

RUSSIAN FEDERATION

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

2015 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 2015.¹

Executive Summary: As the U.S. Government noted in its “Report on Russia’s Implementation of the WTO Agreement” (December 2014), “the current IPR enforcement environment in Russia remains weak” and, more specifically, online piracy “has been, and remains, a significant problem in Russia.”

The Russian Duma enacted one noteworthy amendment in November 2014 (Federal Law No. 364 – in force May 1, 2015), expanding a 2013 law that provided procedures for complying with takedown notices directed at websites and hosting activities. The 2013 law was limited in its application to motion pictures and television programs. The 2014 amendment expands the 2013 law to cover all copyright subject matter, excepting photographs, and it would allow for website blocking in the event of repeat infringement. While the 2013 law has, thus far, been of somewhat limited effectiveness, its expansion to other types of copyright works is welcomed.

The Government of Russia is presently considering the adoption of an Internet tax paid by digital users, intended for distribution to rights holders in lieu of licensing, to compensate rights holders for massive online infringement of their works. While supporters of the proposal suggest it would “improve” the digital marketplace, we are concerned that such a levy would fail to generate fair or meaningful compensation for creators and producers of copyrighted material for the use of material, and would instead reduce competition between services that could expand the legitimate digital marketplace. This proposal would create a compulsory license for the distribution of copyright protected materials in violation of the requirements of the TRIPS Agreement and the WIPO treaties. Advocates of this proposal claim that it would provide a solution to the current market failure. However, the proposal would instead lock-in market failure, in perpetuity, eroding any basis for establishing conditions for healthy and legal competition. We urge the Government of Russia to reject this proposal, and instead focus on improving enforcement against infringing parties (and those who enable infringement), thereby promoting opportunities for voluntary licensing and the development of market conditions, and to use all other available tools to create a robust online marketplace.

It has now been two years since Russia completed its accession to the World Trade Organization, and agreed to a detailed IPR Action Plan with the U.S. Government. Neither the WTO obligations outlined in that Action Plan, nor in the 2006 U.S.-Russia IPR Agreement – both aimed at improving the marketplace for digital copyright materials – have been fully and properly implemented by the Government of Russia. Instead, enforcement has lagged. In the past several years, the quality and quantity of criminal raids and police activity against IPR infringers in general has declined significantly, and, in the case of well-known large-scale infringers on the U.S. Government’s Notorious Markets List, these raids have been absent altogether. In part, this was the result of a 2011 major reorganization of the police force and a drop in resources. It also appears to be the result of a change in government priorities and an unwillingness to take action against online infringement. Effective enforcement in Russia should consist of the Government of Russia pursuing more, and more effective, criminal and administrative actions, and strengthening administrative penalties, particularly against large-scale enterprises.

¹For more details on Russia’s Special 301 history, see previous years’ reports at <http://www.iipa.com/countryreports.html>. For the history of Russia’s Special 301 placement, see <http://www.iipa.com/pdf/2015SPEC301HISTORICALCHART.pdf>.



PRIORITY ACTIONS REQUESTED IN 2015

IIPA recommends the following priority enforcement actions and legal reforms to the Government of Russia for 2015:

