administrative penalties, particularly against large-scale enterprises, and that prosecutors seek (at the Investigative Committee of the Ministry of Internal Affairs, MVD), and judges administer, deterrent criminal penalties.

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 allopmp3.com. Peer-to-peer piracy is a major concern in Russia, as it is globally, although it is presently dwarfed by the problems associated with hosted content at sites such as vKontakte and odnoklassniki.ru; these and the many other illegal music services noted in this filing, combine to prevent the development of a legitimate online market place. The music industry is also concerned with the lack of transparency and governance issues in connection with VOIS, the state accredited collecting body for record labels and performers, and calls upon the Government of Russia to use its oversight authority to ensure that foreign right holders are being fairly represented and treated, in accordance with commitments that it made to the United States Government and other of Russia's trading partners who had expressed concern with the accreditation process and decisions.

The rapid rise of unauthorized access to journals online is stunting the growth of legitimate markets and investment. Further, Russia continues to have a very serious camcording problem, one of the worst in the world, affecting worldwide markets.

Russia is a beneficiary of the General System of Preferences (GSP) program. In the first eleven months of 2011, more than US\$521.9 million in imports to the U.S. from Russia enjoyed duty-free treatment under the GSP program (and more than US\$578 million in 2010).

COPYRIGHT ENFORCEMENT IN RUSSIA

Internet Piracy Enforcement: Internet and wireless access by Russian citizens is growing rapidly; according to the ITU, there were 59.7 million Internet users as of June 2011 in Russia – which represents 43% of the population, making Russia the number two country in Internet usage in Europe after Germany. The 2006 U.S.-Russia 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."

One recommendation to significantly improve Internet enforcement, is to centrally coordinate law enforcement actions, including both administrative and criminal efforts. In addition to increasing the number of IPR cases and conducting expeditious investigations, another recommendation, is to have relevant administrative agencies (e.g., the Federal Anti-Monopoly Control) targeting large-scale illegal distribution enterprises. One key priority would be actions against the large commercial enterprises that are now responsible for most of the illegal distribution of music in Russia (since these enterprises operate without licenses from music rights holders).

In addition, prosecutors should coordinate their efforts with the police (as should the Investigative Committee of MVD, the Federal Security Service of the Russian Federation (FSB), and Customs, now that they all can initiate criminal cases). After January 2011, the General Prosecutor's Office can only supervise, but not initiate, criminal cases. Still, the General Prosecutor's Office and the Investigative Committee of MVD can develop an updated and detailed methodology for investigations of copyright infringements which would help to increase the quality, effectiveness and consistency of IPR enforcement activities. A new such draft methodology was being prepared in 2011, but unfortunately, this work has now been suspended indefinitely.

A fundamental enforcement shortcoming is the lack of authority and jurisdiction to act against copyright infringement crimes occurring on the Internet, whether through administrative or criminal means. The Code of Administrative Procedure fails to provide sufficient clarity on the ability to bring actions against commercial actors involved in the massive distribution of infringing material where there is no direct fee charged by the enterprise for the infringing materials, and Internet piracy is a very low priority for the MVD's Department K (the department with responsibility for combating technological crimes and Internet fraud, but not, explicitly, Internet copyright piracy). 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 – which is why IIPA continues to recommend the proper staffing, equipping and resourcing of a sub-unit within Department K to deal exclusively with IPR Internet cases, and to ensure its officers are 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 MVD, 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, launched in response to the takedown of torrent.ru (rutracker.org has an estimated four million users and a worldwide Alexa website ranking of 275). One particularly problematic site is GameTorrent, a BitTorrent tracker and online pirate discussion forum that is owned by a Russian national, but currently hosted in Estonia; neither ISPs nor website owners respond to takedown requests for this site. In 2011, Russia was fourth in the world in the number of connections by peers participating in the unauthorized file sharing of select Entertainment Software Association (ESA) member titles on public peer-to-peer networks – a dramatic increase from its tenth place ranking in 2010. ESA also reports that Russian service providers either host or provide proxy services to a number of the world's largest and most popular linking sites, including warez-bb.org. The motion picture industry (MPAA) citing "Peer Media Technologies" reported that during 2011, users initiated close to 31 million downloads and/or uploads of unauthorized copies of major U.S. movie titles via certain peer-to-peer protocols in Russia.²

Russia is also home to the world's two most prolific criminal release groups. The pirates obtain their source infringing copies by camcording films from local theater screens and then uploading these illegal camcords onto the Internet (and sell hard copies as well). Russia was the source of 77 illegal camcords in 2011. Pre-release DVDs of major film titles often appear on the Internet (and then in pirate hard copies sold online or in markets), within a few days after the authorized theatrical release. The illicit camcords sourced from Russia are of exceptional quality and are thus in high demand by international criminal syndicates for Internet uploading. During 2011, there were 32 film-based raids, mostly in Moscow. However, these interdictions resulted in the commencement of only one criminal case, which the prosecutor then declined to accept; there is thus no current deterrence to ongoing criminal activity.

