

RUSSIAN FEDERATION

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

2013 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that the Russian Federation be retained on the Priority Watch List in 2013.¹

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 2013:

- Undertake effective actions against Internet piracy – including:
 - (a) stopping the infringement that occurs via unlicensed streaming services including those incorporated into social networks, as well as actions against pay-per-download websites and 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. This includes actions against commercial enterprises that provide services with the clear intent to promote or induce infringement, such as vKontakte’s music service (which consists predominantly of infringing material); and
 - (b) properly staffing and resourcing of Internet enforcement units in the Ministry of Internal Affairs (MVD), and in the various police enforcement agencies (including a sub-unit within Department K).
- 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) clarify (or confirm, if existing) the illegality of providing services that are inducing or encouraging the infringement of copyright and related rights, or that facilitate infringement and do not take reasonable steps to prevent it (i.e., providing a clear basis for liability for such service providers);
 - (c) implement notice and takedown procedures to ensure that websites hosting illegal material take expeditious action to remove links to, or copies of, infringing material. Such procedures should be efficient, scalable (e.g., capable of being fully automated), and likely to result in the permanent removal of links to, or copies of, infringing material;
 - (d) 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 through the adoption and implementation of effective business practices that address infringement;
 - (e) introduce a duty on ISPs to provide information to law enforcement agencies and rights holders; and, ensure that injunctions are available against ISPs and other services;

¹For more details on Russia’s Special 301 history, see IIPA’s “History” appendix to this filing at <http://www.iipa.com/pdf/2013SPEC301HISTORICALCHART.pdf>, as well as the previous years’ reports, at <http://www.iipa.com/countryreports.html>. For a summary of IIPA’s 2013 global issues, see our cover letter at <http://www.iipa.com/pdf/2013SPEC301COVERLETTER.pdf>.



(f) 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; and

(g) 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.

- 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 raising administrative penalties to deterrent levels, for example, by implementing: (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.
 - (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; and
 - (c) establishing a police unit with clear responsibility to conduct administrative IPR enforcement or prioritize this task for Department K (and properly training and resourcing that police unit).
- Increase the overall number of criminal IPR cases to previous levels, and 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 certain rights operate in a fair and transparent manner based on principles of accountability and fair governance, 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.
- Amend the Criminal Code and undertake effective enforcement against illegal camcording of motion pictures.
- Ensure government agencies and state owned enterprises procure and use only legal software.
- Establish a uniform methodology for the Russian enforcement agencies 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 enterprise end-user cases). Prepare and adopt judicial guidelines for civil search procedures (consistent with WTO TRIPS Agreement), and the retention of evidence (after raids) for civil and arbitration proceedings.
- Amend the Criminal Code to establish criminal liability against legal entities, including for IPR crimes.

Executive Summary of IPR Issues: In 2012, Russia completed its accession to the World Trade Organization. It is now obligated to be in full compliance with the WTO TRIPS Agreement, along with the detailed additional obligations spelled out in the Working Party Report. In addition, in December 2012, the U.S. and Russian governments completed a detailed IPR Action Plan which sets out a number of important enforcement and legal reform priorities for Russian IPR enforcement, which, if properly and fully implemented, should significantly improve copyright protection and enforcement in Russia. These two important steps undertaken in 2012, if fully implemented,

provide an historic opportunity for the Government of Russia to make great progress in improving copyright protection and enforcement. Although Russia has made a number of important IPR legal reforms over the past several years for WTO accession and in order 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 and immediately address digital piracy in Russia.

Despite the accession to the WTO and the signing of the U.S.-Russia IPR Action Plan, 2012 was a year where little concrete progress was made in Russia on either legal reforms or, more importantly, enforcement. Russian authorities failed to effectively address 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 2012 from previous years. Following legislation passed in 2011, there was a major reorganization of the police force and a drop in resources (there are about half the number of IPR economic crime police as there were a few years ago), and not coincidentally, in 2012, the initiation of criminal IPR cases is at about half its level from five years ago. Most tellingly (according to the information available to us), there was not a single Internet piracy criminal case commenced in Russia in 2012. Additionally, there were too few administrative actions or deterrent level administrative penalties against commercial enterprises that use or operate as distribution hubs for infringing content. To curb piracy, the Government of Russia needs to pursue more, and more effective criminal and administrative actions, and strengthen administrative penalties, particularly against large-scale enterprises, and law enforcement agencies should seek, and judges should administer, deterrent criminal penalties.