- Reject the proposed Internet levy (and focus instead on growing the legitimate online marketplace by fostering fair competition based on the rule of law).
- Undertake effective actions against Internet piracy – including unlicensed streaming services, pay-per-download websites, videogame hacking or cheating sites, cyberlockers, BitTorrent sites, private servers bypassing official videogame servers, and other commercial enterprises that provide services with the clear intent to promote or induce infringement, whether or not the servers are located in Russia.
- Properly staff and resource the Internet enforcement units in the Ministry of Internal Affairs (MVD) – such as Department K – and add copyright infringement work to their list of priorities.
- Increase the overall effectiveness and number of criminal IPR cases, and bring deterrent criminal actions against retail chains that sell pirated entertainment software, movies and music, and organized criminal syndicates involved in piracy.
- 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) better define the basis for liability for providers of online services that induce or encourage the infringement of copyright and related rights, or that facilitate infringement and do not take reasonable steps to prevent such activities (also, develop a clear definition of the types of intermediaries entitled to the safe harbors, to prevent knowing facilitators from enjoying the safe harbor benefits);
 - (c) implement injunctive relief and efficient and scalable notice and takedown procedures – applicable to all copyrightable works and recordings, as well as applicable to search engines and other service providers; and
 - (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, including, for example, by clarifying the obligations of ISPs to comply with notice and takedowns under the 2013 law.
- Amend the Civil Code in Article 1299, and the Presidium Decision (March 2009), to provide civil liability for commercial trafficking of circumvention devices. Current law limits liability to (the rare) instances where the devices are advertised (solely) as circumvention devices.
- Ensure fairness and transparency in collective administration of certain rights, while preserving the exclusive rights of copyright owners in Internet distribution.
- Amend the Criminal Code to establish criminal liability against principals in legal entities, including for IPR crimes.
- Amend the Criminal Code and undertake effective enforcement against illegal camcording of motion pictures.
- Amend the Criminal Code to establish criminal liability for the importation and commercial trafficking in circumvention devices.
- Strengthen copyright liability under the Administrative Code by eliminating the for-profit requirement in Article 7.12 of the Code of Administrative Offences, and by 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); and/or (iii) penalties to disqualify from their managerial responsibilities, for one to three years, managers of legal entities.

- Establish an official uniform methodology for the investigation and prosecution of copyright and related rights infringements.

COPYRIGHT PIRACY AND ENFORCEMENT IN RUSSIA

Internet Piracy Enforcement: Internet and wireless access by Russian citizens continues to grow rapidly and has resulted in Russia having one of the largest and most active online communities in Europe. As of November 2014, according to the International Telecommunications Union (ITU), over 61% of the Russian population now has Internet access, and wireless broadband penetration is at 60%. Yet, basic copyright enforcement of Internet piracy has lagged far behind the rapid growth of Internet and wireless access in Russia.

Russia is host to a number of large-scale infringing websites, including web-based (and peer-to-peer) downloading sites, linking sites, and cyberlockers that offer access to pirated music and film materials. Because many of these sites cater to English-speaking (and other non-Russian) users they harm markets in many countries, in addition to Russia. Since the enactment of the 2013 law, many pirate sites that host unauthorized motion pictures or television programs have moved their sites to foreign hosting locations. Still, there is one notable exception: *vKontakte* (*vk.com*), the most popular online social network in Russia (with over 46 million visits per day) which remains the largest single distributor of infringing music in Russia as well as a hotbed for online piracy of movies and television programming. This site has been on the U.S. Government's Notorious Markets list since 2012. It is ranked 24 in Alexa's global top 500 most visited websites worldwide and is the second most visited website in Russia. *vKontakte* (now owned by Mail.ru) has a functionality specifically designed to enable its members to upload music and video files, which includes hundreds of thousands of unlicensed copyright works. 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. In addition, some third-party software developers have distributed "apps" to enable non-members to search, stream and download the content available on the site. *vKontakte* will generally take down specific content when notified, but that is not an adequate enforcement mechanism for a problem that *vKontakte* created. Russia's second largest social network site, *odnoklassniki.ru*, also operates an unlicensed music service similar to *vKontakte's* service. While *vKontakte* is by far the biggest impediment to the functioning of a legitimate online marketplace for music, the recording industry reports that paid download sites are still a source of piracy in Russia along with the peer-to-peer services and cyberlockers. There are over thirty *allofmp3.com* copycat sites which offer entire albums for as little as US\$1, and use up to thirty different domain names for the same user interface.