²A major U.S. movie is defined as a movie released in 1,000 or more theaters in the U.S., so these numbers reflect only a small subset of movie-related piracy activity (since it excludes non-major releases, including local titles, other peer-to-peer protocols, and non-peer-to-peer means of dissemination, such as websites, and streaming via other technologies).

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 also a hotbed for online piracy of movies and television programming. It is also one of the largest illegal distributors of music in the world (and is listed as one of the top 40 most visited websites worldwide). It has a functionality specifically designed to enable members to upload music and video files, which includes hundreds of thousands of unlicensed copyright works (films and television programs) and recordings. It is available in many languages, including English, and 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 takedown specific content when notified, that is an inappropriate enforcement mechanism for a problem of vKontakte’s own making. Although vKontakte has a dedicated music feature, it has no licenses to distribute musical content – it either must eliminate this service, or license it properly. In January 2012, Gala Records, a Russian record label won a civil case against vKontakte for copyright infringement. Now that the Copyright Law has been properly interpreted to impose liability on vKontakte, enforcement authorities should use this decision as a springboard for criminal and/or deterrent administrative actions. Besides vKontakte, there are a number of other Russian-based sites targeting users outside of Russia. For example, Video2k.tv, launched in 2011, has quickly risen to the top ranks of linking websites. In one webmaster forum, a representative of Video2k.tv posted a graph indicating the website was loading between 2.5 and 5.3 million pages per day. Video2k.tv presently holds over 35 domains ranging from Video2k.asia to Video2k.ws. Illegal music payment sites hosted in Russia include GoldenMp3 and Mp3ninja.

Overall responsiveness to takedown notices in Russia is mixed. Some ISPs cooperate and take down pirate materials once identified, but many ISPs are 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. ESA reports, for example, only one hosted site (narod.ru) regularly complied with its takedown requests, while other sites ignored such requests. The motion picture industry reports that the largest five or six ISPs did generally cooperate and respond to RAPO cease and desist letters, but that most of the smaller ISPs did not respond (and made clear they would not do so absent a court order).

The recording industry reports that paid download sites remain 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 thirty copycat 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 (they offer “give away” incentives to attract more users; some sell albums for as little as US\$1). Some of the sites use up to thirty different domain names (but the same user interface). The pay-per-download websites remain a problem for the music industry. The Russian Government should take down the sites, and criminally prosecute the site operators. Other important pirate sites (that are not pay-per-download sites) include: zaycev.net, rutracker.org, best-mp3.ru, hotcharts.ru, musicstorm.org, muzoff.ru, primemusic.ru, poiskm.ru, mp3wall.ru, video.mail.ru, my.mail.ru, prostopleer.com, nnm.ru, rutor.org and tfile.ru. The online pirate sites have devastated the legal online music market. Thus, despite the availability in Russia of a variety of legal music services, for example Beeline, Deezer, Fidel, iviMusic, Megafon, Mp3.ru, MTS, Muz.ru, Nokia Music, Tele2, Yandex Music and YouTube, total online revenue (for recorded music) in 2010 was a meager US\$34 million. Music revenue per broadband household in Russia was only US\$11.10. In context, the next worst performing major markets in Europe, Italy and Spain, had revenues of US\$24.60 and US\$23 per broadband subscriber, respectively. In France, the figure is US\$58.80, and in the U.K. it is US\$97.50. Revenue in the United States per broadband household is US\$82.60. Thus, if Russia’s 15,700 broadband households consumed music at the depressed level of Spanish users, revenue in Russia would be ten times the present value; or, similarly using Poland, for the sake of comparison (a country with a similar GSP to Russia), the revenue figures would also be over ten times the present value. In 2010, the total value of the physical and online recorded music market in Russia was US\$101 million, compared to US\$188 million in 2006, so the situation is getting even worse.

