

EVOLUTION AND ENFORCEMENT OF INTELLECTUAL PROPERTY LAW IN RUSSIA

The Russian Federation is at a critical point in its development both as a state and as a legitimate player in the world market. Russia has a growing market economy.¹ From 2000 to 2008, under former President Vladimir Putin's guidance, Russia recovered from the 1998 economic crisis² and the residual effects of the collapse of the Soviet Union. During those years, Russia's gross domestic product ("GDP") increased as much as seventy percent.³ It is hoped for and anticipated that under current President Dmitry Medvedev economic prosperity will continue, and Russia, as the socio-political successor of the Soviet Union, will gain its place as an economic world power.

However, Russia's ability to further join the international marketplace may be jeopardized by its lax enforcement of intellectual property rights and legislation, which falls short of international standards and treaties.⁴ Russia has the dubious honor of being one of the world's worst intellectual property offenders.⁵ Russia's reluctance to protect and enforce intellectual property rights forestalls its progress in several ways. For example, Russia has been unsuccessful in its attempts to accede to the World Trade Organization ("WTO"),⁶ and low investor confidence in Russian

1. From 2000 to 2008, Russia's gross domestic product greatly increased. See *Russia's Economy Under Vladimir Putin*, *infra* note 3.

2. The 1998 crisis was largely caused by the Asian financial crisis during 1997 and 1998, which caused commodity prices to fall drastically. This especially damaged countries whose economies were heavily based on raw materials, as Russia's is, see *infra* note 15 and accompanying text.

3. During Putin's presidency, the GDP increased by about 70%. *Russia's Economy Under Vladimir Putin: Achievements and Failures*, RIA NOVOSTI, Jan. 3, 2008, <http://en.rian.ru/analysis/20080301Report/100381963.html>. There was 75% industrial growth, and investments increased by 125%. *Id.* In 2007 alone, reports place the annual GDP growth between 7.7%, estimated by the Economic Development and Trade Ministry, and 8.1%, according to the Russian Statistics Service. *Russia's GDP Growth Reached 8.1% in 2007—Statistics Service*, RIA NOVOSTI, Jan. 31, 2008, <http://en.rian.ru/russia/20080131/98116820.html>. For further discussion of Russia's economic development during Putin's presidency, see Katya Malofeeva & Tim Brenton, *Putin's Economy—Eight Years On*, RUSSIA PROFILE, Aug. 15, 2007, <http://www.russiaprofile.org/page.php?pageid=Business&articleid=a1187177738>.

4. *Intellectual Property Rights: A Key to Russia's Economic Revival*, RUSSIA BUSINESS WATCH, Summer 2000, at 32, available at <http://www.cipr.org/activities/articles/RBWipr.pdf>.

5. Russia remains on the International Intellectual Property Alliance (IIPA) Priority Watch List, available at http://www.iipa.com/2009_SPEC301_TOC.htm.

6. *Intellectual Property Rights*, *supra* note 4, at 34. Unquestionably, Russia must improve protection and enforcement of intellectual property rights, else it will impede its efforts to join the WTO.

protection of privately held intellectual property keeps many industries underperforming.⁷

Until 2006, any legitimate attempts by Russia to join the WTO were blocked by the United States, in part because of Russia's egregious intellectual property violations.⁸ On November 19, 2006, in Hanoi, Vietnam, a binding, bilateral WTO market access agreement was signed by United States Trade Representative, Susan C. Schwab, and Russian Minister of Trade and Economic Development, German Gref.⁹ Included in this agreement was a Side Letter concerning Russian implementation of key legislation for the protection and enforcement of intellectual property rights.¹⁰

Unfortunately, however, Russia has failed to meet the requirements of this Side Letter. While the country has made many amendments to its intellectual property legislation,¹¹ there are still glaring deficiencies in its legal scheme. Moreover, despite enhanced police and agency enforcement, Russian courts remain notoriously reluctant to engage in decisions regarding intellectual property violations.¹² Despite seizures of goods and arrests, charges are seldom pursued to conviction, offenders are often freed

7. *Id.* at 32.

8. William New, US-Russia Bilateral/WTO Deal Pushes New Standards for IP Protection, BILATERALS.ORG, http://www.bilaterals.org/article.php3?id_article=6570.

9. Of the bilateral agreement, Schwab said:

I am pleased that we have concluded this important agreement in connection with Russia's WTO accession negotiations. This is a strong and far-reaching commercial agreement that meets the high standards of President Bush's market-opening trade agenda and moves Russia closer to full integration into the global, rules-based trading system. Russia has become an increasingly important destination for American agricultural goods, a range of services, and manufactured products—and as Russia's market opens further as a result of its WTO membership, its importance will only grow.

Press Release, Office of the United States Trade Representative, United States, Russia Sign Bilateral WTO Market Access Agreement: Negotiations on WTO Membership Now Move to the Multilateral Phase (Nov. 19, 2006) [hereinafter Press Release, U.S.-Russia Bilateral Agreement], *available at* <http://www.ustr.gov/sites/default/files/PR.pdf>.

