

RUSSIAN FEDERATION

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

2014 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that the Russian Federation be retained on the Priority Watch List in 2014.¹

Executive Summary: In 2013, there was little concrete progress made on IPR enforcement in Russia, especially on the priority problem there – digital piracy. The Russian Duma did enact a package of important legislative changes (Federal Law No. 187 – in force August 1, 2013) with provisions pertaining to online service provider liability, including website and hosting activities. But, the new laws are limited in scope – key provisions apply only to movies and television programs – and so far, have had limited effectiveness. In two post-enactment cases in 2013 aimed at the social networking site vKontakte (whose posted music and film site has been identified by the U.S. Government as a “Notorious Market”), the infringing website evaded any sanctions.

In sum, one year after Russia completed its accession to the World Trade Organization, and agreed to a detailed IPR Action Plan with the U.S. Government, little has improved in the Russian enforcement scheme and where it has improved, it has not done so for all types of content. The U.S. Government acknowledged these enforcement shortcomings in its first annual report to Congress on Russia’s WTO compliance (December 2013), noting that “the current IPR enforcement environment in Russia remains weak” in areas such as end-user software piracy, online piracy, and the persistent collective administration problems.

The number of criminal raids, and police activity in general, declined significantly for the second straight year. Following legislation passed in 2011, there was a major reorganization of the police force and a drop in resources; there are about half the number of IPR economic crime police as there were a few years ago. Not coincidentally, in 2013, the initiation of criminal IPR cases is one-third the level from five years ago. Most tellingly (according to the information available to us), there were only three Internet piracy criminal cases commenced in Russia in 2013. Additionally, there were too few administrative actions against commercial enterprises that use or operate as distribution hubs for infringing content. Effective enforcement in Russia would require the Government of Russia to pursue more, and more effective criminal and administrative actions, and to strengthen administrative penalties particularly against large-scale enterprises.

For the past several years, the business software industry has been the only copyright industry that has seen a positive trend in piracy rates in Russia. Software industry piracy rates declined significantly in the past several years from 87% in 2004 to 63% in 2011.² This has been due to criminal and civil enforcement efforts directed against end-user software piracy and progress made on legalization of software purchased by the government. However, this progress has stalled because of a significant decline in Russian enforcement activity. The Government of Russia needs to recommit to ensuring legal software use in government institutions and state owned enterprises.

Russia has been a beneficiary of the Generalized System of Preferences (GSP) program (which is currently awaiting re-authorization) exceeding US\$500 million in 2012. One key factor in determining eligibility for GSP benefits is whether a country is providing “adequate and effective” protection of intellectual property rights. When the

¹For more details on Russia’s Special 301 history, see previous years’ reports at <http://www.iipa.com/countryreports.html>. For the history of Russia’s Special 301 placement, see <http://www.iipa.com/pdf/2014SPEC301HISTORICALCHART.pdf>. For a discussion of IIPA’s 2014 Key Initiatives and Challenges, see IIPA, *2014 Special 301 Submission*, at <http://www.iipa.com/pdf/2014SPEC301COVERLETTER.pdf>.

²Data on software piracy rates and commercial values are taken from the 2011 BSA Global Software Piracy Study at www.bsa.org/globalstudy. This study assesses piracy rates and the commercial value of unlicensed software installed on personal computers during 2011 in more than 100 markets. The study includes a detailed discussion of the methodology used. BSA plans to release an updated study in the second quarter of 2014.



GSP program is reauthorized, the U.S. Government should consider suspending Russia's participation in the program until it provides significantly improved IPR enforcement.

PRIORITY ACTIONS REQUESTED IN 2014

IIPA recommends the following priority enforcement actions and legal reforms to the Government of Russia for 2014:

- Undertake effective actions against Internet piracy – including unlicensed streaming services, pay-per-download websites, videogame hacking or cheating sites, cyberlockers, BitTorrent sites, private servers bypassing official videogame servers, and other commercial enterprises that provide services with the clear intent to promote or induce infringement, whether or not the servers are located in Russia.
- Properly staff and resource the Internet enforcement units in the Ministry of Internal Affairs (MVD) – such as Department K – and add copyright infringement work to their list of priorities.
- Increase the overall number of criminal IPR cases to previous levels, and bring deterrent criminal actions against retail chains that sell pirated entertainment software, movies and music, businesses using unlicensed software, and organized criminal syndicates involved in piracy.
- Amend the Civil Code, Part IV, to:
 - (a) fully implement the WIPO digital treaties – the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT);
 - (b) better define the basis for liability for providers of online services that induce or encourage the infringement of copyright and related rights, or that facilitate infringement and do not take reasonable steps to prevent such activities (and, develop a clear definition of the types of intermediaries entitled to the safe harbors, to prevent knowing facilitators from enjoying the safe harbor benefits);
 - (c) implement injunctive relief and efficient and scalable notice and takedown procedures – applicable to all copyrightable works and recordings (not just motion pictures and television programs);
 - (d) provide legal norms that create incentives for Internet Service Providers (ISPs) to cooperate with right holders in fighting infringement taking place over their networks or platforms; and
 - (e) introduce a duty on ISPs to provide information to law enforcement agencies and rights holders.
- Strengthen copyright liability under the Administrative Code by eliminating the for-profit requirement in Article 7.12 of the Code of Administrative Offences, and raising administrative penalties to deterrent levels, for example, by implementing: (i) higher fixed fines for violations by legal entities and individuals; (ii) fines proportionate to corporate revenues (e.g., as is done for anti-monopoly violations); and/or (iii) penalties to disqualify from their managerial responsibilities, for one to three years, managers of legal entities.
- Ensure fairness and transparency in collective administration of certain rights, while preserving the exclusive rights of copyright owners in Internet distribution.
- Amend the Criminal Code and undertake effective enforcement against illegal camcording of motion pictures.
- Ensure government agencies and state owned enterprises procure and use only legal software.
- Establish an official uniform methodology for the investigation and prosecution of copyright and related rights infringements (particularly, for Internet and software enterprise end-user cases).
- Amend the Criminal Code to establish criminal liability against legal entities, including for IPR crimes.

COPYRIGHT PIRACY AND ENFORCEMENT IN RUSSIA

Internet Piracy Enforcement: Russia has one of the largest and most active online communities in Europe. Internet and wireless access by Russian citizens is growing rapidly; according to the International Telecommunications Union (ITU), as of June 2013, over 53% of the Russian population now has Internet access, up 10% from two years ago (and compared to 33.7% in Ukraine). Yet, basic copyright enforcement of Internet piracy has lagged far behind the rapid growth of Internet and wireless access in Russia.

There are many linking sites and cyberlockers that offer access to pirated music. *vKontakte*, the most popular online social network in Russia (with over 46 million visits per day) is the largest single distributor of infringing music in Russia, and also is a hotbed for online piracy of movies and television programming, which is why it is on the U.S. Government's "Notorious Markets" list for 2012. It is ranked 26 in Alexa's global top 500 most visited websites worldwide and is the second most visited website in Russia. *vKontakte* has a functionality specifically designed to enable members to upload music and video files, which includes hundreds of thousands of unlicensed copyright works. It is available in many languages, including English, and has a dedicated content search engine that enables other members to search and instantly stream infringing content. In addition, some third-party software developers have distributed "apps" to enable non-members to search, stream and download the content available on the site. *vKontakte* will generally take down specific content when notified, but that is not an adequate enforcement mechanism for a problem that *vKontakte* created. Russia's second largest social network site, *odnoklassniki.ru*, also operates an unlicensed music service similar to *vKontakte*'s service. According to the recording industry, paid download sites are still an important source of piracy in Russia along with the peer-to-peer services and cyberlockers. There are over thirty *allofmp3.com* copycat sites which offer entire albums for as little as US\$1, and use up to thirty different domain names for the same user interface.

In addition to the pay-per-download and other hosted sites, Russia is home to a number of major BitTorrent indexing sites such as *rutracker.org*, launched in response to the takedown of *torrent.ru*. Another particularly problematic site is *Torrent-Games.net*, a Russian BitTorrent tracker. Neither ISPs nor website owners respond to takedown requests for this site. For the second consecutive year, Russia was first in the world in the number of connections by peers participating in the unauthorized file sharing of select Entertainment Software Association (ESA) member titles on public peer-to-peer networks. In 2013, users with Russian IP addresses accounted for more than 36% of the global volume of detected infringements occurring on public peer-to-peer networks. ESA also reports that Russian service providers either host or provide proxy services to a number of the world's largest and most popular linking sites, including *final4ever.com*.

