



April 2, 2009

Marideth Sandler
Executive Director
Generalized System of Preferences (“GSP”) Program
Office of the United States Trade Representative
600 17th Street, NW
Washington, D.C. 20508

2008 GSP Annual Review – Case: 008-CP-08, Russian Federation
Notice of Intent to Testify at the GSP Public Hearing and Pre-Hearing Brief

To the GSP Subcommittee:

In accordance with the Federal Register Notice of March 16, 2009, the International Intellectual Property Alliance (“IIPA”) hereby submits this request to appear (i.e., “Notice of Intent to Testify”) at the April 24, 2009 public hearing on the GSP country practices review of the Russian Federation. IIPA was the original petitioner of the GSP review of Russia’s intellectual property rights practices in the 2000 GSP Annual Review. Attached to this letter is IIPA’s Pre-Hearing Brief.

The IIPA witness will be: Eric J. Schwartz
International Intellectual Property Alliance
1818 N Street, NW, 8th Floor
Washington, D.C. 20036
Tel: (202) 355-7903; Fax: (202) 355-7893
E-mail: ejs@msk.com

Thank you.

Sincerely,
/s/
Eric J. Schwartz
On behalf of IIPA

2008 GSP Annual Review
Case 008-CP-08, Russian Federation

Pre-Hearing Brief
of the International Intellectual Property Alliance in the GSP Review
of the Intellectual Property Rights Practices of Russia

April 2, 2009

The International Intellectual Property Alliance (“IIPA”) appreciates this opportunity to provide the GSP Subcommittee with a summary of the copyright reform and enforcement issues confronting our members in Russia in accordance with the Federal Register notice regarding the Generalized System of Preferences Country Practice Petition of the Russian Federation (“Russia”). See Generalized System of Preferences (“GSP”): Notice Regarding the Review of Country Practice Petitions for the 2008 Annual Review, 74 Fed. Reg. 11,141 (Mar. 16, 2009).

It has been over eight years since the IIPA’s GSP petition was first filed, and over seven years since the U.S. Government accepted the petition. IIPA reminds the Subcommittee that, despite some progress since this investigation was opened, many aspects of Russia’s legal and enforcement regime remain inadequate. We have attached, for the Subcommittee’s consideration – as a part our pre-hearing brief – our recently filed submission to the U.S. Trade Representative (“USTR”) in connection with its Special 301 review. We hope that you will find this useful as the U.S. Government considers how to respond to Russia’s continued failure to provide adequate and effective protection as contemplated in the GSP statute.

As described in our Special 301 submission, while substantial progress has been made to reduce piracy in the business software industry, Russia’s overall record remains poor, and there is much work to do in all sectors – against Internet and hard copy piracy, as well as in the proper accreditation and regulation of collecting societies. Russia has thus far failed to implement many of the commitments that it made in the November 19, 2006 Bilateral IPR Agreement (“IPR Agreement”). When the IPR Agreement was signed, the Government of Russia pledged to implement very specific legal reforms, to undertake “meaningful enforcement,” and to do so “on a priority basis.” In addition to its shortcomings under the IPR Agreement (and an earlier Normal Trade Relations Agreement in 1992), Russia has otherwise maintained practices that fail to provide “adequate and effective protection” of intellectual property rights (“IPR”) as set out by sections 502(b) and 502(c) of the 1974 Trade Act (the intellectual property provisions in the GSP statute found at 19 U.S.C. §§ 2462(b) and (c)).

We thus believe that it is reasonable for this Subcommittee to conclude that Russia’s GSP eligibility, or benefits received thereunder, should be eliminated or reduced. Ultimately, the decision on suspension of benefits is a matter for this Subcommittee to determine based on inter-agency consultation within the U.S. Government about how to ensure Russia’s compliance with its international obligations and the integrity of U.S. trade laws.

The IIPA is a private sector coalition formed in 1984 to represent the U.S. copyright-based industries in bilateral and multilateral efforts to improve international protection of copyrighted materials. IIPA is comprised of seven trade associations, each representing a significant segment of the U.S. copyright community. These member associations represent 1,900 U.S. companies producing and distributing materials protected by copyright laws throughout the world – all types of computer software including business applications software and entertainment software (such as videogame CDs and cartridges, personal computer CD-ROMs and multimedia products); theatrical films, television programs, home videos and digital representations of audiovisual works; music, records, CDs, and audiocassettes; and textbooks, tradebooks, reference and professional publications and journals (in both electronic and print media).

For almost 18 years, IIPA members have closely monitored IPR developments in Russia – both legal reforms and enforcement activities – because Russia’s IPR regime is essential to the development of a flourishing market and creative community in Russia, as well as to stem the losses caused by the production and distribution of materials made in or shipped through Russia and sold into other territories.

We look forward to working with the U.S. and Russian Governments on the work that needs to be undertaken by Russia to meet its commitments in the IPR Agreement and, more importantly, to make significant reductions in piracy that harms all copyright industries, U.S. and Russian alike.

Respectfully submitted,
/s/
Eric J. Schwartz
On behalf of IIPA

RUSSIAN FEDERATION
INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)
2009 SPECIAL 301 REPORT ON COPYRIGHT ENFORCEMENT AND PROTECTION

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

Executive Summary: In 2008, Russian law enforcement officials conducted a substantial number of criminal enforcement actions, including raids against warehouses, retail establishments, and some optical disc production facilities. Although the total number of actions undertaken were fewer than the previous year, these activities and those of the past several years, have resulted in a significant decline in business software piracy, and a modest decline in physical (hard copy) piracy for some of the other copyright industries. In early 2008, the Russian Ministry of Education fulfilled its commitment to legalize software in the schools. This initiative was part of government-funded program that entailed the purchase and distribution of licensed copies of both Russian and non-Russian software products throughout the country. This initiative also contributed to a significant decline in the personal computer software piracy rate in Russia – 14 points in the past four years – as well as strong revenue growth.

At the same time as these positive steps were taking place, the majority of copyright industries – motion picture, recorded sound, entertainment software, music and book publishing – experienced a year of disappointment in Russia, because of the smaller number of enforcement actions undertaken than in years past, a lack of focus by Russian authorities on the growing threat of Internet piracy, and ongoing high piracy rates – for hard and digital copies – keeping legitimate markets from achieving their full potential. Of particular concern is the continued operation of various pay-per-download services that have taken the place of the infamous alofMP3.com. These websites, operating under “licenses” granted by collecting societies that have no authority to issue such licenses, continue to plague the Russian market a year after Russian Civil Code amendments went into force which, among other things, clarified that these types of activities by both websites and rogue collecting societies are illegal. All the copyright industries concur that Russia needs to significantly improve its criminal enforcement activity well beyond current levels, including the imposition of deterrent penalties, as well as improving the quality of investigations and prosecutions.

