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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” (83 Fed. Reg. 40383, August 14, 2018)**

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 4, 2018 public hearing on Russia's implementation of its obligations as a Member of the World Trade Organization (WTO). On behalf of the IIPA, I will testify specifically on Russia's copyright law implementation and 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)).

My full contact information is:

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In addition to the request to testify, this filing provides an overview of the IIPA's October 4 testimony. The testimony will focus on areas pertaining to Russia's obligations and compliance with the WTO TRIPS Agreement, as well as related copyright protection, enforcement and 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. Along with the overview, attached is IIPA's Special 301 Russia filing (February 8, 2018) which sets out a broad array of concerns of the IIPA members regarding copyright protection and enforcement, some beyond the scope of the WTO TRIPS obligations, as well as 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. 83 Fed. Reg. 157 (Aug. 14, 2018).

The copyright and related rights obligations of the WTO TRIPS Agreement consist of the substantive copyright law and related rights provisions set out 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." TRIPS Agreement, Art. 41. 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. Unfortunately, these three agreements have not been fully and properly implemented by the Government of Russia.

Full implementation of the WTO TRIPS Agreement and of the other two bilateral agreements would properly address three IPR priority issues for the copyright industries. The first priority—critically important for all of the copyright industries—is to dramatically improve enforcement against online piracy. This would include effective enforcement directed at hosting sites and streaming services, including, in particular, those directed to users outside of Russia. A second priority is for Russia to address the collective administration problems that have long thwarted the ability of music rights holders to effectively control the licensing of their recordings via the collecting societies in Russia. The state accredited Russian collecting societies are not operating with transparency or good governance consistent with international norms. As noted below, fixing this long-standing problem was an explicit obligation in the WTO Working Party Report and Russia pledged to do so by no later than 2013. A third priority is the problem of camcording motion pictures that has risen dramatically (over 200% since 2015) in recent

years, with many feature films being illegally copied in Russian theaters and migrating online. Addressing 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 in recent years.

Recent legal reforms have improved civil enforcement in Russia against online piracy. In 2017, for example, legal reforms were enacted consistent with improvements in 2013 and 2014 to establish procedures and streamlined processes for websites to comply with takedown notices from rights holders.

The first of two 2013 amendments revised the Civil Code, Part IV—in theory, to provide for third party liability, as well as safe harbors from such liability for “information brokers” (Internet Service Providers, 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 needed. 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.

Since those reforms were enacted, Russian courts (in particular, the Moscow City Court), working in cooperation with a key government ministry, have disabled access to infringing sites for users within Russia. Additional reforms in 2017 allowed these court orders to be applied (without a reapplication to a court) to clone, proxy and mirror websites containing infringing content. The 2017 legal reforms also required online search services to delete search results to blocked websites. Separately,

a law was introduced in the Duma in April 2017 to provide monetary penalties (up to US\$12,000), 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.

Unfortunately, in recent years, these new procedures and processes have been directed only at online piracy by users within Russia. The result has been a substantial and persistent international copyright piracy problem of illegal sites and services accessed by users outside of Russia. The Russian Government needs to engage in enforcement targeting illegal sites and streaming services that operate in Russia, even if the users are abroad.

Examples of these types of online piracy problems are evident. In 2017, the U.S. Government placed several Russian online sites on its Notorious Markets List (the 2017 report was released in January 2018). USTR retained *rapidgator* and *rutracker* on the 2017 list—both have been on the Notorious Markets Lists since 2012.<sup>1</sup> 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.” USTR further noted that the operators of the site net “millions of dollars annually.” The book publishing, motion picture and recorded music industries all cited *rapidgator.net* in their October 2017 Notorious Markets filings, and many 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. 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. This 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.

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 again in 2017. The U.S. Government noted that despite “positive signals,” VK 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 consist of hundreds of thousands of unlicensed copyright 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).

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

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<sup>1</sup>See, <https://ustr.gov/sites/default/files/files/Press/Reports/2017%20Notorious%20Markets%20List%201.11.18.pdf>.

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. While these actions and related enforcement efforts have disrupted Sci-Hub's infringing activity, the lack of clarity in the Russian online enforcement landscape has hampered efforts to take action against the operator and the site in Russia.

