

# RUSSIAN FEDERATION

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

### 2023 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 2023.<sup>1</sup>

**Executive Summary:** This submission is provided against the backdrop of Russia's invasion of Ukraine, the attendant sanctions against Russia by the U.S. and its allies, the suspension of operations in Russia by many U.S. companies, and a disturbing trend in Russia to ignore the intellectual property rights (IPR) of companies that have withdrawn from the market. Regarding the discussion of Russia's legal framework, this submission largely draws from IIPA's submissions from prior years.

The Government of Russia recently has introduced several problematic proposals that would weaken existing intellectual property (IP) protections, including plans for a compulsory licensing scheme to permit exploitation of a copyrighted work if a partner from an "unfriendly state" (including the United States) partially or completely unilaterally repudiated the license agreement on grounds not related to the violation of such contract by a licensee. If Russia follows through on these proposals, it would be tantamount to state-sanctioned piracy on a massive scale. This would be an unprecedented step for a WTO member, contravening the rule of law and serving as a *de facto* expropriation of U.S. IP.

Further, the draft law that would convert the anti-piracy Memorandum of Understanding (MOU) between key Russian Internet companies and rights holders from a voluntary procedure into an obligation has stalled since its introduction in June 2021. An addendum to the MOU, MOU 2.0, that provides for several new measures to stop search engines from providing easy access to infringing services is subject to adoption of the draft law and has not been enforced.

Russia has addressed online piracy with civil, not criminal, enforcement measures and streamlined processes to require websites, and now apps, with infringing content to comply with rights holders' takedown notices. These measures include allowing Russian courts (in particular, the Moscow City Court) to disable access to infringing material, including clone, proxy, and mirror websites containing infringing content and requiring online search services to exclude infringing websites identified in the court orders from search results. An additional recommended legal reform is for Russia to clarify its Civil Code on the legal liability of Internet service providers (ISPs), including that any safe harbors apply to only passive and neutral intermediaries that do not contribute to infringing activities.

While these civil and procedural reforms have disabled or slowed access to some major infringing sites and services, unfortunately these procedures are being directed predominantly against infringing activities of users in Russia, not against Russian sites and services that undermine foreign markets by catering to users outside the country. As a result, Russia presents a substantial and persistent online piracy problem with no borders, as users in major markets outside of Russia access infringing content from sites and services located in or operated from Russia. Russia's actions to take down infringing content have little lasting deterrent effect without civil, and especially criminal, prosecutions directed at operators and owners of piracy sites.

Two other industry-specific problems persist in Russia. One is the need to address the long-standing problems with collective management of music rights in Russia that have caused revenues to be a fraction of what they should be for a market the size of Russia. The state-accredited Russian collecting societies are not currently operating with

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<sup>1</sup> For 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://www.iipa.org/files/uploads/2023/01/2023APPENDIXBSPEC301-1.pdf>.

transparency or good governance rules consistent with international norms. The other enforcement priority is to address the camcording of motion pictures that results in many American feature films being illegally copied in theaters and migrating online worldwide. Furthermore, law enforcement should take steps to prevent or disrupt proliferation of illegal screenings of films in Russian theaters that has occurred in 2022.

## **PRIORITY ACTIONS REQUESTED IN 2023**

- Continue to resist efforts to implement state-sanctioned IP theft, which would have serious, long-term implications for Russia's economy and creative ecosystem.
- Improve enforcement against online piracy by:
  - Increasing the number and effectiveness of criminal copyright digital piracy cases, especially deterrent criminal actions directed against organized criminal syndicates, including against those parties involved in piracy retail chains that continue to sell pirated entertainment software, music, and movies.
  - Enacting the draft legislation to convert the MOU into law, making it applicable to all copyrighted works and all rights holders, with legally mandated obligations for ISPs and appropriate sanctions for non-compliance.
  - Enforcing the addendum to the MOU that provides several new measures to stop search engines from providing easy access to infringing services.
  - Amending the Civil Code, the Copyright Law, or other relevant law to address the issue of “domain hopping” that occurs after the Moscow City Court issues an initial content-removal order to expedite applications for additional relief against repeated copyright infringement.
- Implement regulations on the operation of collective management organizations (CMOs) 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 CMO, and if so, which one, as well as 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, encourage, or facilitate the infringement of copyright and related rights and do not take reasonable steps to prevent such activities to prevent knowing facilitators from enjoying these safe harbor benefits; and
  - clarify the eligibility requirements to qualify for safe harbor protections, to benefit only passive and neutral intermediaries that do not contribute to infringing activities.
- Amend the Civil Code in Article 1299 to provide civil liability for commercial trafficking in circumvention devices (including circumvention software), as well as for acts of circumvention.
- Amend the Criminal Code to establish criminal liability: (i) for the unauthorized camcording of motion pictures; and (ii) for the importation of and commercial trafficking (by distribution, making available, etc.) in circumvention devices (including circumvention software), as well as for acts of circumvention. Also, amend the Administrative Code to sanction camcording.
- Amend the Administrative Code by eliminating the for-profit requirement in Article 7.12 (Administrative Offenses), raise administrative penalties to deterrent levels by implementing higher fixed fines for violations by legal entities and individuals, and increase enforcement under this provision.
- Take action to prevent or disrupt the unauthorized screenings of the motion pictures in cinemas.

