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Re: Russia's WTO Compliance – Notice of Intent to Testify, Summary of Testimony and Comments of the International Intellectual Property Alliance (IIPA) in response to “Request for Comments and Notice of Public Hearing Concerning Russia's Implementation of Its WTO Commitments” (84 Fed. Reg. 40470, August 14, 2019)

To the Trade Policy Staff Committee:

On behalf of the International Intellectual Property Alliance (IIPA), I would like to appear as a witness at the October 8, 2019 public hearing on Russia's implementation of its obligations as a Member of the World Trade Organization (WTO). My testimony will focus on Russia's copyright law obligations – and especially its enforcement obligations – under the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) (Marrakesh Agreement Establishing the World Trade Organization, Annex 1C (Apr. 15, 1994)).

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Along with a request to testify, this submission includes an overview of the IIPA's October 8 testimony. The IIPA's testimony will focus specifically on Russia's copyright obligations and compliance with the WTO TRIPS Agreement, including its enforcement obligations, as well as on related market access issues. Full compliance with the TRIPS Agreement would help to expand the market for authors, producers, and the copyright industries in the Russian marketplace. In addition to this overview, attached is IIPA's Special 301 Russia filing (February 7, 2019) which sets out a broader array of concerns of the IIPA members regarding copyright protection and enforcement, some beyond the scope of the WTO TRIPS obligations, and a panoply of market access issues in Russia.

As requested by the Trade Policy Staff Committee (TPSC) in the Federal Register notice, IIPA's testimony specifically addresses "Russia's implementation of the commitments made in connection with its accession to the WTO...[on] [i]ntellectual property rights (including intellectual property rights enforcement)" – this includes the obligations set forth in the WTO TRIPS Agreement and in the Report of the Working Party of the WTO on the Accession of the Russian Federation. 84 Fed. Reg. 157 (Aug. 14, 2019).

The copyright and related rights obligations of the WTO TRIPS Agreement consist of the substantive copyright law and related rights provisions in Articles 9 through 14, as well as the enforcement provisions in Articles 41 through 61. Article 41 of the WTO TRIPS Agreement requires that member-countries "ensure that enforcement procedures...permit effective action against any act of infringement of intellectual property rights...including expeditious remedies to prevent infringements and remedies which constitute a deterrent to further infringements." Enforcement in Russia has fallen far short of this obligation, certainly against digital piracy, and remains a significant concern for all of the copyright industries represented by the IIPA – the recording, motion picture, book publishing and entertainment software industries.

The existing remedies and enforcement actions under Russian law, taken as a whole, including the civil, administrative and criminal provisions, do not provide the kind of "expeditious," "effective," or "deterrent" remedies required by Article 41 of the WTO TRIPS Agreement.

In addition to its WTO TRIPS Agreement and Working Party Report obligations, the U.S. and Russian governments completed a detailed Intellectual Property Rights (IPR) Action Plan in December 2012, which set out a number of important copyright enforcement and legal reform priorities for Russia. This was in addition to another bilateral agreement – the 2006 U.S.-Russia IPR Agreement. Proper implementation of the WTO obligations, following the detailed road maps of the 2012 Action Plan and the 2006 IPR Agreement, would significantly improve the marketplace for copyright materials, especially the digital marketplace. These agreements have never been fully or properly implemented by the Government of Russia.

Full and proper implementation of the WTO TRIPS Agreement (as well as of the other two bilateral agreements) would help to address the number one priority for the copyright industries in the Russian market – to improve the effectiveness of enforcement against online piracy, especially for hosting sites and streaming services. The lack of proper enforcement is stalling the ability for legitimate digital services to thrive in Russia.

Full implementation would also help to address two other priorities for the copyright industries in Russia. First, is the long-standing problem concerning collective management of music rights in Russia that have resulted in revenues being a fraction of what they should be for a market the size of Russia. The state accredited Russian collecting societies are not operating with transparency, accountability or good governance rules consistent with international norms. The other enforcement priority is the long-standing problem of camcording motion pictures, with many feature films being illegally copied in theaters and

migrating online. To correct the camcording problem requires changes in the Russian legal framework, as well as dedicating sufficient resources and government willpower to engage in effective enforcement.

Online Enforcement

As a part of its WTO accession, the Government of Russia, in the Working Party Report (paragraph 1339), pledged that it would “continue to take actions against the operation of websites with servers located in the Russian Federation that promote illegal distribution of content protected by copyright or related rights, such as phonograms (sound recordings) and investigate and prosecute companies that illegally distribute objects of copyright or related rights on the Internet.”

In December 2012, in the U.S.-Russia IPR Action Plan, the Government of Russia agreed it would take “enforcement actions targeting piracy over the Internet” and more specifically it would, *inter alia*: “Take measures in order to disrupt the functioning of websites that facilitate criminal copyright infringement, and provide for takedown of infringing content.... Take actions against the creators and administrators of websites through which intellectual property crimes are committed.... Conduct meaningful consultations with rights holders to target and to take action against high-priority infringing websites.”

In the 2006 U.S.-Russia IPR Agreement, Russia agreed to combat the growing threat of online 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.”

Notwithstanding these commitments in the WTO and the two bilateral agreements, the problems of online piracy and weak enforcement persist, even as there has been some progress with civil law reforms.

In recent years (2013, 2014 and 2017), Russia adopted new civil procedures to enhance website compliance with takedown notices from rights holders, and, to disable access to infringing sites. The adoption of these laws was a positive step. Unfortunately, the implementation of the laws and use of these new procedures, have only been directed against infringing activities by users within Russia. The new laws and procedures are not being used against Russian sites and services catering to users outside the country for whom infringing material is easily accessible.

The legal reforms adopted in recent years have improved civil procedures and streamlined processes for websites to comply with rights holders' takedown notices, and allowed Russian courts (in particular, the Moscow City Court), working in cooperation with a key government agency, to disable access to infringing sites. These court orders now can be extended – without a reapplication to a court – to clone, proxy and mirror websites containing infringing content. Additionally, online search services are required to exclude infringing websites (identified in the court orders) from search results. One additional set of recent reforms included a law (introduced in the Duma in April 2017) to provide monetary penalties (up to 800,000 rubles; US\$12,165), for attempts to bypass website blocking orders under the law applicable to anonymizers and virtual private network (VPN) services. The VPN law went into force in November 2017; however, the other law providing penalties has not yet been adopted.

Overall, the new laws that were enacted have blocked or slowed access to some significant infringing sites and services. The result of all of these laws has been positive, with an ever-increasing number of injunctions, including permanent injunctions, against various Russian websites. The audiovisual industry along with the other entertainment industries have obtained permanent siteblocking

orders and search engine de-listing for almost 2,000 websites, corresponding with more than 5,000 domains. More specifically, the music industry reports that 1,165 music-related sites have been blocked since the new laws were enacted through 2018 (including 937 in 2018). The video game industry identified over 95 video game-oriented piracy websites blocked in 2018, and 31 sites engaged in the infringement of video games blocked, to date, in 2019. In 2019, journal publishers obtained a permanent injunction against *Libgen.org* (the "Library Genesis Project"), while a preliminary blocking order has also issued against the primary Sci-Hub site.

However, even the most effective takedown procedures and processes to disable access to websites – and even when directed at proper targets – can only slow piratical activities. These actions have little lasting deterrent effect without civil, and especially criminal, prosecutions directed at commercial site operators and owners. IIPA continues to recommend two steps that would improve online enforcement: first, the Government of Russia should target illegal sites and streaming services that operate in Russia, even if the users are abroad. Second, enforcement authorities should target the large commercial site operators and owners with prosecutions. Instead, the copyright industries continue to report that civil and criminal enforcement overall is down from what it was a decade ago, and that government enforcement is skewed to focus on physical piracy, not online piracy.

Examples of the types of large-scale online piracy problems that persist are clearly evident. In April 2019, the U.S. Government placed several Russian online sites on its Notorious Markets List (the 2018 report was released by USTR on April 25, 2019). USTR retained *rapidgator.net* and *rutracker.org* on the 2018 list – both have been on the Notorious Markets Lists since 2012; and, it added *seasonvar.ru* to the list in April 2019.¹ As USTR noted, the cyberlocker "Rapidgator collects revenue through its premium membership and subscription plans and employs rewards and affiliate schemes to compensate users based on downloads and sales of new accounts." The book publishing, motion picture and recorded music industries all cited *rapidgator.net* in their 2017 and 2018 Notorious Markets filings, and some also cited *rutracker.org* (formerly *torrents.ru*), as well. *Rutracker.org* is a BitTorrent portal that first launched in 2010 in response to the takedown of *torrent.ru* by the Russian enforcement authorities; it has an estimated 14 million registered users and is one of the world's most visited websites (as noted by USTR). It has also been subject to blocking orders by the Moscow City Court (a permanent injunction). After the court order, it moved its operations to several mirror sites. It is just one of a number of major BitTorrent indexing sites that contain links to a wide variety of infringing copyrighted material, especially motion pictures and television programs. *Seasonvar.ru*, reportedly hosted in Russia, and now also on the Notorious Markets List, is according to USTR, "one of the world's most popular infringing streaming websites" with more than 12,000 different TV series available without authorization.