In short, more enforcement is needed, targeting these and the myriad of 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 that are causing significant economic harm to rights holders.

### Collective Administration

Fixing the long-standing problems of collective administration for music services in Russia is another unfulfilled obligation of the WTO TRIPS Agreement. There were specific obligations in the WTO Working Party Report, as well as in the 2006 U.S.-Russia IPR Agreement to correct this long-standing problem.

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.

Meeting these obligations would allow properly functioning music broadcasting and streaming services to develop in Russia. The obligations and resolution of the issue of the state accreditation of collecting societies needs to be undertaken in a manner that ensures that rights holders are able to control and manage their own societies, so that 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 2017, legislation was enacted to address problems of the state accreditation system and governance of collecting societies. Unfortunately, the new law falls far short of providing transparency to rights holders and good governance consistent with international norms and best practices for collecting societies. The 2017 legislation was adopted by the Duma in November 2017 and came into force in May 2018. It amends 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 to provide

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 will 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 Russian Government will deprive rights holders of their ability to control the licensing and collection of monies for their works and recordings, and likely result in less, not more, money flowing to authors and producers. 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.

As noted, Russia agreed in the Working Party Report to “phase out non-contractual license management” schemes within five years of the Civil Code reforms coming into place – which was in 2008. Unfortunately, the 2017 legislative reforms set any progress on this issue backward, now five years after Russia pledged to correct this long-standing problem.

#### 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 total number of camcord pirate copies sourced from within Russia rose significantly in 2017 to 78 (up from 63 in 2016). By comparison, in 2015, there were 26 camcords sourced from Russia. In 2018, through August, there were 35 camcords sourced from Russian cinemas. While this is a reduction from 2017 (during the same period of time), Russia remains one of the top five sources for pirated camcords globally.

Most of the Russian camcords come from Moscow, Kazan, Tatarstan, St. Petersburg, Ekaterinburg, Saratov, and some of the Siberian cities. 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 2017, the Russian-Anti Piracy Organization (RAPO) assisted with 14 interdictions by security personnel (trained by RAPO). Four criminal cases were initiated against the camcoders, and a conviction in any of these cases could serve as a precedent.

To fulfil its obligations and to correct this problem, 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 provide adequate resources 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. Although civil measures are not capable alone of providing the requisite level of deterrence against this

type of piracy, if properly applied, civil enforcement can be a useful tool for some industries (as it has been in the courts actions against some websites).

Criminal enforcement, while a more effective tool against large-scale commercial enterprises, can only be effective if enforcement actions are well coordinated, and focused on applying *ex officio* criminal actions against the owners and operators of these enterprises. Focusing on criminal enforcement 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—which 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—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 current 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 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 Control) 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. 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; last, it does not clearly define secondary liability. If Russia is to foster legitimate electronic commerce and if the rule of law is to apply to the online world, Russia needs to develop a balanced system of liability provisions that incentivizes ISPs to cooperate in addressing Internet piracy, and one that does not provide cover for services that induce or promote infringement. Further, it is critical that Russia amend its regime to allow for injunctive relief that is quick, effective and applicable to all works, especially for Internet matters.

Several sectors of the copyright industries and the U.S. Government report that overall IPR criminal enforcement in Russia has continued to decline in recent years, and that the focus on enforcement remains too skewed to physical piracy, not online piracy. For the past several years, however, the Government of Russia has stopped providing annual reports or enforcement statistics, so it is difficult to accurately gauge enforcement activity as a whole. The copyright industries can definitively report that in the absence of a clear nationwide governmental directive on enforcement, criminal and administrative enforcement practices have varied, and will continue to vary, considerably from region to region within Russia. 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, changes in government priorities, and an unwillingness to take action against large-scale online infringers (as well as on the focus on hard copy, and not digital, piracy).

### Market Access Issues

In addition to the issues noted on copyright law and enforcement, there are several significant market access issues in Russia, some in violation of the WTO TRIPS Agreement.

