

RUSSIAN FEDERATION

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

2017 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 2017.¹

Executive Summary: Recent legal reforms have improved enforcement in Russia against online piracy. The reforms (adopted in 2013 and 2014) established procedures and streamlined processes for websites and hosts of infringing content to comply with takedown notices from rights holders. Some Russian courts (in particular, the Moscow City Court) have also disabled access to infringing sites for users within Russia. In spite of these positive steps, several sectors of the copyright industries and the U.S. Government report that IPR enforcement in Russia has declined overall in recent years. Additionally, the new procedures and processes have been directed at online piracy only within Russia. The Russian Government has not adequately addressed the problem of sites operating inside Russia that target users abroad, resulting in a substantial international copyright piracy problem. That is why the U.S. Government placed several Russian online sites on its Notorious Markets List in December 2016. One such site, the torrent website *rutracker.org* has over 13 million active accounts. Even though it was subject to a Moscow court-ordered permanent injunction last year, it is still operating on several mirror websites. Further revisions to the current anti-piracy law are needed to ensure it is effective over time, including its application to clone, proxy and mirror sites, and there is needed clarification regarding the liability of Internet Service Providers (ISPs).

To be more effective, IPR enforcement in Russia should focus on *ex officio* criminal actions targeted at large-scale commercial enterprises as well as taking administrative action and strengthening administrative penalties. This would allow legitimate markets to develop for film, music, entertainment software, and published books and journals, for the benefit of local and foreign creators and producers, and Russian consumers. It would also help support smaller independent rights holders who do not have the resources and therefore must rely on the government for effective enforcement.

In sum, there are three long-standing IPR priority issues for the copyright industries: first and most importantly, is to see an overall improvement in enforcement against online piracy, a problem pervasive for all of the copyright industries. Second, Russia needs to address the collective administration problems that have thwarted music rights holders' attempts to exercise effective control over how collecting societies license their works in Russia. The music industry remains concerned with the lack of transparency and governance issues in connection with the state accredited collecting societies. Third, is the ongoing problem of camcording motion pictures, an illegal activity which, after a few years in decline, was up sharply in 2015 and then saw a three-fold increase in 2016. Reforms in the legal framework are necessary to correct this severe deficiency, along with adequate resources and a commitment to effective enforcement.

It has been five years since Russia completed its accession to the World Trade Organization and agreed to a detailed IPR Action Plan with the U.S. Government (U.S.-Russia IPR Action Plan). Neither the WTO obligations outlined in the U.S.-Russia IPR 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. In December 2016, the U.S. Trade Representative submitted a report to Congress on Russia's compliance with its WTO TRIPS obligations.² The report concluded: “[a]s a general matter, the current IPR enforcement

¹For more details on Russia's Special 301 history, see previous years' reports at <http://www.iipawebsite.com/countryreports.html>. For the history of Russia's Special 301 placement, see <http://www.iipawebsite.com/pdf/2017SPEC301HISTORICALCHART.PDF>.

²See 2016 Report on the Implementation and Enforcement of Russia's WTO Commitments available at <http://ustr.gov/sites/default/files/2016-WTO-Report-Russia.pdf>.



environment in Russia remains weak...online piracy (including unlicensed streaming services, pay-per-download websites, videogame hacking sites, cyberlockers, BitTorrent sites, private servers bypassing official videogame servers, and others) has been, and remains a significant problem in Russia." Further, the U.S. Government stated that although Russia committed in the Working Party Report to address and "prevent certain types of devices or services from circumventing technical protection measures protecting content...notorious pirate websites continue to proliferate."

PRIORITY ACTIONS REQUESTED IN 2017

IIPA recommends the following priority enforcement actions and legal reforms to the Government of Russia for 2017:

- Undertake effective and deterrent actions against Internet piracy—including streaming services, pay-per-download websites, video game hacking or cheating sites, cyberlockers, BitTorrent sites, private servers bypassing official video game 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. The current law (court ordered injunctions and disabling access to infringing sites) should be amended to cover clone, proxy and mirror sites, and also apply not only to websites, but to mobile apps.
- Increase the overall effectiveness of criminal IPR cases focusing on digital piracy. This includes bringing deterrent criminal actions against organized criminal syndicates as well as against those involved in piracy retail chains that sell pirated entertainment software, music and movies.
- Implement regulations on the operation of collecting societies that confirm that rights holders have the legal and practical ability to determine how to exercise their rights (including whether to choose to entrust licensing to any collective, and if so, to choose that entity, and to delineate the rights for such collections).
- Amend (additionally) the Civil Code, Part IV, to:
 - a) 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;
 - b) clarify the definition of the activities of intermediaries eligible to benefit from the safe harbors, to prevent knowing facilitators from enjoying the safe harbor benefits; and
 - c) provide legal norms that create incentives for ISPs to cooperate with rights holders in fighting infringement taking place over their networks (and to clarify that information intermediary services that facilitate the widespread dissemination of unauthorized content cannot benefit from the liability privileges in Article 1253 of the Civil Code).
- Amend the Civil Code in Article 1229, and the Presidium Decision (2009), to provide civil liability for commercial trafficking of circumvention devices. Current law limits liability to rare instances where the devices are advertised (solely) as circumvention devices.
- Amend the Criminal Code to establish criminal liability: (i) for unauthorized camcording of motion pictures (and the Government needs to commence enforcement actions); (ii) against principals in legal entities, including for IPR crimes; and (iii) for the importation and commercial trafficking in circumvention devices.
- Amend the Administrative Code by eliminating the for-profit requirement in Article 7.12 (Administrative Offences), and raise administrative penalties to deterrent levels 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.

COPYRIGHT PIRACY AND ENFORCEMENT IN RUSSIA

Internet Piracy: Effective copyright enforcement continues to lag behind the rapid growth of Internet and wireless access in Russia. In 2009, it was estimated that 29% of individuals in Russia were using the Internet. In 2015, that figure grew to 72.1%, and there has been a huge growth in the number of Russians that have mobile broadband subscriptions—according to the International Telecommunications Union (ITU) (December 2016 Report). The lag in the legal and licensing regime is stifling the development of legitimate markets for copyrighted content.

Despite the legal reforms of the past few years, Russia remains home to many services supporting large-scale infringing websites, including web-based (and peer-to-peer (P2P)) downloading sites, linking sites, and cyberlockers that offer access to pirated music, film, video game, and books and journal articles. Many of these sites cater to English-speaking (and other non-Russian) users, harming markets outside of Russia. The new legal reforms (and court ordered injunctions) have been directed at sites within the Russian market. As a result, some BitTorrent and other pirate sites (especially those hosting unauthorized motion pictures or television programs) have moved their sites to foreign hosting locations.

But there are many sites still hosted in Russia, including those that are listed on the U.S. Government's Notorious Markets List (December 2016), that continue to do significant harm to markets outside of Russia.

The book publishing, motion picture and recorded music industries all cited the cyberlocker *rapidgator.net* which appears to be based in Russia, and *rutracker.org*, formerly *torrents.ru*. The U.S. Government retained *rapidgator* and *rutracker* on the Notorious Markets List in its December 2016 report; they have been on the list since 2012. According to the 2016 U.S. Government report, “[o]perators of the site allegedly net an estimated \$2 million annually” noting also that *rutracker* is “hosted in and operated from Russia.” This is just one of a number of major BitTorrent indexing sites which contain links to a wide variety of infringing copyrighted material, especially motion pictures and television programs.

There are many other problematic sites. For example, the Russian-hosted *demonoid* has over 17,000 infringing video game files available for download; and *myegy.to*, an Arabic-language linking and streaming site that is hosted in Russia, makes over 15,000 links available to unauthorized video games.³ Most ISPs and website owners do not respond to takedown requests for these sites. There are a few exceptions. For example, members of the Entertainment Software Association (ESA) report that a few sites are complying with takedown notices (and the new laws have helped), while others never comply. Additionally, Russia is a haven for the production of cloning software and the hacking of entertainment software programs.

For the fourth 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 video game titles on public P2P networks. Russia is first in the world when it comes to the unauthorized file sharing of video games on PCs with more than three times as many illicit downloads to PCs in Russia compared to the second highest country, Brazil. In 2016, users with Russian IP addresses accounted for more than 31% of the global volume of detected infringements occurring on public P2P networks.