Russia hosts a number of major BitTorrent indexing sites such as *rutracker.org*, launched in response to the takedown of *torrent.ru*. Other particularly problematic sites are *Torrent-Games.net*, a Russian BitTorrent tracker; the cyberlocker *rapidgator.net*, which has been on the U.S. Government's Notorious Markets list since 2012, and was hosting over 500,000 infringing video game files in 2014; *mygully.com*, a German language forum site, hosted in Russia, with over 2.5 million registered users; *rutor.org*, with over 1.5 million visits per day; *Kinozal.tv*, with over 370,000 visits per day; *tfile.me*, with over 335,000 visits per day; and *nnm-club.me*, with over 280,000 visits per day. Neither ISPs nor most website owners respond to takedown requests for these sites. There are a few exceptions; for example, the entertainment software industry reports a few sites even including *rutracker.org*, do comply with takedown notices, while others, such as *rutor.org*, never comply. Some sites operate regionally, such as *games.net*, which is hosted in Russia but administered from Georgia (making takedowns especially problematic). For the third consecutive year, Russia was first in the world by far 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. In 2014, users with Russian IP addresses accounted for more than 32% of the global volume of detected infringements occurring on public peer-to-peer networks.

Russia is home to some of the world's most prolific criminal release groups of motion pictures. Pirates obtain their source materials for infringing copies by camcording films at local theaters, and then upload these copies onto the Internet (as well as sell illegal hard copies). The total number of sourced camcord pirate copies from within

Russia is down from a few years ago, with most of the activity in 2014 clustered in the Solntzevo district of Moscow. The illicit camcords that are sourced from Russia are of exceptional quality and remain in high demand by international criminal syndicates. 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 Government of Russia should propose (so the Duma can adopt) an amendment to Article 146 of the Criminal Code (an amendment was considered in the Duma in 2013, but stalled), as well as undertake effective enforcement against illegal camcording of motion pictures.

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 exclusively authorized local distributors to finance and distribute films and television programming. High quality pirated hard copies (DVDs) are routinely uploaded and offered for free online, destroying the legitimate market for these works. As a result, legitimate distributors cannot commit to distribution agreements, or alternatively, offer drastically reduced license fees which are inadequate to support the financing of independent productions. Revenue from legitimate 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, such as worldwide same day release (referred to as “day-and-date” releases), since national distributors release films on their own schedules around the globe.

Book and journal publishers are also concerned by the prevalence of online piracy in Russia (consisting of books and other text), particularly on hosted-content websites that are locally designed. For example, a group of sites known as the “Library Genesis Project” (*libgen.org*) offers over 21 million journal articles and over 6 million books, all available for free. The site encourages the creation of mirror sites of all of its content, and there are presently 10 such mirror sites (including *bookfi.org* and *bookza.org*). A *libgen.org*-related, but rather specialized site, is *sci-hub.org*. *Sci-hub.org* enables unauthorized access to databases that host scientific, technical and medical (STM) articles published by journal publishers. The “sci-hub model” however, is more pernicious than other online pirate sites, because it facilitates unauthorized access using compromised log-in credentials issued by higher education institutions to their subscribers (i.e., students, faculty and other university personnel). Once the sci-hub operators have obtained a copy of an STM article, the same article is then cross-posted, or also made available, on *libgen.org*.

In general, publishers report online enforcement is hampered by low compliance rates in response to rights holder requests to takedown links to infringing content, with many sites ignoring requests altogether. Peer-to-peer piracy providing free unauthorized access to e-books continues to be an issue as well.

In three separate bilateral and multilateral agreements over the past several years, the Government of Russia 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.” 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.” The Government of Russia, has to date, taken few of these steps.

In order to improve the digital marketplace in Russia, both strong criminal enforcement and better and clearer civil remedies and procedures are needed. For effective criminal enforcement, the relevant administrative agencies (e.g., the Federal Anti-Monopoly Control) should target large illegal distribution enterprises, such as the large-scale unlicensed services responsible for most of the illegal distribution of music and film in Russia. In addition to proper targeting, there needs to be more expeditious investigations and better law enforcement coordination.