The IIPA encourages the Obama Administration to work with the Russian Government to make further progress on intellectual property rights (IPR) issues as the new Administration engages Russia. IIPA supports a reconsideration of U.S.-Russia relations and the various mechanisms available to further cooperation. Given Russia’s own interests and technical expertise in many areas, Russian authorities have expressed an understanding that a fully functioning economy requires attention to IPR. IIPA and its members look forward to actions

¹ For more details on Russia’s Special 301 history, see IIPA’s “History” appendix to this filing at <http://www.iipa.com/rbc/2009/2009SPEC301HISTORICALSUMMARY.pdf>. See also the previous year country reports at <http://www.iipa.com/countryreports.html>.

that effectuate this understanding, and are ready to continue to work with the USG and Russian authorities to ensure full implementation of the November 19, 2006, IPR Agreement between the Governments of Russia and the United States.² The IPR Agreement was entered into in the context of Russia's efforts to accede to the World Trade Organization (WTO) and it reflects Russia's acknowledgment of the numerous legal reforms and enforcement steps it needs to undertake to modernize and improve its copyright system for the benefit of Russian and foreign authors, performers, and producers. As the U.S. Government has consistently noted, Russia must meet the IPR Agreement obligations on protection and enforcement as part of its entry into the WTO. Russia's full compliance with the IPR Agreement should be considered in the Special 301 context, as well as during its review under the General System of Preferences (GSP) program. Compliance with the IPR Agreement will help to significantly reduce piracy, which harms all creators, U.S. and Russian alike, and should be appropriately reflected in Russia's Special 301 status. U.S. industry has been disappointed that the recent discussions with Russia have been hindered by a lack of an interlocutor on the Russian side who is empowered to make decisions and move the process forward. The Obama Administration should encourage an enhanced dialog on IPR matters with the Russian authorities as a matter of priority. As such, the copyright industries are ready to work with the new Administration in this endeavor, to reinvigorate technical support as appropriate, and to pursue an activist work plan.

Top priorities for the music industry in Russia are: first, to enhance the growth of digital music markets by eliminating the operation of illegal pay per download Internet sites and illegal peer-to-peer services. A second priority is to swiftly certify a legitimate collecting rights society as required in Part IV of the Civil Code (which entered into force on January 1, 2008) by the relevant Russian Government authority (Roshrankultura). Stopping the illegal Internet sites and peer-to-peer services can be achieved, in large measure, by enforcement actions against the rogue societies illegally offering "licenses" that they have no authority to grant, as well as against the websites operating in concert with these rogue societies. The state accreditation of a collective management of rights society must be truly representative, and supported by and be transparent to the owners of neighboring rights – both local and international – who are entitled to equitable remuneration under Russian law. Another priority is the need for the Russian Government to undertake coordinated criminal actions against organized criminal syndicates that dominate some of the copyright industry markets, especially the video game, music, motion picture, and book industries.

COPYRIGHT ENFORCEMENT IN RUSSIA

Criminal Enforcement in General: Criminal enforcement in Russia remains a priority for IIPA and its members. In 2008, the Russian Government conducted some significant raids and seizures and the Russian police continued to take actions against copyright infringers, particularly with respect to street vendor piracy and companies involved in the installation and

² The IPR Agreement (the details of which are contained in an "IPR Side Letter") was signed by Russian Minister Gref and Ambassador Schwab. It is known formally as the U.S.-Russia Bilateral Market Access Agreement on Intellectual Property Rights and is at http://www.ustr.gov/Trade_Sectors/Intellectual_Property/Russia/Section_Index.html.

use of pirated software. However, the overall number of raids, seizures, and criminal cases commenced, was reportedly down from previous years.

In 2008, 6,885 criminal IPR (copyright and trademark) cases – including those under Article 180 of the Criminal Code which treats trademark infringements – were initiated (that is, investigations were commenced), and of these, 4,858 cases went to court, with 3,482 cases leading to some penalty under the Criminal Code (Article 146 – copyright). By comparison, the Russian Ministry of the Interior (MOI) statistics reported a total of 4,088 criminal convictions in 2007, 7,423 in 2006, and 2,924 in 2005 (and a total of 7,578 and 6,960 cases in 2007 and 2006, respectively, were commenced in each of those years). The reduction in the number of initiated criminal cases is a concern to U.S. industry which is worried that this may indicate a reduction of police activity in the area of IPR enforcement.

As in recent years, there were some deterrent sentences and prison terms applied by the Russian courts, including a handful aimed at serious repeat offenders. There were also a considerable number of administrative and criminal penalties imposed against illegal hard-copy vendors. For example, there were eight criminal actions taken against sellers at the Gorbushka market according to the software industry. As a result, it now appears that pirated products are not sold as openly as they once were at this market (in fact, the software, music and motion picture industries report that the Gorbushka market operators are now cooperating with rightsholders by terminating lease agreements with detected pirate traders).

Thus, there is evidence that enforcement activities against physical piracy and street vendors (as opposed to online piracy) can and are improving the conditions for some businesses in Russia. Unfortunately, any successes will be short-lived if the 2008 trend of diminished enforcement activity continues. For example, the business software industry reported fewer end-user raids, fewer criminal cases commenced, and thus fewer convictions in 2008, than in 2007.

The motion picture industry reports that enforcement activity in the past few years (although it declined in 2008), especially in Moscow and St. Petersburg, in combination with market changes, has led to an increase of legitimate DVDs sold in Russia over the last several years. DVD sales for Russian and Motion Picture Association of America (MPAA) members' titles have increased from 24 million in 2005, to 42 million in 2006, to 67.4 million in 2007, to 78 million in the first eleven months of 2008. The motion picture industry reports that theatrical box office revenue in Russia, and the other C.I.S. countries, exceeded \$800 million in 2008.

Law enforcement officials initiated several cases against those engaged in video game piracy in 2008. The number of products seized during the raids ranged from 800 to 50,000 discs. Most of these actions involved cases against warehouses where pirated products were found; criminal investigations have commenced against the warehouse owners.

The music industry continues to emphasize the critical need for criminal, rather than civil, enforcement directed against Internet pirates – websites and illegal collecting societies. Criminal enforcement needs to be directed as well against optical disc piracy – namely against the criminal enterprises dedicated to the manufacture, distribution and sale of pirate materials. Addressing commercial-scale piracy through criminal measures is an obligation of WTO members; that is because only governments can effectively deal with these problems. In

contrast, civil measures are intended for “civil” actions, that is, disagreements between parties. Massive and organized criminal activities are not civil disputes, nor are civil measures capable of delivering the requisite level of deterrence.

The problems of civil actions are further exacerbated by the very limited scope of available relief. Civil enforcement inadequacies include: remedies generally limited to the seizure of specific repertoire that is the object of a lawsuit in any specific instance; the failure to award preliminary injunctions, or to freeze assets and evidence; low damage awards, which, like all awards, are also very difficult to enforce; burdensome evidentiary requirements, including rights ownership information; the absence of personal liability for the directors of infringing companies or enterprises (which is the only way to bring proceedings in cases where bogus companies operate); and the absence of the notion of contributory liability under the Russian civil law system dealing with copyright infringements. Physical piracy enforcement is also hampered by the requirement that exemplars be collected only by state officials (or jointly with rightholders), and by a statutory reliance on government expert reports, which both cause trial delays. Thus, effective action against massive and organized illegal activities often is only possible by way of criminal enforcement.

In general the copyright industries report that deterrent criminal penalties are still not being imposed against optical disc plant owners or, with few exceptions, against plant operators, and, rarely if ever against owners of commercial Internet operations. In fact, in the last years when optical disc plants profited and proliferated in Russia, we are not aware of a single plant owner who has been convicted, and only a handful of plant operators (i.e., plant managers or employees) have served jail time or been given suspended sentences. Far fewer criminal cases were initiated against optical disc plants in 2008 than in 2007, a downward trend in fact, of the past several years; in addition, many older cases have languished for a long time. One practical problem that has surfaced recently, is that police and prosecutors have had difficulty applying the criminal law thresholds to Internet crimes which has resulted in very few such cases commencing and even fewer ending in court rooms.