In January 2015, a law went into force that bans advertisements on pay cable and satellite channels. While the 2015 law does not appear to affect state-owned television channels (because they do not rely on advertising revenue), it will eventually have a significant impact on foreign cable and on-demand services, and will harm the overall marketplace for audiovisual content in Russia.

In 2014, the Government of Russia considered adopting an Internet tax that would have been paid by digital users in lieu of licensing, to compensate rights holders for massive online infringement of their works. The proposal was put on hold, and it is hoped it will not resurface or be allowed to move forward (because it would have, among other things, violated TRIPS and the WIPO treaties). Instead, the Government of Russia should focus on improving enforcement against infringing parties and those who enable infringement, to promote opportunities for voluntary licensing and the development of market conditions, to create a robust online marketplace.

In May 2017, a new law was adopted by the Duma (Federal Law No. 87, in force July 1, 2017) which regulates (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). How to calculate this usage is very unclear, and it will impose very 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 websites.

Additionally, the Ministry of Culture has released a proposed draft law late in 2017 (and to date, not yet enacted) intended to promote the local film industry. The proposal would amend the current law "On State Support of RF Cinematography" to modify the timing of film deposit requirements and require all recipients of film distribution certificates (both foreign and domestic) to submit mandatory payments (i.e., non-tax payments) of RUB 5 million (approximately US\$87,707) for every film with at least 100 film screenings. The monies would be placed into a special reserve for the development of cinematography in the country. A second proposal, also intended to advance domestic exhibition of films, would limit film screenings in both multiplexes and monoplexes in Russia to 35% of the total number of screenings of all films exhibited in a multiplex during a given day; and, to 35% of the total number of screenings of all films that are exhibited in a monoplex during a calendar month. Neither of these proposals, if implemented, would advance the government's goal of improving the local film industry.

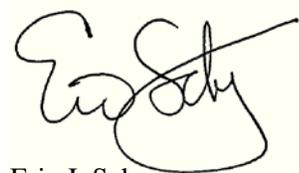
The Ministry of Culture's plan to charge a fee (of approximately US\$80,000) for each foreign movie released in Russia was revoked by the Ministry. However, at a 2017 Presidential Council of Culture meeting, the Minister of Culture announced plans to introduce a new system of support for domestic films. It would charge a 3% tax on theatrical box office fees. The text and details of this proposal have never been made publicly available.

### Conclusion

To summarize, Russia's WTO TRIPS 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 our 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 Articles 41 through 61, to provide "effective action" and "deterrent" remedies, and especially against "wilful...copyright piracy on a commercial scale," TRIPS Agreement, Articles 41 and 61, 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 2018.

Sincerely,

A handwritten signature in black ink, appearing to read "Eric J. Schwartz", is written over a light yellow rectangular background.

Eric J. Schwartz  
Counsel, International Intellectual Property Alliance

Attachment

# RUSSIAN FEDERATION

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

### 2018 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 2018.<sup>1</sup>

**Executive Summary:** The copyright industries have three intellectual property rights (IPR) priorities in Russia, which if properly addressed, could significantly improve the Russian marketplace for copyrighted works and recordings. First and most important for all of the copyright industries is to dramatically improve enforcement against online piracy—for hosting sites and streaming services, including, in particular, those directed to users outside of Russia. Second, Russia needs to address the collective administration problems that have long thwarted the ability of music rights holders to effectively control the licensing of their recordings via the collecting societies in Russia. The state accredited Russian collecting societies are not operating with transparency or good governance consistent with international norms. Third, the problem of camcording motion pictures has risen dramatically over the past three years (200% since 2015) with many feature films being illegally copied in theaters and migrating online. Addressing the camcording problem requires changes in the Russian legal framework, and dedicating sufficient resources and government willpower to engage in effective enforcement.

In 2017, legal reforms were enacted to further improve civil enforcement in Russia against online piracy. These reforms are consistent with improvements in 2013 and 2014 which established procedures and streamlined processes for websites to comply with takedown notices from rights holders. In recent years, Russian courts (in particular, the Moscow City Court), working in cooperation with a key government ministry, have also disabled access to infringing sites for users within Russia. The 2017 legal reforms allow these court orders to be applied (without a reapplication to a court) to clone, proxy and mirror websites containing infringing content. The 2017 legal reforms also require online search services to delete search results to blocked websites. These latest reforms should improve digital civil law enforcement. Unfortunately, in recent years, the new procedures and processes have been directed only at online piracy by users within Russia. This has resulted in a substantial and persistent international copyright piracy problem that needs to be addressed by the Russian Government to target illegal sites and streaming services that operate in Russia, even if the users are abroad. One key missing 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).