For criminal cases, all of the agencies that can commence a case, including the Investigative Committee of Russia, the Investigative Department of MVD, the Federal Security Service of the Russian Federation (FSB), and Customs, should coordinate their efforts with police. Since the General Prosecutor’s Office has supervisory authority over investigations and prosecutions, it should work with the Investigative Committee of Russia and the Investigative Department of MVD to develop an updated and detailed methodology for investigations of copyright infringements. This would help to increase the quality, effectiveness and consistency of IPR enforcement activities. Work on a draft methodology was suspended a few years ago.

One 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. 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 in the past. At present, there is no Department K staff doing any IPR enforcement (that is left to the Economic Crime Police). Department K’s authority and responsibility to act in all cases of online infringement should be clarified and strengthened. In addition, Department K should be properly staffed, equipped and resourced, and other such units within the MVD should be formed to deal exclusively with IPR Internet cases and to train officers in how to combat these copyright crimes, including the maintenance of evidence. It also should be clarified that actions can be brought under the Code of Administrative Offenses against commercial actors involved in the massive distribution of infringing material, where there is no direct fee charged by the enterprise.

An intensification of criminal investigations and criminal convictions against principals of organized commercial pirates is sorely needed, especially directed at Internet operations. Changes to criminal procedure 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 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, so few such cases are ever brought and even fewer tried to a conclusion. The 2011 increase in the criminal threshold, without special consideration of its application to Internet offenses, has exacerbated this problem; this further underscores the importance of also using administrative authority in digital piracy cases.

The 2013 package of laws had two key features applying civil remedies against Internet piracy: (1) amendments to the Civil Code, Part IV – to provide for third party liability, as well as safe harbors from such liability for “information brokers” (ISPs) that comply with all the requirements for those safe harbors; and (2) amendments to the Civil Procedure Code (and corresponding amendments to the Arbitration Procedure Code and the Federal Law on Information and Information Technologies (2006)) that provide injunctions by court order (only) after notice and takedown to block infringing materials or limit access to infringing websites. In addition to expanding the scope of subject matter covered by the 2013 laws, the 2014 amendments also expanded existing procedures for court ordered site-blocking against repeat infringers. The motion picture industry reports that in 2014, about half of the ISPs in Russia voluntarily cooperated and responded to the Russian-Anti Piracy Organization (RAPO) cease and desist letters for their works, and the others did not respond. Efforts between the Ministry of Economic Development to

develop more comprehensive notice and takedown procedures between rights holders and ISPs were not successful. Overall, although some ISPs cooperate and take down infringing materials once identified (even for works other than films and television programs), most ISPs are not willing to cooperate, even with clear evidence of infringement. As of May 1, 2015 the law will cover all copyrightable subject matter (except photographs).

Criminal Enforcement in General: For both online and hard copy piracy, criminal enforcement in Russia remains a priority for IIPA and its members. Russia's laws are generally adequate for addressing hard copy piracy although some gaps remain. As in years past, most criminal enforcement by the government in 2014 was aimed at physical piracy, but that form of piracy is declining as the marketplace moves online. The Government of Russia (MVD) usually provides comprehensive annual statistics on intellectual property cases and investigations commenced; however, the 2014 report was not available before the Special 301 filing deadline. The pattern in the past few years has been a significant decline in enforcement, especially due to severe cuts in police resources.

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. The local motion picture industry (Motion Picture Association, MPA), noted two important cases, in particular: in November 2014, the two owners of the pirate site Interfilm were convicted and sentenced to four and half years imprisonment, which was one of three motion picture criminal convictions for Internet piracy in 2014. In the other case, a Moscow district court issued a verdict on December 29, 2014, regarding a major warehouse raid undertaken in September 2006. Eight years after the raid (which netted over 3 million pirated DVDs), the owner of the warehouse was given a two and half year prison sentence.