## **THE COPYRIGHT MARKETPLACE IN RUSSIA**

**Internet Use and Piracy:** The overall situation with online piracy remains the same when compared to 2021. Russia remains host to several illicit sites that cater to English-speaking audiences, negatively impacting markets worldwide. Many pirate sites have moved to foreign hosting locations after several legal reforms that allow rights holders to seek injunctions through the Moscow City Court. However, the lack of explicit liability provisions for hosting providers creates a supportive environment for infringing services to use the infrastructure in Russia. Infringement on Russian social media and hosting platforms such as *VK*, *OK*, *Telegram*, and *DDoS-Guard* remains a significant concern for rights holders.

Internet access, including mobile phone access, continues to grow in Russia. Despite the civil law reforms intended to mitigate online piracy, Russia remains home to many of the most popular illegal services in the world. These include commercial-scale infringing websites, such as web-based, peer-to-peer (P2P) downloading and streaming sites, stream-ripping sites, linking sites, and cyberlockers, offering access to unauthorized music, film, video games, books, and journal articles. Another problem is the significant movement of pirated content to mobile apps, such as *Telegram*. Russia remains first globally when it comes to P2P piracy for the video game industry. Many of these sites cater to English-speaking and other non-Russian users. Some BitTorrent and other pirate sites have reportedly moved their sites to foreign hosting locations in response to the new enforcement measures or court-ordered injunctions directed at sites within Russia. The development of technologically advanced pirate cloud systems (e.g., piracy as a service, often consisting of content delivery network-based video providers that are accessible to only pirate streaming website operators), which provide Russian streaming websites with pirate video content, likewise continues to grow.

Although the civil law reforms have improved enforcement by the courts, absent these court orders, most ISPs and website operators do not comply with takedown notices; instead, they merely forward notices to users without taking down infringing material. Often, as a delaying tactic, the Russian websites insist on proof of copyright ownership before even considering compliance with takedown requests. Following Russia's invasion of Ukraine, certain platforms hosting user-generated content demonstrated low compliance with takedown notices. For example, VK's compliance reportedly decreased to 10-20%. On the other hand, OK continues to comply at a high rate, up to 90%. The advertising agencies and payment processors that financially support infringing sites continue to resist cooperation with the copyright industries. The only alternative has been the voluntary MOU, signed in November 2018 and extended until March 2023, between some ISPs and certain local rights holders regarding delisting of infringing sites from search engines.

Examples of the types of large-scale online piracy problems that persist are evident in the annual Notorious Markets List, and in the IIPA's past filings with the U.S. government. Many commercial-scale sites in Russia, including those sites on the Notorious Markets List, operate without deterrence, offering unauthorized copies of films, TV programs, music, books and journal articles, and video games. In February 2022, the U.S. government included six Russian online sites on its Notorious Markets List, including *Sci-Hub*, *Libgen* (and its related sites), *VK.com* (*vKontakte*), and *MP3juices*.<sup>2</sup>

The motion picture and television industry is particularly concerned about *VK.com*, which is one of the most popular sites in the world and the most popular social network in Russia, along with *OK*, which is also an infringement hub. On these social media platforms, users illegally distribute thousands of unlicensed motion picture files (even though *VK.com* negotiated licenses a few years ago with some of the music companies for its use of music). *VK.com* has demonstrated improvements over the past few years in their responsiveness to takedown notices and has limited access to third-party apps, thus making it more difficult for users to download content directly. Dozens of groups dedicated to movie and TV piracy with millions of users have been illegally uploading and sharing infringing content on *VK.com* for several years, despite multiple removal requests from rights holders. The publishing industry (particularly trade book publishing) is similarly affected by e-book piracy on the site. Although the site responds to notifications of infringement, piracy remains unabated given the ease with which the site's users can continuously upload and make available pirated e-books and audiobooks. In 2021, *VK.com* was still one of the main platforms for promoting video game piracy sites and marketplaces. Social networks have improved their responsiveness to take-down notices from the video game industry. These sites promptly remove any infringing material, including cheats and other unauthorized digital goods (UDGs).<sup>3</sup> However, video game piracy remains a significant problem in Russia and fuels piracy in other markets.

