

September 16, 2021

FILED VIA REGULATIONS.GOV–DOCKET USTR–2021-0014

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Chair, Trade Policy Staff Committee
Office of the United States Trade Representative
1724 F Street, NW
Washington, DC 20508

Re: 2021 Russia WTO Implementation Report – “Request for Comments and Notice of Public Hearing Concerning Russia’s Implementation of its WTO Commitments” (86 Fed. Reg. 45797, August 16, 2021)

To the Trade Policy Staff Committee:

These comments regarding Russia’s implementation of its obligations as a Member of the World Trade Organization (WTO) are submitted on behalf of the International Intellectual Property Alliance (IIPA). IIPA is a coalition of five member associations each of which represents a significant segment of the U.S. copyright industries.¹ The IIPA comments focus exclusively on Russia’s copyright law and enforcement obligations under the WTO Agreement on Trade- Related Aspects of Intellectual Property Rights (TRIPS Agreement) (Marrakesh Agreement Establishing the World Trade Organization, Annex 1C (Apr. 15, 1994)), as well as on related market access issues. Full compliance with the TRIPS Agreement and the accession obligations would help to expand the market for all creators and producers in the Russian marketplace. In addition to these comments, IIPA is attaching its 2021 Special 301 Russia filing that sets out a broader array of concerns regarding copyright protection and enforcement in

¹IIPA is a private sector coalition, formed in 1984, of trade associations representing U.S. copyright-based industries working to improve copyright protection and enforcement abroad and to open foreign markets closed by piracy and other market access barriers. Members of the IIPA include Association of American Publishers (www.publishers.org), Entertainment Software Association (www.theesa.com), Independent Film & Television Alliance (www.ifta-online.org), Motion Picture Association (www.motionpictures.org), and Recording Industry Association of America (www.riaa.com). Collectively, IIPA’s five member associations represent over 3,200 U.S. companies producing and distributing copyrightable content. The materials produced and distributed by IIPA member companies include: entertainment software (including interactive video games for consoles, handheld devices, personal computers and the Internet) and educational software; motion pictures, television programming, DVDs and home video and digital representations of audiovisual works; music recorded in all formats (from digital files to CDs and vinyl) for streaming and other online services as well as broadcasting, public performance and synchronization in audiovisual materials; and fiction and non-fiction books, educational instructional and assessment materials, and professional and scholarly journals, databases and software in all formats.

Russia, as well as market access issues and issues beyond the scope of the TRIPS Agreement obligations.

As requested by the Trade Policy Staff Committee (TPSC) in the Federal Register notice, IIPA's written submission specifically addresses "Russia's implementation of the commitments made in connection with its accession to the WTO, including, but not limited to, commitments in the following areas: . . . [i]ntellectual property rights (including intellectual property rights enforcement)," related to the obligations set forth in the TRIPS Agreement and in the Report of the Working Party of the WTO on the Accession of the Russian Federation (Working Party Report).² The TRIPS Agreement provides substantive copyright law and related rights provisions in Articles 9 through 14. The enforcement provisions of the TRIPS Agreement are found in Articles 41 through 61.

In sum, the copyright industries have two main priority actions for Russia, which are a result of either legal or enforcement deficiencies, or both, related to Russia's TRIPS Agreement obligations:

(1) Russia should make significant improvements in copyright enforcement against:

(a) physical piracy and especially digital piracy, which affects all of the copyright industries represented by the IIPA—the recording, motion picture, book and journal publishing, and entertainment software industries; and

(b) camcording of motion pictures in Russian theaters, which currently results in illegal online and hard copies of films being widely available without authorization; and

(2) Russia should address deficiencies in the collective management of rights in Russia.

ENFORCEMENT

Article 41(1) of the TRIPS Agreement requires that "Members shall ensure that enforcement procedures . . . are available under their law so as to 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." The existing remedies and enforcement actions under Russian law, including the civil, administrative, and criminal provisions taken as a whole, do not provide the kind of "expeditious," "effective," or "deterrent" remedies required by Article 41 of the TRIPS Agreement.

In addition to the Article 41 obligation, the Government of Russia pledged certain actions in the Working Party Report as a part of its WTO accession. Specifically, the Government of Russia pledged that it would "continue to take actions against the operation of websites with servers located in the Russian Federation that promote illegal distribution of content protected by copyright or related rights, such as phonograms (sound recordings) and investigate and prosecute companies that illegally distribute objects of copyright or related rights on the Internet."³

² 86 FR 45797 (Aug. 16, 2021).

³ Working Party Report (paragraph 1339).

Even before WTO accession, the U.S. and Russian governments completed a detailed Intellectual Property Rights (IPR) Action Plan in December 2012, which set out several important copyright enforcement and legal reform priorities for Russia. This IPR Action Plan was in addition to another bilateral agreement—the 2006 U.S.-Russia Bilateral WTO Market Access Agreement Side Letter on IPR (2006 IPR Side Letter). Neither agreement was ever implemented properly or fully by Russia.

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; . . .⁴

In the 2006 IPR Side Letter, Russia agreed to combat the then 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 providing for more effective enforcement of IPRs in relation to the Internet”⁵ (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.”⁶

Enforcement against Online Piracy

Full and proper implementation of the TRIPS Agreement and these bilateral agreements would help stem online piracy, especially for hosting sites and streaming services. The failure to do so has stalled the ability of legitimate digital services to thrive in Russia. At present, Russia is home to many of the most popular illegal online services in the world, with commercial-scale infringing websites, including web-based and peer-to-peer (P2P) downloading and streaming sites, linking sites, and cyberlockers, offering access to unauthorized music, film, video games, books, and journal articles. Many of these sites cater to English-speaking and other non-Russian users, resulting in significant financial harm to markets outside of Russia.

In the past few years, Russia has focused its attention on reforming its online civil enforcement procedures and on streamlining processes to require websites with infringing content to comply with right holders’ takedown notices. These reforms have allowed the Russian

⁴ U.S.-Russia IPR Action Plan, p. 1, Section IA.

⁵ 2006 U.S.-Russia Bilateral WTO Market Access Agreement Side Letter on IPR (2006 IPR Side Letter), p. 3, Section 2.

⁶ *Id.*

courts (in particular, the Moscow City Court), working with RosKomNadzor (the Federal Service on Communications and Mass Media), to disable access to infringing sites. Additionally, right holders may apply to the Ministry of Communications through an administrative procedure to extend the court orders to clone, proxy, and mirror websites containing infringing content without reapplication to the court. In April 2020, the Duma adopted amendments to expand the existing laws to apply the notice, takedown, and certain blocking procedures to mobile apps. Under the current laws and procedures, online search services are also required to exclude infringing websites that have been identified in the court orders from search results.