Russia is also home to the world's two most prolific criminal release groups of motion pictures. The source materials for the infringing copies come from camcording films at local theaters and then uploading these illegal camcords onto the Internet (and selling illegal hard copies as well). Pre-release DVDs of major film titles often appear on the Internet (and then in pirate hard copies sold online or in markets), within a few days after the authorized theatrical release. The illicit camcords sourced from Russia are of exceptional quality and remain in high demand by international criminal syndicates for Internet uploading. We urge the Government of Russia to amend Article 146 of the Criminal Code (which was considered in the Duma, but stalled, in 2013), as well as to undertake effective enforcement against illegal camcording of motion pictures.

Book publishers are concerned by the prevalence of online piracy in Russia, particularly on hosted-content sites, and note very low compliance rates in response to rights holder requests to takedown links to infringing content. Peer-to-peer piracy providing free unauthorized access to e-books continues to be an issue as well.

The independent segment of the film and television industry (IFTA) reports that online and physical piracy remain a significant export constraint for independent producers and distributors, the majority of which are small to medium-sized businesses. Independent producers partner with local authorized distributors to finance and distribute films and television programming. High quality pirated hard copies (DVDs) are routinely offered for free online,

destroying the legitimate market for these works. As a result, legitimate distributors cannot commit to distribution agreements, or alternatively, offer drastically reduced license fees which are inadequate to support the financing of independent productions. Revenue from legitimate distribution services, which is licensed country-by-country, is critical to financing the development of new creative works worldwide. Since Internet piracy in one territory affects other markets instantly, this type of infringement not only undercuts anticipated revenue from the distribution of a particular asset, it also harms the ability of independent producers to secure financing for future productions. The independent production sector cannot easily shift to new business practices that might otherwise limit piracy, such as worldwide same day release (referred to as “day-and-date” releases), since national distributors release films on their own schedules.

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

To significantly improve Internet enforcement, in addition to increasing the number of IPR cases and conducting expeditious investigations, much better law enforcement coordination is needed. Relevant administrative agencies (e.g., the Federal Anti-Monopoly Control) need to target large-scale illegal distribution enterprises, such as those unlicensed services now responsible for most of the illegal distribution of music in Russia (e.g., *vKontakte*).

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

One fundamental enforcement shortcoming is the lack of clear authority and jurisdiction to act against copyright infringement crimes occurring on the Internet, whether through administrative or criminal means. For example, combating copyright violations on the Internet such as the dissemination of music through illegal pay-per-download sites and illegal peer-to-peer services, does not clearly fall within the current jurisdiction of the Computer Crimes Department (Department K) within the MVD, even though they have occasionally taken action. Department K’s authority and responsibility to act in cases of online infringement should be further clarified and strengthened. 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. Proper staffing, equipping and resourcing of a sub-unit within Department K is essential, along with the formation of other such units within the MVD to deal exclusively with IPR Internet cases, and to train officers in how to combat these copyright crimes, including the maintenance of evidence. It also should be

clarified that actions can be brought under the Code of Administrative Offenses against commercial actors involved in the massive distribution of infringing material, where there is no direct fee charged by the enterprise.

An intensification of criminal investigations and criminal convictions against principals of organized commercial pirates is sorely needed, especially directed at Internet operations. Changes to criminal procedure which placed copyright infringement cases into the category of serious crimes have enabled – at least in theory – Russian law enforcement agencies to conduct thorough and comprehensive investigations against owners and operators of piratical operations. However, deterrent criminal penalties have rarely, if ever, been imposed against owners of commercial Internet operations. One practical problem that has surfaced recently is that police and prosecutors have had difficulty applying the criminal law thresholds to Internet crimes, so few such cases are ever brought and even fewer tried to a conclusion. The 2011 increase in the criminal threshold, without special consideration of its application to Internet offenses, has exacerbated this problem; this further underscores the importance of also using administrative authority in digital piracy cases.

