

EXECUTIVE SUMMARY
Testimony of Eric J. Schwartz, Vice President and Special Counsel
International Intellectual Property Alliance (IIPA)
before the Subcommittee on Courts, the Internet, and Intellectual Property
United States House of Representatives
“Intellectual Property Theft in Russia”
May 17, 2005

The IIPA is a private sector coalition representing the U.S. copyright-based industries in bilateral and multilateral efforts to improve protection and enforcement of copyrighted materials worldwide. The IIPA is comprised of six trade associations representing over 1,300 U.S. companies who produce and distribute materials throughout the world.

- ▶ Russia’s current copyright piracy problem is enormous:
 - The IIPA estimates that the copyright industry lost over \$1.7 billion due to piracy last year, and over \$6 billion in the last five years in Russia.
 - Piracy rates hover around 70% of the market or higher for every copyright sector.
 - There are at least 34 optical disc (CD/DVD) plants, including eight dedicated DVD plants. There were 2 plants in 1996 when IIPA first brought this issue to the attention of the Russian government.
 - Russia's annual manufacturing capacity now stands conservatively at over 370 million CDs and additionally over 30 million DVDs; demand for legitimate discs is unlikely to exceed 80 million in all formats.
 - Forensic evidence indicates that at least 24 of the 34 plants are known to be producing pirate product.
 - Russian-produced optical discs (CDs) have been positively identified in at least 27 countries.
 - In 2004, there were eight actions taken by the Russian government against the optical disc plants, including raids and seizures of illegal materials. Unfortunately, the outcome of these raids was not successful because:
 - Much of the seized material ends up back in the marketplace.
 - All of the optical disc plants that were raided in 2004 remained in operation after those raids.
 - There are few, if any, criminal prosecutions – almost all ending in suspended (not served) sentences.
 - The Russian government’s legacy the past 10 years is of “failed commitments.”
 - There are six suggested steps the Russian government needs to take to effectively control optical disc piracy.

- ▶ The U.S. government should, in response:
 - Condition Russia’s entry into the World Trade Organization (WTO) on meaningful copyright law enforcement;
 - Designate Russia as a Priority Foreign Country (PFC) after the on-going out of cycle review by U.S.T.R.; and
 - Deny Russia’s eligibility for the Generalized System of Preferences (GSP) duty-free trade benefits.



Written Statement

of

Eric J. Schwartz
Vice President and Special Counsel
International Intellectual Property Alliance (IIPA)

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Subcommittee on Courts, the Internet, and Intellectual Property
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“Intellectual Property Theft in Russia”

May 17, 2005

Mr. Chairman, Ranking Member, and Members of the Subcommittee, the International Intellectual Property Alliance (IIPA) and our members thank you for the opportunity to testify today on the piracy problems we are confronting in Russia.

The IIPA is a private sector coalition representing the U.S. copyright-based industries in bilateral and multilateral efforts to improve protection and enforcement of copyrighted materials worldwide. The IIPA is comprised of six trade associations representing over 1,300 U.S. companies who produce and distribute materials throughout the world. The copyright industries contributed over \$625 billion to the U.S. GDP, or 6% of the U.S. economy, and almost 5.5 million jobs or 4% of U.S. employment, in 2002.

The copyright businesses and the individual creators that work with them are critically dependent on having strong copyright laws in place in foreign countries and having those laws effectively enforced. In fact, most of the copyright sectors generate over 50% of their revenue from outside the U.S. This is why we are so concerned with the problems of weak legal regimes and poor enforcement in China, Russia, and the many other countries detailed in our annual Special 301 Report to the U.S. government.

Simply put, Russia’s current copyright piracy problem is enormous. I have worked on U.S. – Russian copyright matters for over 16 years trying to improve the legal regime in Russia – including adoption of better copyright and related enforcement laws, as well as working to improve on-the-ground enforcement. The present piracy problem in Russia is the worst it has been in my 16 years experience. Piracy of all copyright materials – motion pictures, records and

music, business and entertainment software, and books – is at levels ranging from a low of about 66% to a high of 87% – totally unacceptable for a country and economy the size and sophistication of Russia.

Let me begin by describing the scope and nature of the problem in Russia from our vantage point.

Scope and Nature of the Piracy Problem in Russia

Russia has one of the worst piracy problems of any country in the world, second only to China. The IIPA estimates that the copyright industry lost over \$1.7 billion due to piracy last year, and over \$6 billion in the last five years in Russia. As noted, the piracy rates hover around 70% of the market or higher for every copyright sector. In short, Russia's criminal enforcement system has failed to stem persistent commercial piracy.

The number of optical disc (i.e., CD and/or DVD) plants in Russia has more than doubled in just the last three years to number at present, at least 34 plants, including eight dedicated DVD plants. There are a total of 80 known operational production lines. Production capacity has nearly tripled as criminal operations have encountered little hindrance in expanding their activities. Even more troubling, IIPA is aware of nine production plants located on the facilities of the Russian government, so-called restricted access regime enterprises (although the Russian government has publicly acknowledged that there may be as many as 18 such plants). Russia's annual manufacturing capacity now stands conservatively at over 370 million CDs and additionally over 30 million DVDs, despite the fact that the demand for legitimate discs is unlikely to exceed 80 million in all formats.

Forensic evidence indicates that at least 24 of the 34 plants are known to be producing pirate product. Of course, without proper surprise inspection procedures in place, there is no way of knowing for certain the size and scope of what all the plants are producing. Russian-produced optical discs (CDs) have been positively identified in at least 27 countries. So, the harm illegal Russian plants are doing far exceeds the Russian marketplace.

In 2004, there were eight actions taken by the Russian government against the optical disc (“OD”) CD/DVD plants, including raids and seizures of illegal materials according to our industry, and Russian government, reports. The raids are obviously a positive step. But, the outcome of the raids is telling:

First, much of the seized material ends up back in the marketplace either through lax enforcement (or corruption), laws permitting charitable sales of such property, or the conclusion without prosecution of criminal investigations. As an example, over half of the one million illegal CD and DVD copies seized in a raid last year “disappeared” before the case went to trial.

Second, all of the optical disc plants that were raided in 2004 remained in operation after those raids. In some cases, truckloads of illegal material were seized from the same plants by Russian government enforcement officials – and still these same plants remain in operation.

Third, the plant owners remain unscathed by the criminal justice system. A few people employed by the plants were convicted – after extensive delays in criminal investigations – but virtually all received suspended sentences. So, there is no deterrence to continuing to conduct commercial piracy in Russia at present.

In fact, the record industry (International Federation of Phonogram Producers, IFPI) reports that in the past two years, of the 24 cases IFPI is cooperating on, 21 of those 24 cases remain without a resolution – that is, no prosecutions of the operators of illegal CD plants, as investigations have dragged on. In the other three cases, the pirate CDs were destroyed, but no deterrent sentences were handed down. The only exception to this pattern (which has been true for years) was in June 2002 when the Disc Press MSK plant (raided in September 1999) was finally closed and a Zelenograd court handed down 4-year prison sentences to two operators of the plant. In February 2004, there was a one-year conditional sentence given to a manager of the Zelenograd plant which was raided in December 2002, resulting in the seizure of 234,493 pirate CDs (over 59,000 were music CDs). The more typical case is that of the Synograph plant, raided in October 2000. There was a four year criminal investigation aimed at the director of the plant; a court hearing is scheduled for 2005, and the plant is still in operation.

The optical disc problem that IIPA confronts in Russia is one that has been regulated in virtually all other countries where we have found these levels of massive production of pirate product – countries like Taiwan, China, Hong Kong, Macau, Bulgaria and Malaysia. Russia's regulation of the plants is virtually non-existent, and based on a weak 2002 licensing law. Quite simply, Russia is the largest un-regulated and un-enforced producer of pirate optical disc product in the world.

To solve this problem, Russia must undertake vigorous criminal enforcement backed by the highest political officials in the government, since much of the piracy is undertaken by organized criminal syndicates. For example, according to the Entertainment Software Association (ESA), Russian crime syndicate pirates of videogame material are so well-entrenched that they “label” their product. The Motion Picture Association of America (MPAA) reports that producers of motion picture DVDs produce export-only copies of DVDs because they are in seven or eight foreign languages, not including Russian.

Most of our testimony today is limited to problems pertaining to hard-copy piracy, but there are growing problems related to digital piracy as well. In fact, the world's largest server-based pirate music website – allofmp3.com – remains in operation after a criminal prosecutor in early 2005 reviewed the case and determined (wrongly) that current Russian copyright law could not prosecute or prevent this type of activity. In fact, this interpretation of the Russian law is contrary to all the assurances the Russian government gave the U.S. government and private sector during the years-long adoption of amendments to the 1993 Copyright Law; those amendments were finally adopted in July 2004.

The business software industry (Business Software Alliance, BSA) is confronting its own unique digital piracy problem relating to copyright enforcement. In short, the Russian government has failed to take effective action against the broad distribution of counterfeit software over the Internet, primarily through unsolicited e-mails (spam) originating from groups

operating in Russia. Separately, the BSA has had success with Russian law enforcement agencies taking action against channel piracy (i.e., illegal software preloaded on computers sold in the marketplace), not only in the Moscow area, but also in other Russian regions, and has made some progress in software legalization in the public sector.