The lengthy investigative process must also be examined and redressed, particularly at the provincial level. As the government continues to rely on its own experts in investigating, examining and prosecuting IP violations, it should take measures to increase the number of so-called experts as well as consider the appointment of a specialized unit of investigators and prosecutors, adequately trained and provisioned to effectively address IP crimes. Due to the lack of adequate staffing and the high volume of work, examinations of products seized take months. For example, in a case involving the seizure of a large quantity of pirated video game material in Novosibirsk, it has taken more than a year for the experts to finalize their seizure report, and the examination is reportedly expected to take 5 to 6 months more.

Improvements should also be made with respect to court procedure, particularly with how a court dispenses with the seized pirated products. Though courts should include an order for destruction of the goods in its verdict, such orders are typically never included in the judgment. As such, the right holder who requests the destruction of the seized goods (or moves for recovery of damages) in the criminal procedure must institute an entirely new proceeding before the Arbitration Court. This unnecessarily lengthens the process and makes enforcement even more difficult.

Although there were fewer criminal cases in 2008 than in prior years, there were some significant cases. Unfortunately, as in recent years, most cases continue the trend of not applying deterrent penalties as a final disposition. Here is an example of a notable exception: in November 2007, the Moscow Vostok-D plant was raided; it had two DVD lines and over 100,000 illegal discs which were seized at the time of the raid. On December 11, 2008, the Kuzminsky district court of Moscow sentenced seven people in connection with the raid, all of whom were Vostok-D plant employees. The plant's chief manager was given a four year sentence and the other defendants received three and a half year sentences. All had been arrested and tried in a copyright infringement case that resulted from the raid. The equipment and the 2 DVD lines at the plant were confiscated as well.

As was highlighted in the previous year, piracy rates continue to be very high. Thus, improved criminal enforcement is a necessary and important step to establishing legitimate markets for the benefit of Russian and foreign rightholders. In sum, IIPA recommends that the Government of Russia improve its IPR criminal enforcement (including actions aimed at Internet piracy); one way to accomplish this would be through the central coordination of law enforcement. This should include a high-level announcement by the government that IPR enforcement – including Internet piracy – is a priority. IIPA recommends that prosecutors: (a) coordinate their efforts with the police (as should the investigative departments of the Ministry of the Interior (MOI), the Federal Security Service of the Russian Federation (FSB), and Customs now that they all can initiate criminal cases); (b) bring more IPR cases; and (c) conduct expeditious investigations. The development of instructions by the MOI and the General Prosecutor's Office with an updated and detailed methodology for investigations of copyright infringements would help to increase the quality and effectiveness of IPR enforcement activities. Another recommended measure is the appointment of IPR special prosecution investigators and police officers at both the federal and regional levels throughout Russia. In September 2007, the General Prosecutor's Office was reformed and reorganized: prosecutorial bodies are now divided into prosecution offices and investigative committees. The appointment of specialized IPR prosecutorial investigators could, if utilized correctly, significantly increase the efficiency of IPR criminal investigations. The copyright industries are willing to continue their assistance in this regard with training programs for judges and other law enforcement officials.

An intensification of criminal investigations and criminal convictions against principals of organized commercial pirates is sorely needed, especially directed at Internet and optical disc operations. There needs to be a focus on criminal enforcement targeted against organized crime syndicates. Criminal procedure changes which placed copyright infringement cases into the category of serious crimes have enabled – at least in theory – Russian law enforcement agencies to conduct thorough and comprehensive investigations of copyright infringement activities of plant owners and executives (rather than mere plant operators). Regarding Internet piracy, although the notorious allofpm3.com is not currently in operation, other similar (in fact, nearly identical) sites are operating, and must be closed, along with the commencement of criminal investigations against the site operators and the rogue collecting society operators who are illegally conducting business under the 2008 Civil Code. The ability of wrongdoers to simply modify their Internet sites and continue to operate in violation of the law manifests a clear need for reform. To date, there has not been a single criminal conviction against an Internet website operator. One roadblock to effective enforcement has surfaced recently: namely, the police and

prosecutors have had difficulty applying the criminal law thresholds to Internet crimes which has resulted in very few such cases commencing. This needs to be addressed and corrected.

More and improved criminal proceedings in general, along with speedier investigations and trials are needed – against hard copy and digital copy pirates. Last, we recommend that the General Prosecutor’s Office needs to appoint a government liaison with IP rightholders to more effectively bring criminal investigations and trials to successful a conclusion.

In January 2008, while campaigning, then-presidential contender Dmitry Medvedev told a Moscow City forum of non-governmental organizations that “disregard for the law” must be stopped, and that a national program to combat IPR piracy was needed. IIPA encourages President Medvedev to fulfill his promise to combat IPR piracy with criminal enforcement – a problem he properly identified.

Raids Against Optical Disc Plants: Raids have been undertaken at some optical disc plants in 2008, such as the plant in Kazan and the Victoria plant – raided twice in 2007, and again in 2008. However, the Victoria plant is a good example of the problems the industry confront in Russia. Even though the Victoria plant has been repeatedly raided, and a criminal case instigated against two employees there (but not the owner), the plant was given a new 5-year license to operate in April 2008 (even as the criminal cases remain open).

The optical disc enforcement regime continues to lack effectiveness evidenced by the continued operation of many of the raided plants. For example, in February 2007, the Poliplast plant was raided, but its license was not suspended. This plant continues to operate. In another matter, two criminal cases were initiated against the Victoria plant, which has been raided several times over the past few years, yet the plant continues to replicate. In April 2008, its license was extended five years despite the open criminal cases pending in relation to its operations. The Moscow Vostok-D plant, already noted, which was raided in 2007 was only in operation because it had lines belonging to a formerly-licensed plant named Atya located near Moscow, which was raided in 2005. The Atya plant director received a 2-year suspended sentence and the plant owners changed their name with the licensing authority. They then voluntarily asked for the cancellation of Atya’s plant license, and began operations as Vostok-D. The Gamma plant, raided three times in 2007, is an example of a plant that, once raided, did finally cease its operations.

The cases generally highlight the weaknesses that must be addressed if Russia is to meet the IPR Agreement’s obligations for effective optical media regulation. With an estimated 42 plants in operation, raids at a handful of plants, and surprise inspections at very few, IIPA believes there is ample evidence that additional effective enforcement is needed to deter illegal activities, and that such enforcement needs to be called for from the highest levels within the Russian Government.

Raids Against Businesses Using Pirate Products: The Business Software Alliance (BSA) reports the overall quantity of end-user raids against businesses remained high, but that the number and quality of the raids was uneven nationwide, and declined from 2007 levels overall. In 2008, there were 499 raids, down from 589 raids in 2007 (and 550 in 2006). As in recent years, enforcement of IPR is inconsistent, with some cities and regions, such as St.

Petersburg and the Siberian region (Kemerovo, Irkutsk and Omsk), being largely ignored by the police. The continued inconsistency in the number and quality of raids stems from the lack of a uniform methodology promulgated by the Ministry of Interior (MOI) and the General Prosecutor's Office in relation to implementation of Article 146 of the Criminal Code. In 2008, the police ran more raids against chain retail stores (740, up from 621 in 2007), and increased warehouse inspections. Also, in 2008, the police initiated 154 criminal cases against end-user pirates (down from 200 cases in 2007); beginning in 2007 and continuing in 2008, some of these included raids against some larger companies. There were a total of 71 end-user court verdicts in 2008, down from 83 in 2007 (but up from 50 in 2006). There were 427 criminal cases initiated against channel pirates, up from 378 in 2007 (and 288 in 2006); there were 234 court verdicts in channel cases compared with 216 in 2007 (and just 131 in 2006). Further, the business software industry reported that one of the reasons for the 14% drop in piracy rates the past three years, is the effectiveness of end-user enforcement activities overall, which has resulted in a broadening of public education (for businesses especially) about legal versus illegal activities, and the resulting legal licensing of software at many companies and government entities. In addition, the business software industry (BSA) continued to report good cooperation with the police and Ministry of the Interior and Department K officials (including joint participation at training conferences in 2008, as in recent years). Even with the significant activity taken against business software piracy, the Business Software Alliance reported, as preliminary figures, that it lost \$2.773 billion in Russia in 2008, and the piracy rate was 70% (albeit, a 14% decline in the past four years).