The recording industry notes that there are many stream-ripping services, believed to be operating from Russia, as well as paid download sites, that are causing significant harm to the music industry. In addition, pervasive online piracy in Russia is threatening the growth of legitimate digital content services. This is unfortunate because the recorded music market in Russia grew considerably during 2018, fueled by a substantial jump in subscription audio streaming revenue. Paid streaming services such as Yandex Music and vKontakte's Boom gained rapidly in popularity during 2018, with vKontakte reporting two million paying subscribers at the end of 2018. However, this growth is being jeopardized by the continued ubiquitous nature of piracy and unfair competition by infringing music sites vis-à-vis licensed music services. For a legitimate and sustainable digital music market to emerge in Russia, it is critical that Russian authorities prioritize content protection and combatting piracy.

Book and journal publishers remain very concerned by the prevalence of online piracy in Russia (consisting of pirated copies of books and scientific, technical and medical (STM) journal articles),

¹See, https://ustr.gov/sites/default/files/2018_Notorious_Markets_List.pdf.

particularly on hosted-content websites that are operated by Russian residents. The most egregious example is the search engine/locker site *Sci-Hub.io* (formerly *Sci-Hub.org*) and the group of sites known as the "Library Genesis Project" (*libgen.org*) which now makes available for free over 62 million copyright-protected journal articles (more than 85% of articles published in toll access journals) and over 6 million books.² These sites are on the 2018 Notorious Markets List. To further its infringing activities, *Sci-Hub* gains unauthorized access to university systems and publisher databases through compromised user credentials, and obtains copies of copyrighted journal articles, which it then hosts on its own server network, as well as cross-posting it to *Libgen.io*. The *Libgen* site encourages the creation of mirror sites of all of its content, and several such sites exist. *Sci-hub.org*, the Library Genesis Project (*Libgen*), and its operators were sued in the Southern District of New York in 2015 by an Association of American Publishers (AAP) member company for copyright infringement (for the unauthorized reproduction and distribution of journal articles), and violations of the Computer Fraud and Abuse Act (for *Sci-Hub*'s intrusions into publisher databases). Although the U.S. court granted the publisher a preliminary injunction in 2015, the site quickly resurfaced under the *sci-hub.io* domain.

In 2017, the U.S. court granted a permanent injunction, and awarded the publisher \$15 million in damages for the 100 sample works included in the suit. Also in November 2017, following a complaint filed in June 2017 by another American journal publisher, a district court in Virginia issued a second default judgment against *Sci-Hub* (then at *Sci-Hub.io*) of \$4.8 million for the 32 sample works included in that suit. The court enjoined *Sci-Hub* and "those in active concert or participation with them" from infringing the publisher's copyright, and also ruled that "any person or entity in privity with *Sci-Hub* and with notice of the injunction, including Internet search engines, web hosting and Internet service providers, domain name registrars, and domain name registries, cease facilitating access to any or all domain names and websites through which *Sci-Hub* engages in unlawful access to, use, reproduction, and distribution" of the publisher's trademarks or copyrighted works. In October 2018, publishers successfully sought an injunction to block the sites' primary domain in Russia. A permanent block has issued against *Libgen*, while further proceedings are underway to seek a permanent injunction against the primary site's continued operation in Russia.

In short, much more effective enforcement is needed against online piracy in Russia, particularly the long-identified pirate sites (such as those listed in the Notorious Markets proceedings), as well as the myriad other infringing websites. Proper enforcement actions would include steps to keep infringing sites down and taking criminal enforcement actions against the owners and operators of these sites, which are causing significant economic harm to rights holders.

Collective Administration

Fixing the long-standing problems of improper collective administration for music services in Russia is another unfulfilled obligation of the WTO TRIPS Agreement. Existing regulations and state accreditations have institutionalized a system that is not transparent and lacks both good governance and accountability for authors, record labels and performers – who have no other option except the state collective management organizations.

The WTO TRIPS Agreement obligation is clear on this point. During WTO accession (in the Working Party Report, paragraph 1218), Russia assured its trading partners it would "review its system of collective management of rights in order to eliminate non-contractual management of rights within five years after Part IV of the Civil Code entered into effect," to bring the management societies in line with international standards on governance, transparency and accountability. That commitment was due in 2013.

²"Sci-Hub provides access to nearly all scholarly literature." <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5832410/>.

Instead, the 2017 legislative reforms (in force, May 2018) set any progress backwards to phase out non-contractual license management schemes – now six years after Russia was obligated to fix this problem. There were similar obligations in the 2006 U.S.-Russia IPR Agreement to correct this problem. To develop properly functioning music broadcasting and public performance payment systems, the Government of Russia must fulfill its WTO Working Party Report and U.S.-Russia IPR Agreement obligations. This would entail the proper state accreditation of collecting societies in a manner that ensures that rights holders are able to control and manage their own societies, so they are fairly represented and there are no conflicts of interest in the governance structures. Fair representation in these societies includes direct representation of rights holders on the board in a manner that is proportionate to relevant market share and that reflects commercial realities.

The 2017 legislation falls far short of either providing transparency to rights holders or good governance consistent with international norms and best practices for collecting societies. The 2017 law amended the Civil Code and the Administrative Code to revise the make-up and activities of collective rights management organizations (RMOs). One obvious failure of the new law regarding transparency is that it neither allows rights holders to see how much money their RMOs collect, nor how much they distribute to their members.

The new law creates “supervisory boards” for each of the various authors’ collection societies (the Russian Authors Society, the Russian Union of Right Holders and the All-Russian Intellectual Property Organization) consisting of members of each RMO, but also including government representatives and “user” group representatives. This does not allow rights holders to be involved in the selection and management of the organizations that purport to manage their rights. Proper management would allow for a supervisory board of rights holders to oversee the internal management of the RMO, and would include international rights holders with local representatives on the board. Instead, partial control by the Government of Russia deprives rights holders of their ability to control the licensing and collection of monies for their works and recordings, and is resulting in less, not more, money flowing to authors and producers (and certainly less money than should be collected for a market the size of Russia). Lastly, the so-called fiscal control improvements, including regular audit reports, will not improve accountability, because the audit obligations are only to the government (for taxation purposes), not to those rights holders.

There are many models for proper governance of RMOs, including WIPO best practices, international rights holder group best practices, as well as U.S. and European Union existing practices. It is hoped that to both meet its WTO TRIPS obligations, and to properly implement collective administration in the music sector, the Government of Russia will re-visit the 2017 law and follow international practices for proper governance and transparency of collecting societies.

Camcording of Motion Pictures

Russia remains the home to some of the world’s most prolific criminal release groups of motion pictures. Pirates obtain their source materials for infringing copies by camcording films at local theaters, and then upload these copies onto the Internet as well as selling illegal hard copies. The mid-year 2019 statistics show that the scale of the problem of camcording in Russia remains on par with 2018 statistics. In 2017 and 2018, over 108 MPA-company films were camcorded in Russia (and, an additional 74 audio-only recordings were sourced from Russia). The total number of sourced audiovisual camcord copies from within Russia decreased slightly in 2018 from 2017 – to 48, down from 60. In addition, in 2018, there were 34 audio-only recordings source from Russia.

Most of the Russian camcords continue to come from Moscow, Kazan, Novosibirsk, Rostov-On-Don, Ekaterinburg, and Naberezhnye Chelny. The illicit camcords that are sourced from Russia are only

of fair quality, but they remain in high demand by international criminal syndicates. Copies of major film titles often appear on the Internet (and then in pirate hard copies sold online or in markets) within a few days of theatrical release damaging revenues worldwide and across the economic lifecycle of the film. As was reported in the IIPA Special 301 report (in February 2019), in 2018, the Russian-Anti Piracy Organization (RAPO) assisted with five interdictions by security personnel (trained by RAPO). Two criminal cases were initiated against the camcoders last year, and it is hoped that a conviction in either of these cases could serve as a precedent.

To fulfil its WTO (and bilateral) obligations to correct this problem, the Government of Russia should – as IIPA has long recommended – amend Article 146 of the Criminal Code to more effectively address illicit camcording in theaters. A 2013 proposed amendment to Article 146 was never adopted. In addition, IIPA recommends that the Government of Russia should properly resource enforcement actions, and undertake more effective enforcement against illegal camcording of motion pictures.