The August 2013 package of laws had two key features: (1) amendments to the Civil Code, Part IV – to provide for third party liability, as well as safe harbors from such liability for “information brokers” (ISPs) that comply with all the requirements for those safe harbors; and (2) amendments to the Civil Procedure Code (and corresponding amendments to the Arbitration Procedure Code and the Federal Law on Information and Information Technologies (2006)) that provide injunctions after notice and takedown (and by court order only) to block infringing materials or limit access to infringing websites. However, as noted, the provisions are limited to movies and television programs, and have yet to be fully implemented even for these works. As a result, little has changed in 2013 for works other than motion pictures and television programs: some ISPs cooperate and take down pirate materials once identified, but many ISPs are not willing to cooperate absent a court order, even with clear evidence of piracy. This is why further amendments to broaden the scope of the August law to all works, and to include stronger ISP cooperation and clear third party liability provisions, are essential. The motion picture industry reports that in 2013, most of the ISPs often did voluntarily cooperate and respond to the Russian-Anti Piracy Organization (RAPO) cease and desist letters. However, efforts between the Ministry of Economic Development to develop formal notice and takedown procedures between rights holders and ISPs were not successful. In December 2013, film and television producers and some Internet services (including mail.ru – one of the most popular Russian Internet services) signed a Memorandum of Understanding to improve voluntary notice and takedown and other cooperative procedures.

As noted, there were only a few Internet criminal cases commenced in Russia in 2013. One, against a telecommunications employee using malware software; the case is still pending. In October 2013, a district court in Moscow convicted the two administrators of the *interfilm.ru* site; they received four years probation (this was a case that commenced in 2009). It was the first criminal conviction in Russia for online copyright infringement. IIPA recommends that Russian authorities step up their efforts to investigate Internet piracy of software, books, music, and film material, by a variety of technical means, and increase the number and disposition of effective criminal investigators.

BSA | The Software Alliance (BSA) reported only two raids against Internet users or services in 2013 (compared with 25 in 2008 and 22 in 2011), and three criminal cases initiated in 2013, with one conviction. This compares, for example, to 6 cases initiated and 3 verdicts in 2011, and 15 cases and 7 verdicts in 2008.

Criminal Enforcement in General: For both online and hard copy piracy, criminal enforcement in Russia remains a priority for IIPA and its members. For hard goods piracy, Russia’s laws are generally adequate for addressing this problem (although some gaps remain). As in years past, most criminal enforcement by the government in 2013 was aimed at physical piracy.

In 2013, the Russian police continued to take actions against copyright infringers, including against street vendor piracy and companies involved in the installation and use of pirated software. However, all of the copyright industries reported substantial declines in the number of raids in 2013 from previous years, in part due to the severe

cuts in police resources. In addition, the copyright industries are concerned that the proportion of raids to the initiation of cases, and to criminal verdicts, remains disproportionately low. The Government of Russia (MVD) usually provides comprehensive annual statistics on intellectual property cases, and investigations commenced; however, the full 2013 report was not available before the Special 301 filing deadline. From preliminary data, however, it is clear that criminal enforcement is down significantly, from prior years. According to the MVD statistics (through November), the number of criminal investigations in 2013 was 2,535, down from 3,580 in 2012 and less than half the (full year) statistics for 2007, when 7,874 investigations were commenced (there were 5,033 in 2011 and 6,118 in 2010). The number of convictions under Article 146 of the Criminal Code in 2013 (through June) was 580, compared with 1,325 in all of 2012, and 2,676 in 2010.

As in recent years, there were some deterrent sentences and prison terms applied by the Russian courts, including a handful aimed at serious repeat offenders. Some copyright industries, such as the motion picture industry, have seen a decline of 5% to 10% in hard goods piracy in the past two years, in major cities, including Moscow, St. Petersburg, Rostov-on-Don, and Novosibirsk (and an overall decline in the size of the hard goods market by about 50% since 2010). They also report continued cooperation by enforcement authorities with the RAPO in 2012.

There were also a considerable number of administrative and criminal penalties imposed against illegal DVD vendors. The motion picture industry noted several markets, including Gorbushka, Savelovskiy, Sherbakovsky, Luzniki, and Radio that no longer contain pirate DVDs, and only sell legitimate DVDs. Further, the local motion picture industry (Motion Picture Association, MPA) reported very good cooperation with law enforcement authorities in organizing raids against problematic kiosks. Deterrent criminal penalties are still not being imposed against optical disc plant owners or, with few exceptions, against plant operators (no plant owner has ever been convicted and only a handful of plant managers or employees have been convicted).