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<sup>2</sup> See USTR, "2021 Review of Notorious Markets for Counterfeiting and Piracy," available at <https://ustr.gov/sites/default/files/IssueAreas/IP/2021%20Notorious%20Markets%20List.pdf>. The February 2022 report also included three physical markets in Russia, all of which are on the list for the prevalence of counterfeit materials.

<sup>3</sup> Unauthorized digital goods (UDGs) are unauthorized sales of in-game digital items. They have become a growing concern for the video game industry. Closely related to these in-game items are software products (collectively known as "cheat software") that enable the unfair and rapid collection and aggregation of virtual

The video game industry reported that P2P websites remain the main search request and method of content distribution for video games for PCs and consoles. Mobile games are distributed mainly through forums, cyberlockers, and direct download sites. Since the 2018 anti-piracy MOU does not include the video game industry, links to pages with infringing content are available without the option of delisting, except through direct takedown notices. The video game industry reports overall very weak compliance with takedown notices from these sites, and the very quick reposting of materials that are taken down. In general, BitTorrent sites remain the main sources for downloading illegal copies of video games. However, action by the courts and injunctive relief related to mirror sites has reduced the traffic to these sites by at least 40%. In 2021, direct download sites, cyberlockers, and legitimate cloud storage services (such as *cloud.mail.ru* or *yadi.sk*) continue to be actively used primarily by pirate sites with a narrow audience. For example, pirate server sites use third-party sites for hosting their game and patch files. Wider audiences have direct download sites with mobile games, cheats, and other small gaming files. In 2021, more than 350 pirate video game sites were blocked, which consists of more video game sites blocked since the enactment of the anti-piracy law in 2013. One of the main drivers of piracy in Russia is the continued lack of a culture of legal video game consumption and an awareness regarding the threats of distributing unauthorized content, such as malware and phishing. In 2021, the compliance rate of hosting providers to takedown notices from video game providers is only approximately 41%.

The market for recorded music should be much stronger than it is for a country the size of Russia. According to a 2022 industry report, the per capita music revenue in Russia is only US\$2.25 per year, compared with US\$29.45 per capita in the United States.<sup>4</sup> The most prominent forms of music piracy in Russia are the use of BitTorrent sites and stream ripping. The most popular BitTorrent site in Russia is *rutracker.org* (having received over 44 million visits from Russia in the three months between June and August 2021). Visits to the site remain high as Russian users are circumventing the permanent block imposed on the site to access the large amounts of both English and Russian content available on it. The continued popularity of the site is demonstrated in its position as the 123rd most visited site of any kind in Russia. The most popular stream-ripping sites in Russia are *savefrom.net* and *Y2Mate.com* (with the sites having received over 27.3 million and 6.9 million visits from Russia respectively during the three months prior to August 2021, according to SimilarWeb). Russia remains home to many services supporting large-scale infringing websites, including web-based and P2P downloading and streaming sites, linking sites, stream-ripping sites, BitTorrent sites, and cyberlockers that operate globally. For example, *Newalbumreleases.net* is a popular linking site that has a large library of newly released popular music available, and *Music.Bazaar.com* and *mp3va.com* are sites that have the look and feel of legal music sites like Amazon or iTunes but sell downloads at a considerable discount. These sites undermine the sale of licensed music on legitimate platforms and remain targets for action.

Most concerning to book and journal publishers are the Russian-operated online book and journal piracy websites. *Sci-Hub.io* (formerly *Sci-Hub.org*) continues to be the most problematic site for journal publishers. Infringing journal articles purloined by the site's operator are likewise available on a network of sites collaborating under the "Library Genesis Project" (now *libgen.io*). As of November 2021, *Sci-Hub* claimed its servers hold nearly 88 million copyright-protected journal articles, as well as millions of books found on *LibGen*, *Z-Library*,<sup>5</sup> and numerous other mirror sites.<sup>6</sup>

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goods, such as bots, hacks, and "cheats," or which otherwise tilt the scales in favor of one player over another. The rise of UDGs and cheat software have a negative impact on video game companies and consumers in the following ways: (1) sellers of unauthorized digital goods and cheat software divert significant revenue away from video game developers and publishers; (2) sales of digitally delivered items, like in-game digital items, have the potential for consumer fraud (such as stolen payment methods or compromised accounts) and the facilitation of money laundering schemes; (3) the unchecked sales of cheat software can threaten the integrity of game play, alienating and frustrating legitimate players; and (4) video game publishers and developers are forced into a perpetual virtual "arms race" to update their products and security technology before the sellers can update theirs.