10. Much of the legislation was to be enacted by June 1, 2007. Office of United States Trade Representative, *Results of Bilateral Negotiations on Russia's Accession to the World Trade Organization (WTO), Action on Critical IPR Issues*, TRADE FACTS, Nov. 19, 2006, at 1, <http://www.ifap.ru/pr/2006/061206aa.pdf>. Intellectual property organizations were hopeful that this binding agreement would signal an end, or the beginning of an end, to Russia's lax approach to intellectual property violations. *See* Press Release, U.S.-Russia Bilateral Agreement, *supra* note 9.

11. Namely, by enacting Part IV of the Russian Civil Code, which deals specifically with intellectual property, thus replacing most of Russia's former civil legislation in intellectual property rights. *See* OFFICE OF UNITED STATES TRADE REPRESENTATIVE, RUSSIA 10 (2008), http://www.ustr.gov/sites/default/files/uploads/reports/2008/NTE/asset_upload_file602_14668.pdf.

12. For example, see *Court Acquits allopmp3.com Site Owner*, CNN.COM, Aug. 15, 2007, <http://edition.cnn.com/2007/TECH/biztech/08/15/russia.site.reut>.

only to resume pirating activities, and illegal copies are returned to the streets for sale.¹³

Russia is, by far, the largest country in the world in terms of land mass and has a population of over 140 million.¹⁴ It has vast resources, both human and natural. It is one of the world's largest suppliers of oil and natural gas.¹⁵ Its reliance on these materials, however, leaves the country vulnerable to changes in world commodity prices.¹⁶ In order for Russia to more fully enjoy a place in the world marketplace and maintain a sustainable economy, it needs to diversify its economy and move away from reliance on non-renewable or slowly renewed resources.¹⁷ In order to achieve economic diversification, Russia must implement a strong intellectual property scheme that stimulates foreign investment. Protection of intellectual property rights is especially important to persons looking to invest.¹⁸ Further, by strengthening its intellectual property regime to comply with the 2006 Side Letter, Russia will move closer toward possible accession into the WTO. Membership in the WTO would confer upon Russia the benefit of increased foreign investment,¹⁹ market

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[T]he raids run by the police and the municipal authorities were not generally followed up by prosecutors and the courts. The pattern of successful raids without successful prosecutions (with a few exceptions) is a recurring problem. In addition, it is estimated that up to 70% of pirated product seized in raids in Russia finds its way back into the market through either the Veteran's Fund or the Trade Houses in the Ministry of Justice, which both claim the right to sell pirate discs on the open market.

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE [IIPA], 2005 SPECIAL 301 REPORT: RUSSIAN FEDERATION 19 (2005), <http://www.iipa.com/rbc/2005/2005SPEC301RUSSIA.pdf> [hereinafter IIPA, 2005 SPECIAL 301 REPORT].

14. Russia has an area of 17,098,242 square kilometers, and, as of July 2009, an estimated population of 140,041,247. Central Intelligence Agency, *Russia*, WORLD FACTBOOK, <https://www.cia.gov/library/publications/the-world-factbook/geos/rs.html> (last visited Oct. 23, 2009).

15. *Id.* (stating that Russia is the world's largest exporter of oil and second largest exporter of natural gas).

16. *Id.* See also *supra* note 2.

17. In 2006, *The Moscow Times* reported:

Despite enjoying a seventh consecutive year of economic growth on the back of booming oil prices, the country is underperforming in attracting foreign investment Unless active steps are taken to diversify the economy away from oil and gas . . . the momentum for a major breakthrough in sustainable growth could be lost

"The real question before us . . . is whether the Russian economy will do as well as it is capable of doing."

Valeria Korchagina, *Foreign Investors Seek More Clarity*, MOSCOW TIMES, Mar. 2, 2006 (quoting U.S. Ambassador William Burns), <http://www.moscowtimes.ru/article/852/49/206482.html>.

18. *Id.* Further, one of Russia's main hurdles to realizing its potential for growth is intellectual property rights protection. *Id.*

19. Russia has recognized that its intellectual property rights deficiencies have led to wary investors. *The Moscow Times* reported:

diversification, and elimination of arbitrary trade sanctions by other countries;²⁰ Russia would no longer face the stigma of being the only major world power that is not a member of the WTO.²¹

Russia's losses due to intellectual property violations are not confined to those associated with foreign relations.²² Reports suggest that Russia loses \$823 million in taxes and thousands of jobs because legitimate markets are replaced by markets for pirated goods.²³ Also, a high percentage of Russia's pirated goods and piracy operations are controlled by organized crime.²⁴ It is thought that piratical activities create as much revenue for organized crime groups as the trafficking of illegal drugs.²⁵ In order to have a real impact on the activities of organized criminal groups, strong stances are needed both in legislation and enforcement. Local

Multinational companies are quick to turn away from markets where counterfeiting laws are toothless and unpopular, said the International Chamber of Commerce report, which suggested that Russia's courtship of global business partners must be suffering. On every front—from the state's unwillingness to meet international intellectual property standards to the local media's "disregard for the importance of combating piracy"—the survey of 48 global firms found perceptions of Russia and China to be worst by far.