Other Enforcement Issues

The harm caused by commercial-scale piracy in Russia cannot be adequately addressed with civil measures alone; rather, enhanced administrative actions (and penalties) and criminal remedies are needed. Civil measures can be a useful tool for some industries (as it has been in the court actions against some websites), but it is not a deterrent against large syndicates or commercial-scale piracy.

Criminal enforcement – especially against large-scale commercial enterprises – is effective only if enforcement actions are well coordinated, and focused on applying *ex officio* criminal actions against the owners and operators of these enterprises. Focusing criminal enforcement against commercial-scale piracy, and directed at owners and operators of the largest enterprises, would allow legitimate markets to develop for film, music, entertainment software, and published books and journals, for the benefit of local and foreign creators and producers, and Russian consumers. It would also help support smaller independent rights holders who do not have the resources and therefore must rely on the government for effective enforcement.

The agencies that can commence criminal cases should coordinate their efforts with the police. These agencies include: the Investigative Committee of Russia, the Investigative Department of the Ministry of Internal Affairs (MVD), the Federal Security Service of the Russian Federation (FSB), and Customs. Because the General Prosecutor's Office has supervisory authority over investigations and prosecutions, IIPA recommends that this Office should work with the Investigative Committee of Russia and the Investigative Department of MVD to develop an updated and detailed methodology for investigations of digital copyright infringements. This would help to increase the quality, effectiveness and consistency of IPR enforcement activities. Several years ago, work on a draft methodology was suspended.

Some of the fundamental enforcement shortcomings include: a lack of political will, scarce resources, and an absence of institutional incentives for enforcement agencies to act against copyright infringement crimes occurring on the Internet, whether through administrative or criminal means. IIPA continues to recommend that there should be a dedicated digital IPR enforcement unit within the Government of Russia to focus on this problem. For example, combating copyright violations on the Internet, such as the dissemination of music through illegal pay-per-download sites and illegal P2P or streaming services, does not clearly fall within the current jurisdiction of the Computer Crimes Department (Department K) within the MVD, even though they have occasionally taken action in the past. At present, there is no interest, and no Department K staff, to undertake IPR enforcement (only the Economic Crime Police are now doing this). Department K's authority and responsibility to act in all cases of online infringement should be clarified and strengthened. In addition, Department K should be

properly staffed, equipped and resourced, and other such units within the MVD should be formed to deal exclusively with IPR Internet cases and to train officers on how to combat these copyright crimes, including the maintenance of evidence. Enforcement authority should clarify that actions can be brought under the Code of Administrative Offenses against commercial actors involved in the massive distribution of infringing material, even where there is no direct fee charged by the enterprise.

Changes to criminal procedure that 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. In recent years, police and prosecutors have had difficulty applying the criminal law thresholds to Internet crimes (and especially have had difficulty proving intent, or in identifying the individuals responsible for criminal activities). As a result, few such cases are ever brought and even fewer tried to a conclusion. The problem has been an inability to adopt a unified formulation by the police and prosecutors on how to apply the thresholds for online crimes. The status quo only further corroborates the lack of political will or incentives by government agencies to act against large-scale copyright infringers. In addition to criminal enforcement, the relevant administrative agencies (e.g., the Federal Anti-Monopoly Service (FAS)) should target large illegal distribution enterprises, such as the large-scale unlicensed services responsible for most of the illegal distribution of music and film in Russia.

Other legal reforms are needed as well. One simple step would be to expand the established takedown procedures to cover mobile apps, now the most popular means of infringement. Another is more substantial: as noted, the current Civil Code does not provide clear liability rules for online websites and services that induce or encourage infringement (and the applicability of safe harbors for such services). Even after the recent amendments, the law does not clearly define ISPs and the various services they provide, nor does it link liability and safe harbors in a manner that will encourage cooperation with rights holders to effectively deal with Internet piracy – in civil and criminal law; lastly, it does not clearly define secondary liability. In fact, the only pending proposals regarding ISP liability and safe harbors would extend the safe harbors to search engines (within Article 1253 of the Civil Code). 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 (or that directly infringe). Further, it is critical that Russia amend its regime to allow for injunctive relief that is quick and effective and applicable to all works, especially for Internet matters.

For the past several years, the Government of Russia has stopped providing annual reports or enforcement statistics, so it is difficult to accurately gauge enforcement activity as a whole. However, the industries reported that last year, as in recent years, enforcement overall, especially criminal enforcement, seems to have declined, and as noted, focused too much on physical, and not digital piracy. For example, the video game industry reports there were only four criminal convictions for video game piracy under Article 146 of the Criminal Code in all of 2018. To be effective, IPR enforcement in Russia needs a clear nationwide governmental directive on enforcement with a particular focus on online piracy. Without coordination and a high-level directive, criminal and administrative enforcement practices have varied considerably from region to region within Russia, and have had little deterrent effect overall.

Market Access Issues

In addition to the issues noted on copyright law and enforcement, there are several significant market access issues in Russia impacting the motion picture and television industries. One of these laws, currently in place, is a violation of the WTO Agreement; another is a proposal which, if adopted, would also violate the WTO Agreement.

In 2015, a law went into force banning advertisements on pay cable and satellite (i.e., scrambled signal) channels. The law does not affect state-owned (Russian) television channels because they do not rely on advertising revenue, and exempts terrestrial broadcasters (who are heavily dependent on ad revenue). As a result of this disparity in its application, the law is significantly impacting the market for cable and on-demand services, including those services operated by foreign companies.

In 2017, a Mass Media Law amendment was adopted (Federal Law No. 87, in force July 1, 2017) which regulates and licenses online film websites, including streaming platforms, and which limits foreign (non-Russian) ownership to 20% of such sites. The law applies to operators of all online audiovisual services, if their Russian audiences are below 50% of their total users (and, if Russian users are below 100,000/day). The calculation of this usage is very unclear, with severe consequences for violations, including barring a foreign entity or individual from owning or participating in these businesses entirely. Moreover, the law imposes burdensome regulations on the operators of legal sites. When it was proposed, the law drew opposition from both Russian and foreign film distributors (as a violation of international treaties) and website owners of legitimate content, fearing that, if adopted, it would become a tool to limit legal websites while alternatively resulting in more, not fewer, piratical film sites. Although when drafted it was rumored to be aimed at preventing the expansion of foreign businesses into the local market, it is now clear the law was part of an overall scheme to control all media sectors.

Two other discriminatory laws are problematic. First, there are customs duties on the royalty value of some imported audiovisual materials (which includes video games), rather than solely on the value of the physical carrier medium. In practice, however, digital distribution has mitigated its impact, and there are few reported disputes with the customs authorities on this matter in the past few years. The second law is the Value Added Tax (VAT), which remains very problematic and has been imposed in a discriminatory manner: only Russian-made films are given national certifications that exempt them from the VAT. This is a WTO violation because it denies national treatment for taxes on Russian versus identical foreign products.

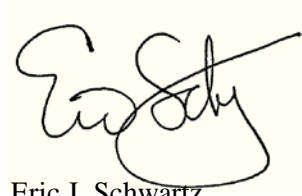
There is one other market access concern regarding a proposed law that, if adopted, would also be a WTO national treatment violation. In October 2018, the Ministry of Culture proposed a measure to limit the percentage of screens that can be taken by any single foreign film (earlier proposals limited the number of foreign film screenings in multiplexes or monoplexes to 35% of the total number of screenings in those theaters). If enacted, these proposals would harm the distribution and exhibition of foreign films in Russia. Another proposal would place a 3% tax on theatrical box office revenue. These proposals have not and should not be adopted.

Conclusion

To summarize, Russia's WTO TRIPS Agreement and Working Party Report commitments have not been fully implemented, especially with regard to adequate and effective enforcement. The substantive copyright and related rights obligations of the TRIPS Agreement found in Articles 9 through 14, have not been the focus of concern for the copyright industries, with the exception of overly broad exceptions in the copyright law – Civil Code, Part IV (detailed in past IIPA Special 301 filings). Rather, the primary concern for the copyright industries has been the failure of the Russian IPR legal regime to fully comply with the enforcement provisions in the TRIPS Agreement's Articles 41 through 61, to provide "effective action" and "deterrent" remedies, and especially against "wilful...copyright piracy on a commercial scale," including against digital piracy and camcording. In addition, Russia has failed to meet its obligations to impose a proper collective administration system for music licensing and distribution.

Thank you for allowing IIPA to provide these comments, and for your consideration and possible incorporation of these comments into the U.S. government's annual WTO compliance report regarding Russia, to be completed in December 2019.