MPA reports that enforcement activity in 2014 was about the same as in 2013, 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 entertainment software industry, including the Association for the Prevention of Computer Crime (APCC), reports a very significant drop in police activity in Moscow and St. Petersburg in 2014, although there was active engagement elsewhere in Russia by the regional police.

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. ESA continues to report delays in examination reports from government experts, due to a lack of technical expertise. Enforcement is also hampered, and trials delayed, by the requirement that exemplars be collected only with the participation of state officials, 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. Worse, some local authorities refuse to share any information on cases with rights holders at the investigative stage, making effective cooperation extremely difficult. The problems are further exacerbated by ongoing reforms of the investigative bodies. These arcane and outdated rules and practices create unnecessary delays and costs in litigation. The rules should be modernized so that industry experts can be more effectively integrated into the judicial process. One way to accomplish this would be for the Supreme Court to issue new guidelines on the admissibility of the testimony of private experts. It is reported that some courts will accept private expert testimony, but a uniform rule would be more effective.

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. The copyright industries recommend clear and sensible guidelines on the calculation of damages in online cases for the purpose of meeting the minimal criminal damage thresholds established under the (revised and increased) Art 146 of the Criminal Code.

Another recommended measure to increase the efficiency of IPR criminal investigations is the appointment of IPR special prosecutors, investigators, and police officers at both the federal and regional levels throughout Russia. IIPA recommends that the Investigative Department of MVD and the Investigative Committee of Russia continue to work with IIPA members on future training programs, and 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) which opened in 2013 (with thirty trained judges) was a positive step; these courts should be created in other cities and regions across Russia to handle copyright, as well as patent cases.

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 unlicensed 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.

Several copyright industries continue to report that raids against retail outlets, while undertaken, are not ultimately successful in stopping criminal activity because: (a) there is no criminal liability for corporate entities or principals in these entities; (b) the police fail to comply with the Criminal Procedure Code; and (c) prosecutors are generally reluctant to recommend the initiation of criminal cases. Amendments to the Criminal Code to allow principals in corporate entities to be held criminally liable would help to correct this problem. There were no large warehouse raids reported in 2014.

Civil Enforcement: The commercial-scale piracy which harms 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 against that type of piracy; but, if, properly applied, civil enforcement can be a useful tool for some industries. However, in Russia, there are many civil enforcement inadequacies, including: remedies limited to the seizure of specific copies of works that are the object of a lawsuit; the failure to award preliminary injunctions (although some changes were made in 2013), 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. In 2014 (as of December), there were 170 applications for preliminary injunctions in the Moscow city court against infringing sites, with a total of 140 actions filed, and several blocking orders issued by the court. But, the law needs more effective provisions against rogue websites, instead of its current focus on individual works on the sites. In addition, there is concern that now that the law is applicable to all works (excepting photographs) and recordings, the system may bog down in administrative proceedings.

One additional recommendation is the adoption of judicial guidelines on civil search practices, including provisional measures (consistent with the WTO TRIPS requirements).

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 juridical entities) and arbitration courts (for legal entities). Imposing significant administrative fines on legal entities would have a deterrent effect, especially in instances when criminal cases are terminated for failing to meet the high evidentiary burdens. Unfortunately, current administrative procedures are inadequate because of the very low level of fines imposed 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, as on illegal websites).

In addition to the piracy problems, 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, the sole state accredited collecting body for record labels and performers. We urge the Government of Russia to use its oversight authority to ensure that rights holders are being fairly represented and treated, in accordance with commitments that it made to the U.S. Government and other trading partners who had expressed concern with the accreditation process. Fair representation in these societies includes direct representation of rights holders on the board in a manner that is proportionate to relevant 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,” to bring the management societies in line with international standards on governance, transparency and accountability. That commitment was due in 2013. As the December 2014 U.S. Government WTO Report noted, what resulted instead (in August 2014) was “a 10-year re-appointment term of the existing collecting societies, which are unable or have failed to properly represent and compensate U.S. rights holders.” To develop legal music markets and protect legitimate licensed services, the Government of Russia must fulfill its WTO Working Party Report obligation and resolve the issue of the state accreditation of collecting societies in a matter that ensures that rights holders are able to control and manage their own societies.