The book industry, the Association of American Publishers (AAP) reports widespread piracy of an array of reference works and textbooks, increasingly a large market in Russia as the penetration of English-language materials in the market grows. Lax enforcement, including poor border enforcement – endemic to all copyright sectors – results in the import (and export) of illegal materials. In the book industry this includes unlicensed imports of pirated reprints from neighboring countries, and pirated reference books and medical texts; there is also widespread illegal commercial photocopying, especially in the academic sector.

We have indicated the devastating consequences to the U.S. copyright owners and authors. The harm to the Russian economy is enormous as well. The motion picture industry alone estimates lost tax revenues on DVDs and videos in Russia was \$130 million last year. In another study undertaken by the software industry, it was estimated that if levels of piracy could be reduced to regional norms (that is, realistic levels), ten of thousands of jobs and several hundred million dollars in tax revenues would be realized from that sector alone in Russia.

The Russian Government's Legacy of Failed Commitments

The performance of the Russian government over the past decade can be summed up as representing a legacy of failed commitments on obligations to the United States and the broader international community. A short list of these failed commitments is as follows:

Optical Disc Enforcement Commitments: The most egregious problem is that illegal production has devastated the domestic Russian market, and exports of Russian-produced pirated optical media (CDs, DVDs, etc.) are causing serious damage to legitimate market worldwide, as witnessed by the huge amount of pirated material originating in Russia that is found abroad.

In 1996, the IIPA first identified optical disc plant production as a problem and suggested the need for an enforcement “action plan” to address this problem, including legislative reforms. Two optical disc (“OD”) plants were identified in the IIPA’s February 1996 Special 301 Report. As noted, there are now 34 CD plants, with a total capacity of 370 million discs per year.

At all levels of the Russian government there have been promises to address this problem (starting in 1999) including a pledge, never met, in 2002 to issue an “action plan”— but to date, there has been virtually no action taken against the plants, no comprehensive plan of action issued by the Russian government, and no legislative reforms on this point have even been introduced. Now ten years after IIPA (and the U.S. government) raised the issue, there is no excuse for why the Russian government has been unable to properly license and inspect all the known (now 34) plants, and to close and repeal the licenses of those engaged in illegal production and distribution, as well as to criminally prosecute the plant owners and operators.

As one example of the failure to regulate the plants: late in 2004, in bilateral talks with the U.S. government and IIPA, the Russian government promised it would “meet with the 18 plants” (their figure) on restricted access (i.e., military) property to ascertain the legal or illegal status of their production, and to report back to the U.S. government. The meeting, scheduled for December, was cancelled and has not been rescheduled. The reason: the Russian government confessed it was unable to determine all the owners of the plants from its records (because of its inadequate licensing law) and therefore could not identify with whom the government needed to meet.

Promised Legal Reforms: The Russian government has for 13 years, obligated itself in bilateral and multilateral negotiations to adopt necessary legal reforms. A short list of the failed commitments relating to legal reforms includes:

In 1995, the Russian government agreed to provide *ex parte* search provisions – critical enforcement tools, especially in the software industry. These were adopted in part in the Arbitration Procedures Code in 2002, however the proper provisions were never implemented and are absent from the Civil Procedure Code (enacted in 2003).

In 1995, the Russian government agreed to provide the police and prosecutors with proper authority to confiscate illegal material and *ex officio* authority to commence criminal investigations. The 1996 Criminal Procedure Code reversed that authority, and required rightholders to formally press charges to commence investigations in some instances, thus thwarting effective enforcement.

In 1995, Russia acceded to the Berne Convention but failed to comply with Article 18 to provide protection for pre-existing works. That same year, Russia acceded to the Geneva Phonograms Convention but provided no protection for pre-existing foreign sound recordings prior to the accession date of March 13, 1995. These were commitments Russia made to the U.S. government in the 1992 Bilateral NTR Trade Agreement – Russia agreed to have these commitments in place by the end of 1992. Finally, in July 2004, Russia adopted provisions to its law to provide protection for foreign pre-existing works and sound recordings – however, the 12 year delay in adopting these provisions has resulted in flooding the marketplace with illegal product that will take years to enforce, even if Russian enforcement were effective (which it is not).

In the 1992 Bilateral NTR Trade Agreement, the Russian government committed to provide effective criminal penalties and enforcement. In 1996, Criminal Code amendments were adopted (after a 1995 veto) but a deficient provision (a “grave harm” threshold) prevented effective enforcement. In 2003 an amendment to “fix” the grave harm provision was finally adopted, but implementation of these criminal provisions remains a matter of concern, and there is no initiative to use these tools, if they even work properly, as part of effective enforcement.

In short, the Russian government has made promise after promise to the U.S. (and other foreign) governments to develop an effective legal regime, including strong copyright and enforcement laws, and strong on-the-ground enforcement. It has failed to meet its commitments

while it has enjoyed trade benefits and preferences with the U.S. that are the *quid pro quo* for these benefits and preferences.

Steps the Russian Government Can Take to Properly Enforce IPR Crimes – Focusing on Optical Disc Piracy

There are six critical steps that the Russian government could take immediately to effectively confront its optical disc piracy problem:

1. Inspect, on a regular, unannounced and continuous basis, each of the 34 known OD plants, and immediately close and seize the machinery of any found to be used to produce pirate product (some of these steps require additional legislative or regulatory measures);
2. Announce, from the office of the President, that fighting copyright piracy is a priority for the country and law enforcement authorities, and instruct the Inter-Ministerial Commission, headed by the Prime Minister, to deliver reports every three months to the President on what steps have been taken to address the problem;
3. Adopt in the Supreme Court a decree setting forth sentencing guidelines for judges—advising the courts to impose deterrent penal sanctions as provided under the penal code as amended (Article 146);
4. Immediately take down websites offering infringing copyright materials, such as allofmp3.com, and criminally prosecute those responsible;
5. Initiate investigations into and criminal prosecutions of organized criminal syndicates that control piracy operations in Russia (including operations that export pirate material to markets outside Russia); and
6. Introduce either via executive order or legislation, the necessary modifications of the optical disc licensing regime so that it clearly provides more effective control over the operations of the plants, including the granting of licenses to legal plants and withdrawing and sanctioning of illegal plants; stricter controls on the importation of polycarbonate and machinery; mandatory seizure and destruction of machinery used to produce pirate materials; and the introduction of criminal penalties for the owners of such plants.

There are, obviously, many other steps the Russian government could take to combat commercial piracy in Russia, including, but not only related to, optical disc piracy. These steps, including other enforcement and legal reforms necessary in Russia, are detailed in our Special 301 Report of February 2005 (attached).

We also want to address one issue that has been raised by certain senior members of the Russian Government in our meetings, which raises serious questions about its commitment to fighting piracy. We have seen a number of reports in which Russian officials have suggested that the prices for legitimate goods and the lack of local manufacturing of legitimate products are to blame for the piracy problem. This comment reflects both an ignorance of what is happening in the marketplace, and a misunderstanding of the nature of the problem that we confront in Russia. The organized criminal enterprises manufacturing and distributing pirate product are

largely servicing foreign markets (local manufacturing capacity is at least a multiple of six or seven times that of local demand), making the Russian price for legitimate materials wholly irrelevant to their motivation or profitability. As noted earlier, Russian manufactured product has been found in over 27 countries over the past two years.

In addition, existing efforts by certain industries to offer low cost Russian editions have not had the effect of reducing local piracy rates. The record industry, for example, is already manufacturing locally, and sells legitimate copies for an average price of \$6.00 to \$8.00 U.S. dollars—a price that is extremely low not just in relation to prices for music elsewhere, but also with respect to other consumer goods sold in Russia. It is not the price of legitimate product that is creating opportunities for piracy—it is the opportunity for easy profits that has brought criminal enterprises into this business, and Russia should stop offering such excuses for its continuing inaction.

Another matter that the Russian government continues to raise is the need for the U.S. copyright industries to use civil remedies for effective enforcement. The copyright industries (especially the record industry) have recently attempted to bring civil cases against illegal plant operators – although procedural hurdles are significant.

However, in no country of the world, including Russia, can copyright owners be left to civil remedies in lieu of criminal remedies to effectively address large-scale organized crime commercial piracy. The government of Russia needs to play a major role in an effective criminal enforcement regime. The copyright industries generally report good police cooperation with raids and seizures, mostly of smaller quantities (with some exceptions) of material, but prosecutorial and other procedural delays and non-deterrent sentencing by judges remains a major hindrance to effective enforcement.

What Can the U.S. Government Do?

There are three things the U.S. government can do to mandate Russia compliance with international norms and obligations to provide “adequate and effective protection and enforcement” for U.S. copyright material:

1. Condition Russia’s entry into the World Trade Organization (WTO) on meaningful copyright law enforcement;
2. Designate Russia as a Priority Foreign Country (PFC) after the on-going out of cycle review by U.S.T.R.; and
3. Deny Russia’s eligibility for the Generalized System of Preferences (GSP) duty-free trade benefits.

1. Condition Russia's Entry into the World Trade Organization (WTO) on Meaningful Progress in Enforcing its Copyright Laws

The Russian IPR regime is not in compliance with the WTO TRIPs obligations, especially pertaining to enforcement. As a consequence, the U.S. government should not assent to Russia's accession into the World Trade Organization until its copyright regime, both legislative and enforcement, is brought into compliance with the WTO TRIPS obligations.