For the past several years, the business software industry has been the only copyright industry that has seen a positive trend in piracy rates in Russia. Software industry piracy rates declined significantly in the past several years (a 10% drop from 2007 to the current rate of 63% in 2011),² due to criminal and civil enforcement efforts directed against end-user software piracy and progress made on legalization of software purchased by the government. However, this progress is likely to stall unless Russian authorities reverse the significant decline in enforcement activity by Russian enforcement authorities and recommit to ensuring legal software use in government institutions and state owned enterprises.

Hard goods piracy remains a serious concern for some industries even though Russia's laws are generally adequate for addressing this problem (although some gaps remain). But it is the online piracy situation where Russia's legal regime is wholly inadequate and in need of modernization. There are important legal reforms needed to move forward – as detailed above. And, the Russian legal regime must avoid backsliding. For example, last year there were efforts to amend the copyright law to clearly exempt from copyright liability all third parties – including hosting providers and service providers who openly encourage infringement, and to excuse almost all online infringing activity as “private” copying. Had these provisions been adopted, the Russian legal regime would have taken a step even further backward in its ability to address its serious digital piracy problem.

The music industry is particularly concerned about the continued operation of infringing music services, such as the one operated by vKontakte (still operating despite several Russian court rulings against it). In December 2012, vKontakte was listed by the U.S. Government as one of thirty Special 301 Out-of-Cycle Review of Notorious Markets because of its ongoing illegal activity. 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 at

²BSA | The Software Alliance's 2012 Global Software Piracy Study, conducted with two leading independent research firms, IDC and Ipsos Public Affairs, measured the rate and commercial value of unlicensed PC software installed in 2011 in more than 100 markets. In 2011, the software piracy rate in Russia was 63%, representing a commercial value of unlicensed software of US\$3.23 billion. These statistics follow the methodology compiled in the Ninth Annual BSA and IDC Global Software Piracy Study (May 2012), <http://portal.bsa.org/globalpiracy2011/index.html>. The BSA study covers piracy of all software run on PCs, including desktops, laptops, and ultra-portables, including netbooks. It includes operating systems, systems software such as databases and security packages, business applications, and consumer applications such as games, personal finance, and reference software. It also takes into account free software, open source software, and software as a service if it is paid for. It does not cover software that runs on servers or mainframes and routine device drivers, free downloadable utilities such as screen savers, and software loaded onto tablets or smartphones. The methodology used to calculate this and other piracy numbers are described in IIPA's 2013 Special 301 submission at <http://www.iipa.com/pdf/2013spec301methodology.pdf>

Russia's second largest social network site, odnoklassniki.ru, which also operates an unlicensed music service. Those two 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 the state accredited collecting societies for authors, record labels and performers, including VOIS, and calls upon the Government of Russia to use its oversight authority to ensure that right holders are being fairly represented and treated, in accordance with commitments that it made to the U.S. Government and other of Russia's trading partners who had expressed concern with the accreditation process. Fair representation in these societies includes direct representation on the board in a manner that is proportionate to market share (and that reflects commercial realities). During WTO accession (in the Working Party Report, paragraph 1218), Russia assured its trading partners it would "review its system of collective management of rights in order to eliminate non-contractual management of rights within five years after Part IV of the Civil Code entered into effect" (in 2008); so, that is an obligation for 2013 – to bring the management societies in line with international standards on governance, transparency and accountability.

Book publishers are also concerned by the prevalence of online piracy in Russia, particularly on hosted-content sites such as pdfchm.com, and note very low compliance rates in response to rights holder requests to takedown links to infringing content this past year. Peer-to-peer piracy continues to be an issue, with sites such as rutracker.org providing free unauthorized access to e-books. Publishers and other rights holders still find a number of phishing sites hosted in Russia purporting to offer instant downloads of free e-books, as well as other copyrighted content, for a minimal membership fee. Customers providing credit card information do not actually get any files, but do incur unauthorized charges on their credit cards. In addition, 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 Generalized System of Preferences (GSP) program. One key factor in determining eligibility for GSP benefits is whether a country is providing adequate and effective protection of intellectual property rights. In the first eleven months of 2012, more than US\$522.1 million in imports to the U.S. from Russia enjoyed duty-free treatment under the GSP program (and more than US\$574.8 million in 2011).