Infringing sites hosted in Russia continue to offer infringing content abroad and remain an impediment to the functioning of a legitimate online marketplace for music. In addition, the recording industry reports that paid download sites are still a source of piracy in Russia along with the P2P services and cyberlockers. There are over 30 *allofmp3.com* copycat sites which offer entire albums for as little as US\$1, and use up to 30 different domain names for the same user interface. Some of the unlicensed pay-per-download sites include: *Soundlike.com*, *Payplay.fm*, *Mp3million.com*, *MP3skull*, and *Goldenmp3.ru*. According to a recent global music report (IFPI Global Music Report

³For the most recent report, see USTR, 2016 Out-of-Cycle Review of Notorious Markets (December 2016), available at <https://ustr.gov/sites/default/files/2016-Out-of-Cycle-Review-Notorious-Markets.pdf>.

2016: Data and Analysis Section – Russia), Russians spend on average 40 cents per person per year on music, in comparison to Americans who spend \$15.50 per person.

The Moscow City Court has issued a number of injunctions, including permanent injunctions, against various Russian websites. For example, the following websites have been permanently blocked: *rutracker.org*, *rututor.org*, *ex.ua* (a Ukrainian site, popular in Russia), *ru-ru.org*, and *new-rutor.org*. However, workarounds exist and thousands of Internet users have access to mirror sites and VPNs. For instance, *rutracker.org* may be accessed through a VPN or through browser add-ons, and *new-rutor.org* redirects to a mirror site called *xrutor.org*.

One positive note in 2016: *vKontakte* (*vk.com*), the most popular online social network in Russia, agreed to music licenses with several major record companies. In spite of these licensing agreements, the U.S. Government retained *vKontakte* on the Notorious Markets List in December 2016 because, as the government noted (and many of the other copyright industries concur), *vKontakte* is still a “hub of infringing activity”, including pre-release content (and because, in 2016, it was the 13th most visited website in the world according to *Alexa.com*). The U.S. Government explained that *vKontakte* will “continue[] to be listed pending the institutionalization of appropriate measures to promote respect on its platform for IPR for all right holders, not just those with whom it has contracts...” and that those measures need to be “comparable to those measures used by other social media sites.” *vKontakte*, now owned by *Mail.ru*, has a functionality specifically designed to enable its members to upload 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* (with 43 million visits per day, and also owned by *Mail.ru*) operates a music service (now with licenses similar to *vKontakte*’s service), but includes thousands of unauthorized motion pictures and television programs. These two sites alone host more than half of the unauthorized motion picture and television material in Russia. So, while some progress has been made at this site on music issues, the same cannot be said for other works such as films and books and other reading materials. *vKontakte* continues to be the preferred platform for the unauthorized distribution of pirated educational course books, and CD and DVD content by certain educational establishments to its students, as well as between and among users of the site.

Book and journal publishers are very concerned by the prevalence of online piracy in Russia (consisting of books and scientific, technical and medical (STM) journal articles), particularly on hosted-content websites that are operated by Russian residents. For example, a group of sites known as the “Library Genesis Project” (*libgen.org*) offers over 51 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 several such sites exist, including *bookzz.org* and *booksc.org*. A *libgen.org*-related, but more specialized site, is *sci-hub.io* (formerly *sci-hub.org*). *Sci-hub.io* enables unauthorized access to databases that host STM articles published by journal publishers. The “sci-hub model”, however, is more pernicious than other online pirate sites, because it facilitates unauthorized access to publisher databases 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 gain unauthorized access to the database and subsequently obtain a copy of an STM article, the article is delivered to the requesting user, and then cross-posted, or also made available, on *libgen.org* and its related mirror sites.

Sci-hub.org, the Library Genesis Project (*Libgen*), and its operators were sued in the Southern District of New York in 2015 by an Association of American Publishers (AAP) member company for copyright infringement (for the unauthorized reproduction and distribution of journal articles), and violations of the Computer Fraud and Abuse Act (for sci-hub’s intrusions into publisher databases). On October 30, 2015, the court granted the publisher a preliminary injunction against *Sci-hub.org*, the Library Genesis Project, a number of mirror sites and its operators. The injunction prohibits the defendants from distributing plaintiff’s copyrighted works, and also ordered the top-level domain (TLD) registries for the defendants’ websites to place the subject domains on registryHold/serverHold. The

site then resurfaced under the *sci-hub.io* domain. These illegal activities compromise the security of libraries and institutions around the world, employing techniques similar to those employed in other instances of cyber intrusions to defeat security measures used to protect not just access to content, but the personal data of students and academic personnel. These activities also endanger the sustainability of science and scholarly communication (promoting the quality and integrity of the scholarly record), which are important to commercial and non-profit publishers, but clearly not a goal of the pirates.