Simon Shuster, *Piracy Watchdog Picks Out Russia for Criticism*, MOSCOW TIMES, Jan. 30, 2007, <http://www.moscowtimes.ru/article/852/49/199436.html>.

20. Paul Blustein, *Bush Urged to Be Cautious of Russia Joining WTO*, WASH. POST, July 13, 2006, at A17.

21. In February 2008, after fourteen years of negotiations, Ukraine joined the WTO. Andrew E. Kramer, *Ukraine, Eager for Ties to the West, Joins the W.T.O.*, N.Y. TIMES, Feb. 6, 2008, at C4, available at <http://www.nytimes.com/2008/02/06/business/worldbusiness/06trade.html>; Boris Kagarlitsky, *WTO Victory Could Backfire for Ukraine*, MOSCOW TIMES, Feb. 21, 2008, <http://www.moscowtimes.ru/article/1040/42/356021.html>. Russian officials were frustrated with this decision, claiming that Ukraine had more serious violations of intellectual property laws than they had. *Id.*

22. *Intellectual Property Rights*, *supra* note 4, at 32.

23.

The piracy levels and dollar losses in Russia are very high for an economy as well developed as the Russian market. These high piracy levels cost the Russian economy millions of dollars in lost jobs and lost taxes. In a study undertaken by the software industry (BSA/IDC Study, December 2005), it was estimated that if levels of piracy could be reduced by 10 points, it would add \$23.5 billion to the Russian economy and create 33,700 new jobs—more jobs than are currently employed in Russia's hardware, software, and services sector combined. It would also generate \$15 billion in local industry revenues and \$823 million in tax revenues.

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE, 2007 SPECIAL 301 REPORT: RUSSIAN FEDERATION 127, <http://www.iipa.com/rbc/2007/2007SPEC301RUSSIA.pdf> [hereinafter IIPA, 2007 SPECIAL 301 REPORT].

24. Nikola Krastev, *Report Says Film Piracy, Organized Crime Intertwined in Russia*, RADIO FREE EUROPE RADIO LIBERTY, Mar. 21, 2009, http://www.rferl.org/content/Report_Says_Film_Piracy_Organized_Crime_Intertwined_In_Russia_/1514434.html ("DVD piracy has become the domain of organized crime groups . . . [F]ilm piracy has become a key part of Russian organized crime's illegal business portfolio." (citing GREGORY F. TREVERTON ET AL., FILM PIRACY, ORGANIZED CRIME, AND TERRORISM (2009), available at http://www.rand.org/pubs/monographs/2009/RAND_MG742.pdf)).

25. IIPA, 2005 SPECIAL 301 REPORT, *supra* note 13, at 16.

authorities must be willing to withstand corruption and exercise vigilance in gathering evidence against leaders of these syndicates. Above this, Russian courts need to be willing to impose deterrent penalties in terms of fines and jail time for owners of facilities that produce pirated material. Until there are strong deterrents against intellectual property violations, organized crime will continue to profit from piracy.

Russia's ability to join the world marketplace has important implications for the United States as well. With acceptable intellectual property rights protection, Russia's legitimate entertainment and business market will expand. Counterfeit items currently comprise up to eighty percent of markets in major Russian cities, leaving little market space for legitimate products.²⁶ Further, with prolonged turmoil in the Middle East, a healthy and sustainable trade relationship with Russia could mean "a reliable source of oil, regardless of what might be happening in the Gulf."²⁷

For years, under Czarist rule, Russia tried to emulate the West. The upheaval of the Communist Revolution was, in part, the reaction of a characteristically non-Western Slavophile intelligentsia and working class to the Western-imposed ideals of the upper class. The complicated relationship that Russia, under the Soviet Union, had with the rest of the world, and the subsequent fall of the Soviet Union, left Russia disadvantaged in many ways. After the fall, the government was in disarray.²⁸ Though Russia was founded in the ninth century, many critical elements of its government were dramatically reformed and have existed for less than two decades.²⁹

Despite previous tensions with Russia, it is important for the United States to attempt to understand and cooperate with Russia as it continues to regain and surpass the prosperity and international power it enjoyed as part of the Soviet Union. As Thomas Graham, a former adviser on Russia

26. INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE, 2009 SPECIAL 301 REPORT: RUSSIAN FEDERATION 127, 122, <http://www.iipa.com/rbc/2009/2009SPEC301RUSSIA.pdf>.