COPYRIGHT ENFORCEMENT IN RUSSIA

Internet Piracy Enforcement: Russia has one of the largest and most active online communities in Europe. Internet and wireless access by Russian citizens is growing rapidly; according to the ITU, as of June 2012, almost 49% of the Russian population now has Internet access, up from 43% just a year earlier. Yet, basic copyright enforcement of Internet piracy has lagged far behind the rapid growth of Internet and wireless access in Russia.

In three separate bilateral and multilateral agreements over the past five years, the Government of Russia has made commitments to take effective action against Internet piracy. In the 2006 U.S.-Russia IPR Agreement, Russia agreed 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 registered in Russia's .ru domain name, or whose servers are situated in Russia) and "to investigate and prosecute companies that illegally distribute objects of copyright or related rights on the Internet." As part of its WTO accession, in the Working Party Report (paragraph 1339), the Government of Russia pledged that it would "continue to take actions against the operation of websites with servers located in the Russian Federation that promote illegal distribution of content protected by copyright or related rights, such as phonograms (sound recordings) and investigate and prosecute companies that illegally distribute objects of copyright or related rights on the Internet." Most recently, in December 2012, in the U.S.-Russia Action Plan on IPR, the Government of Russia agreed it would take "enforcement actions targeting piracy over the Internet" and more specifically it would, inter alia: "Take measures in order to disrupt the functioning of websites that facilitate criminal copyright infringement, and provide for takedown of infringing content...Take actions against the creators and administrators of websites through which intellectual property crimes are committed...Conduct meaningful consultations with rights holders to target and to take action against high-priority infringing websites." Unfortunately, in a current marketplace plagued by digital piracy, the

Government of Russia, has to date, taken few of these steps. The success of Russia's WTO accession, and the Action Plan, will be measured by how it implements the many pledges and commitments it has made, especially those directed against Internet piracy.

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 Russia, the Investigative Department of MVD, the Federal Security Service of the Russian Federation (FSB), and Customs, now that they all can initiate criminal cases. Beginning in 2011, the General Prosecutor's Office can supervise, but not initiate, criminal cases. One recommendation is that the General Prosecutor's Office, the Investigative Committee of Russia, and the Investigative Department of MVD 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 (work on a draft methodology was indefinitely suspended two years ago).

A fundamental enforcement shortcoming is the lack of clear 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, including 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, and that other such units be formed within the MVD to deal exclusively with IPR Internet cases, and to ensure 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 further 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 248; it is also one of the thirty "Notorious Markets" named by the U.S. Government in December 2012 for its blatant online piracy. 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 2012, Russia was first 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 (and fourth place in 2011). 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, final4ever.com and the warezscene.org.

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). 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 remain in high demand by international criminal syndicates for Internet uploading.

vKontakte, the most popular online social network in Russia (over 140 million registered members worldwide and 39 million visits per day) is the largest single distributor of infringing music in Russia and also a hotbed for online piracy of movies and television programming, which is why it is on the U.S. Government's "Notorious Markets" list. 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, stream 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 several civil cases (including from the highest court) against vKontakte for copyright infringement, but very low remedies were awarded – (even though the Civil Code, Part IV, Article 1301 provides statutory damages of 10,000 to 5 million rubles, in the discretion of the court). Now that the Copyright Law has been interpreted to impose liability on vKontakte, enforcement authorities should use this decision as a springboard for criminal and/or deterrent administrative actions against not only vKontakte, but the many other Russian-based sites targeting users inside or outside of Russia (such as, fast-torrene.ru, my-hit.ru, okinj.tv, etc.).

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 (which were also named to the Notorious Markets list by the U.S. Government in 2012). 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). These and other pay-per-download websites remain a problem for the music industry. The Russian Government should takedown 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 (there are over 2,500 sites). In addition, in December 2012, the U.S. Government named two other Russian "Notorious Markets": one a linking site (warez-bb – registered in Sweden but hosted by a Russian ISP), and one cyberlocker (rapidgator.net – originally hosted in the United Kingdom, but now in Russia after U.K. officials shut it down).