However, absent court-ordered procedures, at present, there are no other legally mandated notice and takedown procedures in Russia. In lieu of laws mandating compliance with notice and takedown (absent court orders), key Russian Internet companies (Yandex, Mail.ru, and Rambler) and right holders signed a private agreement—a Memorandum of Understanding (MOU)—in November 2018. The MOU was subsequently extended until February 2022. Only non-commercial organizations could sign the MOU, denying its benefits to right holders who do not have a legal presence in Russia. The Government of Russia has developed proposals to convert the MOU into legislation, but thus far, none of the proposals have passed into law. In June 2021, a new bill, which should replace the MOU, was submitted to the State Duma and should enter into force on December 1, 2021. If adopted, this legislation would revise the MOU from a voluntary agreement to cooperate with right holders into an obligation for search engines to delist sites identified either by court order or on a registry of infringing sites, as well as to broaden the coverage to all copyrighted works (not just audiovisual works or works of right holders with a presence in Russia as in the original MOU). The codification of the new law, applicable to all search engines and Internet Service Providers (ISPs), and all works, would significantly improve enforcement.

Overall, these civil and procedural reforms have blocked or slowed access to some major infringing sites and services. Unfortunately, American right holders continue to report that these procedures are being directed against the infringing activity of only users within Russia and are not being used against Russian sites and services catering to users outside the country. Even the most effective takedown procedures and processes to disable access to websites can only slow piratical activities and have little lasting deterrent effect without civil, and especially criminal, prosecutions directed at commercial site operators and owners.

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 large-scale illegal sites in Russia operate without deterrence, including those on the Notorious Markets List, offering free films, TV programs, music, books, journals, and video games. For example, seasonvar.ru, based in St. Petersburg, is a streaming website of television programs with over 17,000 TV series on the site. Another example, vk.com (vKontakte) is one of the most popular sites in the world and the most popular social network in Russia, where users distribute thousands of unlicensed motion picture files (even though it negotiated licenses a few years ago with some of the music companies for its use of music).

The entertainment software industry reports that Russia is a haven for the production of cloning software and the hacking of entertainment software programs. In 2021, the video game industry notes torrentdownloads.me, dirtywarez.com, and romtohome.com as particularly problematic with torrentdownloads.me hosting an average 3.8 million visits a month. In 2021, for the ninth consecutive year, Russia is 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 also first in the world when it comes to the unauthorized file sharing of video games on PCs with 1.6 times as many illicit downloads to PCs in Russia compared to the second highest country, Ukraine. So far in 2021, users with Russian IP addresses accounted for approximately 28% of the global volume of detected video game infringements occurring on public P2P networks.

The recording industry reports that paid download sites (e.g., mp3va.com) remain a source of piracy in Russia along with stream-ripping services, P2P services, linking sites, and cyberlockers (e.g. turbbit.net), with some sites making available pre-release music. The recording industry notes that some stream-ripping services are being operating from Russia, including Flvto.biz, 2Conv.com, and Flv2mp3.by (all three offer essentially the same service operating from different domains). The sites provide downloads of converted YouTube videos to users as MP3 audio files. Examples of popular pirate sites include:

The popular linking site newalbumreleases.net has a large library of newly released popular music available and receives the highest volume of traffic from the United States.

The site mp3va.com 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 US\$1.50 or less). The site is being hosted from Russia and receives the highest volume of traffic from the United States.

Some of the other unlicensed pay-per-download sites include:

mp3panda.com (hosted in Russia with the highest volume of users from the United States);

mp3fiesta.com (hosted in Russia with the highest volume of users from the United States); and

mp3eagle.com (hosted in Russia with the highest volume of users from the United States).

In the past few years, access to illegal music via apps in Russia has grown exponentially, and major sources of these apps do not respond quickly (e.g., Apple), or, in some cases, at all, to takedown notices.

Book and journal publishers report low compliance rates in response to right holder notifications for links to infringing content, with sites ignoring notices altogether. P2P piracy providing free unauthorized access to e-books also remains an issue. Most concerning to publishers is the prevalence of online book and journal piracy in Russia, particularly on hosted-content websites that are operated by Russian residents. The most egregious actor is the search engine/locker site Sci-Hub.io (formerly Sci-Hub.org), which appears to collaborate with a group of sites known as the “Library Genesis Project” (now libgen.io). As of August 2021, Sci-Hub claimed its servers hold nearly 88 million copyright-protected journal articles, as well as millions of books found on LibGen.⁷

To further its infringing activities, Sci-Hub gains unauthorized access to university systems and publisher databases through compromised user credentials obtained through phishing schemes and uses the compromised credentials to illegally obtain copies of copyrighted journal articles, which it hosts on its own server network and cross-posts to libgen.io.⁸ Notwithstanding two injunctions against the site, Sci-Hub unfortunately remains accessible in the United States. The LibGen site encourages the creation of mirror sites of its content, and several such sites remain active.⁹ 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 late 2019, the Department of Justice (DOJ) confirmed that it was investigating the founder and operator of Sci-Hub, on whether this individual has been working with Russian intelligence to steal U.S. military secrets from defense contractors.¹⁰

In short, much more effective enforcement is needed against online piracy in Russia, particularly the long-identified pirate sites (including those on the Notorious Markets list, as well as the myriad of other infringing websites).

⁷ 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>

⁸ *Id.*

⁹ Active mirror sites include: b-ok.cc, b-ok.org, b-ok.xyz, b-ok2.org, bookfi.net, bookre.org, gen.lib.rus.ec (main site), lib.rus.ec (main site), libgen.is, libgen.lc, libgen.me, Libgen.org, libgen.pw, fiction.libgen.me, libgen.li, bookslabs.xyz, collegefun.org, booksdescr.xyz, and openlib.xyz. In a 2015 case brought by an AAP member company, Sci-hub.org, the Library Genesis Project (Libgen), and its operators were found to have engaged in infringing activity by a court of the Southern District of New York, 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.

¹⁰ For a newspaper account of this investigation, see: https://www.washingtonpost.com/national-security/justice-department-investigates-sci-hub-founder-on-suspicion-of-working-for-russian-intelligence/2019/12/19/9dbcb6e6-2277-11ea-a153-dce4b94e4249_story.html.