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. P2P piracy providing free unauthorized access to e-books continues to be an issue as well.

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. As a result of the piracy, 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 in synch with local release patterns that includes compatibility with local holidays as well as investment in local marketing and advertising.

Camcord Piracy: Russia remains the 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 selling illegal hard copies). The total number of sourced camcord pirate copies from within Russia rose significantly in 2016 to 73 camcords. By comparison, in 2015, there were 26 camcords sourced from Russia. Most of the Russian camcords come from Moscow, Tatarstan, St. Petersburg, Ekaterinburg and some of the Siberian cities. 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 damaging revenues worldwide. The Government of Russia should amend Article 146 of the Criminal Code to effectively address illicit camcording in theaters (a 2013 amendment was never adopted). The Government should also properly resource and undertake effective enforcement against illegal camcording of motion pictures.

Enforcement Against Internet Piracy: For criminal cases, all of the agencies that can commence a case, including the Investigative Committee of Russia, the Investigative Department of the Ministry of Internal Affairs (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 digital copyright infringements. This would help to increase the quality, effectiveness and consistency of IPR enforcement activities. Work on a draft methodology was suspended several years ago.

Some of the fundamental enforcement shortcomings include: a lack of political will, scarce resources, and no institutional incentives for enforcement agencies to act against copyright infringement crimes occurring on the Internet, whether through administrative or criminal means. IIPA continues to recommend that there should be a dedicated digital IPR enforcement unit within the Government of Russia to focus on this problem. For example,

combating copyright violations on the Internet, such as the dissemination of music through illegal pay-per-download sites and illegal P2P 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 interest, and no Department K staff, to undertake IPR enforcement (it 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, even 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. There has been insufficient political will, and little incentive with the government agencies, to undertake the needed actions. 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. 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 in recent years: police and prosecutors have had difficulty applying the criminal law thresholds to Internet crimes (i.e., coming up with a unified formulation), so few such cases are ever brought and even fewer tried to a conclusion.

Civil judicial remedies have significantly improved in the recent years. The 2013 legal reforms included two key civil law changes and procedures directed at online 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)) authorizing judicial injunctions (only) after notice and takedown to block access to infringing materials or websites. In addition to expanding the scope of subject matter covered by the 2013 laws, the 2014 amendments (Federal Law No. 364, in force May 2015) also expanded existing procedures for court ordered site-blocking against repeat infringers.

RosKomNadzor, the Federal Service for Communications, the agency responsible for enforcement of these laws, has been effective and cooperative in implementing this law, along with the Moscow City Court. In October 2015, the court ordered the permanent shut down of 13 Russian websites (including *rutor.org* the BitTorrent tracker and ten other websites) with infringing content, in response to a complaint filed by a Russian music label. In December 2016, the Moscow City Court ordered the permanent shutdown of 27 websites. Official data is not yet available, but it is estimated that the courts have issued 679 preliminary injunctions (350 against infringing websites), taken 456 IPR cases, and disabled access to 103 websites, since the laws went into force.

In 2016, the Russian-Anti Piracy Organization (RAPO) initiated nine criminal cases against the operators of pirate sites. There have been, to date, three criminal prosecutions against the owners of pirate sites. Mostly, however, private parties have to rely on civil, not criminal actions. Using the new anti-piracy laws, petitions by American film producers and record producers have resulted in court orders to disable access to infringing websites of films and music. For example, in August 2015, the Moscow City Court blocked access to sixteen websites for illegally distributing one American film. In September 2015, *vKontakte* was ordered by the St. Petersburg Regional Arbitration Court to use filtering technology to prevent infringement of unauthorized sound recordings by two record labels. This was the result of civil infringement suits brought by the labels in the Russian court in April 2014. But this decision was overturned on appeal in 2016, finding *vKontakte* not liable. This has caused concern that the Civil Code reform pertaining to “information brokers” and other intermediaries is not being properly applied or needs further

clarification. In another lawsuit in October 2015, brought by a Russian record label, *vKontakte* was ordered to pay damages of 750,000 rubles (then, approximately US\$9,616) for ten infringing songs. In a similar suit by another Russian record label, *vKontakte* was ordered to pay 600,000 rubles (then, approximately US\$7,687) for unauthorized uploading of musical recordings. Civil actions, while a positive step, are generally not deterrents. Thus, without more criminal or administrative enforcement of the principals involved in running these lucrative illegal sites, the civil laws alone will not improve the landscape for legal markets to develop in Russia.