Several sectors of the copyright industries and the U.S. Government report that overall IPR criminal enforcement in Russia has continued to decline in recent years, and that the focus on enforcement remains too skewed to physical piracy, not online piracy. For the past several years, however, the Government of Russia has stopped providing annual reports or enforcement statistics, so it is difficult to accurately gauge enforcement activity as a whole. The copyright industries can definitively report that in the absence of a clear nationwide governmental directive on enforcement, criminal and administrative enforcement practices have varied, and will continue to vary, considerably from region to region within Russia.

It has been six years since Russia completed its accession to the World Trade Organization and agreed to a detailed IPR Action Plan with the U.S. Government (U.S.-Russia IPR Action Plan). Neither the WTO obligations outlined in the U.S.-Russia IPR Action Plan, nor in the 2006 U.S.-Russia IPR Agreement—both aimed at improving the marketplace for digital copyright materials—have been fully and properly implemented by the Government of

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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://iipa.org/files/uploads/2018/02/2018SPEC301HISTORICALCHART.pdf>.



Russia. The USTR concluded in its annual Russia WTO compliance report to Congress in December 2017, that Russia had fallen short of its WTO IPR obligations, especially with regard to online enforcement.

## **PRIORITY ACTIONS REQUESTED IN 2018**

IIPA recommends the following priority enforcement actions and legal reforms to the Government of Russia for 2018:

- 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, per 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 clarifying 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 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 1229, 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 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: (i) higher fixed fines for violations by legal entities and individuals; (ii) fines proportionate to corporate revenues (e.g., as is done for anti-monopoly violations); and/or (iii) one to three year penalties disqualifying managers of legal entities from their managerial responsibilities.

## **COPYRIGHT PIRACY AND ENFORCEMENT IN RUSSIA**

**Internet Piracy:** The legal and licensing regime in Russia needs to catch up to the explosive growth in Internet and mobile usage in order to allow legitimate markets for copyrighted content to develop and thrive. In 2009, it was estimated that 29% of individuals in Russia were using the Internet. In 2017, that figure grew to 76.4%, and there has also been a huge growth in the number of Russians that have mobile broadband subscriptions—according to the International Telecommunications Union (ITU) (December 2017 Report).

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. Because the new legal reforms and court-ordered injunctions have been directed at sites within the Russian market, some BitTorrent and other pirate sites (especially those hosting unauthorized motion pictures or television programs) have moved their sites to foreign hosting locations.

As in years past, the U.S. Government placed several Russian online sites on its Notorious Markets List in 2017 (the report was released in January 2018). USTR retained *rapidgator* and *rutracker* on the 2017 list—both have been on the Notorious Markets annual lists since 2012.<sup>2</sup> 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.” The book publishing, motion picture and recorded music industries all cited *rapidgator.net* in their October 2017 Notorious Market filings, and many 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. 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. This is just one of a number of major BitTorrent indexing sites which contain links to a wide variety of infringing copyrighted material, especially motion pictures and television programs.

As detailed below, the Moscow City Court has issued a number of injunctions in the past few years, including permanent injunctions against various Russian websites. For example, in addition to *rutracker.org*, permanent injunctions have been issued against: *rutor.org*, *ex.ua* (a Ukrainian site, popular in Russia), *ru-ru.org* and *new-rutor.org*. However, workarounds still exist and thousands of Internet users have obtained access via mirror sites and VPNs. It is hoped the 2017 legal reforms will help reduce this access in the future.

The recording industry also notes many stream-ripping services believed to be sourced from Russia including *Flvto.biz*, *2Conv* and *Fly2mp3.org* (all three are essentially the same service operating from different domains). The sites provide downloads of converted YouTube videos to users as MP3 audio files (from servers in Germany).