However, in general, the police continue to be reluctant to conduct raids against many medium and large-scale targets; when raids are conducted, the police tend to seize fewer than 10 personal computers ("PCs") on average. This problem is related to the experts' inability to examine large quantities of PCs, a problem connected to the fact that the MOI has not issued an internal order instructing the MOI Expert-Criminal Centers on how to properly conduct software examinations (although some of these centers do prepare expert examinations, this is not their official function).

A new Federal Law on Police Activities – effective January 10, 2009 – was adopted. The copyright industries are monitoring the implementation of this law in the hopes that it will not limit the ability of police to undertake raids and to secure evidence, especially against commercial enterprises. As a result of 2006 amendments to the Criminal Procedure Code, and until this law went into force, the police had broad authority to commence investigations *ex officio*, even though in practice, cases were nevertheless delayed by prosecutorial investigators. The new law, is in the process of being implemented with guidelines from the Ministry of the Interior. IIPA recommends that the Ministry promulgate regulations that will not delay police actions in IPR investigations until after a criminal or administrative case has been initiated; to do so would create a further hindrance to effective enforcement. In sum, the on-going prosecutorial delays and certain of the noted police activities, highlight the lack of effective enforcement coordination between prosecutors (including the General Prosecutor's Office and the regional investigative offices), police, and rightholders.

Raids at Storage Facilities and Piracy at Retail Outlets: Several copyright industries continue to report that raids, while undertaken, are not ultimately successful in stopping criminal activity because of: (a) the absence of criminal liability for legal entities (or alternatively, the

failure of the Article 146 Criminal Code provisions to be applied to company directors); (b) the failure of the police to comply with the Criminal Procedure Code; and (c) the general reluctance of prosecutors to initiate criminal cases.

There were a considerable number of important raids against pirate warehouses in 2008 and there were a number of large seizures of copyrighted materials at these warehouses. In total, the copyright industries reported 31 warehouse raids resulting in the seizure of over 7 million CDs and DVDs.

The motion picture industry (MPAA) reported on several of these raids undertaken by Russian enforcement authorities, many with the cooperation of the Russian-Anti Piracy Organization (RAPO). One continuing concern has been the diminishing role of the Federal Service (FSB) police; IIPA members hope that there will be increased FSB engagement in 2009. RAPO continues to operate its own forensic lab, housed at the Ministry of Culture's Federal Press and Mass Media Agency (Rospechat). Some examples of important raids in 2008 included: a raid in March 2008 when the Economic Crime Police raided a pirate DVD plant and a nearby warehouse in Periaslavl Zalessky. A further investigation in this matter led to the discovery of another warehouse belonging to the same owners, located near Moscow; the two warehouses were storing approximately 1.5 million DVDs which were seized. The plant was closed and a criminal case was initiated; the case is still ongoing. In another large raid in February 2008, a warehouse in Solnechnogorsk (outside of Moscow), resulted in the seizure of 700,000 pirated DVDs.

In 2008, RAPO took part in a total of 326 raids, and it conducted 534 examinations of seized pirated product. As a result of this activity, 174 criminal and 138 administrative cases were initiated on behalf of RAPO and MPAA member companies. There were also over 2,000 retail outlets inspected in 2008. In total, these inspections revealed that over half of the product in retail outlets in Moscow is pirated material. The results of similar inspections in St. Petersburg revealed that more than 60% of material in their retail outlets was pirated, and in other major cities the percentages were as high as 75% to 80% pirated product.

While these raids are positive, the Russian courts have not imposed deterrent sentences against the owners or operators of warehouses, falling short of its IPR Agreement obligation to criminally prosecute in cases of piracy on a commercial scale. RAPO reports that the telecine problem (film prints being transferred illegally on telecine machines to DVDs or tapes) has disappeared as a result of dramatic improvements in the handling and delivery of theatrical film prints. However, unauthorized camcording still remains a serious issue. There were 35 Russian camcorded films identified in 2008; this was a 59% increase from 2007. In most cases, good quality videos sourced from Ukraine were married with good quality audios sourced from Russia to make the final pirated product.

According to the Entertainment Software Association (ESA), video game piracy remains significant in Russia, with pirated products still widely available on the street, in underground venues and at markets. Domestic factory replication remains widespread (although there continue to be some imports from Ukraine), and the pirated video game products that are manufactured are highly sophisticated. Pirate distributors are well versed in circumventing government regulation and enforcement. For instance, government regulation requires that

information on game packaging identify the source of the product such as the place of manufacture and all authorized distributors. ESA member company investigations reveal that such information is typically falsified and the companies/distributors named are non-existent. Although the piracy situation in Moscow has improved somewhat in that large retail chains no longer carry pirated products, the same cannot be said for other Russian cities, such as St. Petersburg, where pirated products continue to be openly sold in the largest retail chains. Piracy at Internet game clubs or cafés (where the establishment is either using pirated or unlicensed video game software on the café computers), continues to be problematic, although action against such cafés appears to be routinely undertaken by law enforcement. Rightsholders are typically asked to support such cases and to provide information with respect to the pirated video game titles and the damages incurred.

The book and journal publishing industry continues to report concerns about hard-copy piracy and online infringement – now of primary concern (as noted in the section on Internet piracy, below). Popular target works include reference works, textbooks and commercial bestsellers. Illegal commercial photocopying of academic materials is also a problem, necessitating vigilance by universities and schools in monitoring use of legitimate materials on campuses.

The City of Moscow's ban on the sale of CDs and DVDs in underground pedestrian walkways is another positive step undertaken in recent years. The Anti-Counterfeiting Unit of the Moscow Police has the authority to terminate leases with vendors and kiosk owners who violate this ban. The Russian Government reported in 2008, that the Moscow City Police initiated 2,037 cases against vendors and seized more than 4 million counterfeit items, in addition to closing 32 retailers.

Internet Piracy Enforcement: The IPR Agreement obligates Russia to combat the growing threat of Internet piracy “with the objective of shutting down websites that permit illegal distribution of content protected by copyright or related rights” (and especially for websites whose servers are situated in Russia). Internet and wireless access by Russian citizens is growing rapidly – by some accounts, Russia will soon have the second largest Internet population in Europe, behind only Germany, and it is currently the fourth largest market worldwide for mobile telephones. In 2008, the Russian Government reports that it (via Department K – the office with responsibility for combating technological crimes) identified 101 offending sites, but it provided no information on the number of sites that were closed in 2008 (there were 72 such sites closed in 2007).

In June 2007, the most notorious website, allofmp3.com, was taken down, and has not resurfaced at that Internet address. However, a nearly identical site, apparently owned and operated by the same company has sprouted up in its place, and the illegal distribution of copyrighted material continues there, as well as on many other sites. Russia is also host to a number of major BitTorrent indexing sites such as <http://www.torrentz.ru/> (which includes materials from many copyright industries), and which are popular channels for illegal peer-to-peer downloading. One particularly problematic site is GameTorrent, a BitTorrent tracker and online pirate discussion forum that is owned by a Russian but currently hosted in Estonia. Neither the hosting ISP nor the website owner have complied with takedown requests. Additionally, since Russia is the fourth largest mobile phone market, the number of Russia-

hosted “WAP” websites offering pirated video game products for mobile phones is of great concern. The response to takedown notices sent by video game publishers to these site operators and to the ISPs hosting these sites, have had mixed and largely inconsistent results.