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.

As noted, there was not one Internet criminal case commenced in Russia in 2012. There were some notable criminal enforcement cases in 2010 and 2011, but with mixed results: for example, in August 2010, Russian enforcement authorities commenced a case against filehoster.ru – an infringing cyberlocker and a BitTorrent site. However, following staffing changes at Department K, the investigation into that case ended. MPAA reports that in October 2011, a 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, where it is still pending. 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, but that case is also still pending.

BSA | The Software Alliance (BSA) reported only one raid against Internet users or services in 2012 (compared with 22 in 2011, 14 in 2010, and 25 in 2008), which did not result in the commencement of a criminal case (compared with 6 in 2011 and 15 in 2008), and thus, no convictions (there were three such convictions in each of 2011 and 2010).

To develop legal online music markets, the Government of Russia must resolve the issue of the state accreditation of collecting societies. IIPA remains very concerned with the lack of transparency and governance issues in connection with VOIS, the sole 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. rights 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 needs to act on this as it obligated itself to do in its international agreements (e.g., as specified in the Working Party Report, to be undertaken by 2013).

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. The motion picture industry reports that in 2012, most of the ISPs did generally cooperate and respond to RAPO cease and desist letters. There were attempts in 2012 by the Ministry of Economic Development to develop formal notice and takedown procedures between rights holders and ISPs, but those efforts were not successful.

Criminal Enforcement in General: For both digital and hard copy piracy, criminal enforcement in Russia remains a priority for IIPA and its members. Criminal enforcement by the government in 2012 was aimed at physical piracy; as already noted, there was not a single criminal case directed at digital piracy. IIPA recommends that Russian authorities step up their 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 2012, the Russian police continued to take actions against copyright infringers, including against street vendor piracy 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. 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 (and an overall decline in the size of the hard goods

market by about 50% since 2010). They also report continued cooperation by enforcement authorities with the Russian-Anti Piracy Organization (RAPO) in 2012.

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.

All of the copyright industries reported substantial declines in the number of raids in 2012 from previous years, in part due to the severe cuts in police resources. In addition, the copyright industries are concerned that the proportion of raids to the initiation of cases, and to criminal verdicts, remains disproportionately low. The Government of Russia (MVD) usually provides comprehensive annual statistics on intellectual property cases, and investigations commenced; however, the full 2012 report was not available before the Special 301 filing deadline. From preliminary data, however, it is clear that criminal enforcement by the Government of Russia is down significantly, from prior years. According to the MVD statistics (through November), the number of criminal investigations was 3,455, less than half the (full year) statistics for 2007, when 7,874 investigations were commenced (there were 5,033 in 2011 and 6,118 in 2010).

BSA reported the overall number of raids decreased (as in prior years, the majority of raids are “channel” raids against CD sellers and pre-installed hard disk loaders). For example, there were 506 end-user raids in 2012 (down from 554 in 2011), and 931 “channel” case raids, down from 1161 in 2011. The number of criminal cases initiated did increase, although the number of court verdicts declined substantially. There were 97 criminal cases initiated against end-users in 2012, up from 63 in 2011, but down substantially from 200 in 2007 and 154 in 2008; there were 609 “channel” cases initiated in 2012, up from 427 in 2011 (there were no Internet criminal cases initiated in 2012). However, there were 24 verdicts in the end-user cases, up from 19 in 2011, but down substantially from 83 in 2007; there were 70 “channel” case verdicts in 2012, down from 180 in 2011, and 325 in 2010 (and no Internet verdicts in 2012).

MPA reports that enforcement activity in 2012 was about the same as in 2011, with most of it concentrated in Moscow and St. Petersburg, but like other industries, was down overall from only a few years ago, as a result of the reorganization of the police and severe reductions in enforcement personnel. The motion picture industry reported box office receipts in Russia in 2012 was US\$1.24 billion (an 8% increase from 2011).

An intensification of criminal investigations and criminal convictions against principals of organized commercial pirates is sorely needed, especially directed at Internet 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 have rarely, if ever, been 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 2011 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 IPR 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 rights 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 it is recommended 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 continues to report delays in examination reports from government experts, due to a lack of technical expertise.