Sincerely,

A handwritten signature in black ink on a light yellow background. The signature is cursive and appears to read "Eric J. Schwartz".

Eric J. Schwartz
Counsel, International Intellectual Property Alliance

Attachment

Appendix

2019 IIPA Special 301 Country Report on Russia

RUSSIAN FEDERATION

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

2019 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 2019.¹

Executive Summary: The number one priority for the copyright industries in the Russian market is to improve the effectiveness of enforcement against online piracy—especially for hosting sites and streaming services. The Government of Russia adopted new civil procedures in recent years to enhance website compliance with takedown notices from rights holders, and, to disable access to infringing sites. These procedures, however, have been directed only against the infringing activity of users within Russia, and are not being used against Russian sites and services catering to users outside the country for whom infringing material is easily accessible. This has resulted in a substantial and persistent international copyright piracy problem.

The legal reforms adopted in 2013, 2014 and 2017 improved civil procedures and streamlined processes for websites to comply with rights holders' takedown notices, and allowed Russian courts (in particular, the Moscow City Court), working in cooperation with a key government agency, to disable access to infringing sites. These court orders can now be extended—without a reapplication to a court—to clone, proxy and mirror websites containing infringing content. Additionally, online search services are required to exclude infringing websites (identified in the court orders) from search results. Overall, these reforms have blocked or slowed access to some significant infringing sites and services.

However, even the most effective takedown procedures and processes to disable access to websites—and even when directed at proper targets—can only slow piratical activities. These actions have little lasting deterrent effect without civil, and especially criminal, prosecutions directed at commercial site operators and owners. So, two steps are needed: first, the Government of Russia should target illegal sites and streaming services that operate in Russia, even if the users are abroad. Second, enforcement authorities should target the large commercial site operators and owners with prosecutions. Instead, the copyright industries continue to report that civil and criminal enforcement overall is down from what it was a decade ago, and that government enforcement is skewed to focus on physical piracy, not online piracy. Another recommended improvement would be to expand the established takedown procedures to cover mobile apps, now the most popular means of infringement. An additional key legal reform that could be effective against online infringing websites and services would be a clarification of the legal liability of Internet Service Providers (ISPs), including that the safe harbors only apply to technical, automatic and passive activities.

There are two other priorities for the copyright industries in Russia. One is to address long-standing problems concerning collective management of music rights in Russia that have resulted in revenues being a fraction of what they should be for a market the size of Russia. The state accredited Russian collecting societies are not operating with transparency or good governance rules consistent with international norms. The other priority is to address the long-standing problem of camcording motion pictures with many feature films being illegally copied in theaters and migrating online. Properly addressing the camcording problem requires changes in the Russian legal framework, and dedicating sufficient resources and government willpower to engage in effective enforcement.

Russia completed its accession to the World Trade Organization over seven years ago. As a part of its accession, Russia agreed to a detailed IPR Action Plan with the U.S. Government (U.S.-Russia IPR Action Plan).

¹For more details on Russia's Special 301 history, see previous years' reports at <https://iipa.org/reports/reports-by-country/>. For the history of Russia's Special 301 placement, see <https://iipa.org/files/uploads/2019/02/2019SPEC301HISTORICALCHART.pdf>.



However, neither the WTO obligations outlined in the U.S.-Russia IPR Action Plan, nor in the 2006 U.S.-Russia IPR Agreement, have been fully and properly implemented by the Government of Russia. These obligations, meant to improve the Russian marketplace for digital copyright materials, included specific provisions directed at the problems of online enforcement and collective administration, noted above.

PRIORITY ACTIONS REQUESTED IN 2019

IIPA recommends the following priority enforcement actions and legal reforms to the Government of Russia for 2019:

- Increase the number and effectiveness of criminal IPR cases focused against digital piracy, including a focus on deterrent criminal actions against organized criminal syndicates. Also, criminal actions should target those involved in piracy retail chains that continue to sell pirated entertainment software, music and movies.
- Increase the number of administrative actions (in addition to the criminal actions, noted above) against Internet piracy—including streaming services, pay-per-download websites, video game hacking or cheating sites, cyberlockers, BitTorrent sites, private servers bypassing official video game servers, and other commercial and non-commercial enterprises that provide services with the clear intent to promote or induce infringement, regardless of whether the servers or users are located in Russia.
- Implement regulations on the operation of collecting societies that confirm that rights holders have the legal and practical ability to determine how to exercise their rights, including whether to choose to entrust licensing to any collective, and if so, to choose that entity and to delineate the rights for such collections.
- Amend the Civil Code, Part IV, to:
 - clarify 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, as well as clarify the definition of the activities that qualify intermediaries to benefit from safe harbors, to prevent knowing facilitators from enjoying these safe harbor benefits; and
 - provide additional legal norms that create incentives for ISPs to cooperate with rights holders in fighting infringement taking place over their networks. Article 1253.1 of the Civil Code provides that intermediary services facilitating the widespread dissemination of unauthorized content cannot benefit from the liability privileges, if they know or should have known of an infringement (so, Article 1253.1 provides only very general principles of ISP liability).
- Amend the Civil Code in Article 1299, and the Presidium Decision (2009), to additionally provide civil liability for commercial trafficking of circumvention devices. Current law limits liability to rare instances where the devices are advertised (solely) as circumvention devices.
- Amend the Criminal Code to establish criminal liability: (i) for the unauthorized camcording of motion pictures; (ii) against principals in legal entities, including for IPR crimes (the Civil Code limits civil liability to the legal entities, not the principals of those entities); and (iii) for the importation of and commercial trafficking in circumvention devices.
- Amend the Administrative Code by eliminating the for-profit requirement in Article 7.12 (Administrative Offences), and raise administrative penalties to deterrent levels by implementing higher fixed fines for violations by legal entities and individuals.

COPYRIGHT PIRACY AND ENFORCEMENT IN RUSSIA

Internet Piracy: Internet access in Russia has grown exponentially in the past decade, but the laws and enforcement authorities are struggling to keep pace.

Despite the laudable legal reforms of the past few years, Russia remains home to many services supporting large-scale infringing websites, including web-based (and peer-to-peer (P2P)) downloading and streaming sites, linking sites, and cyberlockers, that offer access to pirated music, film, video games, books and journal articles. Many

of these sites cater to English-speaking and other non-Russian users, harming markets outside of Russia. As a result of the new enforcement measures and court-ordered injunctions being directed at sites within the Russian market, some BitTorrent and other pirate sites have moved their sites to foreign hosting locations.

While the new laws have helped, most ISPs and website owners never comply with takedown requests, absent court orders, instead merely forwarding notices to users without taking down material, if they respond at all. Often the Russian websites insist on proof of copyright ownership before even considering compliance with takedown requests. There are a few exceptions, with some industries reporting that a few sites do comply with takedown notices. In 2018, a Memorandum of Understanding (MOU) was signed by various rights holders and Internet platforms, including *Yandex* and the *Mail.ru* Group, facilitated by the Government of Russia (RosKomNadzor). The first indications are that the platforms are complying with rights holder requests and disabling access to infringing links in accordance with the MOU. The MOU expires in September 2019 (and is intended to be a precursor to legislative reform); its compliance will continue to be monitored by the copyright industries. Even with clear evidence of infringement, all of the copyright industries report there has been little cooperation with advertising agencies and payment processors who financially support infringing sites.

In January 2018, the U.S. Government placed several Russian online sites on its Notorious Markets List (the last Notorious Markets Report issued by the U.S. Government). In that Report, USTR retained *rapidgator* and *rutracker* on its list of Notorious Markets—both have been on the Notorious Markets annual lists since 2012.² As USTR noted, the cyberlocker “Rapidgator collects revenue through its premium membership and subscription plans and employs rewards and affiliate schemes to compensate users based on downloads and sales of new accounts” and the operators of the site net “millions of dollars annually.” Many of the copyright industries have cited *rapidgator.net* in their recent (including October 2018) Notorious Market filings, and many have cited *rutracker.org* (formerly *torrents.ru*) as well. *Rutracker.org* is a BitTorrent portal that first launched in 2010 in response to the takedown of *torrent.ru* by the Russian enforcement authorities; it has over 14 million registered users, 1.5 million active torrents, and is one of the world’s most visited websites. It has also been subject to blocking orders (a permanent injunction) by the Moscow City Court. After the court order, it moved its operations to several mirror sites. This is just one of the major BitTorrent indexing sites that contain links to a wide variety of infringing copyrighted material, especially motion pictures, television programs and music. The world’s most popular infringing streaming website of film and television programs (with over 12,000 TV series available) is *seasonvar.ru*, based in St. Petersburg, and which had over 332 million visitors between October and December 2018.