<sup>4</sup> International Federation of the Phonographic Industry (IFPI) Global Music Report 2022, p. 191.

<sup>5</sup> In November 2022, *Z-Library* domains were seized by the Department of Justice, and the network of some 244 sites taken offline. The alleged operators, two Russian nationals, were also arrested in Argentina and await extradition. See <https://www.justice.gov/usao-edny/pr/two-russian-nationals-charged-running-massive-e-book-piracy-website>.

<sup>6</sup> *Sci-Hub* provides access to nearly all scholarly literature. See <https://www.insidehighered.com/news/2020/01/17/universities-ignore-growing-concern-over-sci-hub-cyber-risk>.

To further its infringing activities, *Sci-Hub* gains unauthorized access to university systems and publisher databases, typically through compromised user credentials obtained through phishing schemes. Through this unauthorized access, *Sci-Hub* illegally harvests copyrighted journal articles and books, which it hosts on its own server network and simultaneously makes these copies available to the *Libgen* network of mirror sites.<sup>7</sup> *Sci-Hub* is an adjudged pirate entity, with two Association of American Publishers (AAP) members securing judgments against the site and its operator in 2017 and 2015 in two U.S. courts, resulting in injunctions requiring U.S. domain name registries to suspend the site's U.S. administered domains.<sup>8</sup> In October 2018, publishers successfully sought an injunction to block the sites' primary domain in Russia. In 2019, a permanent block issued against *Libgen.org*, while a permanent injunction against several *Sci-Hub* mirrors in Russia, took effect in 2020.

In addition to these large-scale book and journal piracy platforms, Russian Internet users use P2P file-sharing services. An AAP member has registered 2.8 million P2P downloads of their pirated books by Internet users in Russia since May 2021, with 1.5 million of those downloads by Internet users in Moscow. Finally, publishers have identified more than 70 pirate platforms (including *VK*, *Rapidgator*, *Vdoc.pub*, *Takefie.link*, and *Documen.pub*) hosted in Russia that either host pirated books or link to pirated content. *DDOS-Guard* also plays a prominent role in hosting at least seven highly popular book piracy platforms.

The independent segment of the film and television industry (IFTA) reports that online and physical piracy remain a significant export constraint for small- to medium-sized businesses that 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 that 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. Because 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 motion picture, music, video game, and book and journal publishing industries want Russia to take steps to keep infringing content on sites permanently down. Effective enforcement means focusing criminal enforcement actions against the owners and operators of sites engaged in large-scale infringing content, which is causing significant economic harm to all rights holders. The Government of Russia has outstanding commitments to take such action against digital piracy. In the 2006 U.S.-Russia Bilateral WTO Market Access Agreement Side Letter on Intellectual Property Rights (2006 IPR Side Letter), 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." When Russia joined the WTO in 2012, as part of its WTO accession, 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."<sup>9</sup> Also in 2012, Russia agreed it would take "enforcement actions targeting piracy over the Internet" and more specifically it would, *inter alia*:

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<sup>7</sup> Id.

<sup>8</sup> In a 2015 case brought by an Association of American Publishers (AAP) member company, *Sci-Hub.org*, the Library Genesis Project (*Libgen*), and their operators were found by a court of the Southern District of New York to have engaged in infringing activity, for the unauthorized reproduction and distribution of journal articles and to have violated the Computer Fraud and Abuse Act for *Sci-Hub*'s intrusions into publisher databases. Damages in the amount of \$15 million were awarded, and a permanent injunction issued. In November 2017, following another case brought by another AAP member company, a district court in Virginia issued a second default judgment against *Sci-Hub* (then at *Sci-Hub.io*) of \$4.8 million, enjoining *Sci-Hub* and "those in active concert or participation with them" from infringing the publisher's copyright, and also ordered "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 (ISPs), 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.

<sup>9</sup> WTO Working Party Report (paragraph 1339).

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.<sup>10</sup>

The Government of Russia should fully and properly implement these obligations.