The TRIPS Agreement, Article 61 provides that “Members shall provide for criminal procedures and penalties to be applied at least in cases of . . . copyright piracy on a commercial scale.”¹¹ Among other things, the TRIPS Agreement requires Members to make remedies available that “shall include imprisonment and/or monetary fines sufficient to provide a deterrent, consistently with the level of penalties applied for crimes of a corresponding gravity,” and “[i]n appropriate cases, remedies available shall also include the seizure, forfeiture and destruction of the infringing goods and of any materials and implements the predominant use of which has been in the commission of the offence.”¹² Overall, proper enforcement means focusing criminal enforcement actions against the owners and operators of sites engaged in large-scale infringement, which are causing significant economic harm to all right holders.

Enforcement against Camcording of Motion Pictures

Another long-standing problem in Russia is the camcording of motion pictures, with many feature films being illegally copied in theaters and migrating online. To correct the camcording problem properly requires Russia to change its legal framework, as well as to dedicate sufficient resources and government willpower to engage in effective enforcement.

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 sell illegal hard copies. In the past five years, 253 MPA-company films have been camcorded in Russia and an additional 199 audio-only recordings were sourced from Russia. Many of the release groups are connected to online gambling companies which pay for the recording of films in theatres in exchange for the inclusion of advertising for their services within the infringing copies.

The total number of sourced audiovisual camcord copies from Russia decreased very slightly in 2019 to 45 (down from 48 in 2018); in 2019 there were 30 audio-only recordings sourced from Russia. Numbers from 2020 are anomalous owing to COVID-19 cinema closures. Independent films have also been similarly camcorded and negatively impacted by this type of piracy. Most of the Russian camcords come from Moscow, St. Petersburg, Kazan, Novosibirsk, Rostov-On-Don, Ekaterinburg, and Naberezhnye Chelny. The illicit camcords that are sourced from Russia are of only fair quality, but they remain in high demand by international criminal syndicates. Unauthorized copies of major film titles often appear online within a day or two of theatrical release, damaging revenues worldwide and across the economic lifecycle of the film.

In August 2021, the Government adopted a Decree establishing the rules for film exhibition in theaters that cover the rights and obligations of both exhibitors and viewers. The Decree replaces the older version from 1994 and extends the exhibitors’ rights to remove viewers who disregard the exhibition rules from the screening room, including attempting to record the film illicitly. However, this Decree does not resolve the issue of a lack of liability for camcording.

¹¹ WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) (Marrakesh Agreement Establishing the World Trade Organization, Annex 1C (Apr. 15, 1994)), Article 61.

¹² *Id.*

To address the camcord problem, the Government of Russia needs to amend the Administrative Code to add liability for camcording to the general liability provisions (Article 7.12) on copyright infringement and to provide criminal law penalties as well. In 2020, the Government of Russia (Ministry of Culture) proposed changes to a new Administrative Code. 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 also would add administrative sanctions for camcording and would encourage law enforcement to take action against those illicitly recording films. While this is a step in the right direction, unfortunately, the Government of Russia has not proposed to amend the Criminal Code or to add any criminal sanctions for camcording pursuant to Russia's WTO and bilateral obligations.

In addition to the legal reforms, IIPA recommends that the Government of Russia should properly resource enforcement actions and undertake more effective enforcement against illegal camcording of motion pictures.

Other Enforcement Issues

The harm caused by commercial-scale piracy in Russia cannot be adequately addressed with civil measures alone; rather, enhanced administrative actions and penalties and criminal remedies are needed. Civil measures can be a useful tool for some industries (as it has been in the court actions against some websites), but they are not a deterrent against large syndicates or commercial-scale piracy. Unfortunately, in recent years, criminal enforcement in Russia against digital and physical piracy has declined in overall numbers and has not been focused enough on digital piracy.

Additionally, criminal enforcement—especially against large-scale commercial enterprises—is effective only if enforcement actions are well coordinated with a clear nationwide government directive focused on online piracy, and by applying *ex officio* criminal actions against the owners and operators of these enterprises. Without coordination and a high-level directive, criminal and administrative enforcement practices have varied considerably from region to region within Russia and have had little deterrent effect. 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. IIPA continues to recommend that Russia create a dedicated digital IPR enforcement unit within its government to focus on this problem.

Changes to criminal procedure that placed copyright infringement cases into the category of serious crimes have enabled Russian law enforcement agencies, at least in theory, to conduct thorough and comprehensive investigations against owners and operators of piratical operations. However, Russian courts have rarely, if ever, imposed deterrent criminal penalties 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 are 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.

IIPA also recommends that Russia adopt additional structural changes, such as addressing the lengthy criminal investigative process, particularly at the provincial level, including the reliance on government experts alone in investigating, examining, and prosecuting IPR violations. This reliance on government experts has been particularly problematic for the video game industry along with other jurisdictional and procedural hurdles. Moreover, Russia should revise court procedures, especially in criminal proceedings, that in practice have not resulted in the destruction of seized goods or the recovery of damages. Finally, the Government of Russia should improve the efficiency of IPR criminal investigations by appointing IPR special prosecutors, investigators, and police officers at both the federal and regional levels throughout Russia and establish an official uniform methodology for the investigation and prosecution of copyright and related rights infringements, focused on digital enforcement.

To improve enforcement, other legal reforms are needed as well. In addition to criminal enforcement, the relevant administrative agencies (e.g., the Federal Anti-Monopoly Service (FAS)) should target large, illegal distribution enterprises, such as the large-scale unlicensed services responsible for most of the illegal distribution of music and film in Russia. Russia also should clarify its Civil Code on the legal liability of ISPs for copyright infringement, including that any safe harbors apply only to neutral and passive activities. This approach would create incentives for ISPs to cooperate with right holders in fighting copyright infringement taking place over their networks. Even after recent Civil Code amendments, the law does not define ISPs and the various services they provide, nor does the current law define secondary liability for copyright infringement. Last, Russia should amend its laws to allow for injunctive relief that is quick and effective and applicable to all copyright-protected works, especially for Internet matters.

COLLECTIVE MANAGEMENT

The long-standing problems concerning the collective management of music rights in Russia is another unfulfilled WTO accession obligation. Russia's TRIPS Agreement and accession obligations are very clear. During WTO accession, 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."¹³ That commitment had a deadline of 2013. The 2006 IPR Side Letter had similar obligations to correct this problem stating that the Government of Russia would "work actively with the Duma to enact . . . amendments to the law to provide that collecting societies may act only on behalf of rights holders that explicitly authorize such action."¹⁴ Despite these commitments, Russia has failed to bring the management societies in line with international standards on governance, transparency, and accountability.

¹³ Working Party Report, paragraph 1218.

¹⁴ 2006 IPR Side Letter, p. 3, Paragraph 2.