The recording industry notes many stream-ripping services believed to be operating from Russia including *Flvto.biz*, *2Conv.com* and *Flv2mp3.by* (all three offer essentially the same material operating from different domains). The sites provide downloads of converted YouTube videos to users as MP3 audio files (from servers in Germany). In Italy, in November 2018, AGCOM (the telecom regulator in Italy) ordered ISPs to block access to *Flvto* and *2Conv*; in December 2018, a Danish Court also ordered ISPs there to block access to both sites.

Another problematic site is the Russian-hosted *firestorm-servers.com*. Rights holders have observed 6,400 active users on this site playing *World of Warcraft* without having to pay the monthly subscription fee established by the owners of the online video game. There are also P2P sites hosted in Russia including *videocatalog.ru* and *torrent-games.net*, which are popular not only in Russia, but in China and many other countries. Additionally, Russia is a haven for the production of cloning software and the hacking of entertainment software programs.

For the sixth consecutive year, Russia was first in the world in the number of connections by peers participating in the unauthorized file sharing of select video game titles on public P2P networks. Russia is first in the world when it comes to the unauthorized file sharing of video games on PCs with nearly six times as many illicit downloads to PCs in Russia compared to the second highest country, Brazil. In 2018, users with Russian IP addresses accounted for approximately 40% of the global volume of detected infringements occurring on public P2P networks.

²See, <https://ustr.gov/sites/default/files/files/Press/Reports/2017%20Notorious%20Markets%20List%201.11.18.pdf>.

The recording industry reports that paid download sites remain a source of piracy in Russia (in addition to P2P services, linking sites and cyberlockers). Some sites offer unauthorized on-demand streaming as well as downloads (and include pre-release music). Two such examples are: *newalbumreleases.net* (a popular linking site) which has a large library of newly-released popular music available, and *mp3va.com* which has the look and feel of a legal music site like Amazon or iTunes, but sells downloads of single tracks for less than 15 cents (and albums for \$1.50 or less). Some of the other unlicensed pay-per-download sites include: *mp3panda*, *mp3fiesta* (hosted in Russia, but operated from Cyprus) and *mp3eagle.com* (many of this site's users are from the U.S.). In the past few years, access to illegal music via apps in Russia has grown exponentially, and major sources of these apps do not respond quickly (e.g., Apple), or, in some cases, at all, to takedown notices. The draft legislation that would block mobile apps (as the current law does for websites) would significantly improve this particular problem. According to a recent global music report (IFPI Global Music Report 2018), recording industry annual revenue in Russia amounted to just 59 cents per capita; in comparison, revenue in the U.S. was \$18.11 per capita.

In 2016, *vKontakte* (*vk.com*), the most popular online social network in Russia, agreed to music licenses with several major record companies. In spite of these licensing agreements, the U.S. Government retained *vKontakte* on the Notorious Markets List in 2016 and 2017 (the last issued Notorious Markets Report in January 2018). In last year's Report, the U.S. Government noted that despite "positive signals," *vKontakte* reportedly continues to be a "hub of infringing activity" noting, in particular "thousands of infringing motion picture files on the site." *vKontakte*, now owned by *Mail.ru*, has a functionality specifically designed to enable its members to upload files, which includes hundreds of thousands of unlicensed copyrighted works, including film materials. It is available in many languages, including English, and has a dedicated content search engine that enables searches and instant streaming of content (and, for years, it permitted third party "apps" to enable non-members to search, stream and download the content available on the site). Starting in 2016, *vKontakte* has limited access to such third party apps, making it more difficult for users to download content directly, and also has experimented with content recognition technologies. *vKontakte* also blocks infringing sites from accessing videos stored on *vKontakte*, but third party pirate sites can still stream illegal content from another service operated by the same parent company. According to the motion picture industry, *vKontakte* is still serving as a major infringement hub for illegal film materials. One encouraging sign has been *Mail.ru's* overtures to some rights holders to address piracy on *vKontakte* and other *Mail.ru*-owned services (and as noted, signed an MOU with various rights holders in 2018, regarding takedown and stay down obligations). The publishing industry (particularly trade book publishing), is similarly affected by ebook piracy on the site. Although the site is responsive to notifications of infringement, it remains a concern given the ease with which the site's users can upload and share pirated ebooks and audiobooks. The video game industry reported that in 2018 there was a continued decline in the number of groups distributing game items on *vKontakte*, and that they have been generally responsive to takedown notices (even as there has been an increase overall in the number of other sites offering in-game items).

Russia's second largest social network site, *odnoklassniki.ru* (with 43 million visits per day, owned by *Mail.ru*) now operates a licensed music service. It also includes thousands of unauthorized audiovisual and print materials. This site and *vKontakte* alone host more than half of the unauthorized audiovisual material in Russia, so much more needs to be done to engage in effective enforcement against these sites. For example, *vKontakte* continues to be the preferred platform for the unauthorized distribution of pirated educational course books, and CD and DVD content by certain educational establishments to its students, as well as between and among users of the site. There are many other Russian-originating websites that offer movies for downloading and/or for streaming. For example, *movie4k.tv* is a popular streaming linking site with thousands of American movies that has been identified by the motion picture industry as a notorious market.

Book and journal publishers remain very concerned by the prevalence of online piracy in Russia (consisting of pirated copies of books and scientific, technical and medical (STM) journal articles), particularly on hosted-content websites that are operated by Russian residents. The most egregious example is the search engine/locker site *Sci-Hub* (formerly *Sci-Hub.org*) and the group of sites known as the "Library Genesis Project" (*libgen.org*) which now makes available for free over 62 million copyright-protected journal articles (more than 90% of existing publisher content) and over 6 million books. To further its infringing activities, *Sci-Hub* gains unauthorized access to university

systems and publisher databases through compromised user credentials, and obtains copies of copyrighted journal articles, which it then hosts on its own server network, as well as cross-posting it to *Libgen.io*. The *Libgen* site encourages the creation of mirror sites of all of its content, and several such sites exist. *Sci-hub.org*, the Library Genesis Project (*Libgen*), and its operators were sued in the Southern District of New York in 2015 by an Association of American Publishers (AAP) member company for copyright infringement (for the unauthorized reproduction and distribution of journal articles), and violations of the Computer Fraud and Abuse Act (for *Sci-Hub*'s intrusions into publisher databases). Although the U.S. court granted the publisher a preliminary injunction in 2015, the site quickly resurfaced under the *sci-hub.io* domain.

In 2017, the U.S. court granted a permanent injunction, and awarded the publisher \$15 million in damages for the 100 sample works included in the suit. Also in November 2017, following a complaint filed in June 2017 by another American publisher, a district court in Virginia issued a second default judgment against *Sci-Hub* (then at *Sci-Hub.io*) of \$4.8 million for the 32 sample works included in that suit. The court enjoined *Sci-Hub* and "those in active concert or participation with them" from infringing the publisher's copyright, and also ruled that "any person or entity in privity with *Sci-Hub* and with notice of the injunction, including Internet search engines, web hosting and Internet service providers, domain name registrars, and domain name registries, cease facilitating access to any or all domain names and websites through which *Sci-Hub* engages in unlawful access to, use, reproduction, and distribution" of the publisher's trademarks or copyrighted works. In October 2018, publishers successfully sought an injunction to block the sites' primary domain in Russia. Further proceedings are underway to seek a permanent injunction against the site's continued operation in Russia.

In general, publishers report online enforcement is hampered by low compliance rates in response to rights holder requests to takedown links to infringing content, with many sites ignoring requests altogether. P2P piracy providing free unauthorized access to e-books continues to be an issue as well.

The independent segment of the film and television industry (IFTA) reports that online and physical piracy remain a significant export constraint for independent producers and distributors, the majority of which are small to medium-sized businesses and cannot engage in lengthy and expensive civil enforcement. Independent producers partner exclusively with authorized local distributors to finance and distribute films and television programming. As a result of the piracy, legitimate distributors cannot commit to distribution agreements, or alternatively, offer drastically reduced license fees which are inadequate to support the financing of independent productions. Revenue from legitimate distribution services, which are licensed country-by-country, is critical to financing the development of new creative works worldwide. Since Internet piracy in one territory affects other markets instantly, this type of infringement not only undercuts anticipated revenue from the distribution of a particular asset, it also harms the ability of independent producers to secure financing for future productions. The independent production sector cannot easily shift to new business practices that might otherwise limit piracy, such as worldwide same day release (referred to as "day-and-date" releases), since national distributors release films on their own schedules in synch with local release patterns that include compatibility with local holidays as well as investment in local marketing and advertising.