**Civil Enforcement Against Online Piracy:** Civil judicial and administrative remedies have improved over the years (with legal reforms in 2013, 2014, 2017, and 2020), but enforcement difficulties continue.<sup>11</sup> The civil injunctive relief mechanism continues to allow rights holders to enjoin notoriously infringing sites, but critical gaps remain. These include the lack of relevant laws targeted at online piracy, “domain hopping” of pirate sites that occurs after the Moscow City Court issues an initial content-removal order, and the liability of hosting providers. Current regulations were designed in the offline environment, and some provisions are difficult to apply to diversified online piracy, particularly regarding timelines, evidence fixation, and damages calculation.

Moreover, pirates have found tools to navigate around the content protection tools provided in recent legal reforms. Part of the problem lies in how Yandex, the major search engine in Russia, indexes sites. Neither internal Yandex policy nor laws oblige Yandex to improve search and retrieval algorithms to reduce the number of pirate sites and links to infringing content. Yandex algorithms instantly or even automatically include updated mirror sites. Another tactic is to use an empty site with a relevant domain name for search engine results, which redirects to a site with infringing content. Significant changes and improvements in the piracy situation will require adoption of anti-piracy laws and policies that are relevant to the current issues affecting the creative industries.

In addition, court practice related to title-specific civil injunctions has worsened. The Moscow City Court, under the influence of the first appellate court, changed its approach to decisions in title-specific civil injunction cases. Previously, the court prohibited a site from using the title on the site in general. Now, the court prohibits the use of the title on only the page on which it was captured. Thus, any change of the URL allows the site to avoid enforcement under the court decision.

In June 2021, legislation was proposed in the Duma to convert the ISP-rights holder MOU into legislation. The Duma was to consider the bill in February 2022 but has not taken any action. The legislation should provide sanctions for non-compliance with takedown notices and should be applicable to all platforms and search engines and all copyrighted works. An addendum to the MOU, MOU 2.0, was signed in December 2021, but it is subject to the adoption of the legislation and has not been enforced. MOU 2.0 provides for several new measures to stop search engines from providing easy access to infringing services. New measures include removal of repeat offender sites from search results, removal of sites displaying over one hundred links to infringing content from search results, and measures to defeat “domain gluing.”<sup>12</sup> The deadlines for the removal of pirated links from search results by search engine operators will also be reduced.

Overall, the results of the reforms to civil laws and procedures have been positive. Some sites have seen dramatic decreases in traffic right after such court orders, and some sites have even moved out of the country. Unfortunately, without the deterrence of criminal prosecutions against the owners and operators of notoriously infringing sites and services, many simply resurface in new guises.

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<sup>10</sup> U.S.–Russia Intellectual Property Rights (IPR) Action Plan (2012).

<sup>11</sup> Prior IIPA filings have detailed the 2013, 2014, 2017, and 2020 legal reforms, which implemented ISP liability and safe harbors and injunctive relief against infringing content online. See, e.g., IIPA 2022 at 79–80.

<sup>12</sup> Domain gluing” is a process used by operators of infringing services allowing them to return to the same search ranking from which they were removed by “gluing” pages together.

While civil measures are not capable of providing the requisite level of deterrence against large-scale digital piracy, they can be a useful tool for some industries or in some instances. For independent creators, however, such as independent film and television producers, civil lawsuits are not viable because they are too time consuming and too costly to pursue. For those creators or producers who are able to pursue civil enforcement, many inadequacies remain. The list includes: (i) remedies limited to the seizure of specific copies of works that are the object of a lawsuit; (ii) failure to award preliminary injunctions (although 2013 changes 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); (vi) the absence of the notion of clear contributory liability under the Russian civil law system dealing with copyright infringements; and (vii) the absence of judicial guidelines on civil search practices, including provisional measures consistent with the WTO TRIPS Agreement requirements.

There is a troubling, long-pending proposal to lower fines (i.e., statutory damages) from their current levels, below the minimum levels set in the Civil Code (approximately US\$140 per infringement). Awards imposed by the courts are already too low; further lowering the permissible levels would not be a deterrent. This proposal, which had a first reading in the Duma in 2017 and a second reading in 2018, remains under consideration for final passage to amend Article 1252 of the Civil Code. It should not be adopted, and instead, damage awards should be increased.

**Criminal Enforcement Against Online Piracy:** Russia needs to increase its enforcement activity beyond current levels to provide adequate and effective enforcement against IPR violations, including deterrent criminal penalties. A critical element of the 2006 IPR Side Letter is Russia's obligation to provide effective enforcement of IPR online. Currently, criminal cases for online piracy do not reach courts due to outdated provisions of the Criminal Code that are hard to enforce for online infringements, specifically, the definition of the "value of the crime" that sets the threshold for liability. The copyright industries continue to report high levels of piracy and declining levels of criminal enforcement, continuing a trend of the past several years. Official statistics of the Ministry of Interior demonstrates a continuous decrease in the number of registered copyright-related crimes, dropping from 423 cases in 2020 to 317 cases in 2021, a 22% decrease, and as of August 2022, there were zero copyright infringement cases in 2022.