After years of missed deadlines, instead of fixing its collective management system, Russia adopted new legislation in 2017 (in force, May 2018) that created even more problems. The 2017 law amended the Civil Code and the Administrative Code to revise the structure and activities of collective rights management organizations (RMOs). However, the new collective management system lacks transparency to right holders and good governance consistent with international norms and best practices for collective management. Without these features, Russia's collective management system fails to meet Russia's WTO accession obligations.

One obvious failure of the new law regarding transparency is that it neither allows right holders to see how much money their RMOs collect, nor how much they distribute to their members. In terms of governance, the new law creates "supervisory boards" for each of the various authors' collective management organizations (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 right holders to select the governing board or participate in the management of the organizations that purport to manage their rights. Instead, partial control of RMOs by the Government of Russia deprives right 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).

Therefore, Russia does not appear to adequately provide right holders with equitable remuneration as required under Russia's WTO accession obligations. Proper transparency requires right holders access to all remuneration collected and amounts distributed, and proper management requires a supervisory board of right holders to oversee the internal management of the RMO and would include international right holders with local representatives on the board.

Lastly, the so-called "fiscal control improvements" in the new law, including regular audit reports, will not improve accountability, because the audit obligations are only to the government for taxation purposes, not to right holders. To develop a properly functioning collective management system, the Government of Russia must fulfill its WTO Working Party Report and its 2006 IPR Side Letter obligations. This would entail the proper state accreditation of collective management organizations in a manner that ensures that right holders are able to control and manage their own societies, so they are fairly represented with no conflicts of interest in the governance structures. Fair representation in these societies includes direct representation of right holders on the board in a manner that is proportionate to relevant market share and that reflects commercial realities.

There are many models for proper governance of RMOs, including WIPO best practices and international right holder group best practices, as well as U.S. and European Union existing practices. The Government of Russia should re-visit the 2017 law and follow international practices for proper transparency and governance of collective management organizations to both meet its WTO accession obligations and to properly implement collective administration. Instead, the existing regulations and state accreditations have institutionalized a system that is

not transparent and lacks both good governance and accountability for authors, record labels, and performers – who have no other option except the state collective management organizations.

MARKET ACCESS ISSUES

In addition to the issues noted on copyright law and enforcement, significant market access issues in Russia impact the motion picture and television industries. Russia imposes customs duties on the royalty value of some imported audiovisual materials, which includes video games, rather than solely on the value of the physical carrier medium. In practice, however, digital distribution has mitigated the impact of these duties and reduced the number of reported disputes with the customs authorities on this matter in the past several years. The Value Added Tax (VAT) remains very problematic and has been imposed in a discriminatory manner: only Russian-made films are given national certifications that exempt them from the VAT, which was raised to 20% on January 1, 2019. This discriminatory application is a WTO violation because it denies national treatment for taxes on identical foreign products.

The Russian government has proposed several draft bills to limit the percentage of screens that can be taken by any single film. One proposal would limit the number of foreign film screenings in multiplexes or monoplexes to 35% of the total number of screenings in those theaters. If enacted, these proposals would harm the distribution and exhibition of foreign films in Russia. Another proposal would place a 3% tax on theatrical box office revenue. None of these bills have been enacted, nor should they, as they violate Russia's WTO obligations.

Other market access concerns in Russia include a 2015 law banning advertisements on pay cable and encrypted satellite channels. The law does not affect state-owned television channels because they do not rely on advertising revenue, and it exempts terrestrial broadcasters who are heavily dependent on ad revenue. As a result, the law significantly impacts the market for cable and on-demand services, including those services operated by foreign companies, and hinders the growth of the pay-TV industry in Russia.

Moreover, in 2017, a Mass Media Law amendment was adopted that regulates and licenses online film websites, including streaming platforms, and limits foreign ownership of such sites to 20%. 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/month. The usage calculation is very unclear, with severe consequences for violations, including barring a foreign entity or individual from owning or participating in these businesses entirely. The law was opposed by Russian and foreign film distributors as a violation of international treaties and website owners fearing that, upon adoption, it would become a tool to limit legal websites while alternatively resulting in more, not fewer, piratical film sites. Although it was initially thought to be a law aimed at preventing the expansion of foreign businesses into the local market, it is now clear the law was part of an overall scheme to control all media sectors.

A new draft law introduces substantial amendments to the Mass Media Law, replacing the 20% foreign ownership cap with restrictions on "foreign control" over video-on-demand (VOD) services. Foreign services would be allowed to "exercise ownership of a VOD service in

Russia” through the special “international funds” established in “special administrative territories” in Russia. Further developments are expected on these draft amendments by October 2021, with some probability of adoption by the end of the autumn parliamentary session.

In December 2019, a new law was enacted requiring manufacturers of electronic devices to install Russian software on all smartphones, computers, and other devices by July 1, 2020. The practical implication of this law is still unclear. The Law was supposed to come into force in July 2020, but the date was later postponed to April 1, 2021. The Government adopted the implementation regulation in November 2020 that sets out the requirements for the software for pre-installation and the list of devices covered by the rule. In December 2020, the Government issued a regulation that specifies the apps for pre-installation. The law allows amending this list, and right holders of the Russian software have the right to apply to the list provided they comply with all the requirements established by the Government. Currently, there are 28 apps on the list, including search engines, navigation, antivirus, social media (VK and OK), and over-the-top (OTT) platforms (Wink, ivi, 1tv, Kinopoisk, Okko, More.tv, Premier, Smotrim, NTV, and Start). The copyright industries continue to urge the government to ensure that no unlicensed content distribution apps are installed.

Conclusion

To summarize, Russia’s WTO TRIPS Agreement and Working Party Report commitments have not been fully implemented, especially with regard to adequate and effective enforcement against online piracy. 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 in Civil Code, Part IV (detailed in past IIPA Special 301 filings). Rather, the primary concern for the copyright industries has been the failure of the Russian IPR legal regime to fully comply with the enforcement provisions in the TRIPS Agreement’s Articles 41 through 61, to provide “effective action” and “deterrent” remedies, and especially against “wilful . . . copyright piracy on a commercial scale,” including against digital piracy and camcording. In addition, Russia has failed to meet its obligations to impose a proper collective administration system for music licensing and distribution and to address the problem of camcording.

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 2021.