Publishers report continuing problems with Internet piracy affecting academic and professional textbooks and reference books. In particular, a family of sites – including <http://ebook-mega-store.com>, <http://download-ebook.org> and <http://www.ebooknetstore.com> – continues to decimate the market for academic and professional materials. Other sites include: <http://www.pdfchm.com/> as well as free-file host providers like Paid4share.net, Icefile.info and others. Takedown notices have gone unheeded (notable non-compliant ISPs include: relcom.ru, agava.ru and delfan.net). IIPA urges immediate action against the operators of illegal sites, in particular, these mentioned sites. Commercial bestsellers are also widely available for download on multiple websites.

Few, if any, criminal cases have been pursued against illegal website operators, or against those who, in furtherance of a criminal conspiracy, purportedly license such sites having no authorization to do so. Russian authorities must step up efforts to investigate Internet piracy of business and entertainment software, books, music, and film material, by a variety of technical means, and there needs to be an increase in the number and disposition of effective criminal investigators. The business software industry (BSA) reported 25 raids against Internet users or services in 2008, which resulted in the commencement of 15 criminal cases, resulting in seven convictions (all of which were against individuals in the cities of Izhevsk and Samara, for those involved in the distribution of illegal copies of software offered via peer-to-peer networks). Other industries report that some Internet Service Providers (ISPs) will cooperate and will move to take down pirate sites once identified, but many ISPs will not cooperate – even with clear evidence of piracy – absent a court order. This is the reason why ISP cooperation, and clear third party liability, is essential.

Given the growing threat of Internet piracy, Russian authorities are allocating far too few resources to fight it. IIPA members report that IP crime is a very low priority for the Ministry of the Interior’s Department K (the department with responsibility for combating technological crimes). Although Department K has equipment and expertise, there is not a single person in the department assigned to the sole task of combating IP crime, and according to their own statistics, only 9% of the cases they pursued in 2008 were related to copyright infringement on the Internet. For many years, rightholders have recommended the establishment of a sub-unit within Department K to deal exclusively with IP Internet cases, and to ensure it is properly staffed, equipped, and trained with detailed methodologies to combat these copyright crimes, especially for the maintenance of evidence. At present, jurisdiction for Internet piracy is not consolidated. For example, combating copyright violations on the Internet such as the dissemination of music through illegal pay-per-download sites and illegal peer-to-peer services, does not fall within the current jurisdiction of the Computer Crimes Department (Department K) within the Ministry of the Interior.

The copyright industries report that they have participated in as many as 40 to 50 training seminars a year with enforcement agencies and judges on how best to fight against Internet piracy, as well as hard-copy piracy, and remain ready to continue this cooperation.

Administrative Enforcement: The business software industry (BSA) reported 37 administrative court decisions against infringing end-users and three against channel pirates in 2008. This is comparable to the 40 administrative court decisions that were resolved in 2007 – 35 against end-users, five against channel pirates (compared with 38 and zero, respectively, in 2006). There were also a total of 48 end-user settlements and 22 channel piracy settlements. Over the past few years, the average administrative fine imposed has been about 3,680 to 4,906 rubles (US\$150 to \$200) per case.

Software Legalization: BSA reports that the Russian Government has responded seriously to the strong market demand for legal software in the Russian education system. In October 2007, a resolution was adopted that will result in the Ministry of Education purchasing legal software programs – from Russian and foreign vendors – for all Russian schools (kindergarten to 12th grade); this major step has ensured that the schools are using legitimate software, thus eradicating piracy in a large segment of the public service sector. The program is probably the largest software distribution project in software history. Every public school in Russia – some 65,000 schools in total – received a package with 56 disks containing software from 30 vendors (both Russian and non-Russian). The Russian Government is also taking steps to work with BSA member companies to make technology more relevant, accessible, and affordable for Russian schools and pupils. BSA anticipates that these programs will yield noticeable reductions in software piracy in 2009, and the software industry is ready to carry this remarkable progress into other sectors of the Russian economy.

Enforcement Training: In 2008, many of the copyright industries participated in Russian government enforcement training programs. For example, the government hosted one cross-industry training seminar, jointly organized by the European Commission, the General Prosecution Office, and the Investigation Committee of Russia in December 2008. That program was a follow-up to the training commitments outlined in the EU-sponsored IPR roundtable that took place in Russia in October 2007. Topics addressed included hard copy piracy and Internet piracy, as well as the sharing of investigative best practices from enforcement officers from several EU countries. A number of copyright industry representatives participated in the training for the 160 prosecutors that attended the program. Participants indicated interest in participating in future training programs, noting the need for more programs of this sort.

Optical Disc Plant Licensing and Inspections

The continued lack of clear authority for optical disc licensing and inspections in 2008 remains a significant set-back in the enforcement of optical disc production and distribution in Russia. In 2007, as part of a government reorganization, there was a transition period while the licensing authority was transferred from one agency (Roshrankultura) to a newly established “Federal Service for the supervision of mass communication and the protection of cultural legacy” (Rossviazokhrankultura). In May 2008, the Russian Government, was again reorganized. The former Ministry of Economic Development and Trade (MEDT) was divided in two: into a Ministry of Economic Development (MED) and a Ministry of Industry and Trade (MIT). Copyright policymaking was not affected – it remains within the Ministry of Culture (and Rospatent retained its primary responsibility for trademark and patent policy). However, the former Rossviazokhrankultura was reorganized into two entities: Roshrankultura and

Rossvyazcomnadzor (which as of January 2009, is now named Roskomnadzor – the name change did not indicate any change in authority). Roshrankultura, a part of the Ministry of Culture, retains its role as the chief enforcement agency for copyright matters. However, optical disc plant licensing is now under the authority of Roskomnadzor (now part of the Ministry of Communications and Mass Media); unfortunately, it has to date been awaiting authorization and resources to commence its work. As a result of these reorganizations, Rossvyazcomnadzor (now, Roskomnadzor) did not undertake regular inspection of plants or the suspension of raided licensed plants in 2008 as required under the IPR Agreement.

The lack of regular surprise inspections of all the production facilities exacerbates Russia's optical disc piracy problem, and is not consistent with Russia's IPR Agreement obligations. Instead, according to IIPA's information, in 2008, Russian authorities undertook only 10 raids and closed 4 licensed plants (in 2007, three out of 42 licensed plants and three unlicensed plants were inspected). Only two plants operating without a license were closed in 2008. The Russian Government reported that the two unlicensed plants were uncovered by the Ministry of the Interior (MOI) in the Spring of 2008; this was the first major activity against any plants since the 2007 St. Petersburg raids.

Now that both the optical disc plant licensing authority (Rosokhrankultura, now Rossviazokhrankultura) and the Economic Crime Department of the Ministry of the Interior have completed their reorganizations, we hope that they will address their present lack of adequate staffing and be able to engage in the kind of monitoring contemplated by the IPR Agreement. More training and more resources need to be available to conduct the promised effective enforcement. In addition, the problem of optical disc piracy in Russia has moved from major production facilities to smaller "burning" operations which require more flexible enforcement mechanisms and resources. The Russian Government is also not prosecuting the "persons and enterprises" involved in the manufacturing, storage and/or distribution of optical discs as required by the IPR Agreement. Nor is the Russian Government initiating investigations to determine and prosecute the owners, distributors and manufacturers of these optical disc products as required by the IPR Agreement.