To be effective, IPR enforcement in Russia needs a clear nationwide governmental directive 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 and have had little deterrent effect. A coordinated nationwide campaign should focus on *ex officio* criminal actions targeting large-scale commercial enterprises, improving investigations and digital tracking, and strengthening administrative penalties that to date have been largely ineffective.

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. Because 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. Such coordination would help to increase the quality, effectiveness, and consistency of IPR enforcement activities. Work on a draft methodology was suspended years ago.

IIPA continues to recommend that the Government of Russia create a dedicated digital IPR enforcement unit to focus on online piracy. For example, combatting 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 acted on such cases in the past. 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 adequately staffed, equipped, and resourced, and other such units within the MVD should be formed to deal exclusively with IP 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 the enterprise does not charge a direct fee.

Changes to criminal procedure that placed copyright infringement cases into the category of serious crimes have enabled Russian law enforcement agencies to conduct thorough and comprehensive investigations against owners and operators of piratical operations, at least in theory. However, deterrent criminal penalties have rarely, if ever, been imposed against operators or 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 and identifying the individuals responsible for criminal activities. As a result, few such cases are ever brought and even fewer are tried to a conclusion. The problem has been an inability of police and prosecutors to adopt a unified formulation for 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.

For the past several years, the quality and quantity of criminal raids and police activity against IP infringers in general has declined, especially against large-scale online infringers. The decline in police activity in general is the lingering result of the major reorganization of the police force in 2011 and the consequent reduction in resources, as well as changes in government priorities and an unwillingness to pursue large-scale online infringers. Though rare, Russian courts have imposed some deterrent sentences, including a handful aimed at serious repeat offenders.

The Government of Russia should also examine and redress the lengthy criminal investigative process, particularly at the provincial level. As the government continues to rely on its own experts in investigating, examining, and prosecuting IP violations, it should take measures to increase the number of 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 seized products take months. The video game industry continues to report delays in examination reports from government experts, because of 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 law enforcement 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. The Government of Russia should modernize the rules so that industry experts can be more effectively integrated into the judicial process. One way to accomplish this integration would be for the Supreme Court to issue new guidelines on the admissibility of the testimony of private experts. Some courts reportedly 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 to move for recovery of damages in a separate proceeding before the Arbitration Court (a court of general jurisdiction). However, the criminal courts are reluctant to order these remedies and instead, treat these cases as civil law matters. 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 Article 146 of the Criminal Code, which increased such thresholds.

Another recommended measure to increase the efficiency of IP criminal investigations is the appointment of IP special prosecutors, investigators, and police officers at both the federal and regional levels throughout Russia. IIPA recommends that Russia establish 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 (an innovation center) was launched with 30 trained judges. This development 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.

Finally, Russia's Criminal Code should be amended to allow for corporate entities to be held criminally liable for infringement. At present, only a natural person (usually a corporate director) can be found criminally liable and only upon a showing that he or 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.

**Administrative Enforcement:** In addition to criminal enforcement, the relevant administrative agencies 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. The Administrative Code (Article 7.12) provides a range of fines for infringement by natural persons (1,500 to 2000 rubles, US\$20 to US\$27), the owners or managers of legal entities (10,000 to 20,000 rubles, US\$133 to US\$266), and legal entities themselves (30,000 to 40,000 rubles, US\$400 to US\$533) and permits the confiscation and destruction of pirated products. The police or agencies file administrative cases, but the courts of general jurisdiction levy fines. 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, as well as the inability to reach commercial enterprises that distribute infringing content. Moreover, enforcement under the Administrative Code has been ineffective due to the lack of enforcement actions. In 2021, there were 676 cases under this article, in which only 449 cases included fines for a total of 5,129,000 rubles (approx. US\$70,000).

**Camcord Piracy:** A long-standing problem in Russia is the camcording of motion pictures. Traditionally, Russia has been the source of many feature films being illegally copied in theaters and migrating online. Piracy operators obtain their source materials for infringing copies by camcording films at local theaters, and then upload these copies onto the Internet and sell illegal hard copies. Russia remains the home to some of the world's most prolific criminal release groups of motion pictures.