Best regards,

Linda Quigley

Linda Quigley
Director for Policy and Legal Affairs
International Intellectual Property Alliance

ATTACHMENT

RUSSIAN FEDERATION

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

2021 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 2021.¹⁵

Executive Summary: In 2020, Russia added mobile apps to the list of infringing sources subject to the civil enforcement mechanisms. These civil procedures rely on courts to order takedowns of infringing content and blocking of websites, and now, also mobile apps. This is a positive development since mobile apps are the most popular means of online infringement in Russia. This reform follows a recent trend in Russia to address 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. The reforms allow Russian courts (in particular, the Moscow City Court), working with RosKomNadzor (the Federal Service on Communications and Mass Media) to quickly disable access to infringing material. Additionally, the court orders can extend—without reapplication to the court—to clone, proxy and mirror websites containing infringing content. The current laws and procedures also require online search services to exclude infringing websites (identified in the court orders) from search results.

Absent the court-ordered procedures, at present, there are no other legally mandated notice and takedown procedures in Russia. There is a 2018 private agreement, a Memorandum of Understanding (MOU) between key Russian Internet companies and rights holders, requiring search engines to delist links to infringing content from search results. It does not result in the removal of the content. The goal of the MOU was to establish a legal framework for legislation to make enforcement (i.e., responding to rights holders' notices) mandatory, but legislation has been delayed until 2021. The MOU is voluntary, and it only covers certain audiovisual works, including music videos, and only those of the signatories. Proposed legislation would convert the MOU from a voluntary agreement into law for search engines to delist links, as well as to block sites and apps identified by court order or on a registry of infringing sites, and would be broadened to cover all copyrighted works. After two prior extensions, the MOU expires on January 31, 2021.

Overall, the civil and procedural reforms have blocked or slowed access to some major infringing sites and services. Unfortunately, American rights holders continue to report that these procedures are being directed predominantly against infringing activities of users in Russia, and are not used against Russian sites and services catering to users outside the country. The end-result is a substantial and persistent online piracy problem with no borders, as users in major markets outside of Russia access infringing content from Russian sites and services. Even the most effective takedown procedures and processes to disable access to infringing content on these websites can only slow piratical activities. These actions have little lasting deterrent effect without civil, and especially criminal, prosecutions directed at operators and owners of sites engaging in infringing content. One 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 only apply to passive and neutral intermediaries that do not contribute to infringing activities. 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 transparency or good governance rules consistent with international norms. The other enforcement priority is to address the camcording of motion pictures which results in many American feature films being illegally copied in theaters and migrating online worldwide.

¹⁵For 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/2021/01/2021SPEC301HISTORICALCHART.pdf>.

PRIORITY ACTIONS REQUESTED IN 2021

- Increase the number and effectiveness of criminal IPR cases focused against digital piracy, especially on deterrent criminal actions directed against organized criminal syndicates. Criminal actions should target those involved in piracy retail chains that continue to sell pirated entertainment software, music and movies.
- 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, to prevent knowing facilitators from enjoying these safe harbor benefits; and
 - enact additional legal norms that create incentives for ISPs to cooperate with rights holders in fighting infringement taking place over their networks. Article 1253.1 of the Civil Code provides that intermediary services facilitating the widespread dissemination of unauthorized content cannot benefit from the liability privileges if they know or should have known of the infringement.
 - Amend the Civil Code (or other relevant law) to convert the MOU into law, applicable to all copyrighted works, with legally mandated obligations for ISPs and appropriate sanctions for non-compliance.
- 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. Amend the Administrative Code as well to sanction camcording.
- Amend the Administrative Code by eliminating the for-profit requirement in Article 7.12 (Administrative Offences), and raise administrative penalties to deterrent levels by implementing higher fixed fines for violations by legal entities and individuals.
- Increase the number of administrative actions against Internet piracy regardless of whether the servers or users are located in Russia.

THE COPYRIGHT MARKETPLACE IN RUSSIA

Internet Use and Piracy: As Internet access, including mobile phone access, has grown exponentially in Russia, and despite the civil law reforms intended to mitigate digital 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 (and peer-to-peer (P2P)) downloading and streaming sites, linking sites, and cyberlockers, offering access to unauthorized music, film, video games, books and journal articles. Many of these sites cater to English-speaking and other non-Russian users, resulting in financial harm to markets outside of Russia. 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. More advanced technologies are used for infringements as well, including pirate cloud systems (e.g., PaaS), which are growing in popularity.

Although the civil law reforms have improved enforcement by the courts, absent these orders, most ISPs and website operators do not comply with takedown notices, instead merely forwarding notices to users without taking down material. Often the Russian websites insist on proof of copyright ownership before even considering compliance with takedown requests. The only alternative is the voluntarily MOU between some ISPs and rights holders regarding delisting of sites from search engines. Converting the MOU into legislation, with sanctions for non-compliance of takedown notices, and applicable to all platforms and search engines, and all copyrighted works, remains a priority of IIPA members to improve overall enforcement. The advertising agencies and payment processors that financially support infringing sites continue to resist cooperation with the copyright industries.

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. There are many commercial-scale sites in Russia operating without deterrence, including those on the Notorious Markets List, offering free films, TV programs, music, books and journal articles and/or video games. In January 2021, the U.S. government included six Russian online sites on its 2020 Notorious Markets List (the same online markets as in 2019).¹⁶ USTR retained *rapidgator*, *rutracker*, *Sci-hub* (and its related sites) and *vk.com* (*vKontakte*) on its list of Notorious Markets, as well as the two sites listed for the first time in 2019: *seasonvar.ru*, and *MP3juice*. *Rapidgator* and *rutracker* have been on the list since 2012.

The motion picture and television industry is particularly concerned about *seasonvar.ru*, a St. Petersburg-based streaming website of television programs illicitly offering over 17,000 TV series on the site. It is also concerned about *vk.com*, now owned by *Mail.ru*, which is one of the most popular sites in the world and the most popular social network in Russia, along with *OK* and *Telegram*, which are also infringement hubs. 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* limits access to third party apps, making it more difficult for users to download content directly, and it now blocks infringing sites from accessing videos stored on its site, but, third party pirate sites can still stream illegal content from another service operated by the same parent company. This means that *vk.com* is still a major infringement hub for illegal film materials. The publishing industry (particularly trade book publishing), is similarly affected by e-book piracy on the site. Although the site is responsive to notifications of infringement, piracy remains a concern given the ease with which the site's users can upload and share pirated e-books and audiobooks. The video game industry reported that *vk.com* continues to play a role in the distribution of illegal copies of video games, with a growing number of ready-to-download files on social media pages on the platform. This includes wall posts with advertisement links to external pirate resources or cloud storage sites. The number of groups distributing in-game items on *vk.com*, however, has continued to decrease because of good responsiveness by the websites' administrators to requests to block infringing groups. *Telegram* is also a full-fledged global piracy hub for video games and music. The site is mostly unresponsive to takedown notices, and there is no transparency on what steps, if any, it is taking to address infringement. The website *switch-nintendo.ru* makes unauthorized video games available through indexing torrents for users to upload or download. The video game industry reports overall very weak compliance with takedown notices, and the very quick reposting of materials that are taken down.