27. Emma Clark, *Russia's Bid for Economic Greatness*, BBC NEWS, May, 24, 2002, <http://news.bbc.co.uk/2/low/business/2002455.stm>. Further, increased foreign investment in Russia will facilitate an upgrade in Russia's oil and natural gas technology. *Id.*

28. "[There was] widespread chaos [in] the 1990s[:] violent turf wars between criminal groups in Moscow, St. Petersburg, Yekaterinburg, and Vladivostok and bankers regularly targeted for kidnapping or assault" GREGORY F. TREVERTON ET AL., *FILM PIRACY, ORGANIZED CRIME, AND TERRORISM* 98 (2009) (footnotes omitted).

29. See Kelly L. Ross, *Successors of Rome: Russia, 862-Present*, PROCEEDINGS OF THE FRIESIAN SCHOOL, FOURTH SERIES, <http://www.friesian.com/russia.htm>.

to President George W. Bush said, “You can’t do without Russia, so the question is how you manage relations with Russia.”³⁰

This Note gives a brief history of Russian intellectual property laws, beginning with Czarist Era protection, moving through massive shifts during the Soviet Era, and arriving at the gaping holes left after the fall of the Soviet Union. Next, this Note discusses Russia’s current struggle to gain control over its piracy problems, including its continuing attempts to join the WTO, its progress made under the 2006 Side Letter, and the implementation of Part IV of the Civil Code. This Note suggests that diligent and thorough enforcement by Russian courts will give synergy to enforcement efforts by police and legislators. Russia’s difficult transition into a market economy and its move toward a more complete intellectual property legislation will be eased if piracy is deterred due to judicially imposed criminal sanctions.

CZARIST ERA

“[D]evelopments in Russian intellectual property law have mirrored the country’s political evolution.”

—Julian Zegelman, *Researching Intellectual Property Law in the Russian Federation*³¹

The Czars of the seventeenth, eighteenth, and nineteenth centuries looked to the West for political, scientific, and cultural ideologies and advancements.³² Thus, during Czarist times, Russia’s intellectual property laws were apace with modernity.³³

Authors’ rights were first given protection under the “Censorship Statute of 22 April 1828.” Further, the “Regulations [or Statute] on privileges for inventions and improvements” enacted May 20, 1896, already contained most of the elements of a modern patent system, such as the enablement, novelty and utility requirements, and a fifteen-year exclusive patent term.”³⁴

30. Anatoly Medetsky, Anna Smolchenko, & Emma Stickgold, *Gref Calls WTO Top Priority This Year*, MOSCOW TIMES, Apr. 5, 2007, <http://www.moscowtimes.ru/article/850/49/197919.html>.

31. Julian Zegelman, *Researching Intellectual Property Law in the Russian Federation*, LAW & TECH. RES. FOR LEGAL PROF’LS, Feb. 14, 2009, <http://www.llrx.com/features/russiaiplaw.htm>.

32. Ross, *supra* note 29.

33. Zegelman, *supra* note 31.

34. *Id.* For further discussion of the development of Czarist intellectual property rights, see WILLIAM E. BUTLER, *INTELLECTUAL PROPERTY LAW IN RUSSIA*, at xxiii (William E. Butler trans., Wildy, Simmonds & Hill Publishing 4th ed. 2005) (1998).

Due to the vast scientific and cultural changes that occurred during the nineteenth and twentieth centuries, intellectual property law also evolved to keep up with progress. In 1911, the demand for reform was met with “[t]he first detailed and balanced national Statute on copyright”³⁵

Given the path of Czarist intellectual property protection, it is easy to imagine that without the great upheaval of the 1917 Bolshevik Revolution and its effects on property rights, including intellectual property rights, Russia would not be facing the same problems with piracy as it is today.

SOVIET ERA

After the Communist Revolution of 1917, Russia’s political and economic systems were immediately and permanently changed to meet Socialist ideals.³⁶ Theoretically, Russia had new rulers, new owners, and a new, all-encompassing class—“The People.” As most personal property shifted to the State, or “The People,” intellectual property rights not surprisingly underwent drastic changes in protection.³⁷ The potential of the 1911 legislation, which had promised to keep Russia’s intellectual property protection well established, was lost.

Immediately following the Revolution, the new leaders of the Soviet Union had more pressing concerns than overhauling Russia’s intellectual property laws.³⁸ The need for evolved protections most likely became clear later during attempts to reorganize and publicize industries.³⁹ If inventions and technology were no longer recognized as the sole domain of their creator, that would eliminate costs and administrative headaches that went along with patent protection during rapid industrialization. Also, in 1917 the Soviet government was largely free from international agreements concerning intellectual property rights, making it easier for the government to create its own scheme.⁴⁰

35. Dmitry Golovanov, *Transformation of Authors' Rights and Neighbouring Rights in Russia*, LEGAL OBSERVATIONS OF THE EUROPEAN AUDIOVISUAL OBSERVATORY, Feb. 2008, at 2, 2 (IRIS plus Supp. 2008), available at http://www.obs.coe.int/oea_publ/iris/iris_plus/iplus2_2008.pdf.en.