On a positive note, the Russian Government has taken steps to address the problem of the Russian State owned Restricted Access Regime Enterprises ("RARE") that house or run optical disc plants. The Russian Government reported at the June 2008 Working Group meetings with U.S. Government officials the following: in 2007, there were ten reported RARE plants – that is, OD plants on government controlled military-industrial sites. In mid-2008, only five such plants – on four RARE sites – remained in operation. At present, there are four such plants on four RARE sites still in operation. The Russian Government reported in 2008 that it was in the process of closing the remaining plants by cancelling their leases. This is a positive step. IIPA continues to recommend that, in addition to lease cancellations, any plant engaged in the production of illegal optical disc material should also be the subject of a criminal investigation, closure, and the prosecution of those involved. In 2008, it was reported that a warehouse containing illegal video games was found located on a RARE site; it is not known whether action has been taken against this warehouse.

There are key legislative reforms still needed to improve optical disc enforcement. Russia has not yet enacted a sound optical disc licensing, revocation, and recordkeeping regime as described in the IPR Agreement. This essential IPR Agreement obligation had a June 1, 2007, deadline and is key to addressing many of the current OD piracy problems – both the manufacturing and distribution of pirate material. Rosokhrankultura, to its credit, tried to apply such measures in a *de facto* manner (during the reorganization in 2007), but the absence of clear statutory authority limited its success. IIPA is concerned that there is no known timetable in the Russian Government to meet this obligation. The current combination of the federal law on (optical disc) licensing, the Administrative Code, and government regulations on the licensing of the reproduction of discs (including audiovisual works), does not allow the regulatory body to suspend (or revoke) a license at all. Russia should include the monitoring of high-grade polycarbonate material used to manufacture optical discs in its OD enforcement regime, especially its border enforcement. Although this problem has declined in recent years, the recording industry reported that in 2008, Russian manufactured pirated optical discs were forensically matched to thirteen replication plants and found in Germany, Hungary, Ireland, Estonia, Latvia, Bulgaria, Moldova and Ukraine, as well as for sale on numerous Internet sites.

Implementation of the IPR Agreement

The IIPA continues to recommend several key measures to improve enforcement in Russia and in order to fully implement the IPR Agreement. These include:

1. 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 First Deputy Prime Minister, to deliver reports every three months to the President on what steps have been taken to address the problem. Also, it is imperative to establish a central coordinating body for law enforcement authorities with wide powers, derived directly from the President, to combine the efforts of the Economic Crime Police, Department K (the New Technologies Police), and the Police of Street Order.
2. Amending the relevant code(s) so that legal entities can be subject to criminal liability (a bill to do so was considered, but never adopted by the Duma in 2007).
3. Using the existing authority to take down websites offering infringing copyright materials of films, music, business and entertainment software and books, and to criminally prosecute those responsible, including unauthorized collecting societies (such as ROMS, FAIR, ROUPI and FOSP) that purport to grant licenses for rights that they do not possess, as well as introducing clear provisions to establish liability in civil and criminal cases for ISPs that fail to operate in a responsible manner, and for services that effectively promote, contribute or otherwise induce infringement. The Russian Government in 2008 did, as promised, post public information on government websites informing the public that the Civil Code prevented collecting societies from granting rights beyond their specific mandate from rightholders. The generic statement made on the Ministry of Culture website (which did not refer to online music) clarified that collecting societies purporting to grant licenses to users (whether they are legitimate societies or rogue societies) can do so only in respect of music, which they are mandated by rightholders to manage on a collective basis, i.e. by way of a direct agreement between the society and the rightholders in question, until state accreditation is granted to a specific society to represent all rightholders. When and if state accreditation takes place, the

accredited society will be able to grant licenses in respect of all rightholders, including those who do not have an agreement (giving a mandate to administer rights) with the society. The government needs to be clear that Internet licenses are not the same as, nor are they covered by, state accreditation, but remain based on licenses individually agreed upon between rightholders and websites. Additionally, the Russian Government needs to bolster the public campaign with the take-down of notorious sites, as well as the criminal prosecution of the operators of these sites.

4. Making certain that the optical disc licensing regime includes: (a) stricter controls on the importation of polycarbonate and machinery; (b) mandatory seizure and destruction of machinery used to produce pirate materials (regardless of the ownership of the machinery, and the relationship of the “owner” of the machinery to the infringement); and (c) the introduction of criminal penalties for the owners of such plants. Plant inspections must be undertaken regularly and exemplars tested jointly with rightholders. In addition, any plant licensing regime should extend in scope to the operators of telecine machines and mastering laboratories used to pirate audiovisual works.

5. Using the improved border enforcement authority to stop the import of optical grade polycarbonate used to produce illegal product, in addition to the export of shipments of product abroad.

6. Initiating 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).

7. Encouraging the Economic Police (including the Anti-Fraud Department) to substantially increase the number of anti-piracy raids, especially against large-scale targets, and to extend their actions to the distribution networks supplying illegal street sellers as well as to bring more cases to the prosecutors.

8. Taking action to undo the situation in St. Petersburg, where legitimate video and DVD markets have been effectively lost due to the activities of a collective management organization known as the Association of Collective Management of Authors’ Rights which falsely claims to represent MPAA member companies and which, incredibly, enjoys the support and protection of local officials, and requires (in violation of federal law) the application of a pirate hologram on all products sold with its license. Similar organizations have proliferated in Russia, including MAS (Interregional Authors Partnership), ROSA, and MO UIPKO (Interregional Union for Collective Management of Rights). The recording industry (Recording Industry Association of America, RIAA, and International Federation of the Phonographic Industry, IFPI) reports that the biggest illegitimate market for selling international repertoire (and most Russian music) is in Moscow. Elsewhere in the country – for example, in St. Petersburg, Novgorod, Yekaterinberg, Rostov-on-Don, and the Krasnodar region – the market is flooded with pirated music. In St. Petersburg, musical disc distribution is controlled by unauthorized organizations that require retailers to pay “membership fees” in order to sell optical discs in that city.

9. Developing effective measures to criminalize the camcording of motion pictures in theaters, since this is the primary source for illegal DVDs.

10. Adopt guidelines (in the Ministry of the Interior) that continue the broad *ex officio* authority by police to commence IPR investigations and to seize evidence as provided in the 2006 amendments to the Criminal Procedure Code. A new Federal Law on Police Activities – effective January 10, 2009 – could, if it is not properly implemented, limit this ability by police, until after a criminal or administrative case has been initiated which would hamper the collection of evidence and the effective prosecution of (or administrative actions undertaken against) IPR infringers.

The IPR Agreement Obligations: Status Report: As noted, since the signing of the IPR Agreement in November 2006, some steps have been undertaken, but much remains to be done. One notable “positive” step that simultaneously illustrates the weakness of the Russian legal/enforcement system is the closure of the notorious website *allofmp3.com* and the surprising acquittal of the former CEO Denis Kvasov. Although IIPA and its member are obviously pleased that *allofmp3.com* was itself taken down, we note that a nearly identical site is now in operation that is apparently owned and operated by the same or related parties – illustrating the need for corporate criminal liability and the criminal sentencing of principals of pirate operations, as well as the need for better information about and the investigation of these juridical entities. As noted, Russian enforcement authorities have undertaken plant and warehouse raids, and seized large quantities of illegal material. Although there was a pause in 2008 during the Russian Government reorganization, Russia has been meeting quarterly with the U.S. through the U.S.-Russia Working Group, which IIPA members view as a positive step toward ensuring that dialog and work to implement the IPR Agreement continue.