As noted, IIPA remains very concerned with the lack of transparency and governance issues in connection with VOIS, the state accredited collecting body for record labels and performers. VOIS has not demonstrated compliance, thus far, with international standards in terms of accountability and transparency. In order for U.S. right holders to be properly represented in Russia, and to establish legal digital music services, it is essential that VOIS operates 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 independent segment of the film and television 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 films and television programming. These authorized distributors find it nearly impossible to compete with pirates and report that piracy in Russia has reached disastrous levels. Independent producers and distributors confirm that DVD sales have been particularly impacted since pirated digital copies are routinely offered for free online and with the same quality viewing experience that a DVD can provide. Unable to compete with free, legitimate distributors cannot commit to distribution agreements, or alternatively, offer drastically reduced license fees which are inadequate to support the financing of independent productions. As a result, piracy severely undermines and may permanently damage legitimate distribution networks essential to reaching consumers in Russia and leaves little confidence for investment in intellectual property. Revenue from these distribution services, which is licensed country-by-country, is critical to financing the development of new creative works worldwide. Since Internet piracy in one territory, affects other markets instantly, this type of infringement not only undercuts anticipated revenue from the distribution of a particular asset, it also harms the ability of independent producers to secure financing for future productions. The independent production sector cannot easily shift 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.

In August 2010, enforcement actions were undertaken by Russian enforcement authorities against filehoster.ru – an infringing cyberlocker and a BitTorrent site. However, following staffing changes at Department K the investigation into that case was, unfortunately, ended. MPAA reports that in October 2011, the case against Interfilm.ru was reopened and the public prosecutor charged two of the administrators of Interfilm.ru under Article 146 of the Criminal Code; the case has been referred to the Timiryazevky District Court. The Prosecutor told the media, in announcing the case, that damages to the film industry were US\$1.24 billion. Also in 2011, MPAA reported that the Economic Crime Police and Department K raided Sib-Port.ru, confiscating equipment and arresting three of the site’s owners.

The business software industry (BSA) reported twenty-two raids against Internet users or services in 2011 (compared with 14 in 2010, and 25 in 2008), which resulted in the commencement of six criminal cases (compared with 15 in 2008), and three convictions (the same as in 2010).

Criminal Enforcement in General: Criminal enforcement in Russia is a priority for IIPA and its members. Most criminal enforcement activity by the government in 2011 was geared toward physical piracy and little, if any, toward digital piracy enforcement. As a result, few criminal cases (including for example, the 2009 Interfilm.ru case), have been pursued against illegal website operators. IIPA recommends that Russian authorities step up efforts to investigate Internet piracy of business software, entertainment software, books, music, and film material, by a variety of technical means, and increase the number and disposition of effective criminal investigators.

In 2011, the Russian police continued to take actions against copyright infringers, including against street vendor piracy (which remained constant from 2010, after years of decline), and companies involved in the installation and use of pirated software. However, the overall number of raids, seizures, and especially criminal cases commenced, was down from the number of cases undertaken only a few years ago. 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. One major case undertaken by authorities in cooperation with the Russian-Anti Piracy Organization (RAPO) in 2011, was the raid of a mid-size replication plant, and the seizure of over 10,000 discs, including motion picture and entertainment software materials. A criminal case is pending, awaiting the results of forensic experts. Between May and September 2011, RAPO, along with law enforcement authorities, engaged in a concerted campaign against DVD distributors in Moscow, St. Petersburg, Novosibirsk, and Rostov-on-Don. During this campaign, 246 searches were conducted, 46 kiosks were closed, 6.3 million counterfeit DVDs were seized, and 107 criminal and 69 administrative cases were initiated. As part of this campaign, FSB, in cooperation with RAPO, seized 1.5 million pirated DVDs in two warehouses at a closed military plant in Moscow in June 2011; a criminal case was initiated against the two owners. Additionally, FSB, in cooperation with RAPO, raided two warehouses and four retail shops in Tula in June 2011, seizing 500,000 pirated DVDs; two criminal cases were initiated against the owners of the warehouses and retail shops. In October 2011, RAPO, working with enforcement authorities, participated in the largest known seizure in Russia (which was widely covered in the press): in Krasnoyarsk, Siberia, authorities seized two million pressed counterfeit discs, including a number of pre-release titles, from a warehouse.

There were also a considerable number of administrative and criminal penalties imposed against illegal hard copy vendors. The motion picture industry noted several markets, including Gorbushka, Savelovskiy, Sherbakovsky, Luzniki, and Radio that no longer contain pirate DVDs, and only sell legitimate DVDs. Further, the local motion picture industry (Motion Picture Association, MPA) reported very good cooperation with law enforcement authorities in organizing raids against problematic kiosks. One St. Petersburg court sentenced the two co-owners of Media Records to (3 and 3 1/2 years) imprisonment, and fined them US\$115,000 in damages; this case commenced after a replication plant raid (in 2010) by the Economic Crime Police and RAPO and the seizure of three replication lines, stampers, and over 200,000 illegal discs. 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, and at the Yunoa market in St. Petersburg, remain a significant problem. Some copyright industries, such as the motion picture industry, have seen a decline of 5% to 10% in hard goods piracy in the past two years, in major cities, including Moscow, St. Petersburg, Rostov-on-Don, and Novosibirsk. The Entertainment Software Association (ESA) also reported a slight decline in the number of illegal hard goods replicated in Russia.