36. “The capitalist monarchy was gone, replaced by a Soviet Socialist Republic, with its regulated planned economy, subsidized production and complete lack of private enterprise and private ownership of property.” Zegelman, *supra* note 31.

37. See Levitsky, *infra* note 40.

38. Zegelman, *supra* note 31.

39. *Id.*

40.

When the Soviet government assumed power in Russia in 1917, it was virtually free from multilateral or bilateral obligations relating to the protection of copyright. Not only has the revolutionary government adopted a policy of disregarding all obligations entered into by the Imperial and Provisional governments, but the four bilateral copyright conventions concluded

What we know as “intellectual property” in Russia is often broken up into “author’s rights” and patents.⁴¹ It is possible that the difference in understanding the product of intellectual pursuit as ‘rights’ instead of ‘property’ curtailed immediate upheaval of intellectual property protection. This semantic difference may also have affected the rights that the Soviet Union did recognize and protect.⁴²

LEGISLATION IN THE INTERIM BETWEEN THE REVOLUTION AND THE FALL OF THE USSR

The New Economic Policy (“NEP”), which spanned a critical period during the first half of the 1920s wherein there was, under Vladimir Lenin, a small resurgence of private enterprise,⁴³ further affected Soviet intellectual property protection.⁴⁴ However, despite early aims of the NEP,

by the Imperial government between 1911 and 1915 had either already expired, or were about to expire.

Serge L. Levitsky, *The Beginnings of Soviet Copyright Legislation 1917–1925*, 50 TIJDSCHRIFT VOOR RECHTSGESCHIEDENIS 49 (1982) (footnotes omitted). Russia had agreements with France, Germany (which expired before the 1917 Revolution), Denmark, and Belgium, which “[t]he Soviet government did not enforce . . . during the remaining period of their validity. The first Soviet bilateral convention . . . was to be signed only in 1967.” *Id.*

41. For a more detailed description of author’s rights, including neighboring rights, see *Grazhdanskii Kodeks RF [GK] [Civil Code] art. 5-43 (Russ.)*, as translated in BUTLER, *supra* note 34, at 20–55.

42. “Soviet legal doctrine avoided the term ‘intellectual property’ or ownership altogether, it being criticized for not only its inaccuracy but for being bourgeois and exploitative.” BUTLER, *supra* note 34, at x. The term “intellectual property” re-emerged in legislation following the fall of the Soviet Union. *Id.*

43.

[T]he development of [the NEP] coincided with a nearly disastrous breakdown in industrial and agricultural production and with the outbreak of severe famine and revolts among the peasantry. Lenin, acknowledging that the transformation had been pushed too fast, advocated an immediate retrenchment and the adoption of “state capitalism”.

Robert C. North, *The NEP and the New Democracy*, 24 PAC. AFFAIRS 52, 53 (1951) (footnote omitted).

The NEP had several purposes, such as increased production of grain and fuel, and improving the position of the peasantry, as the newly formed state solidified its market.

In order to achieve these various purposes, Lenin’s NEP restored freedom of trade within the country and revived a money economy; industry was decentralized, cooperatives were put on an independent basis; and concessions were made to the peasantry, to foreign capitalists, and to small private traders. In nearly every phase of economics and politics, moderation replaced . . . inflexible dogmatism . . .

Id. at 54 (footnote omitted).

44. For example, during the NEP, though the state maintained a majority of printing rights, legislation allowed for limited private printers, though they were subject to strict guidelines. This was significant because prior to the NEP, the Soviet government had commandeered all control of all printing and had essentially named itself the owner of many of the works being printed.

subsequent legislation hindered copyright protection in the early Soviet Era. When Joseph Stalin rose to power after Lenin's death in 1924, the policies of the NEP were abandoned for more aggressive and prototypical socialist schemes of the government controlling intellectual property.⁴⁵

By 1925 author's rights had begun to be recognized.⁴⁶ The 1925 principles were improved upon by the Law on Author's Rights of 8 October 1928.⁴⁷ The basic aims were to nationalize and monopolize works and publishing, most markedly of deceased Russian writers.⁴⁸ These made

The decree of 12 December 1921 on 'private publishing houses', a forerunner of the NEP legislation, showed the unequal alliance between socialist economy and private enterprise at work:

(a) Private publishers were allowed to own and rent workshops . . . and to sell their output . . . at market prices. But the grant of one-year permits to operate such establishments remained within the government's discretionary power (Sections 2, 3).

(b) All manuscripts intended for publication were subject to preliminary censorship by the State Publishing House . . . [This] censorship was extended from privately published to *all* published works, and survived the NEP experiment to become a long-term feature of Soviet publishing. . . .

(c) Although . . . private publishers were authorised to sell their products at market prices, the State Publishing House . . . possessed . . . an option of buying out the output of private publishers, or parts of it, at prices not higher than the wholesale price.