In August 2021, the Government adopted a Decree establishing the rules for film exhibition in theatres that cover the rights and obligations of both exhibitors and viewers. The Decree replaced the older document from 1994 and extended the exhibitors' rights to remove from the screening room viewers who disregard the exhibition rules, including those who attempt to record the film illicitly. While the Decree provides an explicit framework to address viewers who illicitly attempt to record a film in the theater, it does not resolve the issue of lack of liability for camcording.

To adequately address the camcording problem requires changes in the Russian legal framework, as well as dedicating sufficient resources and government willpower to engage in effective enforcement. Owing to the complex burden of proof procedure that the Administrative Code requires for copyright infringements, law enforcement is reluctant to investigate camcording incidents. Separate provisions addressing illegal recording in theaters and tailored to that specific form of infringement, could enhance enforcement. The Government of Russia should amend the Administrative Code to add liability for camcording to the general liability provisions on copyright infringements (Article 7.12) and to provide criminal law penalties as well. In 2020, the Government of Russia prepared changes to a new Administrative Code to address camcording, but the timing for revising the Code is unclear. The new rules, if adopted, would explicitly prohibit video or audio recordings of films in theaters and would allow theater owners to act to stop any such recordings, including removing the offending party from a theater. The proposed new law would also add administrative sanctions for camcording. While this is a step in the right direction, unfortunately, no proposals exist to amend the Criminal Code or to add any criminal sanctions for camcording pursuant to Russia's WTO and bilateral obligations. In addition to these needed legal reforms, IIPA recommends that the Government of Russia properly resource enforcement actions and undertake more effective enforcement against illegal camcording of motion pictures.

**Unauthorized Theatrical Screenings:** As noted above, after Russia's invasion of Ukraine in February 2022, the U.S. film industry, along with many other industries, suspended operations in Russia. Unfortunately, third-party

operators have recently begun organizing illegal screenings of U.S. films in theaters throughout Russia. The theaters do not advertise the screenings openly, referring to them as “private club” events, and have escaped enforcement by claiming that renting out their premises for a fixed fee to a third-party waives liability for any unlawful actions during the rental period. The content shown at these illegal screenings are sourced from pirated Digital Cinema Packages (DCP) that are illegally distributed online. Moreover, there is evidence of camcording occurring at these illegal screenings, compounding the harm.<sup>13</sup>

**Collective Management of Rights:** The long-standing problems concerning the collective management of music rights in Russia needs to be addressed properly. The ability to exercise one’s rights through proper collective management is a WTO TRIPS Agreement obligation, and Russia made specific commitments on these issues as part of its accession to the WTO. In the Working Party Report, 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.<sup>14</sup> That commitment had a deadline of 2013. The 2006 IPR Side Letter had similar obligations to correct this problem.

After years of missed deadlines, Russia adopted new legislation in 2017 (in force, May 2018) that instead of fixing the collective management system in Russia, did not address key relevant issues and created even more problems. The new collective management system denies transparency to rights holders and good governance consistent with international norms, as well as best practices for CMOs as required by Russia’s WTO accession obligations. 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 2017 law regarding transparency is that it does not allow rights holders to see how much money their RMOs collect or distribute to their members. Moreover, in terms of a lack of good governance, the law does not allow rights holders to control their RMOs.

The so-called “fiscal control improvements” in the new law, including regular audit reports, will not improve accountability because the audit obligations are for reports only to the government for taxation purposes, not to rights holders. The new law creates “supervisory boards” for each of the various authors’ CMOs (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 structure 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 of RMOs 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.

To develop properly functioning music broadcasting and public performance payment systems via collective management, the Government of Russia should re-visit the 2017 law to ensure that rights holders are able to control and manage their own RMOs or can effectively opt out of collective management. This change would result in fair representation characterized by direct representation of rights holders on the board in a manner that is proportionate to relevant market share and reflects commercial realities, with no conflicts of interest in the governance structures. Many models for proper governance of RMOs exist, including WIPO best practices, international rights holder group best practices, as well as U.S. and European Union (EU) existing practices. Instead, the existing regulations and state accreditations have institutionalized a system that is neither transparent, nor well governed with accountability for authors, record labels, and performers, who have no other option except for the state CMOs.

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<sup>13</sup> On August 23, 2022, Webwatch reported a partial capture of *Top Gun: Maverick* from Moskva Cinema in Moscow.

<sup>14</sup> WTO Working Party Report (Paragraph 1218).