BSA reported the overall number of raids decreased substantially in 2013, which has been a trend the past several years. In 2013, the number of *ex officio* raids declined even in major cities including Moscow, Rostov-on-Don, and Novosibirsk (among others), and there was inconsistent enforcement in other cities and regions. As in prior years, the majority of raids are “channel” raids against CD sellers and pre-installed hard disk loaders. There were 333 end-user raids in 2013 (down from 506 in 2012, and 554 in 2011); there were 1000 “channel” case raids, up from 931 in 2012, but down from 1161 in 2011. The number of criminal cases initiated (as a result of these raids) declined from 97 in 2012 to 66 in 2013 against end-users, and from 609 “channel” cases in 2012 to 556 in 2013. The total number of court verdicts was up substantially for “channel” cases with 260 in 2013, but was substantially down for end-user cases, falling from 24 verdicts in 2012 (and 83 in 2007), to only 11 in 2013.

BSA continues to report good cooperation with enforcement officials, but inconsistency in the number and quality of raids stemming from the lack of a uniform methodology promulgated by the Investigative Department of MVD, the Investigative Committee of Russia, and the General Prosecutor’s Office in relation to implementation of Article 146 of the Criminal Code. Investigators and prosecutors often do not consider evidence collected by police during raids as sufficient, but they have been unable or unwilling to provide police with guidelines for evidence collection. Thus, criminal cases are frequently suspended by investigative authorities or terminated by prosecutors.

MPA reports that enforcement activity in 2013 was about the same as in 2012, with most of it concentrated in Moscow and St. Petersburg, but like other industries, was down overall from only a few years ago, as a result of the reorganization of the police and severe reductions in enforcement personnel. RAPO reported one major raid on a DVD plant in 2013 in Tver, in cooperation with the FSB and economic crime police (seizing 12 DVD and 2 CD lines). The police (with cooperation from RAPO) seized a total of 3.2 million discs in 2013. The motion picture industry reported box office receipts in Russia in 2013 of US\$1.37 billion (a 10.6% increase from 2012).

The lengthy criminal investigative process must also be examined and redressed, particularly at the provincial level. As the government continues to rely on its own experts in investigating, examining and prosecuting IPR violations, it should take measures to increase the number of experts and consider the appointment of a

specialized unit of investigators and prosecutors, adequately trained and provisioned to effectively address IP crimes. Due to the lack of adequate staffing and the high volume of work, examinations of products seized take months. ESA continues to report delays in examination reports from government experts, due to a lack of technical expertise. Enforcement is also hampered, and trials delayed, by the requirement that exemplars be collected only with the participation of state officials, and by a statutory reliance on government expert reports. Delays also result from a lack of subject matter expertise in some cases, as well as a reluctance to use or rely on rights holder expertise on forensic matters. Worse, some local authorities refuse to share any information on cases with rights holders at the investigative stage, making effective cooperation extremely difficult. The problems are further exacerbated by ongoing reforms of the investigative bodies. These arcane and outdated rules and practices create unnecessary delays and costs in litigation. The rules should be modernized so that industry experts can be more effectively integrated into the judicial process. One way to accomplish this would be for the Supreme Court to issue new guidelines on the admissibility of the testimony of private experts.

Improvements should also be made with respect to court procedure. The criminal procedures generally require that a rights holder request the destruction of the seized goods (or move for recovery of damages) in a separate proceeding before the Arbitration Court (court of general jurisdiction) – which unnecessarily lengthens the process and makes enforcement even more difficult.

Another recommended measure to increase the efficiency of IPR criminal investigations is the appointment of IPR special prosecutions, investigators, and police officers at both the federal and regional levels throughout Russia. The copyright industries are willing to continue their assistance in this regard with training programs for judges and other law enforcement officials. IIPA recommends that the Investigative Department of MVD and the Investigative Committee of Russia should continue to work with IIPA members on future training programs, and that the General Prosecutor's Office (along with the MVD-IC) appoint a government liaison with IP rights holders to more effectively bring criminal investigations and trials to successful conclusions. The approval in 2011 of a specialized IP court in Skolkovo (the innovation center) which opened in 2013 (with thirty trained judges) was a positive step; these courts should be created in other cities and regions across Russia to handle copyright, as well as patent cases.

Russia's current Criminal Code does not allow for corporate entities to be held criminally liable. Only a natural person (usually a corporation director) can be found criminally liable for infringement, and only upon a showing that he/she had a direct intent to commit the infringement. It is extremely difficult to make such a showing (for example, against the owners of a retail outlet selling pirated product or against a business using unlicensed software), so, many cases are suspended without any penalty. Thus, verdicts are issued against only the retail staff found selling pirate products at the time of a seizure or raid, rather than against a manager or corporate owner, with little deterrence against the retail establishment.