IIPA is disappointed that the IPR Agreement deadlines were not met, with Russia still needing to: (1) address the problem of illegal optical disc manufacturing; (2) effectively enforce criminal laws with deterrent penalties for IPR violations (especially focusing on larger enterprises – and whether committed for purposes of commercial advantage, private financial gain, or resulting in substantial economic harm); (3) combat Internet piracy; (4) implement international IPR agreements, up to the WTO-TRIPs levels; (5) enact legislation (Article 393 of the Customs Code) to provide Customs officials with the authority to take actions *ex officio*; and (6) fully implement the WIPO “digital” treaties (the WCT and the WPPT).

One particular concern, pertaining to ensuring that collecting societies can only operate within the scope of the mandate that they receive from rightholders, was presumably corrected in Part IV of the Civil Code with the requirement of state accreditation; the requirement entered into force on January 1, 2008. It has now been a year since this provision went into force, but unfortunately, it has not yet been effectively implemented against the many rogue collecting societies and websites that fictitiously claim to represent rightholders. Rightholders are eagerly awaiting the state accreditation process, and look forward to a swift and effective implementation of this critical provision in 2009, in line with the requirements of Part IV of the Civil Code. Proper implementation of this process is necessary to meet the requirements set out in the IPR Agreement. After considerable delay, the state accreditation process began in September 2008; for neighboring rights, the process was set to begin in December 2008, but Rossviazokhrankultura has now postponed that process into 2009. While rightholders welcomed the introduction of the state accreditation process, these prolonged delays have created an environment of uncertainty, leading to the collapse of the previously existing system of collection of equitable remuneration for producers and performers. In the vacuum, new rogue

societies have surfaced, taking advantage of the legal uncertainty, claiming to have authority to represent rightholders, and undermining longstanding contractual relations (for example, with RFA, the one society that is mandated by both the local and the international music industry and which complies with international standards in terms of accountability and transparency). Users have begun to cease payments to RFA justifying their action as the result of the absence of an accredited society. The Ministry of the Interior, although aware of the need for swift enforcement against rogue societies and fraudulent licenses, has not been able or willing to act until the accreditation process proceeds.

DEFICIENCIES IN THE RUSSIAN LEGAL REGIME

Overview of Legal Reforms: Effective enforcement is itself predicated upon the existence of a comprehensive and modern IPR legal regime, elements of which continue to be absent in Russia. Russia has made progress on legal reforms. Here are some of the recent highlights:

- Russia acceded to the two WIPO digital treaties – the WCT and WPPT – effective February 5, 2009. This very positive step was the result of a July 24, 2008 resolution signed by the Prime Minister to accede to the two treaties. The treaties still need to be fully implemented with legislation – including additional amendments to Part IV of the Civil Code – as detailed below.
- The Criminal Procedure Code was amended in 2006 to allow Russian police, in addition to prosecutors, to initiate criminal investigations. (As noted, IIPA is monitoring the progress of the 2009 law and regulations from the Ministry of the Interior to ensure that this effective enforcement tool remains viable).
- The Criminal Code was amended in January 2007 (in force April 9, 2007) to increase IPR penalties from 5 to 6 years imprisonment and to reclassify “grave crimes.” This latter change allows prosecutors and enforcement authorities to use investigative measures far exceeding those under the prior “medium gravity” threshold. (To date, rightholders’ expectations that these provisions would be used against the large-scale operators of illegal activity have not been met, but we are hopeful they will be used properly in 2009).
- The Supreme Court, on April 26, 2007, adopted a resolution detailing IPR (Articles 146 and 180) enforcement practices. This directive was aimed at the lower courts to provide guidance to them for IPR enforcement (along with a similar June 2006 resolution directed at civil IPR cases). It is expected that in 2009, another resolution – by the Supreme Court and Senior Arbitration Court – will set guidelines for the full implementation of the 2008 Civil Code (IIPA encourages the swift adoption of this joint resolution).
- Amendments to the Administrative Code of Misdemeanors were adopted on April 9, 2007, with a new Article 14.33 on unfair competition. This change means that the introduction of illegal goods into markets can result in fines on either individuals or legal entities (as an administrative liability). Article 14.33 provides for additional

sanctions only after the facts of copyright infringement have been established. This is why this provision does not pertain to or require the seizure or forfeit of pirate product. The Administrative Code was positively amended in 2006 by revising the timetable for administrative investigations which now permits up to two months (the old provision, was two days), and, the statute of limitations was extended to a year. There were also penalty increases, with further revisions in July 2007 (changing the sanctions from multiples of the minimum monthly wage to ruble equivalents) which now provide sanctions of 30,000 to 40,000 rubles (US\$869 to \$1,159).

- Amendments to the Code of Administrative Misdemeanors were adopted in 2005 and entered into force in January 2006. These amendments add administrative liability for copyright infringements and the confiscation of such products.
- Amendments to the Civil Code (in force, January 1, 2008) provide as a remedy for infringement, the “liquidation of a legal enterprise” – if used effectively against illegal companies (including optical disc producers) this should improve enforcement.
- Administrative amendments (Resolution #185, March 27, 2007) extended the existing street sale ban – applicable to street vendors and kiosks – from music and audiovisual material, to software and database materials as well.
- Amendments to the Federal Law on Licensing – making software production an activity subject to licensing in Russia – went into force on August 6, 2008.
- A Software Licensing Agreement (in accordance with Resolution #1447-R of October 18, 2007) went into force; it is applicable from 2008 through 2010, and applies to all 65,000 Russian schools (from kindergarten to the 12th grade). This is a major accomplishment of the Government of Russia, requiring the purchase and installation, from Russian or foreign vendors, of legal software in all schools.

As noted in the 2008 Report, these legal reforms are a step in the right direction toward meeting the IPR Agreement obligations, and other essential steps are pending government review or Duma adoption. But, there are many other essential legal reforms, some required by the IPR Agreement, that have yet to be adopted.

The priority legal reforms include: (1) the Criminal Code which needs to be amended to make legal entities liable for IPR crimes; (2) the Customs Code which must be amended to add *ex officio* authority (amendments were introduced in the Duma but never enacted in 2007); (3) the complete and proper implementation (in the Civil Code) of both digital treaties – the WCT and the WPPT – now that Russia has acceded to the treaties (effective February 5, 2009), as well as the other Civil Code amendments (some of which were considered, but never adopted, in 2008); and the adoption of long-promised optical disc regulations.

Effective optical disc regulations would: properly regulate the licensing of plants and their equipment and raw material used in production; provide for the surprise inspection of plants; and, provide for closure of illegal plants and the imposition of sanctions – including criminal penalties – for violations. Russia plans to address this problem with one legislative

amendment: to deny licenses to plants and individuals whose business license was previously revoked, as well as with regulatory amendments to the Prime Minister's Decree of April 2006.