Another problematic site is the Russian-hosted *firestorm-servers.com*. Rights holders have observed 8,800 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. Most ISPs and website owners do not respond to takedown requests for these sites; these include direct MP3 downloading sites (such as *mp3eagle*). There are a few exceptions. For example, the video game industry reports that a few sites are complying with takedown notices (and the new laws have helped), while others never comply. Additionally, Russia is a haven for the production of cloning software and the hacking of entertainment software programs.

For the fifth 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 more than four times as many illicit downloads to PCs in Russia compared to the second highest country, Brazil. In 2017, users with Russian IP addresses accounted for more than 33% of the global volume of detected infringements occurring on public P2P networks.

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<sup>2</sup>See, <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 are still a source of piracy in Russia (in addition to the P2P services and cyberlockers already noted). Some sites offer unauthorized on-demand streaming as well as downloads (and include pre-release music). Two such examples are: *newalbumreleases.net* 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). Some of the other unlicensed pay-per-download sites include: *mp3panda*, *mp3fiesta* (hosted in Russia, but operated from Cyprus) and *mp3eagle.com* (one third of this sites' users are from the U.S.). In the past two years, access to illegal music via apps in Russia has grown exponentially, and major sources of these apps (Apple and Google) do not respond quickly (on average two to three weeks), or, in some cases, at all, to takedown notices. Draft legislation that would block mobile apps (as current law does for websites) would significantly improve this particular problem. According to a recent global music report (IFPI Global Music Report 2017), Russians spend on average 44 cents per person per year on music; in comparison Americans spend \$16.41 per person.

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 again in 2017. The U.S. Government noted that despite "positive signals," VK 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 copyright 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). In 2016, *vKontakte* also took steps to limit access to such third party apps, making it more difficult for users to download content directly. It has also 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. Thus, the motion picture industry concurs with the U.S. Government's assessment of *vKontakte* as 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.

Russia's second largest social network site, *odnoklassniki.ru* (with 43 million visits per day, and also owned by *Mail.ru*) operates a music service now with licenses similar to *vKontakte's* 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. While these actions and related enforcement efforts have disrupted Sci-Hub’s infringing activity, the lack of clarity in the Russian enforcement landscape has hampered efforts to take action against the operator and the site 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. 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.

**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. The total number of sourced camcord pirate copies from within Russia rose significantly in 2017 to 78 (up from 63 in 2016). By comparison, in 2015, there were 26 camcords sourced from Russia. Most of the Russian camcords come from Moscow, Kazan, Tatarstan, St. Petersburg, Ekaterinburg, Saratov, and some of the Siberian cities. 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 2017, the Russian-Anti Piracy Organization (RAPO) assisted with 14 interdictions by security personnel (trained by RAPO). Four criminal cases were initiated against the camcoders, and a conviction in any 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.

**Enforcement Against Internet Piracy:** To be more effective, IPR enforcement in Russia should be better coordinated, and should focus on *ex officio* criminal actions targeted at large-scale commercial enterprises, as well as on taking administrative actions and strengthening administrative penalties. Focusing on criminal enforcement 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. In its annual report to Congress entitled “Implementation and Enforcement of Russia’s WTO Commitments” (December 2017), USTR concluded that the “current IPR enforcement environment in Russia remains weak” and highlighted “online piracy” as a “significant problem in Russia.” It further summarized that overall IPR enforcement had “decreased, rather than increased, over the past few years” noting especially, criminal enforcement.

The agencies that can commence criminal cases—which 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—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 Control) 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.

Civil judicial remedies have significantly improved in the recent years because of the 2013, 2014 and, now 2017, reforms. The 2013 legal reforms included two key civil law changes and procedures directed at online piracy: (1) amendments to the Civil Code, Part IV—to provide for third party liability, as well as safe harbors from such liability for “information brokers” (ISPs) that comply with all the requirements for those safe harbors; and (2) amendments to the Civil Procedure Code (and corresponding amendments to the Arbitration Procedure Code and the Federal Law on Information and Information Technologies (2006)) authorizing judicial injunctions only after notice and takedown to block access to infringing materials or websites. In addition to expanding the scope of subject

matter covered by the 2013 laws, the 2014 amendments (Federal Law No. 364, in force May 2015) also expanded existing procedures for court ordered site-blocking against repeat infringers.