Several copyright industries continue to report that raids against retail outlets, while undertaken, are not ultimately successful in stopping criminal activity because of: (a) the absence of criminal liability for corporate entities; (b) the failure of the police to comply with the Criminal Procedure Code; and (c) the general reluctance of prosecutors to recommend the initiation of criminal cases. Amendments to the Criminal Code to allow corporate entities to be held criminally liable would help to correct this problem. As one example, CDs and DVDs with illegal software are readily available in markets and in kiosks, but the police only take action against the vendors, not the organized illegal businesses that make those materials available. There were three reported raids against large pirate warehouses in 2013 (one resulting in the seizure of over a million illegal discs and the other two over 700,000 discs).

Civil Enforcement: The commercial-scale piracy harming all of the copyright industries can and should be addressed through enhanced administrative actions (and penalties), and criminal remedies. Civil measures are not capable of providing the requisite level of deterrence against that type of piracy; but, if, properly applied, civil enforcement can be a useful tool for some industries. However, in Russia, there are many civil enforcement inadequacies, including: remedies limited to the seizure of specific copies of works that are the object of a lawsuit; the failure to award preliminary injunctions (although some changes were made in 2013), or to freeze assets and

evidence; low damage awards, which, like all awards, are also very difficult to enforce; burdensome evidentiary requirements, including rights ownership information; the absence of personal liability for the directors of infringing companies or enterprises (which is the only way to bring proceedings in cases where bogus companies operate); and the absence of the notion of contributory liability under the Russian civil law system dealing with copyright infringements. The August 2013 package of laws resulted in 77 applications for preliminary injunctions in the Moscow city court; 40 lawsuits were filed and several blocking orders were issued by the court. But, the law needs more effective provisions against rogue websites, instead of its current focus on individual works on the sites (in addition to its application to all works and recordings, not just motion pictures and television programs).

While criminal enforcement (by the police) remains the primary IPR enforcement tool in Russia against commercial piracy, in the past few years the business software industry has been able to expand its civil search practices against enterprises using unlicensed software as a secondary enforcement method. While the number of searches is low (12 in 2013, 11 in 2012), this activity has contributed to public awareness for businesses especially about legal versus illegal activities, as well as helping to legalize software in commercial entities. One additional recommendation is the adoption of judicial guidelines on civil search practices, including provisional measures (consistent with the WTO TRIPS requirements).

Administrative Enforcement: The Administrative Code (Article 7.12) provides a range of fines on natural persons (1,500 to 2000 rubles), the owners or managers of legal entities (10,000 to 20,000 rubles) and on legal entities themselves (30,000 to 40,000 rubles), as well as permitting the confiscation and destruction of pirated product. Administrative cases are filed by the police or by agencies, but the levying of fines is done by courts of general jurisdiction (for natural persons and juridical entities) and arbitration courts (for legal entities). Imposing significant administrative fines on legal entities, for example, for the distribution or making available of infringing content or the use of unlicensed software, would have a deterrent effect (and could be imposed in instances when criminal cases are terminated for failing to meet the high evidentiary burdens). Unfortunately, current administrative procedures are inadequate because of the very low level of fines imposed and the inability to reach commercial enterprises that distribute infringing content (especially when there is no direct payment for such infringing content, but only, for example, advertising revenue, such as at *vKontakte*). BSA reported only 27 administrative court decisions against enterprises using unlicensed software, and only 2 against “channel” pirates in 2013 (compared to 18 end-user and 24 “channel” cases in 2012). During 2013, the average administrative fine imposed on legal entities was about 30,000 rubles (approximately, US\$1,000) per case, which is too low to be a deterrent. In total, the number of administrative cases has, like the number of criminal cases, fallen significantly: there were 3,310 cases in 2013 through June, compared with 7,482 cases in all of 2012, and 13,268 administrative cases in 2010. BSA reported two prosecutorial raids in 2013 that did commence administrative cases in each instance.