The video game industry further reports that Russia is a haven for the production of cloning software and the hacking of entertainment software programs. In 2020, the industry noted *rutracker.org*, *ibit.to* and *rgmechanics-games.com* as particularly problematic with *rutracker.org* hosting an average 47 million visits a month (even though it is blocked in Russia). In 2020, for the eighth 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 also first in the world when it comes to the unauthorized file sharing of video games on PCs with more than twice as many illicit downloads to PCs in Russia compared to the second highest country, Ukraine. In 2020, users with Russian IP addresses accounted for approximately 31% of the global volume of detected video game infringements occurring on public P2P networks. Direct download sites remain a problem, including the uploading of files to rogue cyberlockers. Overall, the pandemic likely caused an initial spike in piracy of video games (far exceeding prior years), with a retreat to normal, albeit, high rates of piracy returning in the second half of 2020.

The market for recorded music should be much stronger than it is for a country the size of Russia. According to a September 2020 industry report, the per capita spending on music in Russia is only US\$1.21 per year, compared with US\$22.11 per capita in the U.S. (IFPI Global Report 2020). The recording industry reports that paid download sites (e.g., *mp3va.com* and *music-bazaar.com*) remain a source of piracy in Russia along with stream-ripping services, P2P services, linking sites and cyberlockers (e.g., *turbobit.net*), with some sites including pre-release music. The recording industry notes that some stream-ripping services are believed to be operating from Russia including

¹⁶See [https://ustr.gov/sites/default/files/files/Press/Releases/2020%20Review%20of%20Notorious%20Markets%20for%20Counterfeiting%20and%20Piracy%20\(final\).pdf](https://ustr.gov/sites/default/files/files/Press/Releases/2020%20Review%20of%20Notorious%20Markets%20for%20Counterfeiting%20and%20Piracy%20(final).pdf). The January 2021 report also included three physical markets in Russia, two of which are on the list for the prevalence of counterfeit (but not copyright-pirated) materials.

savefrom.net, the most popular stream-ripping site in Russia, as well as *Flvto.biz*, *2Conv.com* and *Flv2mp3.by* (all three offer essentially the same material operating from different domains). The sites provide downloads of converted YouTube videos to users as MP3 audio files (from servers in Germany). Examples of other popular stream-ripping sites include *Y2mate.com* and *Getvideo.org*, as well as *Newalbumreleases.net*, a popular linking site that 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 US\$1.50 or less). Some of the other unlicensed pay-per-download sites include: *mp3panda*, *mp3fiesta* (hosted in Russia) and *mp3eagle.com* (hosted in Russia with over 45% of its users from the U.S.). In the past few years, access to illegal music via apps in Russia has grown exponentially, and major sources of these apps do not respond quickly (e.g., Apple), or, in some cases, at all, to takedown notices. It is hoped that the 2020 law, applying enforcement against mobile apps, will effectively address this problem.

Book and journal publishers report low compliance rates in response to rights holder notifications for links to infringing content, with many sites ignoring the notices altogether. P2P piracy providing free unauthorized access to e-books likewise continues to be a problem. Most concerning to publishers is the prevalence of online book and journal piracy in Russia, particularly on hosted-content websites that are operated by Russian residents. The most egregious actor is the search engine/locker site *Sci-Hub.io* (formerly *Sci-Hub.org*) which appears to collaborate with a group of sites known as the “Library Genesis Project” (now *libgen.io*). *Sci-Hub* claims that as of October 2019, its servers hold some 79 million copyright-protected journal articles (more than 85% of articles published in toll access journals) and over six million books.¹⁷ To further its infringing activities, *Sci-Hub* gains unauthorized access to university systems and publisher databases through compromised user credentials, sometimes obtaining the credentials through phishing schemes. The compromised credentials are then used to illegally access university infrastructures to obtain copies of copyrighted journal articles, which *Sci-Hub* hosts on its own server network and cross-posts to *Libgen*. Notwithstanding two injunctions against the site, *Sci-Hub* unfortunately remains accessible in the U.S. The *Libgen* site encourages the creation of mirror sites of all of its content, and several such sites remain active.¹⁸ In October 2018, publishers successfully obtained an injunction to block the sites’ primary domain in Russia. In 2019, a permanent block was issued against *Libgen.org*, while a permanent injunction against the primary site’s continued operation in Russia is expected to take effect this year.

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 which cannot engage in lengthy and expensive civil enforcement. Independent producers partner exclusively with authorized local distributors to finance and distribute films and television programming. As a result of the piracy, legitimate distributors cannot commit to distribution agreements, or alternatively, offer drastically reduced license fees which are inadequate to support the financing of independent productions. Revenue from legitimate distribution services, which are licensed country-by-country, is critical to financing the development of new creative works worldwide. Since Internet piracy in one territory affects other markets instantly, this type of infringement not only undercuts anticipated revenue from the distribution of a particular asset, it also harms the ability of independent producers to secure financing for future productions.

The motion picture, music, and book publishing industries want Russia to take steps to keep infringing content 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 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.” When Russia joined the WTO in 2012, as part of its WTO accession, in the Working Party Report (paragraph 1339), Russia pledged that it

¹⁷“*Sci-Hub* provides access to nearly all scholarly literature.” <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5832410/>.

¹⁸The *Libgen.is* site lists *Gen.lib.rus.ec*; *Libgen.IC*; *Libgen.pw*; *Z-library*; and *BookF1.net* as mirror sites.

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.”¹⁹ Also in 2012, in the U.S.–Russia IPR Action Plan, 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 should fully and properly implement these obligations.

Civil Enforcement Against Online Piracy: As noted, civil judicial remedies have significantly improved in the recent years (with the legal reforms in 2013, 2014, 2017 and 2020), along with administrative remedies. RosKomNadzor, the agency responsible for enforcement of these laws, has been effective and cooperative with rights holders in implementing the new laws, in coordination with the Moscow City Court.

The 2013 legal reforms included two key civil law changes and procedures directed at online piracy. The first change amended the Civil Code, Part IV—in theory, to provide for third party liability, as well as safe harbors from such liability for “information brokers” (ISPs) that comply with all the requirements for those safe harbors. The changes did not provide clarity regarding the liability of online infringing websites and services, including that safe harbors should only apply to passive and neutral intermediaries that do not contribute to infringing activities. 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 after notice and takedown to block access to infringing materials or websites. In 2014, amendments expanded the subject-matter scope of the 2013 changes (Federal Law No. 364, in force May 2015) and expanded the existing procedures for court ordered site-blocking against repeat infringers.