RosKomNadzor, the Federal Service for Communications, is the agency responsible for enforcement of these laws. They have been effective and cooperative with rights holders in implementing the 2013 and 2014 laws, as well as the new 2017 law, in coordination with the Moscow City Court.

In July 2017, President Putin signed new legislation into law (Federal Law No. 157, in force October 1, 2017) to address 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 RosKomNadzor identifying a mirror (or clone or proxy) site, and, after review by the ministry, RosKomNadzor can also block these 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 RosKomNadzor (although it is limited to 50 or 60 site blocks per day) under regulations it adopted (effective October 17, 2017). The ministry's decisions—which must be made within 24 hours of receipt by a rights holder—can be appealed in the courts. In addition, the 2017 legislation requires, upon request by rights holders to RosKomNadzor, search engines to remove links to infringing content on sites that have been subjected to an order under the existing laws.

Separately, a law was introduced in the Duma in April 2017 to provide monetary penalties (up to US\$12,000), 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 enacted, but passed its first reading in the Duma in October 2017. 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.

In 2017, the Moscow City Court ordered over 1,100 site blocking orders (compared with 679 in 2016). Since the 2017 mirror site law has been in force (in October), 255 mirror sites have been blocked. In addition, 786 website links have been removed by search engines following the new procedures. As noted, previous court orders have included the permanent shut down of key piratical Russian websites including (in 2015) against *rutor.org* the BitTorrent tracker. Official data for 2017 is not yet available, but it is estimated that, to date, the court blocking orders of the past few years have resulted in over 630 infringing websites (including about 260 music sites) being permanently blocked, with over half of these coming in 2017.

In 2017, RAPO used the new procedures to take down 58 websites and assisted with the commencement of several criminal cases against the owners of pirate sites (including against *goodzzona.co*, torrent tracker *netnsk.ru*, *kuzbassvsem.ru* and *fast-torrent.ru*). Mostly, however, private parties have to rely on civil, not criminal actions, using the new anti-piracy laws and court procedures by the Moscow City Court. Civil actions, while a positive step, are generally not deterrents. Thus, without more criminal or administrative enforcement of the principals involved in running these lucrative illegal sites, the civil laws alone will not improve the landscape for legal markets to develop in Russia.

As a result of the 2013, 2014 and 2017 legal reforms, many of the copyright industries reported that civil enforcement on balance improved in 2017. In 2013, a Memorandum of Understanding was signed by RAPO, the *Mail.ru* Group and other Internet platforms, and the Government of Russia (RosKomNadzor). As a result, the motion picture industry reports that, in 2017, most ISPs in Russia voluntarily cooperated and responded to RAPO cease and desist letters for their works (however, it often takes between one to three days). The ISPs are also complying with RosKomNadzor blocking orders. Unfortunately, however, some copyright industries report that some ISPs either merely forwarded notices to users without taking down material, or did not respond at all. Further, even with clear

evidence of infringement, there has been little cooperation with advertising agencies and payment processors who financially support infringing sites.

**Criminal Enforcement in General:** Criminal enforcement in Russia remains a priority for some of the copyright industries to deter digital, and 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 2017 was aimed at physical piracy, but that form of piracy has declined significantly as the marketplace moved online. A few industries, such as the independent segment of the film and television industry (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 make such a showing, 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; and (c) prosecutors are generally reluctant to recommend the initiation of criminal cases. Amendments to the Criminal Code to allow principals of corporate entities to be held criminally liable would help to correct this problem.

**Civil Enforcement:** 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). There remain many civil enforcement inadequacies, including: remedies limited to the seizure of specific copies of works that are the object of a lawsuit; the failure to award preliminary injunctions (although there are the 2013 improvements), or to freeze assets and evidence; low damages awards, which, like all awards, are also very difficult to enforce; burdensome evidentiary requirements, including rights ownership information; the absence of personal liability for the directors of infringing companies or enterprises (which is the only way to bring proceedings in cases where bogus companies operate); and the absence of the notion of 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, is 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\$26 to US\$35), the owners or managers of legal entities (10,000 to 20,000 rubles, US\$175 to US\$350), and on legal entities themselves (30,000 to 40,000 rubles, US\$526 to US\$702), 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.