Russia is not providing adequate and effective enforcement as required for entry into the WTO, certainly not the enforcement standards required as "effective" (Articles 41 through 61 of TRIPs).

The U.S. can and should condition Russia's entry into the WTO on Russia making positive and meaningful enforcement progress – for example, by licensing and inspecting all the known 34 optical disc plants, closing those engaged in illegal activities, and criminally prosecuting those involved in this commercial illegal activity, and ensuring imposition of deterrent (not suspended) sentences.

2. Designate Russia as a Priority Foreign Country (PFC) When the Current Out-of-Cycle Review is Complete

The U.S. Trade Representative's announcement on April 29, 2005 that Russia would be left on the Priority Watch List (for the ninth straight year) noted "[w]e will continue to monitor Russia's progress in bringing its IPR regime in line with international standards through out-of-cycle review, the ongoing GSP review that was initiated by USTR in 2001, and WTO accession discussions."

The situation has gotten significantly worse, not better, in the past few years. IIPA recommended in February, and continues to recommend as part of the out-of-cycle review, that it is time to designate Russia a Priority Foreign Country to force Russia to properly enforce its laws or face the trade sanction consequences.

3. Remove Russia's Eligibility for Generalized System of Preferences (GSP) Benefits

In August of 2000, IIPA filed a petition asking the U.S. government to open an investigation into Russia's practices and outlining a variety of ways in which Russia failed (and continues to fail) to meet the GSP criterion of providing adequate and effective protection for intellectual property. That petition was accepted by the U.S. government on January 10, 2001. IIPA has since testified twice before the U.S. government GSP interagency committee (March 2001; September 2003) and submitted a number of materials and briefs in this matter since then.

IIPA believes it is time to revoke Russia's eligibility from the GSP program. Russia is not providing the U.S. GSP mandated "adequate and effective protection" as required by Sections 502(b) and 502(c) of the 1974 Trade Act (the intellectual property provisions in the GSP statute are at 19 U.S.C. §§ 2462(b) and (c)).

It has been almost five years since the IIPA petition was filed, and over four years since the U.S. government accepted the petition, which at least as a threshold matter, acknowledged the potential of Russia's shortcomings under the GSP program. The Russian government has had years to move to fix these problems and they have not done so adequately.

Conclusions

Unfortunately, the Russian piracy problem has been allowed to grow significantly worse in the past ten years, and the IIPA members' losses have continued to increase. Most obviously, the past five years have witnessed an explosion of optical disc manufacturing capacity without the concomitant controls to ensure that this capacity was used only for legitimate purposes.

Russia's anti-piracy efforts remain severely hampered by flawed legislation, ineffective enforcement by the Russian authorities and insufficient deterrent penalties in the courts. The Russian government needs to address legal reforms in the copyright law (even after the adoption of the 2004 amendments), the criminal code, the criminal procedure code, and the administrative code, but more importantly, it needs to provide stronger and more effective enforcement compatible with international norms, and WTO TRIPs (and the WIPO digital treaties). The Russian government has taken some steps towards addressing copyright piracy, such as adopting improvements in its copyright law in 2004, and including by taking some actions against pirate optical disc plants, adopting a ban on the sale of certain products at kiosks and other street locations. This is a start, but it is only that. IIPA suggests that the U.S. government should adopt positions, and a timetable, to ensure that Russia is significantly moving towards achieving meaningful and lasting progress to meet its international obligations – especially IPR enforcement.

In sum, Russia's commercial piracy problem must be addressed immediately by the Russian authorities. IIPA recommends that the U.S. government take the necessary trade steps to deny Russia trade benefits (such as GSP) and entry into the World Trade Organization until Russia takes clear and effective steps to bring this illegal activity under control. This country can no longer afford inaction.

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2005 SPECIAL 301 REPORT

RUSSIAN FEDERATION

EXECUTIVE SUMMARY

Special 301 Recommendation: IIPA recommends that the Russian Federation should be designated a Special 301 Priority Foreign Country in 2005¹ and that the United States government should immediately suspend Russia's eligibility for any duty-free trade benefits that it enjoys under the Generalized System of Preferences (GSP) program.²

Russia's copyright piracy problem remains one of the most serious of any country in the world—over \$1.7 billion in losses in 2004. Five years ago, the IIPA filed a petition with the U.S. government for the removal or suspension of Russia's GSP trade preferences, worth hundreds of millions of dollars per year, until the Russian government addressed enforcement deficiencies in a straightforward and effective manner. The copyright industries have lost over \$7 billion in the past eight years in Russia as a result of poor enforcement so it is reasonable to link U.S. trade losses with Russia's trade benefits. We continue to press the U.S. government to use the GSP and other trade measures to get the Russian government to make progress on a piracy problem that has significantly deteriorated during the past few years. In large measure, the explosive growth in piracy is a result of the Russian government's legacy of failing to meet its commitments to improve IPR enforcement.

The Russian government has taken some IPR action during the past five years, mostly focusing on legal reforms, such as passage in 2004 of much-needed improvements in the copyright law. But these steps are meaningless without actual enforcement of old and new laws. The piracy problem has gotten worse and our losses have increased as Russia has become one of the world's largest producers and distributors of illegal optical media material. The production has devastated the domestic market, and exported Russian pirated optical discs have been forensically identified in over 25 countries. This activity must be addressed immediately by the Russian authorities with effective criminal enforcement to stem persistent commercial piracy.

IPR Enforcement Priorities: Russia must make enforcement its highest IPR priority to (1) stem the explosive growth of illegal optical media plants run by organized crime syndicates with widespread distribution networks; and (2) improve overall enforcement, in particular, focusing on deterrent criminal penalties addressing the problem of persistent commercial piracy. It is also important for Russia to make necessary enforcement-targeted legal reforms, including

¹ As detailed below, the Business Software Alliance (BSA) joins this recommendation solely as a result of the Russian government's failure to take effective action against the broad distribution of counterfeit software over the Internet, primarily through unsolicited e-mails (spam) originating from groups operating in Russia. BSA notes the adoption in July 2004 of positive improvements to the Copyright Law, and recognizes the willingness of Russian law enforcement agencies to take action against channel piracy (i.e., illegal software preloaded on computers sold in the marketplace), not only in the Moscow area, but also in other Russian regions. In addition, BSA is appreciative of progress made in software legalization in the public sector.

² For more details on Russia's Special 301 history, see IIPA's "History" appendix to filing at <http://www.iipa.com/pdf/2005SPECIAL301HISTORICALSUMMARY.pdf>. Please also see previous years' reports at <http://www.iipa.com/countryreports.html>.

further updating the criminal code, the criminal procedure code, and administrative code (as detailed in this and prior reports).

There are seven critical steps that the Russian government must undertake in the next few months to begin to effectively confront optical disc (“OD”) piracy:

7. Announcing, from the office of the President, that fighting copyright piracy is a priority for the country and law enforcement authorities, and instructing the Inter-Ministerial Commission, headed by the Prime Minister, to deliver reports every three months to the President on what steps have been taken to address the problem;
8. Inspecting, on a regular, unannounced and continuous basis, each of the 34 known OD plants, and immediate closing and seizing the machinery of any found to be used to produce pirate product (some of these steps require additional legislative or regulatory measures);
9. Adopting by the Supreme Court a decree setting forth sentencing guidelines for judges—advising the courts to impose deterrent penal sanctions as provided under the penal code as amended (Article 146);
10. Immediately taking down websites offering infringing copyright materials, such as allofmp3.com, and the criminally prosecuting of those responsible;
11. Pledging to investigate all complaints from copyright owners with respect to the commercial replication, distribution or export of pirate optical discs;
12. Initiating investigations into and prosecutions of organized criminal syndicates that control piracy operations in Russia (including operations that export pirate material to markets outside Russia); and
13. Introducing, either via executive order or legislation, the necessary modifications of the optical disc licensing regime so that it clearly provides more effective control over the operations of the plants, including the granting of licenses to legal plants and withdrawing and sanctioning of illegal plants; stricter controls on the importation of polycarbonate and machinery; mandatory seizure and destruction of machinery used to produce pirate materials; and the introduction of criminal penalties for the owners of such plants.

These steps will not by themselves resolve the situation, but they would represent significant progress toward more completely addressing the range of continuing problems, both legal and enforcement related. Along with these steps, the Russian police and prosecutors must show significant improvement in the number and disposition of criminal cases brought against commercial pirates (especially the organized criminal enterprises). Separately, the Russian government must ensure that the Supreme Court will notify the judiciary that judges are to impose deterrent criminal penalties.

Russia did make important law reforms in 2004, to bring its laws into compliance with the 1992 Bilateral NTR Trade Agreement and the Berne Convention by, among other things, providing protection of pre-existing works and sound recordings. Now it needs to focus all its energies on enforcement, addressing the problem of piracy in Russia, and the pirated material (especially optical discs) which is made in Russia and exported around the world.