DEFICIENCIES IN THE RUSSIAN LEGAL REGIME

Although Russia did make some progress on legal reforms as part of its WTO accession, many key elements of an effective legal regime remain absent or incomplete, especially with regard to effective Internet enforcement. 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 formal notice and takedown procedure, and the other list of deficiencies noted in previous IIPA filings). While the 2013 package of laws and the 2014 amendments were a step forward, key improvements, detailed above, are still needed.

In the Civil Code, IIPA and its members have in the past 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 clear liability rules for online websites and services that induce or encourage infringement. The 2013 package of laws was intended, in part, to address this latter issue. But the law (even after the 2014 amendments) does not clearly define ISPs (and the various services they provide); nor does it link liability (and safe harbors) in a manner that will encourage cooperation with rights holders to effectively deal with Internet piracy – in civil and criminal law; last, it does not clearly define secondary liability. If Russia is to foster legitimate electronic commerce and if the rule of law is to apply to the online world, Russia needs to develop a balanced system of liability provisions that incentivizes ISPs to cooperate in addressing Internet piracy, and one that does not provide cover for services that induce or promote infringement. Further, it is critical that Russia amend its regime to allow for injunctive relief – quickly and effectively, applicable to all works, and especially for Internet matters.

Other existing hurdles to effective civil and criminal enforcement are: (a) the failure of courts and police to apply statutory presumptions of copyright ownership; (b) overly burdensome evidentiary requirements to prove title; and (c) the lack of criminal liability for corporate enterprises or the principals in such enterprises. To require a “full” chain of title for each recording in every investigation is especially problematic for foreign rights holders with translation, notarization and other costs and delays. Similarly, the procedures for obtaining injunctions tied to notice and takedown (and proposals for further changes), have been criticized as being overly burdensome in requiring “proof” of ownership.

For a detailed list of IIPA's comments specifically on the 2008 Civil Code (and some of the related laws), see <http://www.iipa.com/rbc/2010/2010SPEC301RUSSIA.pdf> at page 138. Article 1299 of the Civil Code provides a cause of action against importers of circumvention devices, but there is an overly burdensome procedure to identify the importer (and include details of any seizure) that needs simplification and improvement. Plus, as noted, the liability should apply for commercial trafficking of all circumvention devices, not as at present, only in instances where the devices are advertised as circumvention devices. And, commercial trafficking in circumvention devices (including by importation) should be criminalized as well.

In addition to those already mentioned, we continue to recommend steps to ensure that remedies for IPR infringements required by treaties, found in the Criminal Code, the Criminal Procedure Code, the Administrative Code and the Customs Code, 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.

There is one recent development of particular concern to the motion picture industry: a new law went in to force on January 1, 2015 that bans advertisements on pay cable and satellite channels. While the new law does not appear to effect state-owned television channels, it will likely have a significant impact on foreign cable and on-demand services, and will harm the overall marketplace for audiovisual content in Russia.

Last, on October 3, 2014, President Obama issued a proclamation removing Russia from eligibility for trade benefits under the Generalized System of Preferences (GSP) program, based "on a determination that Russia is sufficiently advanced in economic development and improved in trade competitiveness that continued preferential treatment under GSP is not warranted." As a result, the USTR closed the GSP country practices review of Russia's protection of intellectual property rights (which was originally launched in response to a petition filed by the IIPA). This means that removal of some or all of the GSP benefits for Russia, for failing to provide adequate and effective IPR protection or enforcement, is no longer possible.