(d) Textbooks and other teaching aids remained . . . subject to the monopoly of the State Publishing House (*Gosizdat*).

Levitsky, *supra* note 40, at 56–57 (footnotes omitted).

45. Zegelman, *supra* note 31.

46. BUTLER, *supra* note 34, at xiv.

47. *Id.* at xiv–xv.

48. Serge Levitsky, a scholar of Soviet copyright and politics, describes the four aims prior to the Copyright Act of 1925: "(1) nationalisation of the Russian classics; (2) monopolisation of publishing rights and the publishing industry; (3) establishment of government-approved tariffs for the remuneration of authors of published works; and (4) abolition of copyright protection after the death of the author." Levitsky, *supra* note 40, at 49–50. Furtherance of these aims was achieved in a number of ways. For example, in response to the unemployment of printers:

A decree issued on 29 December 1917 by the RSFSR Central Executive Committee [mere months after Bolshevik takeover] . . . arrange[d] for the publication . . . of the works of deceased Russian 'classics' to which the copyright had already expired. In addition, the [People's Commission on Education] was authorised to 'nationalise' the works of *any* Russian author and to declare a government monopoly on publishing these works, for a period of up to five years. Although the monopoly was limited in time, the nationalisation was not.

Id. at 50 (footnote omitted) (emphasis in original). Although this decree covered only deceased authors, by its terms it "also covered authors of musical compositions and stage productions." *Id.* Royalties from productions of these works went to the state. *Id.* See also BUTLER, *supra* note 34, at xiv, which states:

The Soviet authorities preoccupied themselves with reserving the right to establish a State monopoly over the authors' rights of certain writers and, from 26 November 1918, over any writers, published or unpublished, and following the abolition of inheritance in general by the Bolsheviks, the inheritance rights of authors and their descendants were not recognized.

it possible for the government to compulsorily purchase authors' rights.⁴⁹ Though this was not common practice, it is indicative of the ideology that Soviet officials imposed on the concept of intellectual property—it had become a public commodity, as other private property had become. There was, however, some form of ownership retained if the state chose not to exercise its right of purchase. For instance, in 1925, the author's right was recognized for twenty-five years from the date of publication.⁵⁰ In 1928, the right endured for the life of the author and to his heirs for fifteen years, possibly greater than twenty-five years.⁵¹

The Civil Code, adopted in 1964, was the first piece of significant author's rights legislation since the early Soviet days.⁵² Though it fell short of international treaties, it went further to recognize the rights of the author than previous practice or legislation.⁵³ This departure from international standards, such as the TRIPS WTO agreement,⁵⁴ continued through the fall of the Soviet Union and did little to solve the already prevalent problem of piracy.⁵⁵ Failure to meet international standards is still an issue for Russia, as it looks to further participate in the world marketplace.⁵⁶

49. BUTLER, *supra* note 34, at xv.

50. *Id.*

51. *Id.*

52. Golovanov, *supra* note 35, at 2.

53.

The Soviet period was marked by a very long path from revocation of the tsarist law and complete negation of author's rights to a curtailed and limited admission of rightsholders [*sic*] rights and interests in the Civil Code adopted in 1964. The Code granted a lower level of protection than what was required by international treaties on copyright. The Soviet Union joined these treaties, but did not adapt its own legislation. In the late 1980s when the need for economic liberalisation and *perestroika* was acknowledged the drafting of new legislation started. The last Soviet law dealing with copyright issues was adopted in June 1991 just six months before the fall of the Soviet Union.

Id.

54. "The TRIPS Agreement . . . is to date the most comprehensive multilateral agreement on intellectual property." World Trade Organization, A More Detailed Overview of the TRIPS Agreement, http://www.wto.org/english/tratop_e/trips_e/intel2_e.htm (last visited Nov. 29, 2009). The agreement focuses on minimum standards, domestic enforcement, and dispute settlement. *Id.*

55. It was not just the official policy of the State to nationalize works and inventions at will that led to intellectual property violations in Russia. Indicators also point to other Soviet policies that effectively encouraged piracy.

The clandestine recording industry emerged in Russia some 30 years ago. During the Soviet years the only state recording company[,] Melodia, following the lead of the Communist Party, pretended that neither The Beatles nor The Rolling Stones existed. The gap was filled by enthusiasts who copied vinyl LPs After the fall of communism, the bootleggers snatched the Melodia's producing facilities and started a new industry, filling shops with pirated LPs and CDs.

Alexander Koliandre, *Russia Battles Against CD Piracy*, BBC NEWS, Jan. 7, 2003, <http://news.bbc.co.uk/2/low/business/2578989.stm>.