Russia also needs to seriously address the problem of optical disc piracy that has been “discussed” for far too long without meaning action. Nearly ten years ago, IIPA and the U.S. government first identified optical disc plant production as an important emerging problem in

Russia, and suggested the need for an enforcement “action plan” to address it, including legislative reforms. Two optical disc plants were identified in the IIPA’s 1996 Special 301 Report. There are now 34 optical disc plants with a total plant capacity of 390 million discs per year of all types of optical discs. The local legitimate market is significantly less than this figure. At all levels of the Russian government there have been promises to address this problem (starting in 1999), including a 2002 pledge, never fulfilled to issue an “action plan”—but to date, there has been no effective action taken against the plants, no comprehensive plan of action issued by the Russian government, and no legislative reforms that have even been introduced to tackle optical disc plants’ unauthorized activities.

The Russian government has an unfortunate history of failing to meet its commitments to the U.S. government with regard to copyright protection and enforcement. A history of the most significant failures, and the dates upon which these (mostly unfulfilled) commitments were first made, was included in IIPA’s 2003 filing and is available at: <http://www.iipa.com/rbc/2003/2003SPEC301RUSSIA.pdf>

RUSSIAN FEDERATION										
Estimated Trade Losses Due to Copyright Piracy										
(in millions of U.S. dollars)										
and Levels of Piracy: 2000-2004³										
INDUSTRY	2004		2003		2002		2001		2000	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Motion Pictures	275.0	80%	275.0	75%	250.0	80%	250.0	80%	250.0	90%
Records & Music	411.9	66%	405.0	64%	371.9	66%	285.0	64%	250.0	70%
Business Software⁴	751.0	87%	704.0	87%	370.0	89%	90.6	87%	89.0	88%
Entertainment Software⁵	255.8	73%	NA	80%	NA	90%	173.6	90%	NA	94%
Books	42.0	NA	40.0	NA	40.0	NA	48.0	NA	48.0	NA
TOTALS	1735.7		1424.0		1031.9		847.2		637.0	

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Illegal Optical Media Production and Distribution

The number of optical disc plants (of music CDs, DVDs, videogames, and VCDs) in Russia manufacturing and distributing products has more than doubled in the last three years; at present, there are at least 34 optical disc plants in operation in Russia and at least 24 of them are known to be producing pirate product. Production capacity has nearly tripled in the past four

³ The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA’s 2005 Special 301 submission, and is available on the IIPA website at www.iipa.com/pdf/2005spec301methodology.pdf.

⁴ BSA’s final 2003 figures represent the U.S. software publisher’s share of software piracy losses in Russia, as compiled in October 2004 (based on a BSA/IDC July 2004 worldwide study, found at <http://www.bsa.org/globalstudy/>). In prior years, the “global” figures did not include certain computer applications such as operating systems, or consumer applications such as PC gaming, personal finance, and reference software. These software applications are now included in the estimated 2003 losses resulting in a significantly higher loss estimate (\$1.104 billion) than was reported in prior years. The preliminary 2003 losses which had appeared in previously released IIPA charts were based on the older methodology, which is why they differ from the 2003 numbers in this report.

⁵ ESA’s reported dollar figures reflect the value of pirate product present in the marketplace as distinguished from definitive industry “losses.” The methodology used by the ESA is further described in Appendix B of this report.

years as criminal operations have encountered little hindrance in expanding their activities. The Russian government has acknowledged that as many as 18 plants are located on facilities of Russian military-industrial enterprises. As noted, it is estimated that Russia's annual manufacturing capacity now stands at 390 million CDs, despite the fact that the demand for legitimate discs is significantly lower.

Organized criminal enterprises are involved in many aspects of optical disc piracy in Russia, and they run operations in other countries as well. In late 2004, the Russian government announced that 18 plants, including those on military-industrial properties, would report on their activities to the government by the end of 2004. To the best of our knowledge, that meeting was postponed because, IIPA was informed, the government was having a hard time determining the owners of each of the plants. This is precisely why optical disc regulation is needed: to properly license and hold accountable the (licensed) owner of each plant for that plant's activities. The planned (and subsequently postponed) meeting with the government is simply, in our view, a measure of "self-policing" as an information gathering tool, and a dubious one at that. But it is not an enforcement tool. What is needed is government-directed criminal enforcement, not private party action, with actions undertaken by law enforcement authorities. With piracy profits rivaling or exceeding those made through the distribution of illegal drugs, the government must commit itself to cleaning up the criminal syndicates running piracy operations.

It appears that these enterprises are using the Internet as one means of distributing their counterfeit products. The business software industry reports that there is a persistent problem of counterfeit software promoted and sold all over the world using unsolicited e-mail advertisements (spam) and via mail-order. These spam e-mails originate from an organization operating under various names: CD Cheap, OEM CD Shop, OEM Software, and other aliases. Most of the counterfeit products are mailed to consumers from Yekaterinburg and other cities in the Sverdlovsk region. The spam and scam operation is apparently run by a well-connected, sophisticated Russian criminal network. In January and February 2004 two police raids and related arrests were carried out in Yekaterinburg, but the key figures were not touched and there was no noticeable impact on this criminal enterprise. While recognizing some legislative improvements, as well as in other areas of enforcement—especially against hard disc loading, or HDL piracy, which entails loading illegal software onto computers sold in the marketplace—the failure of Russian law enforcement agencies to effectively address online solicitation and sales of counterfeit software led BSA to join in this year's PFC recommendation.

IIPA has documented the problem of optical disc production and distribution in Russia since 1996, when there were two known plants. The nearly ten years of inaction by the government of Russia has allowed the problem to mushroom to today's 34 known plants. The steady growth of optical disc production has been documented (in numerous IIPA filings) as follows: In 1996, there were two known plants; in 1998, three plants; in 1999, six plants with a capacity of 60 million discs; in 2000, ten plants with a capacity of 90 million discs; in 2001, 13 plants with a capacity of 150 million discs; in 2002, 17 plants with a capacity of between 150 and 183 million discs; in 2003, 26 plants, including 5 DVD plants, with a total capacity exceeding 300 million discs; and in 2004, 34 plants, including 8 DVD plants (7 in operation), with a total of 80 lines (excluding the 3 CD-R lines), and a total capacity of 390 million discs per year.

To address optical disc production, the Russian government (formerly the Ministry of Press and Mass Media) used reproduction and licensing regulations (issued in June 2002) to provide licenses for replication facilities for optical discs and analog tapes. The regulations allow for unannounced inspections of replication plants and for the suspension, but not withdrawal, of operating licenses of facilities found to be in breach of the regulations. This is

why the provisions are inadequate—because even blatantly pirating plants cannot have their licenses revoked (withdrawn) absent a court order. Another major shortcoming is the lack of deterrent criminal penalties for such violations (e.g., seizure and confiscation of the equipment used for pirate production). In fact, last year, the government noted that four plants did have their licenses “withdrawn”, but for other reasons: in one case for the failure to pay the appropriate fees; in the other three cases the plant operators asked that their licenses be withdrawn. Year-end figures on the number of licenses issued and the number of plant inspections conducted in 2004 were unavailable, probably because of the March 2004 government reorganization. Unofficial reports are that as many as 24 licenses were issued and 28 plants “inspected”—but, no surprise inspections occurred. This government reorganization resulted in a loss of enforcement momentum in 2004 when the Ministry of Press and Mass Media was transformed and the new enforcement authority (the federal service known by the acronym FSCLMM—Federal Service for Supervising Compliance with Laws Regarding Mass Communications and the Protection of Cultural Heritage) which took over the licensing function had not—in all of 2004—even begun the process of issuing or suspending operating licenses. After the reorganization, plant inspections and licensing were placed in this new federal service (FSCLMM) within the new and overarching Ministry of Culture (which has none of the experience or staff of the former ministry). Copyright policy was vested in the new Federal Service on Intellectual Property within the Ministry of Education and Science, setting up the potential for bureaucratic wrangling, or at best unclear lines of authority, over IP enforcement.

In short, the existing laws and regulations pertaining to plant licensing fall far short of IIPA’s model optical disc legislation (provided to the government of Russia), and is demonstrably inadequate—evidenced by the fact that the existence of these regulations has done little to stem, or even slow, the production of pirate discs in the country’s optical disc facilities. Until better provisions exist, however, the existing laws must be utilized to the fullest extent possible. Draft resolutions and legislation started to circulate at the end of 2004 to change optical disc licensing requirements, including a much-needed proposal to adopt mandatory SID codes, and another to license the importation of polycarbonates used to manufacture optical discs. In the absence of a comprehensive scheme, however, the existing regulations, and any piecemeal additions, must be seen as a starting point for action. In the long run, a comprehensive series of legal reforms is needed. These include legislative and regulatory steps—proposals that IIPA gave to the Russian government more than three years ago.

Raids and Seizures in 2004

In 2004, there were eight actions taken against optical disc plants, including raids and seizure of illegal materials, according to industry and Russian government reports. While the raiding of plants is a positive development, enforcement problems persist. In almost all cases the plant operators go unscathed by the criminal justice system and/or the plants continue in operation.

In one example, the Economic Crime Police along with the motion picture industry’s anti-piracy organization, RAPO, conducted a raid on the UVK Stimul plant in Zelenograd on June 21, 2004 (this same plant was raided in April 2003). The plant had 2 DVD lines and one CD line in operation; a total of 37,000 pirate CDs and DVDs, and 8 stampers, were seized. The plant however continued to operate, as it did after the raid in 2003, and is still in operation today, reportedly working 24 hours a day. On January 14, 2005, a Moscow court imposed a suspended one-year prison sentence on the plant’s chief technician, after he confessed to

ordering the plant's personnel to replicate pirate DVDs. The court apparently heard the case under a "special procedure" in the absence of RAPO because the accused had agreed to plead guilty. While the result in this case is highly disappointing, it is nevertheless the first time that a Russian court has convicted anyone for replicating pirate DVDs. RAPO now plans to seek the immediate suspension by the Ministry of Culture of the plant's replicating license.