Civil Enforcement Against Online Piracy: As noted, civil judicial remedies have significantly improved in the recent years with the 2013, 2014 and 2017 reforms (as have administrative remedies). RosKomNadzor, the Federal Service for Communications, is the agency responsible for enforcement of these laws, and they have been effective and cooperative with rights holders in implementing the new laws, in coordination with the Moscow City Court.

The 2013 legal reforms included two key civil law changes and procedures directed at online piracy. The first change amended the Civil Code, Part IV—in theory, 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. Unfortunately, the changes did not provide clarity regarding the liability of online infringing websites and services, so a clarification of the legal liability of ISPs is still necessary (and that safe harbors apply only to activities that are merely technical, automatic or passive). The second 2013 reform included a set of amendments to the Civil Procedure Code (and corresponding amendments to the Arbitration Procedure Code and the Federal Law on

Information and Information Technologies (2006)) authorizing judicial injunctions (but only injunctions) after notice and takedown to block access to infringing materials or websites. In 2014, amendments expanded the scope of subject matter covered by the 2013 changes (Federal Law No. 364, in force May 2015), and expanded the existing procedures for court ordered site-blocking against repeat infringers.

The 2017 reform (Federal Law No. 157, in force October 1, 2017) addressed the problems of clone, proxy and mirror sites by broadening the Russia court ordered (civil) injunctions to cover these sites as well as the original infringing site. Under the 2017 law, with an existing court order against an infringing website, a rights holder can submit a request to the Ministry of Digital Development, Communications and Mass Media (Ministry of DDCMM) identifying a mirror (or clone or proxy) site, and, after review by the ministry, RosKomNadzor issues instructions to block these sites; an administrative procedure is then used to block mirror sites. No special request to a court is needed from a rights owner; rather, a list of qualified blocked websites is provided by rights holders via an online mechanism to the Ministry of DDCMM although it is limited to 50 or 60 site blocks per day under regulations it adopted in October 2017. The ministry's decisions—which must be made within 24 hours of receipt by a rights holder—can be appealed in the courts. The 2017 legislation also required that search engines must remove links to infringing content on sites that have been subjected to an order from the courts or the Ministry of DDCMM. RosKomNadzor oversees compliance of both ISPs and search engines with this process. There are fines of up to 700,000 rubles (US\$10,350) for search engines that do not comply with de-indexing orders.

One other proposal (which has passed a first reading in the Duma), not yet adopted, would apply the same website blocking procedures to mobile apps. There are two other proposals (recommended by the Ministry of Culture): one to block anonymous pirate websites without applying to a court; the other would accelerate enforcement of site blocking orders (from three days to one day)—neither has yet been adopted. The Federal Tax Service (FTS) also has the authority to block the use of anonymizers and to create a list of banned resources to bypass blocked websites, but its jurisdiction is specifically limited to acting against online illegal gambling operations. The FTS can also request that RosKomNadzor block anonymizers, so there is in place effective authority to take action against online piracy if the Government of Russia chooses to apply it.

Separately, a law was introduced in the Duma in April 2017 to provide monetary penalties (up to 800,000 rubles; US\$11,840), for attempts to bypass website blocking orders under the law applicable to anonymizers and virtual private network (VPN) services. The VPN law went into force in November 2017; the other law providing penalties has not yet been adopted.

The result of all of these laws has been positive, with an ever-increasing number of injunctions, including permanent injunctions, against various Russian websites. The motion picture industry reports that more than 2,500 domains have been permanently blocked and de-indexed (corresponding to approximately 500 unique websites). The music industry reports that 1,165 music-related sites have been blocked to date, including 937 in 2018.

The video game industry alone identified over 95 video game-oriented piracy websites blocked in 2018. There are many examples of injunctions against major infringing sites, including those against *rutracker.org* and *rutor.org*. However, workarounds still exist, and Internet users have obtained access via mirror sites (and alternative DNS services) and VPNs, so sites such as *rutor.org*, *rutracker.org* and *nnm-club.me* retain millions of monthly users in spite of the laws. Although the 2017 legal reforms were intended to curtail this access, the court orders have struggled to keep up with the growing number of sites and services.

Even though some sites have seen dramatic decreases in traffic right after such orders (and even sites moving out of the country), many simply resurface in new guises and continue operations without the deterrence of a criminal prosecutions against the owners and operators of infringing sites and services. Still, one consequence of the recent legal reforms is that most of the copyright industries reported that civil enforcement on balance did improve in 2018, and some industries (such as the video game industry) are reporting that as a result, there has been growth in the legal marketplace.

In November 2018, rights holders (almost exclusively Russian), search engine operators and social networks signed a voluntary MOU requiring operators and networks to remove URLs to illegal content (i.e., audiovisual works), so that search results would not direct users to these sites. Currently, the MOU only applies to audiovisual works, and is effective until September 2019, but is expected to be replaced by legislation in 2019, and made applicable to all works, including books, music, and business and entertainment software (video games). If not replaced with legislation the MOU should, at the very least, be subject to independent court review to uphold the rule of law.

Criminal Enforcement Against Online Piracy: For the past several years, the Government of Russia has stopped providing annual reports or enforcement statistics, so it is difficult to accurately gauge enforcement activity as a whole. However, the industries have again reported in 2018, that enforcement overall, especially criminal enforcement, seems to have declined, and as noted, focused too much on physical, and not digital piracy. For example, the video game industry reports there were only four criminal convictions for video game piracy under Article 146 of the Criminal Code in all of 2018.

To be effective, IPR enforcement in Russia needs a clear nationwide governmental directive on enforcement with a particular focus on online piracy. Without coordination and a high-level directive, criminal and administrative enforcement practices have varied considerably from region to region within Russia, and have had little deterrent effect. Any coordinated nationwide campaign should focus on *ex officio* criminal actions targeting large-scale commercial enterprises, as well as on taking administrative actions and strengthening administrative penalties. This would allow legitimate markets to develop for film, music, entertainment software, and published books and journals, for the benefit of local and foreign creators and producers, and Russian consumers. It would also help support smaller independent rights holders who do not have the resources and therefore must rely on the government for effective enforcement.

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

Some of the fundamental enforcement shortcomings include: a lack of political will, scarce resources, and an absence of institutional incentives for enforcement agencies to act against copyright infringement crimes occurring on the Internet, whether through administrative or criminal means. IIPA continues to recommend that there should be a dedicated digital IPR enforcement unit within the Government of Russia to focus on this problem. For example, combating copyright violations on the Internet, such as the dissemination of music through illegal pay-per-download sites and illegal P2P or streaming services, does not clearly fall within the current jurisdiction of the Computer Crimes Department (Department K) within the MVD, even though they have occasionally taken action in the past. At present, there is no interest, and no Department K staff, to undertake IPR enforcement (only the Economic Crime Police are now doing this). Department K's authority and responsibility to act in all cases of online infringement should be clarified and strengthened. In addition, Department K should be properly staffed, equipped and resourced, and other such units within the MVD should be formed to deal exclusively with IPR Internet cases and to train officers on how to combat these copyright crimes, including the maintenance of evidence. It also should be clarified that actions can be brought under the Code of Administrative Offenses against commercial actors involved in the massive distribution of infringing material, even where there is no direct fee charged by the enterprise.

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. In recent years, police

and prosecutors have had difficulty applying the criminal law thresholds to Internet crimes (and especially have had difficulty proving intent, or in identifying the individuals responsible for criminal activities). As a result, few such cases are ever brought and even fewer tried to a conclusion. The problem has been an inability to adopt a unified formulation by the police and prosecutors on how to apply the thresholds for online crimes. An intensification of criminal investigations and criminal convictions against principals of organized commercial pirate syndicates is sorely needed. The status quo only further corroborates the lack of political will or incentives by government agencies to act against large-scale copyright infringers. In addition to criminal enforcement, the relevant administrative agencies (e.g., the Federal Anti-Monopoly Service (FAS)) should target large illegal distribution enterprises, such as the large-scale unlicensed services responsible for most of the illegal distribution of music and film in Russia.

Camcord Piracy: Russia remains the home to some of the world's most prolific criminal release groups of motion pictures. Pirates obtain their source materials for infringing copies by camcording films at local theaters, and then upload these copies onto the Internet as well as selling illegal hard copies. In the past two years, over 108 MPA-company films have been camcordered in Russia (and, an additional 74 audio-only recordings were sourced from Russia). The total number of sourced audiovisual camcord copies from within Russia decreased in 2018 to 48 (down from 60 in 2017); there were 34 audio-only recordings source from Russia. Most of the Russian camcords come from Moscow, Kazan, Novosibirsk, Rostov-On-Don, Ekaterinburg, and Naberezhnye Chelny. The illicit camcords that are sourced from Russia are only of fair quality, but they remain in high demand by international criminal syndicates. Copies of major film titles often appear on the Internet (and then in pirate hard copies sold online or in markets) within a few days of theatrical release damaging revenues worldwide and across the economic lifecycle of the film. In 2018, the Russian-Anti Piracy Organization (RAPO) assisted with five interdictions by security personnel (trained by RAPO). Two criminal cases were initiated against the camcoders, and a conviction in either of these cases could serve as a precedent. Importantly, the Government of Russia needs to amend Article 146 of the Criminal Code to more effectively address illicit camcording in theaters (a 2013 amendment was never adopted). The government should also properly resource and undertake more effective enforcement against illegal camcording of motion pictures.