While the business software industry reported an increase in the number of raids, most of the other industries reported substantial declines in the number of raids, likely due to the severe cuts in police resources. All the copyright industries are concerned that the proportion of raids to the initiation of cases, and to criminal verdicts is very disproportionate. For example, the Business Software Alliance (BSA) reported the number of raids increased (with most focused on “channel” raids against CD-sellers and hard disk loaders), but the number of criminal cases initiated declined substantially. There were significantly fewer criminal cases in 2011 (63) than in 2008 (154) and 2007 (200) against end-users, and in “channel” cases (pre-installed hard disk piracy) – 427 in 2011 versus 496 in 2009 and 491 in 2010. BSA reported that there were only 19 verdicts in 2011 involving end-user piracy compared to 41 in 2010 (and 83 in 2007), 180 involving “channel” piracy compared to 325 in 2010, and three involving Internet piracy (the same number as in 2010, but down from seven in 2008). The Government of Russia (MVD) usually provides detailed annual statistics on intellectual property cases, and investigations commenced; however, the 2011 report was not available before the Special 301 filing deadline.

The local motion picture industry (MPA) reports that enforcement activity in the past few years, especially in Moscow and St. Petersburg, has remained relatively consistent. According to “Film Business Today” (Russia), box office receipts in Russia and the other Commonwealth of Independent States (excluding Ukraine) set a new record in 2011 – US\$1.16 billion (an 11.74% increase from 2010).

One member of the Entertainment Software Association (ESA) reported an increase in the number of criminal actions initiated (15 total) in 2011 from 2010. However, an ongoing problem is the reluctance on the part of police to pursue *ex officio* actions against major distributors and manufacturers of pirated entertainment software

products. Instead, the 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 (10 to 250 discs). 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 in St. Petersburg, Rostov and Krasnoyarsk.

All the copyright industries are being harmed by commercial-scale piracy, which can only be addressed through enhanced administrative actions (and penalties), and criminal measures. Civil measures are not capable of providing the requisite level of deterrence. 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. The recent increase in the criminal threshold without special consideration of its application to Internet offenses, as was done in the United States (in the Net Act), could exacerbate this problem; this further underscores the importance of also using administrative authority in digital piracy cases. 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 right holders), 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 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. The problems are further exacerbated by ongoing reforms of the investigative bodies. ESA reports delays in examination reports from government experts, due to a lack of technical expertise; they estimate that the average time for a case (a forensic examination) is a year and half. In one instance involving 19,000 pirate discs from 2009, the forensic examination is still ongoing. In one case from 2007 (involving 800 pirate discs), the case was suspended in 2011 for failing to properly identify the infringer.

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 (court of general jurisdiction) – 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 in MVD should continue to work with IIPA members on future training programs. IIPA recommends that the General Prosecutor's Office (along with the MVD-IC) appoint a government liaison with IP right holders to more effectively bring criminal investigations and trials to successful conclusions. The approval in November 2011 of a specialized IP court in Skolkovo (the innovation center), to be implemented in February 2013 (with 30 trained judges), is a positive step (and even more so if these courts are eventually created in other cities and regions across Russia).

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.

Raids Against Businesses Using Pirate Products: The Business Software Alliance (BSA) reports the overall quantity of end-user raids against businesses remained high, in fact, increased back to 2007 levels after several years of decline. However, as already noted, the number of the raids, while high, is disproportionate to the number of criminal cases initiated and verdicts rendered (and raids in many federal districts resulted in no criminal investigations proceeding). In 2011, there were 554 raids, up from 436 raids in 2010 (but down from 589 in 2007), but only 63 cases initiated and only 19 leading to verdicts, compared with four times those numbers 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 Investigative Committee of the MVD, and the General Prosecutor's Office in relation to implementation of Article 146 of the Criminal Code, although efforts to update the methodology began in 2010. In 2011, police ran more raids against chain retail stores (1,161, up from 1,098 in 2010, 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). Investigators often 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.

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 awareness (for businesses especially) about legal versus illegal activities, and the resulting legal licensing of software at many companies and government entities. In 2011, BSA successfully used civil enforcement actions in six out of seven cases filed. In addition, BSA continued to report good cooperation with the police and investigators. BSA reports that the piracy rate for software deployed on personal computers in 2010 was 65%, down from a level of 87% in 2004; the commercial value of unlicensed software use attributable to U.S. vendors in Russia has increased significantly during that time from US\$1.4 billion in 2005 to US\$2.8 billion in 2010 (BSA will release its 2011 data in May 2012).