Other plants raided in 2004 included: the Puskino plant (3 DVD lines, seizing 25,000 pirate DVDs and computer games discs, and 800 stampers) situated on a government defense facility; the Samara plant (2 DVD lines); the Koroliov plant (2 DVD lines and one CD line); and 2 CD plants engaged in producing illegal music CDs. Raids against the Rufon/Card Media plant (in April and August 2004) have not yet resulted in the initiation of a criminal case pending further investigation by the local prosecutor's office. Following raids in cooperation with the recording industry (IFPI), the prosecutor's office did initiate criminal cases against two replication plants: the "TINE-Invest/Data Media" plant at which 35,000 DVDs and CDs were seized in April 2004 and an additional 22,721 CDs in June 2004; and the "Rubin" plant, at which 30,000 CDs were seized. Investigations are still ongoing on the activities of both plants. Separately, a criminal case against the plant "Synograph" is being considered by the Moscow Regional Noginsk City Court, and civil proceedings against "Russobit" and "ROFF Technologies" are pending before the Moscow Regional Arbitration Court.

In all of these cases, it is reported that the plants remain in operation. While criminal investigations proceed in some, but not even all instances—and with extensive delays—the operators and owners of the plants remain unpunished. In the case of the Koroliov plant that was raided on April 30, 2004, the plant continued to work illegally. RAPO and the Economic Crime Police have since intercepted trucks full of illegal DVDs leaving the plant. The plant operator pleaded guilty in December 2004 to replicating pirate product and is awaiting a sentencing hearing in February 2005. Not only should a deterrent penalty be meted out, but the court needs to order the destruction of the plant's illegal lines, as well as the closure of the plant's operations until and unless it can be inspected and licensed for legal operation.

IFPI has cooperated with 24 total cases in the past two years against optical disc producers, large warehouses, and distributors. In 21 out of the 24 cases, there has been no resolution, that is, no prosecution of the operators of illegal CD plants, as investigations have dragged on. In the other three cases, the pirate CDs were destroyed, but no sentences were handed down. The only exception to this pattern (which has been true for years) was in June 2002 when the Disc Press MSK plant (raided in September 1999) was finally closed and a Zelenograd court handed down 4-year prison sentences to two operators of the plant. In February 2004, there was a one-year conditional sentence given to a manager of the Zelenograd plant which was raided in December 2002, resulting in the seizure of 234,493 pirate CDs (over 59,000 were music CDs). The more typical case is that of the Synograph plant, raided in October 2000. There was a four year criminal investigation aimed at the director of the plant; a court hearing is scheduled for early 2005, and the plant is still in operation.

The Samara plant raid, conducted by the Economic Crime Police in April 2004, is another example of the frustrations of poor enforcement. That plant was found to be a pirate DVD plant during a routine tax inspection at a cement factory; the police discovered two DVD lines and contacted RAPO. RAPO later uncovered over 7,000 pirate DVDs and 30 stampers at the plant. However, although the plant director was questioned and a criminal prosecution prepared, the local prosecutor closed the criminal case twice in 2004 (it was reopened the first time after a regional prosecutor ordered the case re-opened). The plant, without a license,

remains in operation. The local prosecutor ordered the seized stampers to be returned to the plant operator, and RAPO has again filed a protest with the prosecutor to re-open the case.

In August 2004, the Moscow Economic Crime Police, RAPO, and IFPI raided a warehouse located on a military base in Odintzovo, near Moscow and uncovered 1 million pirate discs. A nearby second warehouse was found that contained an additional 1.5 million pirate discs. The discs included DVDs, VCDs, and MPEG-4 CD-ROMs containing movies, as well as music and interactive games. A criminal investigation has been initiated, but no criminal case has been opened yet.

In short, the copyright industries can report some successful raids and seizures in 2004, but these activities have not resulted in any appreciable reduction in the amount of pirate optical disc product being produced in Russia, nor in meaningful criminal convictions. Pirate manufacture continues unabated and the pirates are getting more entrenched.

To address retail piracy, two years ago, the government of Russia adopted a legal ban on the street sales of audio and audiovisual products, for example, at kiosks, especially in Moscow. This was a promising step that resulted, at least in the short term, in a significant reduction in the availability of pirated home video entertainment, especially on the streets of Moscow. However, the ban has been irregularly enforced and music CDs remain widely available. Retail cases have resulted in some administrative fines, but these are generally of a *de minimis* nature.

In 2004, as in prior years, the federal police and the IP unit in the Ministry of the Interior were generally cooperative in running raids against major pirates (although the Unit "R" has had IPR enforcement jurisdiction taken from it). However, the raids run by the police and the municipal authorities were not generally followed up by prosecutors and the courts. The pattern of successful raids without successful prosecutions (with a few exceptions) is a recurring problem. In addition, it is estimated that up to 70% of pirated product seized in raids in Russia finds its way back into the market through either the Veteran's Fund or the Trade Houses in the Ministry of Justice, which both claim the right to sell pirate discs on the open market. The government of Russia must put a stop to these practices.

In total, major warehouse raids have been successful in the total numbers of DVDs and CDs seized. As in recent years, about half of the DVDs contained two feature films. The film industry's anti-piracy organization, RAPO, seized over 4.75 million pirate DVDs in raids on warehouses and outlets across Russia in 2004; in 2003, this number was approximately 1.4 million DVDs.

In 2004, the recording industry (IFPI) assisted in the investigation of, and in raids and seizures on, a number of suspected producers and distributors of illegal recorded material. Only a handful of cases made it to the courts (mainly as administrative proceedings) and even then, the disposition was disappointing because the operators received neither deterrent penalties nor imprisonment. A total of 1,530 police raids (on different levels in various regions) were carried out with the participation of the Russian experts (IFPI). These resulted in the seizure of: 2,086,000 CDs; 17,600 cassettes; 28,400 CD-ROMs; 209,500 music DVDs; 130 stampers; 74 units of recording equipment; 656,000 CD inlays (the printed material for the jewel boxes); 126,000 blank CD-Rs; and 11,200 music VHS tapes.

In 2004, the business software industries focused their enforcement activities on the prevention of hard disc loading ("HDL piracy") by computer resellers, and on the illegal use of software by corporate end-users ("end-user piracy"). The business software industry is aware

of approximately 50 raids on hard disc loading operations, and approximately 25 end-user raids conducted in various parts of Russia. Regarding resellers, recent signs of police action—especially in Moscow and the surrounding region—are encouraging, even though to date only a small number of these cases have resulted in criminal convictions. Regarding end-user enforcement, there are persistent problems, especially prosecutorial procedures and delays. For example, the difficulty in proving intent and the inability to impose criminal liability on legal entities under Russian law are two obstacles to enforcement. Consequently, the identification and prosecution of the specific individuals making actual installations is needed—a very tough enforcement standard. As a result, most end-user cases end up treated as administrative misdemeanors.

RASPA, a Russian anti-piracy organization, continues to conduct raids on behalf of some Entertainment Software Association (ESA) member companies, but these are mostly seizures of street market inventory. ESA believes that the Russian government must take action against the organized criminal syndicates that run the key piracy operations involved in the production, distribution and export of pirated entertainment software products. These syndicates are destroying not only the Russian market, but also markets in many other countries. These same syndicates are believed to control distribution of pirate entertainment software products in Russia, Ukraine, and much of Eastern Europe as well. Pirated entertainment software products, primarily for play on personal computers, are shipped from Russia to Poland, Latvia, Lithuania and other neighboring countries. While domestic production is still high, pirated materials produced in Ukraine are also being shipped through the Russian markets. Pirated cartridge-based video games in Russia are imported from China, and some of the pirated console game material is imported from Malaysia. Piracy at Internet cafés is also problematic; of the 7,500 cafés in the country, only 10% are licensed, with the remainder using either pirated or unlicensed product. Flea market-type venues are increasing in the country (it is estimated that there are about 50,000 in the country); this is the primary outlet for pirated video games in the country.

The key issue for the entertainment software industry in Russia is organized criminal syndicate involvement. There are a few syndicates that control the entire market for pirated optical disc entertainment software products, both domestically and for export. Shutting down these syndicates will significantly impact the entertainment software piracy problem. Furthermore, not only do these syndicates produce, distribute and export, they are also trying to hijack the trademarks of ESA member companies by attempting to record the company trademarks themselves, and using the false recordations to exploit pirated copies of the games. It is imperative that the government begin to address in earnest criminal syndicate involvement in piracy.

Continued High Piracy Levels and Other Problems

Very high estimated piracy levels in all copyright sectors accompany massive losses, as noted in the chart above. These high piracy levels cost the Russian economy millions of dollars in lost jobs and lost taxes. For example, the motion picture industry alone estimates lost tax revenues on DVDs and videos in Russia was \$130 million last year. In another study undertaken by the software industry, it was estimated that if levels of piracy could be reduced to regional norms (that is, realistic levels), ten of thousands of jobs and several hundred million dollars in tax revenues would be realized from that sector alone.