The 2017 reform (Federal Law No. 157, in force October 1, 2017) addressed the problems of clone, proxy and mirror sites by broadening the scope of a court ordered (civil) injunction to cover these sites as well as the infringing site subject to the original order. Under the 2017 law, with an existing court order against an infringing website, a rights holder can submit a request to the Ministry of Digital Development, Communications and Mass Media (Ministry of DDCMM) identifying a mirror (or clone or proxy) site, and, after review by the ministry, RosKomNadzor issues instructions to block the mirror site; an administrative procedure is then used to block the mirror site. No special request to a court is needed from a rights owner; rather, a list of qualified blocked websites is provided by rights holders via an online mechanism to the Ministry of DDCMM, although it is limited to 50 or 60 site blocks per day under regulations adopted in October 2017. The ministry’s decisions—which must be made within 24 hours of receipt of a rights holder’s request—can be appealed to the courts. The 2017 legislation also required that search engines must remove links to infringing content on sites that have been the subject of an order from the courts or the Ministry of DDCMM. RosKomNadzor oversees compliance of both ISPs and search engines with this process. There are fines of up to 700,000 rubles (US\$9,357) for search engines that do not comply with de-indexing orders. An additional change was adopted in April 2019 in a Resolution of the Plenum of the Supreme Court (revising Chapter IV of the Civil Code), which amended existing practices to permit the use of screenshots of websites with unauthorized material on them to be treated as sufficient evidence to obtain a court order. In 2020, the law was further amended (Federal Law No. 177, in force October 1, 2020), to apply the same website blocking procedures to mobile apps, giving RosKomNadzor 72 hours after it receives the Moscow City Court order to act against the app marketplace or a website. The 2020 law allows actions directed at infringing apps as well as against sites (and stores) that distribute the apps, including otherwise legal platforms.

¹⁹The U.S. government last detailed all the intellectual property WTO commitments of Russia in its “2018 Report on the Implementation and Enforcement of Russia’s WTO Commitments” (December 2018), available at <https://ustr.gov/sites/default/files/Russia-2018-WTO-Report.pdf>.

There are other pending proposals (recommended by the Ministry of Culture): one to block anonymous pirate websites without applying to a court; another to accelerate enforcement of site blocking orders (from three days to one day); a third to provide new penalties for failure to comply with the ordered-removal of infringing content. The Federal Tax Service (FTS) 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 illegal online gambling operations. The FTS can also request that RosKomNadzor block anonymizers, so there is in place effective authority to take action against online piracy if the Government of Russia chooses to apply it. Separately, a law was introduced in the Duma in 2017 to provide monetary penalties (up to 800,000 rubles or US\$10,694), 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 2017; the other laws have not yet been adopted. Another proposed law would block websites that display ads of illegal businesses, including online casinos, which are major sponsors of copyright infringing websites.

Overall, the results of the civil laws and procedures have been positive, with increasing numbers of injunctions, including permanent injunctions, issuing against various infringing Russian websites. Some sites have seen dramatic decreases in traffic right after such orders (and some sites have even moved out of the country). While these actions are commendable, without the deterrence of criminal prosecutions against the owners and operators of infringing sites and services, many simply resurface in new guises. The motion picture industry reports that in 2020, more than 8,000 domains of copyright infringing websites were blocked (10% the result of court orders and 90% the result of RosKomNadzor decisions against mirror sites), and that since 2015, the annual numbers of sites taken down or blocked have increased yearly. The recorded music industry reports that, to date, 2,460 music sites have been blocked on a permanent basis as a result of the civil procedures and court-orders.

In 2020, the video game industry did receive several successful decisions under the civil procedures to prohibit game servers from using popular games, and the cases created helpful precedents for future cases. For example, in 2020 there was decision that blocked more than 200 mirror sites from six original blocked websites with pirated games. Also in 2020, a court granted a permanent injunction based on the valid claims of a video game company. There are many examples of injunctions against major infringing sites, including those against *rutracker.org* and *rutor.org*. However, workarounds still exist, and Internet users have obtained access via mirror sites (and alternative DNS services) and VPNs, so sites such as *rutor.org* and *rutracker.org* retain millions of monthly users in spite of the laws.

As noted, the MOU expires on January 31, 2021, and a legislative substitute is under consideration. In late 2020, legislative text was being drafted by the Legal Department of the Administration of the President. Reportedly, the President's office suggested amendments that were not previously considered by rights holders or the other MOU signatories, which may delay the legislation's progress. Only non-commercial organizations could sign the MOU denying its benefits to rights holders who do not have a legal presence in Russia. The codification of the new law, applicable to all search engines and ISPs, and all works, would significantly improve enforcement.

Criminal Enforcement Including Against Online Piracy: The copyright industries continue to report high levels of piracy and declining levels of criminal enforcement continuing a trend of the past several years. The criminal enforcement in Russia that is undertaken still is not focused enough on digital piracy. A few industry groups, such as IFTA, report that physical piracy remains a problem for independent producers and distributors (although not as large a problem as digital piracy). 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. The video game industry also reports persistent problems with physical piracy because of the absence of effective criminal (or administrative) enforcement. One criminal case, commenced in 2020, against an individual (in the Lipetsk region) for selling hacked game consoles, resulted in a guilty plea, and a fine of 20,000 rubles (US\$266).

To be effective, IPR enforcement in Russia needs a clear nationwide governmental directive on enforcement with a particular focus on online piracy. Without coordination and a high-level directive, criminal and administrative enforcement practices have varied considerably from region to region within Russia and have had little deterrent effect. A coordinated nationwide campaign should focus on *ex officio* criminal actions targeting large-scale commercial

enterprises, improving investigations and digital tracking, as well as on taking administrative actions and strengthening administrative penalties which have largely been ineffective. This would allow legitimate markets to develop and would also help support smaller independent rights holders who do not have the resources, and therefore must rely on the government for effective enforcement.

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

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

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 major reorganization of the police force in 2011 and the consequent drop in resources, as well as changes in government priorities and an unwillingness to take action against large-scale online infringers. As in recent years, there were some deterrent sentences 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 of Russia 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 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. Worse, some local authorities refuse to share any information on cases with rights holders at the investigative stage, making effective cooperation extremely difficult. 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). However, the criminal courts are reluctant to order this and instead, treat these 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 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 with respect to 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 (an 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 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 corporation director) can be found criminally liable, and only upon a showing that he/she had a direct intent to commit the infringement. It is extremely difficult to meet this burden of proof, so many cases are suspended without any penalty.