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 took effect on

March 1, 2011. For the copyright industries the key is that these laws properly enable 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. Amendments to the Criminal Code to allow corporate entities to be held criminally liable would help to correct this problem.

There were a considerable number of important raids against pirate warehouses (and large numbers of seizures) in 2011, particularly in Moscow and St. Petersburg. As one example, in August 2011, the Federal Security Service along with RAPO, raided a warehouse in Moscow, seizing 1.2 million illegal DVDs (including a large number of pre-release titles). A criminal case (per Article 146 of the Criminal Code) was initiated, along with the arrest of two owners and 23 workers.

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. Pirate product, while not found in the major retail chains in Moscow, is being openly sold in other large cities, such as St. Petersburg (by two of the three largest retailers), Rostov and Krasnoyarsk. ESA reported that there were only four criminal verdicts rendered in entertainment software cases in Russia in 2011 (including fines, community service, and a suspended sentence, but no jail sentences). 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.

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 2 optical disc plants were closed in 2011. However, it is more difficult now to gauge the number of plants in operation in Russia because there are many that have licenses; RAPO reports that there are about 25 now in operation.

The continued lack of clear authority for optical disc licensing and inspections in 2011 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 right holders. In addition, any plant licensing regime should extend in scope to the operators of telecine machines and mastering laboratories used to pirate audiovisual works.

Administrative Enforcement: 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

entitles 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 (for natural persons) and arbitration courts (for legal entities). Imposing significant administrative fines on legal entities, for example, for the distribution of infringing content or 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). Unfortunately, current administrative procedures are inadequate because of the very low level of fines and the inability to reach commercial enterprises that distribute infringing content (especially when there is no direct payment for such infringing content, but only, for example, advertising revenue, such as at vKontakte). When administrative actions have been undertaken, they have resulted in the imposition of wholly inadequate penalties. BSA reported only eleven administrative court decisions against infringing end-users and only one against channel pirates in 2011. 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 between 4,754 and 6,339 rubles (approximately, US\$150 to US\$200) per case, which is much too low to be a deterrent.

DEFICIENCIES IN THE RUSSIAN LEGAL REGIME

Overview of Legal Reforms: As detailed in previous filings, Russia has made progress on legal reforms as it moved toward WTO accession. 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. Another positive step was the removal of camcording from the scope of the private copy exception, allowing for enforcement against illicit camcording in theaters. In addition, we note the revisions to Article 146 of the Criminal Code that were enacted on December 7, 2011 as part of a larger reform of the Criminal Code raised the monetary threshold for the first level of criminal copyright cases from 50,000 to 100,000 rubles. While this represents a significant increase, we appreciate that the final bill scaled back the initial proposal to raise the threshold to 250,000 which would have severely undermined enforcement for many Russian and foreign copyright industries.

However, as noted in the priority list at the outset of this filing, there are still many key missing pieces to having an effective legal regime – especially for 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, had some very troubling provisions pertaining to: (i) the liability of ISPs (Article 1253(1)); (ii) technological protection measure exceptions (Article 1299(4)), and (iii) broad exceptions (Articles 1274 and 1275). The proposed September 2011 draft would not fix any of these key problems.

In addition, 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) the absence of rules that clarify the illegality of providing services that are intended to promote the infringement of copyright and related rights. This latter issue is a 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 was encouraging when Deputy Prime Minister Igor Shuvalov announced in January 2011 that the Government of Russia wanted to develop Internet regulations to guarantee compensation and effective enforcement for rights holders, and to ensure the ISPs operate in a responsible manner. Unfortunately, to date, those provisions have not been adopted. Further, it is critical that Russia amend its regime to allow for injunctive relief, especially for Internet matters.

Two existing hurdles to effective civil and criminal enforcement are: (a) the failure of courts and police to apply statutory presumptions of copyright ownership; and (b) overly burdensome evidentiary requirements to prove

title – requiring a “full” chain of title for each recording in every investigation which is especially problematic for foreign rights holders with translation, notarization and other costs. For the music industry, the criminal threshold, now raised to 100,000 rubles, equals 4,000 songs based on the current calculation methodology; this presents a virtual bar to commencing most criminal investigations and denies critical enforcement remedies.

For a detailed list of IIPA’s comments on the Civil Code, and the other relevant laws, 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 should continue to apply in light of the adoption of the 2008 Civil Code and the repeal of the copyright law. Last, we recommend 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).