The only way to bring down these piracy levels and losses is for Russian authorities to use deterrent criminal penalties against the operators of optical disc plants and crime syndicates. Instead, Russia continues to mete out low penalties and only a small number of jail sentences for piracy.

The motion picture industry reports that with 90% piracy rates for DVDs, sales of legitimate DVDs have fallen back to 1999 levels, despite significant increases in the number of households with DVD players as well as efforts by foreign producers to quickly get legitimate locally replicated DVDs into the Russian market. Evidence that piracy is negatively impacting home video sell-through revenues is revealed by comparing box office growth with home video growth. Between 2000 and 2003, box office spending in Russia rose by a cumulative 438%, compared with only 75% cumulative growth for home video sell-through over the same period. This runs counter to the trend in virtually every other country where the motion picture industry does business, where home video grew much faster than box office revenue during the last three years. Television piracy, especially outside of Moscow, remains a problem, and cable piracy abuses outside of Moscow are rampant.

The recording industry reports that the closure of the former Gorbushka market resulted in the migration of illegal sales to the nearby building of the Rubin Trade Center (La-La Park), where most of the dealers sell pirate audio products. New pirate markets are prospering on the outskirts of Moscow (for example, Tsaritsinio, Mitino, etc.). A major raid was undertaken by the police and RAPO against the Tsaritsinio market on January 28, 2005 (netting 67,000 discs and temporarily closing 52 shops in the market); five criminal investigations have commenced with more cases expected. Audiocassette piracy levels remain very high (above 68%), as well as CD piracy (over 65%), despite major raiding activity and the expenditure of major resources by IFPI. Overall losses in the recording industry were \$411.9 million in 2004.

The level of piracy for entertainment software is at 73% of the market. Russian syndicates control 100% of the production in Russia of PlayStation® video and personal computer games. About half of certain PlayStation® games (such as PlayStation2® games) come from Malaysia, while for other materials such as PlayStation1® and certain personal computer games, the majority of illegal material is produced in Russia, though there are some copies imported from Ukraine. Cartridge-based video games (like Nintendo Game Boy products) continue to be imported from Asia, particularly China. The retail markets in St. Petersburg and Vladivostok are all full of pirate videogame product.

One example of the failure of the Russian enforcement regime to work effectively is the control that criminal syndicates have over entertainment software piracy in Russia. There are four principal criminal syndicates which control the production and distribution of pirated entertainment software in Russia, and the scope of their operations do not appear to have diminished. The syndicates attach “logos” or “brand” names to their illegal product and localize the illegal copies they produce even before legitimate product is released into the market. These same groups control not only illegal distribution networks in Russia, but also in surrounding countries. It is widely believed that the Russian groups control piracy operations in much of Eastern Europe including the markets in Poland and Latvia, and that they also have ties with syndicates operating in Ukraine. One ESA company reports that in 2004, one of these piracy syndicates attempted to register one of the company’s trademarks for a videogame product that was being pirated by the syndicate. Given these circumstances, it is imperative to use the criminal code against organized criminal syndicates, and that the Russian government focus its attention on a course of action to fight piracy by the criminal syndicates.

Book piracy continues to hurt the publishing industry in Russia. Although increased licensing of legitimate product has sporadically resulted in some improvement in the piracy rates, significant and lasting improvement has remained elusive. While bestsellers were the target of the pirates in the 1990s, popular items for pirates now also include an array of reference works and textbooks, increasingly a large market in Russia as the penetration of English-language materials in the market grows. Unlicensed imports of pirated reprints from neighboring countries, and pirated reference books and medical texts, still abound. Illegal commercial photocopying is also a problem, especially in the academic sector.

Publishers are also experiencing a degree of Internet piracy, mostly in the form of unlicensed translations of fiction bestsellers available for download on websites in Russia. This phenomenon is appearing in a number of countries worldwide, but seems to be especially problematic in Russia. The “hidden print run” and “overrun” problems remain, where printers of legitimate editions deliver additional unauthorized copies to unauthorized distributors before delivering books to legitimate publishers. The Association of American Publishers (AAP) estimates losses in Russia in 2004 at \$42 million.

In 2004, the Russian government, including certain senior members of the Putin Administration, continued to note a “pricing” issue with IIPA which raises serious questions about their commitment to fighting piracy. There have been a number of reports in which Russian officials have suggested that the prices for legitimate goods are to blame for the piracy problem. This comment reflects both an ignorance of what is happening in the marketplace, and a misunderstanding of the nature of the problem that we confront in Russia. The criminal enterprises manufacturing and distributing pirate product are largely servicing foreign markets (at least for music and film), making the Russian price for legitimate materials wholly irrelevant to their motivation or profitability. As noted earlier, Russian manufactured product has been found in over 25 countries over the past year. In addition, existing efforts by certain industries to offer low cost Russian editions have not had the effect of reducing piracy rates. The record industry, for example, is already manufacturing locally, and sells legitimate copies for an average price of \$6 to \$8 dollars—a price that is extremely low, not just in relation to prices for music elsewhere, but also with respect to other consumer goods sold in Russia. The motion picture producers have also lowered the prices of DVDs offered in certain Russian markets to about \$10. Similarly, entertainment software products are already reasonably priced. It is not the price of legitimate product that is creating opportunities for piracy—it is the opportunity for easy profits that has brought criminal enterprises into this business, and Russia must stop offering such excuses for its inaction.

Criminal Enforcement

The criminal enforcement system in Russia remains the weakest link in the Russian copyright regime resulting in the extraordinarily high piracy levels and trade losses. At the retail level, there is no practical alternative for running anti-piracy actions other than using the municipal authorities (even though the criminal police have the authority—they just do not use it), and in these cases pirates are subject to administrative, not criminal, remedies that have proven ineffective. Although legislative efforts were undertaken (in 2003) to “fix” the Criminal Code, implementation of these provisions remains troubling.

Four years ago, to assist in combating piracy, an Alliance for IP Protection was formed. It combined the forces of IFPI Moscow, RAPO, BSA and RASPA—thus combining the representatives of the recording, motion picture and software industries, as well as some of the entertainment software companies.

Tracking cases for over five years, we note that less than one-third of the criminal cases were even heard by the courts, with the other two-thirds of cases dismissed for a variety of reasons. In only 20% of the criminal cases heard were the offenders punished at all—often with small fines, confiscation of pirate products, or suspended sentences (even this is very rare)—and, according to Russian statistics provided to IIPA, only 1% of those convicted of crimes were sentenced to any jail time and fewer than 25% were fined (most of these were not even deterrent fines).

In August 2004, MPA was able to get its first-ever unsuspended prison sentence for a pirate in Russia; the defendant was a video shop owner found in possession of a DVD burner and hundreds of pirate DVDs, DVD-Rs and VHS cassettes. The defendant was sentenced to three years and two months in prison; this was the second time this defendant had been convicted (he received a suspended sentence of two years in the prior case).

The business software industry (BSA) reports some encouraging enforcement developments in 2004. The police did undertake several criminal actions against illegal resellers (i.e., hard disk loaders) in 2004, and the Moscow criminal courts sentenced hard disk loaders. The most notable of these sentences was a first-ever unsuspended imprisonment sentence (six months) for a hard disk loader in February 2004. In addition, a number of other cases resulted in one or two year suspended sentences, with one or two years of probation. The Russian criminal courts issued several criminal judgments against smaller resellers (selling pirate CD-Rs) with sentences that included, for example, a two year suspended sentence plus two years of probation. In some cases, the criminal courts were also able to adjudicate the civil matter involved, making the process more cost efficient and expeditious. BSA reports consistent problems with end-user enforcement, however, due to little or no prosecutorial cooperation. Also, although the business software piracy level is estimated to be well over 87% outside of Moscow, the police there have only recently started to take action against illegal resellers. Finally, Internet piracy and piracy by organized crime networks are growing problems for the software industry, especially in the face of little prosecutorial assistance and huge procedural hurdles in the criminal courts.

Administrative Enforcement

As in past years, retail cases are increasingly handled under administrative machinery, resulting in very small fines, or none at all. While pirate product is generally confiscated, shop operators are normally not the owners and the latter seldom get caught and fined. As in past years, the recording, business software, and motion picture industries report numerous administrative raids. However, it was also reported that these matters were less effective than in prior years because the new administrative code is more complicated, requiring the involvement of attorneys. In 2004, IFPI reported that 1,300 raids against audio pirates were undertaken, many of which resulted in administrative actions. The average administrative fine imposed was about US\$50 per case; this is obviously not a deterrent penalty. RAPO reported that it is able to average nearly ten administrative court decisions a week against pirate retailers that order illegal product to be confiscated and that impose small fines (on average, less than US\$200). Market seizures continue to involve the employment of huge resources, since administrative penalties remain totally inadequate to deter over the long term. The recording industry reported that although the law makes liable those who distribute material, the sources and channels of illegal material are rarely pursued. In lieu of this, most administrative actions against shop owners and sellers require payment of, on average, US\$200.