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 Investigative Department of 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 rights holders to more effectively bring criminal investigations and trials to successful conclusions. The approval in 2011 of a specialized IP court in Skolkovo (the innovation center), to be implemented in February 2013 (with thirty trained judges), is a positive step (and even more so if these courts are eventually created in other cities and regions across Russia). In 2012, the Government of Russia, including Prime Minister Medvedev, convened an anti-piracy/anti-counterfeiting forum that included over 1000 participants from the copyright and trademark industries (including IIPA members); one recommendation is to make this an annual event.

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 or against a business using pirated software), 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: While the number of criminal end-user raids (and verdicts) were down substantially from a few years ago, as noted above, BSA did report good cooperation with enforcement officials. In 2012, the number of *ex officio* end-user raids declined even in major cities including Moscow and Rostov-on-Don (among others), and there was inconsistent enforcement in other cities and regions. The continued inconsistency in the number and quality of raids stems from the lack of a uniform methodology promulgated by the Investigative Department of MVD, the Investigative Committee of Russia, and the General Prosecutor's Office in relation to implementation of Article 146 of the Criminal Code. 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.

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. As one example, CDs and DVDs with illegal software are readily available in markets and in kiosks, but the police only take action against the vendors, not the organized illegal businesses that make those materials available. There were no reported raids against large pirate warehouses in 2012, but there were eight raids (and the seizure of materials) against mid-sized warehouses.

Civil Enforcement: The commercial-scale piracy harming all of the copyright industries can and should be addressed through enhanced administrative actions (and penalties), and criminal remedies. 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.

While criminal enforcement (by the police) remains the primary IPR enforcement tool in Russia against commercial piracy, beginning in 2011, the business software industry has been able to expand its civil search practices against commercial end-user infringers as a secondary enforcement method. While the number of searches is low (six in 2011, eleven in 2012), this activity has contributed to public awareness for businesses especially, about legal versus illegal activities, as well as helping to legalize software in commercial entities.

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 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 (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 18 administrative court decisions against infringing end-users, and 24 against “channel” pirates in 2012 (none against Internet pirates). This was an increase from the 11 end-user and one “channel” decision in 2011, but is down from the 37 end-user decisions in 2008, or the 11 “channel” decisions in 2009. During 2012, the average administrative fine imposed on legal entities was about 30,000 rubles (approximately, US\$1,000) per case, which is too low to be a deterrent.

DEFICIENCIES IN THE RUSSIAN LEGAL REGIME

Overview of Legal Reforms: Russia did make progress on legal reforms as part of its 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. Amendments were made in 2012 to the Criminal Code (Articles 81 and 82) pertaining to the seizure and retention of electronic evidence obtained in pre-trial investigations.

However, there remain 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 (unclear ISP liability, no notice and takedown procedure, and the other list of deficiencies noted in previous IIPA filings). A 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); it was never enacted. More recently, in 2012, amendments were offered to introduce liability for ISPs (intended to comply with the EU e-Commerce Directive). However, there are no concrete proposals yet on formal notice and takedown provisions or other key proposals; there was discussion in 2012 of a separate concept for a voluntary registry to share information between rights holders and intermediaries.

Since the adoption of the new Civil Code, IIPA and its members have commented on three major overarching concerns: (a) a lack of clarity on numerous provisions (especially exceptions); (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 (i.e., a clear basis of liability for online websites and services that induce or encourage infringement). This latter issue is a principal challenge for IIPA: for Russia to define ISPs (and the various services they provide), 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. Further, it is critical that Russia amend its regime to allow for injunctive relief, especially for Internet matters.

Two other 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”). Unfortunately, the resolution did not resolve a number of legal issues that remain unclear, and as a result problematic for judges trying to enforce IPR infringements. These issues include: the treatment of temporary copies, i.e., defining reproduction as the storage of a digital copy of a work in an electronic medium; the failure to craft explicit liability rules for infringers who pre-install business software on PCs; the failure to establish rules to determine damages (i.e., the value of works), including in instances of a “making available”; and, the failure of courts to apply provisional measures (and to clarify evidentiary rules in civil searches including the retention of materials after raids).