Civil Enforcement in General: While civil measures are not capable of providing the requisite level of deterrence against most digital piracy, they can be a useful tool for some industries or in some instances (including the current procedures used against websites, and now apps). But for independent creators, 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, there remain many inadequacies. 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 requirements.

There is a troubling proposal, long-pending, to lower fines (i.e., statutory damages) from their current levels, below the minimum levels set in the Civil Code (currently US\$170) 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 (Amendments to Article 1252 of the Civil Code). It should not be adopted, and instead, damage awards should be increased.

Administrative Enforcement: The Administrative Code (Article 7.12) provides a range of fines on 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 on legal entities themselves (30,000 to 40,000 rubles, US\$400 to US\$533), 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 as well as the inability to reach commercial enterprises that distribute infringing content.

Camcord Piracy: A long-standing problem in Russia is the camcording of motion pictures, with many feature films being illegally copied in theaters and migrating online. To correct the camcording problem properly requires changes in the Russian legal framework, as well as dedicating sufficient resources and government willpower to engage in effective enforcement. 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 sell illegal hard copies. In the four years before 2020 (and the pandemic's closure of theaters), 245 MPA-company films were camcorded in Russia and an additional 185 audio-only recordings were sourced from Russia. The illicit camcords that are sourced from Russia are of fair quality, but they remain in high demand by international criminal syndicates. Copies of major film titles often appear online within a few days of theatrical release, damaging revenues worldwide and across the economic lifecycle of the film.

To address the camcord problem, the Government of Russia should amend the Administrative Code to add liability for camcording in addition to the general liability provisions (Article 7.12) on copyright infringements, and provide criminal law penalties as well. In 2020, the Government of Russia (Ministry of Culture) prepared changes to a new Administrative Code to address camcording; the Code will reportedly be completely overhauled in 2021. 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, there are no proposals to amend the Criminal Code or add any criminal sanctions for camcording pursuant to Russia's WTO and bilateral obligations.

In addition to the legal reforms, IIPA recommends that the Government of Russia should properly resource enforcement actions and undertake more effective enforcement against illegal camcording of motion pictures.

Collective Administration: The long-standing problems concerning the collective administration of music rights in Russia needs to be addressed properly. The ability to exercise one's rights through proper collective administration is a WTO TRIPS obligation, and Russia made specific commitments on these issues as part of its accession to the WTO. 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 had a deadline of 2013. There were similar obligations in the 2006 U.S.–Russia IPR Agreement to correct this problem.

Instead of fixing the collective management system in Russia after years of missed deadlines, Russia adopted new legislation in 2017 (in force, May 2018), that did not address key relevant issues, and created even more problems

(e.g. with the supervisory boards). The new collective management system denies transparency to rights holders and good governance consistent with international norms (e.g., allowing rights holders to control societies), as well as best practices for collecting societies 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 neither allows rights holders to see how much money their RMOs collect, nor how much they distribute to their members.

Additionally, the new law creates "supervisory boards" for each of the various authors' collection societies (the Russian Authors Society, the Russian Union of Right Holders and the All-Russian Intellectual Property Organization) consisting of members of each RMO, but also including government representatives and "user" group representatives. This does not allow rights holders to be involved in the selection and management of the organizations that purport to manage their rights. Proper management would allow for a supervisory board of rights holders to oversee the internal management of the RMO and would include international rights holders with local representatives on the board. Lastly, 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 those rights holders. 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 societies, or can effectively opt out of collective management. This would result in fair representation (direct representation of rights holders on the board in a manner that is proportionate to relevant market share and that reflects commercial realities), and no conflicts of interest in the governance structures. There are many models for proper governance of RMOs, including WIPO best practices, international rights holder group best practices, as well as U.S. and European Union existing practices. 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 collective management organizations.

DEFICIENCIES IN THE RUSSIAN LEGAL REGIME

Russia has made progress on legal reforms but gaps remain, especially with regard to effective Internet enforcement and implementation of the digital treaties.

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 (and 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, it does not 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 or that directly infringe. Further, it is critical that Russia amend its regime to allow for injunctive relief that is quick and effective and applicable to all works, especially for Internet matters.

Other existing hurdles to effective civil and criminal enforcement are: (a) the failure of courts and police to apply statutory presumptions of copyright ownership; (b) overly burdensome evidentiary requirements to prove title; and (c) the lack of criminal liability for corporate enterprises or the principals of 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.²⁰

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 parallel changes in the respective procedural codes.

MARKET ACCESS ISSUES

In addition to the issues noted on copyright law and enforcement, there are significant market access issues in Russia that impact the motion picture and television industries.

Russia imposes customs duties on the royalty value of some imported audiovisual materials (which include video games), rather than solely on the value of the physical carrier medium, contrary to standard international practice. Digital distribution has mitigated its impact, but the duty is a double taxation since royalties are also subject to withholding, income, value-added, and remittance taxes.

The Value Added Tax (VAT), raised to 20% in January 2019, remains very problematic because of its discriminatory treatment: Russian-made films are issued certifications exempting them from the VAT. The exemption for Russian films is imposed in the Customs Code (Article 32), and the Federal Law “On State Support of Cinematography” (Article 4), the latter defining the Russian-film criteria. This is a WTO violation because it denies national treatment for taxes on identical foreign products.

The Mass Media Law prohibits non-Russians (including legal entities with foreign participants) from engaging in certain mass media activities, including broadcasting. The law limits foreign ownership to 20% of the capital of a covered entity, thus denying film producers and distributors access to the Russian market absent a joint venture partner. The law applies to broadcasters, as well as to online film websites, streaming platforms, and “over-the-top” (OTT) services. The law, opposed by Russian and foreign film distributors (as a violation of international treaties), reduces consumer choices, and is part of an overall scheme to control the media.

In 2015, a law went into force banning advertisements on pay cable and encrypted satellite channels. The law does not affect state-owned television channels because they do not rely on advertising revenue, and it exempts terrestrial broadcasters who are heavily dependent on ad revenue. As a result, the law significantly impacts the market for cable and on-demand services, including those services operated by foreign companies, and has hindered the growth of the pay-TV industry in Russia.

A persistent legislative concern have been the numerous proposals over the years (never enacted) to adopt screen quotas to limit the availability of foreign films. Another proposed law would place a 3% tax on theatrical box office revenue, but only on foreign films. If enacted, this too would violate the national treatment obligations of the WTO TRIPS Agreement.

²⁰For 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.