Civil Enforcement

In 2004, as in years past, the business software industry filed separate lawsuits in the arbitration court, rather than pursue civil claims as an adjunct to a criminal prosecution. As a result, several significant cases were won against software system builders who install unlicensed copies of business software onto sold computers as well as against corporate end-users that used illegal copies of software in their business operations. However, the remaining deficiencies in the copyright law—including the unclear status of temporary copies—make it very difficult to apply civil remedies in end-user piracy cases. Also, the unfortunate delay (until September 2006) in implementing the new copyright law amendment on the making available right seriously hinders enforcement actions against certain types of Internet piracy.

In 2003, the recording industry (IFPI) commenced civil claims against optical disc plants in Russia, seeking damages of millions of dollars, a prohibition against production of the pirate CD titles named in the suits, and confiscation of the machinery and equipment used by the plants. This was the first time that a civil cause of action was commenced in Russia against an optical disc plant. IFPI was being pressed to do so by the Russian government, which was convinced that civil procedures would prove effective. There is now a total of 16 IFPI civil claims lodged against two plants—Russobit and Roff Technologies. Instead of showing any effectiveness in the enforcement regime of Russia, those cases have been bogged down with procedural hurdles that will likely mean that there will be either no resolution, or a total vindication of the plant operators. That would mean the absolute failure of civil proceedings in these types of cases.

Border Enforcement

Russia must significantly improve the lax border enforcement that permits the easy trafficking of illegal material into and out of Russia. The government of Russia should instruct Russian customs officials to address this issue and should provide them with the necessary resources to allow effective enforcement. There are numerous examples of Russian made material being seized, not by Russian authorities who failed to detect illegal product, but by enforcement authorities in other countries. To use Poland as an example because it is a major marketplace for Russian-made material, the local Polish anti-piracy organization for the film industry (FOTA) seized over 76,000 Russian-made pirate DVDs through September 2004, compared with 17,000 in all of 2002. Other destinations of Russian pirate DVDs include Estonia, Finland, Ukraine, the Czech Republic, Slovakia, Hungary, Romania, Bulgaria, Israel, Turkey, and for the first time (in 2004), the UK. The music industry reports that Russian-made pirate CDs are exported to as many as 25 countries, including many of those noted above. The entertainment software industry reports that Russian sourced pirate video games are shipped into Poland, Latvia, Lithuania and Israel.

Russian Government Efforts to Address Piracy

In 2002, the Russian government established an Inter-ministerial Commission to combat piracy, which was, at least in theory, a positive step. The commission meets quarterly and is headed by the Prime Minister. Unfortunately, the government reorganization in 2004 stalled much of the important enforcement action that the commission needed to undertake. To date, the commission has taken small steps by focusing on legislative reforms more than on truly combating optical disc production and retail piracy. The commission needs to get more decisive and focused on these key enforcement objectives including stopping the production of optical

media on military-industrial properties and at the other facilities; consideration of more effective optical media laws; curtailing piracy by street vendors and kiosks; and revisiting the question of a federal stamp for optical disc products.

The Business Software Alliance (BSA) reports on the government's increased focus on the legal protection of software. Especially encouraging are steps towards ensuring the use of licensed software within the public sector. In September 2004, the Russian government adopted a policy statement for the use of information technologies by federal governmental agencies through 2010. Among other things, the policy statement declares the need to use only licensed software as part of overall government management strategies, and sets forth a procedure for an annual report on the use of legal software by governmental agencies (including a factual listing of any copyright infringement by each agency). BSA appreciates this progress.

GENERALIZED SYSTEM OF PREFERENCES PROGRAM

Even with piracy rates and losses among the highest in the world, Russia continues to receive trade benefits from the U.S. government. In August 2000 IIPA filed a petition, accepted by the U.S. government in 2001, to examine whether Russia should continue to be eligible to receive duty-free trade benefits under the Generalized System of Preferences program. That petition is still pending; hearings were held in October 2003 (to supplement those held in March 2001). The U.S. government now must decide whether to fully or partially suspend GSP benefits for Russia. In 2003, \$429.8 million worth of Russia's imports to the United States benefited from the GSP program. During the first 11 months of 2004, \$515.3 million worth of Russian goods entered the U.S. under the duty-free GSP code. While Russia was receiving these benefits, losses to U.S. industries from copyright piracy in Russia in 2004 amounted to well over \$1.7 billion. The IIPA recommends that Russia should immediately lose its eligibility for GSP benefits until it improves its copyright enforcement regime.

DEFICIENCIES IN THE RUSSIAN LEGAL REGIME

Overview of Legal Reforms

There are a number of critical legal reforms that Russia must undertake to improve copyright protection and enforcement, as well as to ensure accession into the World Trade Organization.⁶ These reforms include the need to adopt:

- Proper optical media regulations to address (with criminal sanctions) the production and distribution of optical discs and the equipment and machinery used to produce them;
- Immediate regulation of the use of copyright materials on the Internet;
- Criminal code provisions for the confiscation of equipment used to make illegal copyright materials;
- Amendments to the criminal procedure code to provide proper *ex officio* authority;
- Amendments to strengthen the implementation of the code on administrative misdemeanors;
- Amendments to the customs code (to provide *ex officio* seizure authority);

⁶ A more detailed discussion of each of the proposed legal reforms, including the necessary changes to the Copyright Act, and the problems related to the draft Civil Code, discussed in this section, can be found in previous filings, available on the IIPA website at <http://www.iipa.com/rbc/2003/2003SPEC301RUSSIA.pdf> at page 13.

- Amendments to the copyright law to ease the role of collecting societies—which are overly regulated (and, in some cases, mandatory).

Further amendments to the criminal code may be needed if the new Article 146, as implemented, remains a problem. Amendments to the criminal code (adopted in 2003) provided *ex officio* authority to allow prosecutors, but not the police, to commence and investigate certain IPR criminal cases. This resulted from the Article 146 amendment (although the division of authority between police and prosecutors is set out in the corresponding criminal procedure code), which made the prosecution of copyright-related cases a “public” matter, meaning it no longer requires a formal complaint from the rightsholder (although as a matter of practice, such a complaint is still necessary).

A new customs code went into force on January 1, 2004, providing for measures to prevent the trade of counterfeit goods across borders. Unfortunately, the law fails to expressly provide for *ex officio* enforcement authority. Thus, even if customs officers discover shipments of obviously infringing products, they may not be able to act on their own authority, but only in those cases where rightsholders have filed written applications to suspend the release of suspect goods. A proposal to fix the *ex officio* authority problem was rejected by a key Russian *Duma* committee in 2003.

The threat of deleterious amendments in the Russian Civil Code pertaining to IPR protection remains, with the possibility of the latest draft being considered by the *Duma* in 2005. In addition, there is at present a separate law on the protection of computer programs and databases, which are also protected in the copyright law. Amendments added in the Computer Program Law of 2002 weakened enforcement for computer programs; the software industry would like to see the 2002 law repealed and all software-related provisions consolidated into the copyright law. The Russian government must not allow any amendments to be adopted that would weaken or interfere with the implementation of the copyright law.

Optical Media Regulations

To address the problem of the unlicensed optical disc plants in Russia in a comprehensive manner, effective laws must be enacted and utilized. Two relatively minor licensing laws, and one set of regulations, have been enacted in this area of law in the past few years. But neither law nor the regulations resulted in effective action undertaken against the illegal plants. In short, regulations are needed to: (1) close plants that are caught illegally producing copyrighted material; (2) seize infringing product and machinery; (3) introduce criminal liability for infringing these regulations; (4) monitor the importation of raw materials (optical grade polycarbonate) used in the production of optical disc media; and (5) require plants to adopt source identification (SID) codes so that the source of illegally produced discs can be traced. Finally, the proper authority must be delegated to agencies and officials to undertake effective enforcement and to implement these regulations. Details of the laws and of IIPA’s proposal for addressing the problem in a comprehensive fashion can be found at the IIPA website at <http://www.iipa.com/rbc/2003/2003SPEC301RUSSIA.pdf> on page 14.

In the immediate term, the government of Russia must use its existing authority to withdraw the licenses of illegal plants and stop their production, especially those plants operating on government soil. In addition, criminal enforcement against known commercial pirates must be undertaken. Some of the copyright industries are further frustrated that

enforcement authorities have not worked cooperatively with rightsholders in targeting known commercial pirates for enforcement action.

Copyright Law Amendments

At long last, in 2004, Russia adopted copyright amendments including the protection for pre-existing works (prior to 1973) and sound recordings (prior to 1995). The copyright amendments were also intended to implement (for eventual accession) the WIPO digital treaties. Unfortunately, one key provision, the exclusive right of making available (and right of communication to the public), although adopted, was delayed until September 1, 2006. The new right would be a particularly useful enforcement tool for both authors and producers of phonograms. This short-sighted step means that effective enforcement of certain types of digital piracy will face unnecessary legal obstacles until at least the last half of 2006.

Other deficiencies in the copyright law (detailed in earlier IIPA reports) remain, such as overly broad private copying exceptions, weak provisions on technological protection measures (because they are linked to copyright infringement), and on collective management issues. For example, the poorly worded provisions in Article 45 permit collective management organizations to claim representation of the rights of foreign copyright owners. This provision has been used, totally contrary to logic, by a local organization in St. Petersburg to deny motion picture producers (MPA) their own rights against pirated copies of their works, thus allowing piracy to flourish. The Inter-Ministerial Commission was asked to study the problems of collective rights management in Russia, but preliminary discussion on this matter in December 2004 did not result in any actual changes.