In 2013, a Memorandum of Understanding was signed by RAPO, the Mail Group and other Internet platforms, and the Government of Russia (RosKomNadzor). As a result, the motion picture industry reports that, in 2016, most ISPs in Russia voluntarily cooperated and responded to RAPO cease and desist letters for their works. The others either merely forwarded notices to users without taking down material, or did not respond at all. Overall, although some ISPs cooperate and take down infringing materials once identified, many ISPs are not willing to cooperate, even with clear evidence of infringement, and there has been little cooperation with advertising agencies and payment processors who financially support infringing sites. In addition, the response times by some websites is very slow—measured in weeks, not days—to takedown notices. Despite these shortcomings, the motion picture industry reports that the number of users in Russia accessing legal content has increased significantly in recent years. Additionally, some of the copyright industries reported that civil enforcement on balance improved in 2016. There were approximately 2,500 copyright and related rights civil court claims filed in the first half of 2016 (with 1,809 resolved by the court of first instance).

Criminal Enforcement in General: Criminal enforcement in Russia remains a priority for some of the copyright industries to deter digital, and hard copy, piracy. Russia's laws are generally adequate for addressing hard copy piracy, although some gaps remain. As in years past, much of the criminal enforcement by the government in 2016 was aimed at physical piracy, but that form of piracy has declined significantly as the marketplace moved online. A few industries, such as the independent segment of the film and television industry (IFTA), reports that physical piracy is still a problem, in their case, for independent producers and distributors. High quality pirated DVDs and artwork are routinely sold in street markets or uploaded and offered for free online, destroying the legitimate market for these works.

For the past several years, the quality and quantity of criminal raids and police activity against IPR infringers in general has declined significantly, and especially against large-scale online infringers. The decline in police activity in general is the lingering result of the 2011 major reorganization of the police force and the consequent drop in resources, as well as changes in government priorities and an unwillingness to take action against large-scale online infringers and a focus on hard copy piracy (which is naturally diminishing), rather than on digital piracy. 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 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. The Entertainment Software Association (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 permit a rights holder to 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). But the criminal courts are reluctant to order this and treat these as civil law matters instead. The copyright industries recommend that the Supreme Court should clarify guidelines on destruction of goods, and the courts should also clarify the calculation of damages in online cases for the purpose of meeting the minimal criminal damage thresholds established under the (revised and increased) Article 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. In 2013, a specialized IP court in Skolkovo (the innovation center) was launched with 30 trained judges. This was a positive step in IP enforcement, but was limited to patent cases. These courts should be created in other cities and regions across Russia and the jurisdiction broadened to handle copyright, as well as patent cases. Another important step would be the establishment of an official uniform methodology for the investigation and prosecution of copyright and related rights infringements, focused on digital enforcement.

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, so many cases are suspended without any penalty.

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.

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 (as it has done in the courts actions against some websites). There remain 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 there are the 2013 improvements), 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 clear contributory liability under the Russian civil law system dealing with copyright infringements. 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, US\$25 to US\$33), the owners or managers of legal entities (10,000 to 20,000 rubles, US\$166 to US\$332), and on legal entities themselves (30,000 to 40,000 rubles, US\$499 to US\$665), 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.

COMPLIANCE WITH EXISTING OBLIGATIONS TO THE UNITED STATES

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.”

Russia joined the WTO in 2012. 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 IPR Action Plan 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 not fully implemented these obligations.

Regulations and state accreditations have institutionalized a system that is not transparent and lacks good governance or accountability for authors, record labels and performers—who have no other option except the state collective management organizations. Correcting this problem is a treaty obligation. 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.