Amendments to the 2002 Reproduction Regulatory Regulations were adopted on October 2, 2007 (further amending the April 2006 regulations). The regulations allow for unannounced inspections of replication plants and for the suspension, as well as the initiation of the cancellation, of operating licenses of facilities found to be in breach of the regulations (Article 13). Thus, Rossvyazcomnadzor (now, Roskomnadzor) can issue and check licenses, and it can suspend a license, but it cannot close a plant. The regulations foresee only one regular (planned) visit every five years to each plant, absent information about piracy at a plant. The current regulations seem only to have resulted in further confusion about the ability of Roskomnadzor to suspend a plant license without a court order. In addition, there are no provisions for properly seizing evidentiary material under the administrative procedures (which time-out after two months). And further, the Federal Service was not granted such authority under the Administrative Code after the reorganization, thus denying administrative remedies. Overall, this is not what the IPR Agreement calls for to effectively enforce optical media production and distribution, and criminal (and other remedial) relief for infractions. Thus, although IIPA members welcome the fact that the new Federal Service is in operation, we are concerned that it is still operating under the existing, inadequate, plant licensing and inspection regime, without the needed and promised comprehensive and more effective regime – with clear regulations (or if needed, legislation) to license production and suspend (without a court order) the licenses of violators and to permanently close illegal plants.

One other legislative recommendation (first proposed in 2007) would mark a step backward if adopted. The proposal, if enacted, would require copyright product labels (or stickers) as individual identifiers on all legitimate product sold in Russia. This proposal, made in the past by the Moscow City government and others in the federal government, however well intentioned, will have the practical effect of hampering the dissemination of legal product, while illegal product, with counterfeit labels, is freely distributed.

Since its adoption, IIPA and its members have commented on two major overarching concerns with the new Civil Code. First, there are many provisions (including legal terms and definitions) whose context and relation to other provisions in the Civil Code lacks clarity. One example is Article 1326 which does not explicitly clarify that the making available right (Article 1324(2)(4)), or any other interactive use, is covered by the statutory license in Article 1326(a). Ambiguities may cause challenges to enforcement efforts. Second, there are administrative law principles throughout the Civil Code that likely cannot be enforced by civil or criminal procedures.

In 2008, IIPA made several recommendations to address some of problems and to improve enforcement generally. The Civil Code, Part IV amendments passed a second reading in the Duma on January 30, 2009. With the exception of one non-copyright amendment (a compulsory license for semi-conductors), the amendments are largely the same as those introduced at the first reading. Thus our recommendations remain the same as those proffered in 2008, as set forth below. The recommendations include a suggestion for the introduction into the Civil Code of a clear definition of an "Internet Service Provider" (ISP) and confirmation of clear third party liability in civil and criminal law for facilitating Internet piracy, as well as a duty to

provide all necessary information to law enforcement agencies in Internet piracy cases. In addition, to stem the rise in Internet piracy that is harming many of the copyright industries, Russia should undertake steps to address and implement notice and takedown procedures for websites hosting illegal material.

IIPA continues to recommend the following set of Civil Code Part IV amendments, in order to comply with TRIPs and the WIPO digital treaties:

- Article 1229, the Civil Code’s “three-part” (fair use) test is far too broad and must be narrowed. It does not currently comply with Article 9(2) of the Berne Convention, Article 13 of WTO/TRIPs and Articles 10 and 16 of the WCT and the WPPT, respectively. The three-part test must be re-stated in its entirety in Article 1229. Further, in Article 1274(3), any taking of a work for the purposes of parody, should be limited to that portion of the work necessary for this purpose (one suggestion is to delete paragraph 3, if it is not so limited in scope, and allowing the three-part test to govern this use).
- Articles 1273 and 1306 in the Civil Code contain an overly broad exception for copying for “personal needs” (or alternatively, translated as “personal purposes”). IIPA recommends that the best way to “fix” this exception would be to clearly apply the three-part test to narrow the scope of the exception as well as to apply it only to specific instances (and to clearly, as it does now, exclude some activities from these personal use exceptions, such as camcording and telecine copying).
- Article 1280(4) of the Civil Code violates the three-part test for permissible exceptions, and needs to be significantly narrowed.
- Articles 1299 and 1309, respectively for works and objects of neighboring rights in the Civil Code fail to provide WCT (Article 11) and WPPT (Article 18) compliant levels of protection – because they are too narrow, and do not provide adequate remedies for technological protection measures (TPMs).
- Articles 1270(2)(1), 1317(2)(4) and (6), 1324(2)(5) and (6), and 1330(2)(2) contain definitions of “reproduction” that fail to adequately cover the creation of temporary copies because they explicitly state that temporary copies that constitute “integral and essential” parts of processes conducted with the sole purpose of lawfully using or bringing works or objects of neighboring rights to the public do not qualify as reproductions.
- Articles 1232-38, 1240, 1286, and 1307-08 over-regulate contractual relations in connection with copyright and neighboring rights (including the application of general rules on assignments and licensing of exclusive rights).
- Articles 1281, 1282, 1318, and 1324 fail to clarify that the Civil Code provisions apply equally to pre-existing works. (By one reading – a cross-reference to Articles 5 and 6 with Articles 1281 and 1282 – the Civil Code does apply to pre-existing works – but this should be clarified).

- Article 1231 fails to clarify whether non-Russian works and objects of neighboring rights receive national treatment (i.e., that foreign works are protected the same as Russian works).
- Article 1231 mixes copyright, patents, trademarks and other IP together, where it should be differentiated; separately, the right of remuneration needs clarification.
- Steps need to be taken to make certain that essential – treaty required – remedies for IPR infringements found in the Criminal Code, the Criminal Procedure Code, the Administrative Code and the Customs Code will continue to apply in light of the adoption of the new Civil Code and the repeal of the copyright law.
- The Civil Code fails to clearly provide for third party liability for civil and criminal facilitation of Internet piracy, as well as a duty to provide all necessary information to law enforcement agencies in Internet piracy cases.
- Article 1244 needs to be corrected so that the Civil Code further limits the current abusive practices of collecting societies in Russia. This includes amending Articles 1244(4) and 1326, so that rightholders can freely exclude their works and phonograms from the accredited societies' repertoires and can in lieu authorize their own collective societies (by direct contract).
- Article 1326(1) should be clarified so that the making available right applicable for objects of neighboring rights is not limited by the statutory license in that provision.
- Article 1334(2) should be clarified so that any use of a protected work or object of neighboring rights incorporated into a database is clearly subject to the rightholder's exclusive rights (as otherwise limited by the general narrow exceptions of the Code).
- Article 1239 of the Civil Code provides procedures for granting compulsory licenses without specifying conditions. This type of licensing is applicable only to patents and should be so stated.

There are several positive features of the Civil Code that deserve mention, as well. These features include:

- Article 1242 which clarifies that collective administration organizations can only operate within the mandates they receive from rightholders.
- Article 1253 which adds civil (but, because it is the civil code, not criminal) liability for legal entities.
- Articles 1252 and 1302 which adds remedies for the seizure and destruction of materials and equipment used in infringements. However, this could be further improved by deleting the exception for the sale of materials by the state for "income," and by parallel changes in the respective procedural codes.
- Article 1261 which adds clear protection for computer programs as "literary works."

- Article 1240 and 1263 which provides proper rights of ownership and exploitation of audiovisual works.
- Article 1270(11) which provides a clear making available right consistent with the digital treaties; and, Article 1245 which provides a private (personal purpose) levy.
- Article 1301 which provides statutory damages (ranging from 10,000 to 5 million rubles).

GENERALIZED SYSTEM OF PREFERENCES PROGRAM

In the first eleven months of 2008, Russia benefited from over \$541 million in unilateral duty free Generalized System of Preferences (“GSP”) benefits in the U.S. market. In 2007, Russia benefited from \$403.7 million in duty free GSP imports into the United States. The IIPA recommends that U.S. Government should continue to monitor whether the Government of Russia is complying with the eligibility requirements for GSP benefits, and if it is not, should consider terminating some or all of Russia’s eligibility to participate until such time as it has achieved “adequate and effective protection” of intellectual property rights as contemplated under the GSP statute.