Criminal Enforcement in General: Criminal enforcement in Russia remains a priority for the copyright industries to deter digital as well as hard copy piracy. Russia's laws are generally adequate for addressing hard copy piracy, although some gaps remain. As in years past, much of the criminal enforcement by the government in 2018 was aimed at physical piracy, but that form of piracy has declined significantly as the marketplace moved online. A few industries, such as IFTA, reports that physical piracy is still a problem, in their case, for independent producers and distributors. High quality pirated DVDs and artwork are routinely sold in street markets or uploaded and offered for free online, destroying the legitimate market for these works.

For the past several years, the quality and quantity of criminal raids and police activity against IPR infringers in general has declined, especially against large-scale online infringers. The decline in police activity in general is the lingering result of the 2011 major reorganization of the police force and the consequent drop in resources, as well as changes in government priorities and an unwillingness to take action against large-scale online infringers, and a focus on hard copy piracy (which is naturally diminishing), rather than on digital piracy. As in recent years, there were some deterrent sentences and prison terms applied by the Russian courts, including a handful aimed at serious repeat offenders.

The lengthy criminal investigative process must also be examined and redressed, particularly at the provincial level. As the government continues to rely on its own experts in investigating, examining and prosecuting IPR violations, it should take measures to increase the number of experts and consider the appointment of a specialized unit of investigators and prosecutors, adequately trained and provisioned to effectively address IP crimes. Due to the lack of adequate staffing and the high volume of work, examinations of products seized take months. The video game industry continues to report delays in examination reports from government experts, due to a lack of technical expertise. For the video game industry, enforcement efforts are also complicated by other issues including new legislation, changes in jurisdiction or new personnel. Enforcement is also hampered, and trials delayed, by the requirement that exemplars be collected only with the participation of state officials, and by a statutory reliance on

government expert reports. Delays also result from a lack of subject matter expertise in some cases as well as a reluctance to use or rely on rights holder expertise on forensic matters. Worse, some local authorities refuse to share any information on cases with rights holders at the investigative stage, making effective cooperation extremely difficult. The problems are further exacerbated by ongoing reforms of the investigative bodies. These arcane and outdated rules and practices create unnecessary delays and costs in litigation. The rules should be modernized so that industry experts can be more effectively integrated into the judicial process. One way to accomplish this would be for the Supreme Court to issue new guidelines on the admissibility of the testimony of private experts. It is reported that some courts will accept private expert testimony, but a uniform rule would be more effective.

Improvements should also be made with respect to court procedure. The criminal procedures generally permit a rights holder to request the destruction of the seized goods or move for recovery of damages in a separate proceeding before the Arbitration Court (a court of general jurisdiction). But the criminal courts are reluctant to order this and treat these as civil law matters instead. The copyright industries recommend that the Supreme Court clarify guidelines on the destruction of goods and the calculation of damages in online cases for the purpose of meeting the minimal criminal damage thresholds established under the (revised and increased) Article 146 of the Criminal Code.

Another recommended measure to increase the efficiency of IPR criminal investigations is the appointment of IPR special prosecutors, investigators, and police officers at both the federal and regional levels throughout Russia. IIPA recommends that the Investigative Department of MVD and the Investigative Committee of Russia continue to work with IIPA members on future training programs, and that the General Prosecutor's Office (along with the MVD-IC) appoint a government liaison with IP rights holders to more effectively bring criminal investigations and trials to successful conclusion. This would also help to improve criminal enforcement nationwide, since expertise and enforcement practices vary widely throughout the country, especially against digital piracy. A similar step to improve this problem would be the establishment of an official uniform methodology for the investigation and prosecution of copyright and related rights infringements, focused on digital enforcement. In 2013, a specialized IP court in Skolkovo (the innovation center) was launched with 30 trained judges. This was a positive step in IP enforcement, but is limited to patent cases. These courts should be created in other cities and regions across Russia and the jurisdiction broadened to handle copyright, as well as patent cases.

Russia's current Criminal Code does not allow for corporate entities to be held criminally liable for infringement. Only a natural person (usually a corporation director) can be found criminally liable, and only upon a showing that he/she had a direct intent to commit the infringement. It is extremely difficult to meet this burden of proof, so many cases are suspended without any penalty.

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

Civil Enforcement in General: The commercial-scale piracy, which harms all of the copyright industries, can and should be addressed through enhanced administrative actions (and penalties) and criminal remedies. Civil measures are not capable of providing the requisite level of deterrence against this type of piracy; but, if, properly applied, civil enforcement can be a useful tool for some industries (as it has in the courts actions against some websites). However, independent film producers and their authorized distributors are unable to avail themselves of lengthy and costly civil enforcement. For those who are able to pursue these remedies, there remain many civil enforcement inadequacies, including: (i) remedies limited to the seizure of specific copies of works that are the object of a lawsuit; (ii) the failure to award preliminary injunctions (although 2013 amendments made some improvements), or to freeze assets and evidence; (iii) low damages awards, which, like all awards, are also very difficult to enforce; (iv) burdensome evidentiary requirements, including rights ownership information; (v) the absence of personal liability for the directors of infringing companies or enterprises (the only way to bring proceedings in cases where bogus

companies operate); and (vi) the absence of the notion of clear contributory liability under the Russian civil law system dealing with copyright infringements. One additional recommendation is the adoption of judicial guidelines on civil search practices, including provisional measures consistent with the WTO TRIPS requirements.

One very troubling development is a proposal to lower fines (statutory damages) from their current levels, below the minimum levels set in the Civil Code (currently US\$170) per infringement. Awards are already too low as imposed by the courts; further lowering the permissible levels will not provide deterrent penalties. This proposal, adopted at a first reading in the Duma in October 2017, remains under consideration for final passage (Amendments to Article 1252 of the Civil Code). It should not be adopted.

Administrative Enforcement: The Administrative Code (Article 7.12) provides a range of fines on natural persons (1,500 to 2000 rubles, US\$22 to US\$30), the owners or managers of legal entities (10,000 to 20,000 rubles, US\$148 to US\$296), and on legal entities themselves (30,000 to 40,000 rubles, US\$444 to US\$592), as well as permits the confiscation and destruction of pirated product. Administrative cases are filed by the police or by agencies, but the levying of fines is done by courts of general jurisdiction (for natural persons and juridical entities) and arbitration courts (for legal entities). Imposing significant administrative fines on legal entities would have a deterrent effect, especially in instances when criminal cases are terminated for failing to meet the high evidentiary burdens. Unfortunately, current administrative procedures are inadequate because of the very low level of fines imposed and the inability to reach commercial enterprises that distribute infringing content. The video game industry reported only a single administrative law case involving fines and damages in all of 2018 against an entertainment software infringer.

Collective Administration: In 2017, legislation was enacted (entering into force in May 2018), to purportedly address the problems of the state accreditation system and the governance of collecting societies. Unfortunately, the new law falls far short of either providing transparency to rights holders or good governance consistent with international norms and best practices for collecting societies. The new law amended the Civil Code and the Administrative Code to revise the make-up and activities of collective rights management organizations (RMOs). One obvious failure of the new law regarding transparency is that it neither allows rights holders to see how much money their RMOs collect, nor how much they distribute to their members.

The new law creates “supervisory boards” for each of the various authors’ collection societies (the Russian Authors Society, the Russian Union of Right Holders and the All-Russian Intellectual Property Organization) consisting of members of each RMO, but also including government representatives and “user” group representatives. This does not allow rights holders to be involved in the selection and management of the organizations that purport to manage their rights. Proper management would allow for a supervisory board of rights holders to oversee the internal management of the RMO, and would include international rights holders with local representatives on the board. Instead, partial control by the Government of Russia deprives rights holders of their ability to control the licensing and collection of monies for their works and recordings, and is resulting in less, not more, money flowing to authors and producers (and certainly less money than should be collected for a market the size of Russia). Lastly, the so-called fiscal control improvements, including regular audit reports, will not improve accountability, because the audit obligations are only to the government (for taxation purposes), not to those rights holders. There are many models for proper governance of RMOs, including WIPO best practices, international rights holder group best practices, as well as U.S. and European Union existing practices.