## **DEFICIENCIES IN THE RUSSIAN LEGAL REGIME**

Since its invasion of Ukraine, Russia has introduced several troubling legal reforms that would negatively impact the copyright industries. For example, on May 27, 2022, the Russian President issued Decree #322 regarding the payment of remuneration to foreign rights holders from “unfriendly” countries (i.e., the countries that imposed sanctions against Russia in response to its invasion of Ukraine). The Decree orders that Russian persons (including the Russian authorities, organizations, companies, and residents) make payments for the use of IP to foreign rights holders in rubles to a special O-type bank account opened in the name of the foreign rights holder. Russian entities have no obligation to make payments to foreign rights holders until the rights holder agrees to the new method and rights holders may not transfer funds from O-type bank accounts outside of Russia without government permission. The Decree restricts the rights holders subject to the Decree from receiving license payments other than under Governmental approval.

On May 30, 2022, the Russian Government terminated the application of the MOU between the Russian Federation and the United States on the principles of cooperation in the field of culture, humanities, social sciences, education, and mass media. The MOU, signed in 1998, included a provision encouraging the parties to facilitate the establishment of contacts between interested governmental and non-governmental organizations to develop programs and joint projects in fields of mutual interest that help strengthen bilateral ties. The MOU listed TV, film, and audiovisual materials. Although it had no direct impact on IPR protection, the MOU was a positive step towards establishing a proper legal framework. Termination of the MOU illustrates a general trend in Russia to deprioritize international obligations.

In mid-April 2022, Russia began drafting legislation that, if enacted, would drastically undermine exclusive rights. This unprecedented bill would allow a Russian licensee of a copyrighted work to apply to the court for a compulsory license to exploit a copyrighted work if a partner from an “unfriendly state” (including the United States) partially or completely unilaterally repudiated the license agreement on grounds not related to the violation of such a contract by the licensee. As U.S. industries have suspended operations in Russia in the wake of Russia’s invasion of Ukraine, such a bill, in effect, would legalize piracy of copyrighted materials owned by U.S. rights holders, in clear violation of Russia’s WTO obligations—essentially amounting to state-sanctioned IP theft. On August 19, 2022, the first version of the draft was submitted to the State Duma. However, after the pushback from the local industry association, the sponsor of the bill stated the bill would be withdrawn and an alternative version would be drafted. The amended text will reportedly cover only compulsory licensing for theatrical distribution of audiovisual content, leaving out over-the-top (OTT) and TV services, but this would still violate Russia’s obligations under international treaties, including the Berne Convention.

IIPA and its members continue to note three major overarching concerns in the Civil Code, as amended: (a) a lack of clarity on numerous provisions, especially on exceptions and limitations; (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, as well as the applicability of safe harbors for such services. Even after the recent amendments, the law does not 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. Lastly, Russia’s law does not define secondary liability. The law should be clarified regarding the liability of online infringing websites and services, including that those safe harbors should apply to only passive and neutral intermediaries that do not contribute to infringing activities. Further, it is critical that Russia amend its regime to allow for civil injunctive relief that is quick and effective and applicable to all works.

Article 1299 of the Civil Code prohibits the commercial distribution (i.e., trafficking) in circumvention devices and services that circumvent technological protection measures (TPMs). The law should be expanded so that liability applies to the commercial trafficking in all variety of circumvention devices (including software) and services. In addition, commercial trafficking in circumvention devices, including by importation, should be criminalized. IIPA also

recommends improving Article 1252(5) of the Civil Code, which currently includes remedies for the seizure and destruction of materials and equipment used in infringements, by deleting the exception for the sale of materials by the state for “income” and by making corresponding changes in the respective procedural codes.

## **MARKET ACCESS ISSUES**

While U.S. industries have largely suspended operations in Russia, significant market access barriers remain, including a discriminatory VAT; foreign ownership restrictions in broadcasters, mass media entities, and OTT services; and an advertising ban on Pay-TV. In 2022, in response to sanctions imposed on Russia following the invasion of Ukraine, the Russian government adopted several restrictive measures targeting foreign investors from unfriendly jurisdictions. The measures include an obligation for the foreign shareholders of the Russian joint-stock and limited liability companies to obtain governmental approval for any deals involving their shares.

In addition to these barriers, the video game industry also faces significant market access issues in Russia. For example, Russia imposes customs duties on the royalty value of some imported audiovisual materials, including some video games, rather than solely on the value of the physical carrier medium, contrary to standard international practice. Furthermore, on June 17, 2021, the State Duma adopted a law mandating foreign Information Technology (IT) companies with a daily audience over 500 thousand users to open a branch, a representative office, or an authorized legal entity in Russia, which could potentially affect the video game industry.