56. For further reading regarding author's rights during the Soviet Era through the present, see

Though these author's rights are significantly more limited than Russia's current policies or even (potentially) those of its contemporaries,⁵⁷ they provide significantly greater patent protection than during the early Soviet Era.⁵⁸ After the Soviet takeover, the "Regulations on privileges for inventions and improvements of 1896" remained in effect until 1919. Soviet legislation then dispensed with the statute in the Decret (Decree) of 30 June 1919, which repealed "all laws and statutes on privileges for inventions published before the Decret" and "the Russian State was declared to have the right to alienate to its use any invention deemed to be useful by the Committee for inventions."⁵⁹ This framework, more than discouraging inventors to seek protection, would also discourage users and potential users from seeking to obtain the rights to certain inventions, and rather would encourage them to continue use without specific regard to the patent owners of the inventions.

As with author's rights, the NEP had a brief revival of patent rights with the "Statute on Patents and Inventions of September 12, 1924."⁶⁰ Under this statute, patents were issued for fifteen years, and patent rights were alienable.⁶¹ The State, however, retained power to compulsorily alienate a patent or create a license for the State.⁶² The "Statute of Inventions and Technical Improvements of 1931" replaced the "Statute on Patents and Inventions."⁶³ The effect of this change was the return of the author's certificate from the Decret of 1919.⁶⁴ Subsequent to this, although

Dmitry Golovanov, *supra* note 35.

57. Currently, U.S. copyright protection lasts for seventy years after the death of the author. 17 U.S.C. § 302(a) (1978). Under the Copyright Act of 1909, works were copyrighted for a twenty-eight year term, which was renewable for a second term of equal duration, for a total of fifty-six years. Copyright Act of 1909, Pub. L. No. 60-349, §§ 23, 24, 35 Stat. 1075, 1080-81 (1909).

58. See generally Levitsky, *supra* note 48.

59. BUTLER, *supra* note 34, at xxiv.

[E]xcluding secret inventions for defense or of special importance to Russia, [inventions] were in the common use of all citizens and institutions on conditions to be specially stipulated in each case. The author of such an invention was guaranteed recognition and protection of his right of authorship and remuneration certified by an author's certificate. The remuneration, determined by the commission, was more in the nature of a bonus In reality the remuneration was derisory and most inventors, rather than risk nationalization of their invention, preferred not to seek protection at all.

Id. Not only was this framework a vast departure from previous practices in former Russia, but requiring conditions to be "stipulated in each case" must have caused administrative nightmares, especially in a country industrializing as quickly as the USSR has been at this point.

60. *Id.* at xxiv-xxv.

61. *Id.* at xxv.

62. *Id.*

63. *Id.*

64. *Id.* at xxv.

patents were not formally abolished, their granting was disfavored by Soviet officials.⁶⁵

Provisions of “patent law” remained fairly static until President Mikhail Gorbachev instituted *Perestroika* in 1991 and turned the country toward more market-oriented laws.⁶⁶ Under the emerging system, there were many amendments and revisions underway when the Soviet Union collapsed in 1991 (“Fall”).⁶⁷ Before the collapse, many of the laws of the Soviet Union were being rewritten because they were simply not feasible in a modern economy and in a country that was in dire straits. However, having somewhat obsolete laws in effect at the time of the Fall, with new ones still being created, left successor states in a difficult situation as they relied on former legal and government structures in the immediate wake of the Fall. Though Russia seceded from the Soviet Union on December 12, 1991, it was not until two years later, on December 12, 1993, that the Constitution of the Russian Federation was adopted, replacing the Soviet Constitution of April 12, 1978.⁶⁸

POST-SOVIET AND CURRENT LEGISLATION

“With the demise of the USSR, the protection of industrial property [or intellectual property] in Russia was in a desperate position. Russia itself

65. Russia also claims loss due to intellectual property violations on products owned by their government or citizens:

[P]ast self-imposed isolation is now haunting Russian producers of anything from vodka to weapons. They have been fighting legal battles to get back their brand names lifted by unscrupulous rivals both at home and abroad. But there are loopholes in the recently adopted Russian copyright law that allow domestic manufacturers to pirate foreign goods.

Nikolai Gorshkov, *Russian Producer Wins Kalashnikov Rights*, BBC NEWS, June 2, 2002, <http://news.bbc.co.uk/2/low/europe/2021173.stm>. To further its ideological ends, the Soviet government essentially encouraged other nations, with poor intellectual protection, to produce goods that the Soviet Union had patents on. Even though many of these countries initially had licenses granted by the Soviet Union, some products, most notably the Kalashnikov 1947 rifle (AK-47), continue to be produced with expired or no licenses. *Id.* Russia claims to have lost millions in revenue from copyright infringement on this particular weapon and, in the past, it has taken a defensive position when countries, such as the United States, accuse them of intellectual property violation, countering that the United States participates in the use, sale, and movements of these rifles. See C.J. Chivers, *Who's a Pirate? Russia Points Back at the U.S.*, N.Y. TIMES, July 26, 2004, at A1, available at <http://www.nytimes.com/2004/07/26/international/europe/26russ.html>. Russia's claims, however, just serve as further proof of its need to establish an adequate approach to intellectual property rights protection so it is able to protect not only foreign interests, but those of its own citizens. “Russia's complaints about copyright abuse are usually met with suggestions to put its own house in order.” Gorshkov, *supra* note 65.