**Collective Administration:** In 2017, legislation was enacted to address problems of the state accreditation system and governance of collecting societies. Unfortunately, the new law falls far short of providing transparency to rights holders and good governance consistent with international norms and best practices for collecting societies. The 2017 legislation was adopted by the Duma in November 2017 and will come into force in May 2018. It amends

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 to provide 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 will 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 Russian Government will deprive rights holders of their ability to control the licensing and collection of monies for their works and recordings, and likely result in less, not more, money flowing to authors and producers. 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.

## **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.

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.”

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.”

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.” The Government of Russia has not fully implemented these obligations.

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 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. As noted, legislation was adopted by the Duma in October 2017 (amending the Civil Code and Administrative Code) to provide collective rights management reforms, but the new provisions do not provide the necessary corrections required in the Working Party Report.

To develop properly functioning music broadcasting and streaming services (including proper public performance collections), the Government of Russia must fulfill its WTO Working Party Report and U.S.-Russia IPR Agreement obligations and resolve the issue of the state accreditation of collecting societies in a manner that ensures that rights holders are able to control and manage their own societies, so that 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. As the U.S. Government noted in its annual report to Congress (December 2017), the Russian “collecting society regime remains nontransparent and burdensome” and, this is one of several WTO obligations (including effective enforcement) that Russia has yet to fulfill.

In 2014, based on a proclamation by then-President Obama, 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 the more recent Civil Code, Part IV revisions (2013 through 2017), 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. As noted, in 2017, the web-blocking law was expanded to cover clone, proxy and mirror sites (without the need for additional court proceedings), and to require search engines to remove links to infringing content on sites that have been subjected to a court order.

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 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 who 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.<sup>3</sup>

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<sup>3</sup>For 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.

Article 1229 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.

## **MARKET ACCESS ISSUES**

In January 2015, a law went into force that bans advertisements on pay cable and satellite channels. While the 2015 law does not appear to affect state-owned television channels (because they do not rely on advertising revenue), it will eventually have a significant impact on foreign cable and on-demand services, and will harm the overall marketplace for audiovisual content in Russia.

In 2014, the Government of Russia considered adopting an Internet tax that would have been paid by digital users in lieu of licensing, to compensate rights holders for massive online infringement of their works. The proposal was put on hold, and it is hoped it will not resurface or be allowed to move forward (because it would have, among other things, violated TRIPS and the WIPO treaties). Instead, the Government of Russia should focus on improving enforcement against infringing parties and those who enable infringement, to promote opportunities for voluntary licensing and the development of market conditions, to create a robust online marketplace.

In May 2017, a new law was adopted by the Duma (Federal Law No. 87, in force July 1, 2017) which regulates (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). How to calculate this usage is very unclear, and it will impose very 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.

Additionally, the Ministry of Culture has released a proposed draft law (that it hopes to enact in 2018) intended to promote the local film industry. The proposal would amend the current law "On State Support of RF Cinematography" to modify the timing of film deposit requirements and require all recipients of film distribution certificates (both foreign and domestic) to submit to mandatory payments (i.e., non-tax payments) of RUB 5 million (approximately US\$87,707), for every film with at least 100 film screenings. The monies would be placed into a special reserve for the development of cinematography in the country. A second proposal, also intended to advance domestic exhibition of films, would limit film screenings in both multiplexes and monplexes in Russia to 35% of the total number of screenings of all films exhibited in a multiplex during a given day; and, to 35% of the total number of screenings of all films that are exhibited in a monplex during a calendar month. Neither of these proposals, if implemented, will advance the government's goal of improving the local film industry.

The Ministry of Culture's plan to charge a fee (of approximately US\$80,000) for each foreign movie released in Russia was revoked by the Ministry. However, at a 2017 Presidential Council of Culture meeting, the Minister of Culture announced plans to introduce a new system of support for domestic films. It would charge a 3% tax on theatrical box office fees. The text and details of this proposal have not yet been made publicly available.