COMPLIANCE WITH EXISTING OBLIGATIONS TO THE UNITED STATES

In three separate bilateral and multilateral agreements over the past several years, the Government of Russia made commitments to take effective action against Internet piracy. First, 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.”

Second, when Russia joined the WTO in 2012, as part of its WTO accession, in the Working Party Report (paragraph 1339), the Government of Russia pledged that it would “continue to take actions against the operation of websites with servers located in the Russian Federation that promote illegal distribution of content protected by copyright or related rights, such as phonograms (sound recordings) and investigate and prosecute companies that illegally distribute objects of copyright or related rights on the Internet.”³ Last, in 2012, in the U.S.-Russia IPR Action Plan, the Government of Russia agreed it would take “enforcement actions targeting piracy over the Internet” and more specifically it would, *inter alia*: “Take measures in order to disrupt the functioning of websites that facilitate criminal copyright infringement, and provide for takedown of infringing content....Take actions against the creators and administrators of websites through which intellectual property crimes are committed....Conduct meaningful consultations with rights holders to target and to take action against high-priority infringing websites.” The Government of Russia has not fully implemented these obligations.

With regard to collective administration, existing regulations and state accreditations have institutionalized a system that is not transparent and lacks good governance or accountability for authors, record labels and performers—who have no other option except the state collective management organizations. Correcting this problem is also a treaty obligation. During WTO accession (in the Working Party Report, paragraph 1218), Russia assured its trading partners it would “review its system of collective management of rights in order to eliminate non-contractual management of rights within five years after Part IV of the Civil Code entered into effect,” to bring the management societies in line with international standards on governance, transparency and accountability. That commitment was due in 2013. Instead, the 2017 legislative reforms (in place as of May 2018) set any progress backwards to phase out non-contractual license management schemes—now five years after Russia was obligated to fix this problem.

To develop properly functioning music broadcasting and public performance payment systems, the Government of Russia must fulfill its WTO Working Party Report and U.S.-Russia IPR Agreement obligations. This would entail the proper state accreditation of collecting societies in a manner that ensures that rights holders are able to control and manage their own societies, so they are fairly represented and there are no conflicts of interest in the governance structures. Fair representation in these societies includes direct representation of rights holders on the board in a manner that is proportionate to relevant market share and that reflects commercial realities.

In 2014, by presidential proclamation, Russia was removed from eligibility for trade benefits under the Generalized System of Preferences (GSP) program because its economic developments exceeded the statutory qualifications for GSP benefits. As a result, in 2014, USTR closed the GSP country practices review of Russia’s protection of intellectual property rights which was originally launched in response to a petition filed by the IIPA. Thus, the removal or suspension of GSP benefits for IPR deficiencies is no longer a trade enforcement tool.

DEFICIENCIES IN THE RUSSIAN LEGAL REGIME

Russia has made progress on legal reforms during the lead up to WTO accession, and in the more recent Civil Code, Part IV revisions, but gaps remain in the legal regime, with either incomplete or inadequate reforms, especially with regard to effective Internet enforcement and implementation of the digital treaties.

IIPA and its members have in the past commented on three major overarching concerns in the Civil Code, as amended: (a) a lack of clarity on numerous provisions, especially exceptions; (b) administrative law principles throughout the Civil Code that likely cannot be enforced by civil or criminal procedures; and (c) the absence of clear liability rules for online websites and services that induce or encourage infringement (and the applicability of safe harbors for such services). Even after the recent amendments, the law does not clearly define ISPs and the various services they provide, nor does it link liability and safe harbors in a manner that will encourage cooperation with rights holders to effectively deal with Internet piracy—in civil and criminal law; lastly, it does not clearly define

³The U.S. Government detailed all the intellectual property WTO commitments of Russia in its “2018 Report on the Implementation and Enforcement of Russia’s WTO Commitments” (December 2018), available at <https://ustr.gov/sites/default/files/Russia-2018-WTO-Report.pdf>.

secondary liability. In fact, the only pending proposals regarding ISP liability and safe harbors would extend the safe harbors to search engines (within Article 1253 of the Civil Code). 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 (or that directly infringe). Further, it is critical that Russia amend its regime to allow for injunctive relief that is quick and effective and applicable to all works, especially for Internet matters.

Other existing hurdles to effective civil and criminal enforcement are: (a) the failure of courts and police to apply statutory presumptions of copyright ownership; (b) overly burdensome evidentiary requirements to prove title; and (c) the lack of criminal liability for corporate enterprises or the principals in such enterprises. To require a “full” chain of title for each recording in every investigation is especially problematic for foreign rights holders with translation, notarization and other costs and delays. Similarly, the procedures for obtaining injunctions tied to notice and takedown (and proposals for further changes), have been criticized as being overly burdensome in requiring “proof” of ownership.⁴

Article 1299 of the Civil Code (in conjunction with the Presidium’s decision No. 5/29 (October, 26, 2009)) prohibits the commercial distribution (i.e., trafficking) in circumvention devices and services that circumvent technological protection measures (TPMs). It applies to devices and services that are advertised or offered for sale, but only if advertised or sold exclusively as circumvention devices. The law needs to be expanded so that liability applies to the commercial trafficking in all variety of circumvention devices and services, not just those advertised and marketed as “circumvention devices.” In addition, commercial trafficking in circumvention devices—including by importation—should also be criminalized.

In addition to those already mentioned, IIPA recommends steps to ensure that remedies for IPR infringements required by treaties, found in the Criminal Code, the Criminal Procedure Code, the Administrative Code and the Customs Code, continue to apply in light of the adoption of the 2008 Civil Code and the repeal of the copyright law. Lastly, IIPA recommends 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.

One proposal currently being considered by the Government of Russia (FAS) would bring copyright within the scope of anti-monopoly laws (which have to date been exempted), and could result in a prohibition of exclusive licensing and distribution agreements. If adopted, this would cause chaos for many of the copyright industries in the Russian market who are dependent on such exclusive agreements.

MARKET ACCESS ISSUES

There are four existing laws harming the marketplace for audiovisual content in Russia, and one proposed restriction that, if enacted, would do even further damage.

In 2015, a law went into force banning advertisements on pay cable and satellite (i.e., scrambled signal) channels. The law does not affect state-owned (Russian) television channels because they do not rely on advertising revenue, and exempts terrestrial broadcasters (who are heavily dependent on ad revenue). As a result of this disparity in its application, the law is significantly impacting the market for cable and on-demand services, including those services operated by foreign companies.

In 2017, a Mass Media Law amendment was adopted (Federal Law No. 87, in force July 1, 2017) which regulates and licenses online film websites, including streaming platforms, and which limits foreign (non-Russian) ownership to 20% of such sites. The law applies to operators of all online audiovisual services, if their Russian audiences are below 50% of their total users (and, if Russian users are below 100,000/day). The calculation of this

⁴For a detailed list of IIPA’s prior comments specifically on the Civil Code (and some of the related laws), see <https://iipa.org/files/uploads/2017/12/2010SPEC301RUSSIA.pdf> at page 138.

usage is very unclear, with severe consequences for violations, including barring a foreign entity or individual from owning or participating in these businesses entirely. Moreover, the law imposes burdensome regulations on the operators of legal sites. When it was proposed, the law drew opposition from both Russian and foreign film distributors (as a violation of international treaties) and website owners of legitimate content, fearing that, if adopted, it would become a tool to limit legal websites while alternatively resulting in more, not fewer, piratical film sites. Although when drafted it was rumored to be aimed at preventing the expansion of foreign businesses into the local market, it is now clear the law was part of an overall scheme to control all media sectors.

Two other discriminatory laws are problematic. First, there are customs duties on the royalty value of some imported audiovisual materials (which includes video games), rather than solely on the value of the physical carrier medium. In practice, however, digital distribution has mitigated its impact, and there are few reported disputes with the customs authorities on this matter in the past two years. The second law is the Value Added Tax (VAT), which remains very problematic and has been imposed in a discriminatory manner: only Russian-made films are given national certifications that exempt them from the VAT. This is a WTO violation because it denies national treatment for taxes on Russian versus identical foreign products.

In October 2018, the Ministry of Culture proposed a measure to limit the percentage of screens that can be taken by any single foreign film (earlier proposals limited the number of foreign film screenings in multiplexes or monoplexes to 35% of the total number of screenings in those theaters). If enacted, these proposals would harm the distribution and exhibition of foreign films in Russia. Another proposal would place a 3% tax on theatrical box office revenue. None of these proposals have been implemented, nor should they be implemented, as they violate Russia's international treaty obligations (WTO Agreement).