It was noted in the December 2016 U.S. Government report to Congress on Russia’s WTO compliance as Russia’s failure to address the collective management issues. As the report said, instead of improving the system, Russia engaged in 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” even though Russia agreed in the Working Party Report to “phase out non-contractual license management” schemes within five years of the Civil Code reforms coming into place (in 2008). Finally, the U.S. Government report said: “Russia’s legislature is considering further amendments to its IPR legal regime, and it appears that the Russian Ministry of Culture is currently making another attempt to reorganize the collecting society regime system in Russia, although draft legislation has not been circulated” and that the United States Government would “monitor these efforts and whether reforms improve the transparency and effectiveness of these organizations.”

To develop properly functioning music broadcasting and streaming services (including proper public performance collections), the Government of Russia must fulfill its WTO Working Party Report (and U.S.-Russia IPR Agreement) obligations and resolve the issue of the state accreditation of collecting societies in a manner that

ensures that rights holders are able to control and manage their own societies, so that they are fairly represented and there are no conflicts of interest in the governance structures. 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). Several Government of Russia proposals are now pending; one by the Ministry of Culture would, unfortunately, keep the status quo. A proposal by the Ministry of Communication and Mass Communications would make several improvements to the current system.

DEFICIENCIES IN THE RUSSIAN LEGAL REGIME

Although Russia made progress on legal reforms during the lead up to WTO accession, and the more recent Civil Code, Part IV revisions (2013 through 2015), there remain gaps in the legal regime, with either incomplete or inadequate reforms, especially with regard to effective Internet enforcement and implementation of the digital treaties. As noted, the anti-piracy laws need to be expanded to include clone, proxy and mirror sites. A proposal by the Ministry of Communication and Mass Communications would do this. It would also require search engines to remove links to infringing content on sites that have been subjected to an order under the law.

IIPA and its members have in the past commented on three major overarching concerns in the Civil Code, as amended: (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 (and the applicability of safe harbors for such services). Even after the recent amendments, the law 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 that is quick and effective and applicable to all works, 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.⁴

Article 1229 of the Civil Code provides a cause of action against importers of technological protection measures (TPM) circumvention devices, but there is an overly burdensome procedure to identify the importer (and include details of any seizure) that needs simplification and improvement. In addition, 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. Commercial trafficking in circumvention devices (including by importation) should be criminalized as well.

In addition to those already mentioned, IIPA recommends 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, IIPA recommends that Article 1252(5) of the Civil Code, which currently includes remedies for the

⁴For a detailed list of IIPA's prior comments specifically on the Civil Code (and some of the related laws), see <http://www.iipawebsite.com/rbc/2010/2010SPEC301RUSSIA.pdf> at page 138.

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.

MARKET ACCESS ISSUES

In January 2015, a law went into force that bans advertisements on pay cable and satellite channels. While the 2015 law does not appear to effect state-owned television channels, it will likely eventually have a significant impact on foreign cable and on-demand services, and will harm the overall marketplace for audiovisual content in Russia.

In 2014, the Government of Russia considered adopting an Internet tax that would have been 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. The proposal has, for now, been put on hold. It should not be allowed to move forward. Supporters of the proposal suggested it would “improve” the digital marketplace, but copyright creators and producers remain very concerned that such a levy would fail to generate fair or meaningful compensation for the use of their copyrighted material, and would instead distort the competitive environment for services that could expand the legitimate digital marketplace. In short, the proposal would have created a compulsory license for the distribution of copyright protected materials in violation of the requirements of TRIPS and the WIPO treaties. It would not, as some suggested, have provided a solution to the current market failure, but instead would have locked-in market failure, in perpetuity, eroding any basis for establishing conditions for healthy and legal competition. Instead of this proposal, the Government of Russia should 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.

In late 2016, a draft law was introduced in the Duma to regulate (license) online film websites and limit foreign ownership of such sites (ownership interests by non-Russians would be limited to 20%). The law is opposed by Russian and foreign film distributors and website owners of legitimate content, fearing the new law, if adopted, would become a tool to limit legal websites while alternatively resulting in more, not fewer, piratical film sites. It also would impose very burdensome regulations on the operators of legal sites. The draft bill passed its first reading in the Duma in January 2017. Additionally, the Ministry of Culture has floated a plan to charge a fee (of approximately US\$80,000) for each foreign movie released in Russia; issuing a film distribution certificate would be conditioned upon payment of this fee. The Ministry’s goal is to promote domestic movies, and it appears to have local industry support. No draft bill has yet been prepared.

GENERALIZED SYSTEM OF PREFERENCES (GSP)

In 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, 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.