In addition to the piracy problems, the music industry is also concerned with the lack of transparency and governance issues in connection with the state accredited collecting societies for authors, record labels and performers, including VOIS, the sole state accredited collecting body for record labels and performers. We urge the Government of Russia to use its oversight authority to ensure that rights holders are being fairly represented and treated, in accordance with commitments that it made to the U.S. Government and other trading partners who had expressed concern with the accreditation process. Fair representation in these societies includes direct representation of rights holders on the board in a manner that is proportionate to relevant market share (and that reflects commercial realities). During WTO accession (in the Working Party Report, paragraph 1218), Russia assured its trading partners it would “review its system of collective management of rights in order to eliminate non-contractual management of rights within five years after Part IV of the Civil Code entered into effect,” to bring the management societies in line with international standards on governance, transparency and accountability. That commitment came due in 2013 but no such action was taken. To develop legal music markets and protect legitimate licensed services, the Government of Russia must fulfill this obligation and resolve the issue of the state accreditation of collecting societies in a matter that ensures that rights holders are able to control and manage their own societies.

In October 2013 (to be implemented in 2014), a new Federal Service for Copyright will replace the existing Federal Service for Intellectual Property (Rospatent), including the governance of collective management organizations.

DEFICIENCIES IN THE RUSSIAN LEGAL REGIME

Although Russia did make some progress on legal reforms as part of its WTO accession, many key elements of an effective legal regime remain absent or incomplete, especially with regard to effective Internet enforcement. The Civil Code, Part IV, in force in 2008, made some improvements, but left many reforms either incomplete (implementation of the digital treaties), or inadequate (unclear ISP liability, no formal notice and takedown procedure, and the other list of deficiencies noted in previous IIPA filings). While the 2013 package of laws is a step forward, key improvements, detailed above, are still needed.

In the Civil Code, IIPA and its members have in the past commented on three major overarching concerns: (a) a lack of clarity on numerous provisions, especially exceptions; (b) administrative law principles throughout the Civil Code that likely cannot be enforced by civil or criminal procedures; and (c) the absence of clear liability rules for online websites and services that induce or encourage infringement. The 2013 package of laws was intended, in part, to address this latter issue. But the law does not clearly define ISPs (and the various services they provide) nor does it link liability (and safe harbors) in a manner that will encourage cooperation with rights holders to effectively deal with Internet piracy – in civil and criminal law; last, it does not clearly define secondary liability. If Russia is to foster legitimate electronic commerce and if the rule of law is to apply to the online world, Russia needs to develop a balanced system of liability provisions that incentivizes ISPs to cooperate in addressing Internet piracy, and one that does not provide cover for services that induce or promote infringement. Further, it is critical that Russia amend its regime to allow for injunctive relief – quickly and effectively, applicable to all works, and especially for Internet matters. One additional tool would be to introduce a duty on ISPs to provide information to law enforcement agencies and rights holders to assist with criminal enforcement.

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

For a detailed list of IIPA’s comments on the Civil Code, and the other relevant laws, see <http://www.iipa.com/rbc/2010/2010SPEC301RUSSIA.pdf> at page 138. In addition to those already mentioned, we continue to recommend steps to ensure that treaty required remedies for IPR infringements found in the Criminal Code, the Criminal Procedure Code, the Administrative Code and the Customs Code continue to apply in light of the adoption of the 2008 Civil Code and the repeal of the copyright law. Last, we recommend that Article 1252(5) of the Civil Code, which currently includes remedies for the seizure and destruction of materials and equipment used in infringements, be improved by deleting the exception for the sale of materials by the state for “income,” and by parallel changes in the respective procedural codes.

On March 26, 2009, the Supreme Court and the Higher Arbitration Court adopted a joint Plenum Resolution (“On issues relating to the introduction of Part IV of the Civil Code”). Unfortunately, the resolution did not resolve a number of legal issues that remain unclear, and as a result are problematic for judges trying to enforce IPR infringements. These issues include: the treatment of unlicensed stored copies in an electronic medium (IIPA recommends they be treated as illegal without the need to prove use of the software in the user’s business activities); the failure to craft explicit liability rules for the pre-installation of unlicensed software on PCs; the failure to establish rules to determine damages (i.e., the value of works), including for “making available”; failure to provide explicit guidelines pertaining to infringement for PCs (with illegally installed software) used in businesses, regardless of the

ownership of the PCs; and, the failure of courts to apply provisional measures (and to clarify evidentiary rules in civil searches or civil suits based on materials acquired in criminal raids).