Criminal Procedure and Criminal Code Amendments

In 2003 the Russian Criminal Code Article 146 (pertaining to infringement of copyright and neighboring rights), was finally amended to fix the previously ambiguous “grave harm” standard. The amendments (effective December 11, 2003) increased the fixed threshold amount (i.e., value). Some of the copyright industries remain concerned that in its implementation, this threshold amount will be too high to trigger a criminal case, and as a result, will be used too infrequently. In addition, the amendments replaced the minimum fines, previously linked to multiples of the minimum wage, with fixed amounts.

Article 146 provides for fines of up to 250,000 rubles (or ~US\$8,800), or up to 18 months of the defendant’s income, or correctional labor (from 180 to 240 hours), or imprisonment of up to five years for unlawful acts that constitute a “significant amount.” The November 2003 amendments (replacing amendments adopted in April) define “significant damage” as a fixed threshold rather than scaled to the minimum daily wages. The fixed thresholds are as follows: 50,000 rubles for the lowest level criminal violation (about US\$1,775), and 250,000 rubles for the most serious criminal violation (about US\$8,800). This means that any activity below US\$1,775 cannot be treated as a criminal matter. The amendments unfortunately leave almost all retail and some wholesale activities outside the scope of criminal prosecution.

Some of the copyright industries remain concerned that the threshold in the newly adopted Article 146 will thus fail to give the police the necessary tools when they are conducting initial raids, and will complicate anti-piracy campaigns as authorities must sift through determinations concerning whether a case should be brought under the criminal code or the administrative code. There was, in years past, a proposal to lower the threshold to 50 times the

minimum wage, or US\$150, but what was adopted was a significantly higher threshold. The implementation of Article 146 will be closely monitored by IIPA to see whether further amendments are needed.

Last, there are now efforts underway to revise Article 146 to add criminal penalties for illegal acts with respect to technological protection measures and rights management information. The IIPA supports adoption of such criminal penalties necessary to enforce against digital piracy.

There are several other criminal code/criminal procedure code amendments that need to be adopted.

First, the government of Russia should introduce and the *Duma* should adopt amendments to add specific substantive and procedural provisions for all types of actions, including criminal, civil and arbitration proceedings. In 2004, amendments were made to Article 49 of the copyright law, but not to the criminal code or the criminal procedure code, to grant police a legal basis to confiscate infringing goods, materials, and the equipment used to produce such items. The current Criminal Code (Article 146) does permit the confiscation and destruction of pirate and counterfeit goods—that is, the illegal copies themselves. However, it does not explicitly provide for the confiscation and destruction of the “machinery” used in the making of illegal copies. Now the copyright law makes clear that copies as well as “materials and equipment used for the reproduction of counterfeit copies of works or phonograms and other tools” used to violate the criminal law can be confiscated. However, local counsel advises that these new provisions in the copyright law will not be used in criminal cases, much less in civil or arbitration cases, because the provisions are *not* provided for in the criminal code. Thus, as a practical matter “machinery” used to create illegal copies cannot be confiscated in criminal cases. A provision in the Copyright Law (Article 49.4) provides civil remedies for the confiscation and destruction of “materials and equipment,” but it is not effective and is, in any case, limited to civil cases. Last, the available remedies are not available against legal entities, so they will prove useless in criminal enforcement actions.

Second, the government of Russia should introduce and the *Duma* should adopt amendments to increase the levels of fines because they are too low and therefore inadequate to deter commercial piracy.

Third, some of the copyright industries remain concerned that the criminal procedure code does not give jurisdiction over criminal violations to the police authorities, as it does for the prosecutors. It is our understanding that the 2003 amendments did fix one problem by revising the 1996 Criminal Procedure Code amendments so that it is no longer necessary to file a formal complaint for public crimes, including copyright offenses. Also as IIPA understands, prosecutors are entitled to supervise investigations conducted by the police (Article 146, CPC) in all cases including IPR investigations. IIPA will continue to monitor the implementation of these provisions to make certain they result in effective enforcement for all of the copyright industries.

Other Legal Reform Issues

WIPO Treaties; Electronic Commerce; Notice and Takedown Procedures: As a result of the explosive growth of Internet piracy in Russia, the Russian government needs to accelerate its accession to the WIPO digital treaties (WCT and WPPT). The Copyright Law

amendments adopted in July 2004 have moved Russia closer to implementation of and therefore accession to the treaties. Unfortunately, the legislation postponed until September 1, 2006, the effective date of a key provision in the copyright law—an exclusive right of making available applicable for all authors (communication to the public right consistent with Art. 8 of the WCT) and for phonogram producers (consistent with Art. 14 of the WPPT). Russia should accede to the digital treaties as quickly as possible, and should move up the effective date of this provision. Swift and complete implementation of these treaties is critical to Russia's effective protection of creative content.

IIPA also understands that a federal draft law “On Electronic Trade” first submitted to the *Duma* in 2000 may be considered in 2005. This draft law should be carefully watched by the industries and the U.S. government to ensure that e-commerce is not over-regulated and that liability issues for copyright infringement on the Internet are dealt with in a manner to ensure that rightsholders can properly and effectively enforce their rights.

Civil Procedure Code Amendments: A major revision of the Civil Procedure Code (effective February 1, 2003) set the rules for initiating and examining civil cases, including disputes pertaining to copyright and neighboring rights infringements. But unfortunately, the code still does not contain the necessary civil *ex parte* search procedures (required by the WTO TRIPS Agreement). These are essential tools for effective enforcement in the software industry. In 2002, an amended Arbitration Procedures Code in Article 72 introduced civil *ex parte* search provisions in a more limited context. The software industry reports that these provisions have only been tried to date one time in actual practice (although the case was cited by the High Arbitration Court as a de-facto precedent); overall, the procedure remains a difficult and onerous proposition. A major contributor to the problem is that the judges who must impose it lack experience. The overall inefficiencies of the court-mandated bailiff system also are problematic.

Customs Code Amendments: The Russian *Duma* must introduce and adopt amendments to the customs code to ensure full authority to seize pirate product at the border and to bring Russia's border controls at least into compliance with Articles 51-60 of WTO TRIPS. Imports of pirate optical media product continue from Eastern Europe (especially from the Czech Republic), from other countries of the C.I.S. with production capacity (i.e., Ukraine), and from Asia.

Code of Administrative Misdemeanors: In 2002, a revised code on administrative misdemeanors went into force allowing administrative cases against legal entities and the imposition of fines on them in the amount from US\$900 to US\$1,200 for copyright infringements. Since its enactment, effective implementation of this law has been very limited because it falls under the competence of under-qualified municipal police. The Code on Administrative Misdemeanors also effectively limits the time period for the investigation of copyright infringements to several days, even when a much longer time is necessary to investigate such cases. The code needs to be amended to provide for at least a one-month period for the investigation of copyright infringing cases, as it does in other cases of administrative misdemeanors. Amendments to the code are set for consideration by the *Duma* in early 2005. IIPA understands the current draft would permit a two month administrative investigation, which, if adopted, would be satisfactory for effective enforcement. IIPA urges its adoption.

Civil Code: The effort to include detailed copyright provisions as part of comprehensive civil code reform remains a continuing threat to strong IPR protection. For over 11 years, opponents of strong copyright protection have threatened to “redo” and weaken the copyright law with provisions in the civil code. The copyright law should remain self-standing, and nothing in the civil code should undermine that detailed law or its implementation. Last, any revision of the

civil code should not be used to delay in any way the speedy adoption of the copyright law amendments.

Stamp Tax and the Tax on Video Rental Profits: In 2001, the Moscow city government replaced its requirements that all video and audio cassettes, optical discs and computerized information carriers have a “protective identification mark” (i.e., a stamp tax), with another law (Ordinance No. 73) that abolished the stamps but created a registration stamp/mark in lieu. Effective January 1, 2004, the Moscow City government required a city identification system. Several alternative systems, including a federal stamp, and a self-regulating system have since been under consideration (most recently at the December 2004 Inter-Ministerial Commission meeting). The copyright industries strongly recommend that anti-piracy systems, whether in the form of stamps or otherwise, be voluntary and left to the individual rightsholders. Mandatory systems have been shown to slow the development of legitimate markets and thus help the pirates. The entertainment software industry reports that the current registration stamp system is causing many retail establishments to stop the sales of legitimate product for fear of running afoul of the law, while pirates continue to operate in open markets.

Also interfering with the development of legitimate markets is the high taxation system on video rentals. Since 2002, a 24% profit tax on revenue from video rentals, along with other “vice” activities such as gambling, has been in effect. This tax is very high (although an improvement from the previous 70% rate). The GOR felt that lowering the tax to 24% would help the video market’s growth in Russia, but the lingering high rate combined with the growth of DVD piracy has, for the most part, overwhelmed the legitimate market for rentals.

Rome Accession and Article 16 Reservation: Russia acceded to the Rome Convention on May 26, 2003. IIPA is very troubled by Russia’s decision to make an exception to its national treatment obligations and adopt the reservations permitted by Article 16 of the Rome Convention. In short, this reservation will mean that American record producers and performers will be denied broadcasting remunerations even though the U.S. is a member of the WPPT (and even after Russia accedes to that treaty). This is a very unfortunate and shortsighted decision by the government of Russia and one that IIPA hopes will be reversed.