66. See Zegelman, *supra* note 31.

67. *Id.*

68. Konstitutsiia Rossiiskoi Federatsii [Konst. RF] [Constitution], English version, available at <http://www.constitution.ru/en/10003000-01.htm>.

*had no patent department and the 1991 USSR Law on Inventions was inconsistent with several Russian Federation laws, including those on taxation, enterprise, and investments. . . .*⁶⁹

Just before the fall of Communism, Soviet laws underwent massive restructuring.⁷⁰ Though the Fall clearly disrupted and halted legislative progress, many of the laws, as they were being amended, were adopted early on by the Russian Federation.⁷¹ Legislation on intellectual property,⁷² though much improved from early Soviet eras,⁷³ remained largely an

69. BUTLER, *supra* note 34, at xxvi.

70. See Zegelman, *supra* note 31.

71.

In the twilight years of the USSR reform of intellectual property legislation enjoyed high priority. On 31 May 1991 the USSR adopted new Fundamental Principles of Civil Legislation of the USSR and Republics [1991 FPCivL], with effect from 1 January 1992, and the Law on Inventions in the USSR. On 3 July 1991 the Law on Trademarks and Service Marks was enacted. Since the Government of the USSR had signaled its willingness to accede to the Berne Convention and the Paris Protocol of the Geneva Convention, their provisions were taken into account when drafting the 1991 FPCivL and individual laws adopted by the USSR in 1991 on author's rights. The Soviet Union disappeared before the 1991 FPCivL had entered into force. The Russian Federation with effect from 3 August 1992 introduced the 1991 FPCivL into force on its territory until a new civil code was enacted to replace that of 1964.

BUTLER, *supra* note 34, at xv–xvi (footnotes omitted).

72. The Civil Code of 1994 declared intellectual property an object of Civil Rights:

In the instances and in the procedure established by the present Code and by other laws an exclusive right (intellectual property) of a citizen or juridical person shall be recognized to the results of intellectual activity and the means of individualization of the juridical person equated to them or the individualization of a product or the work fulfilled or services (firm name, trademark, service mark, and others).

The use of the results of intellectual activity and means of individualization which are the object of exclusive rights (intellectual property) may be effectuated by third persons only with the consent of the possessor of the right.

Grazhdanskii Kodeks RF [GK] [Civil Code] art. 138 (Russ.), *as translated in* BUTLER, *supra* note 34, at 7.

Violations of intellectual property rights, which gave redress to author's and neighboring rights and patent rights infringement, were codified in articles 146 and 147 of the Criminal Code, respectively, which also defined the scope of violations and punishments. See BUTLER, *supra* note 34, at 10–11 for an English translation of articles 146 and 147. A key problem with this legislation is that it called for criminal enforcement only "if these acts caused large-scale damage to the author or other rights-possessor," which allowed many violations to continue without penalty. Another problem with the legislation under article 146 of the Criminal Code was that it

permit[s] the confiscation and destruction of pirate and counterfeit goods—that is, the illegal copies themselves. . . . [However,] it does not explicitly provide for the confiscation and destruction of the "machinery" used in the making of illegal copies. . . . Thus, as a practical matter "machinery" used to create illegal copies cannot be confiscated in criminal cases.

IIPA, 2005 SPECIAL 301 REPORT, *supra* note 13, at 28.

73. For example,

[t]he 1991 FPCivL . . . excluded the free use of works in the cinema, radio, and television or the public performance of works without the author's consent. The range of works subject

extension of Soviet initiatives,⁷⁴ which subsequent amendments did not go far enough to reform and were largely ineffective for deterring piracy because they were unclear, overly lax, and did not provide deterrent penalties.⁷⁵ What is more, there were gaps in patent legislation that led to confusion as to rights held by certain patent holders, especially those who filed for a patent in the period surrounding the Fall.⁷⁶

to protection was enlarged, the period of author's right extended to up to 50 years after the author's death, and neighboring rights were recognized for the first time.

BUTLER, *supra* note 34, at xvi.

74.

With the dissolution of the USSR the Russian Federation was well placed to enact its own legislation on intellectual property to supplant relevant provisions of the 1964 RSFSR [Russian Soviet Federative Socialist Republic] Civil Code and the 1991 FPCivL. In 1992–1993 the Russian Federation adopted the Patent Law of 23 September 1992, the Law on Trademarks, Service Marks, and Names of Places of Origin of Goods of 23 September 1992, the Law on the Legal Protection of Computer Programs and Data Bases of 23 September 1992, the Law on Author's Right and Neighboring Rights of 9 July 1993, the Law on Selection Achievements of 6 August 1993, the Federal Law on Information, Informatization, and the Defense of Information of 20 February 1995, and the Federal Law on Architectural Activity in the Russian Federation of 17 November 1995, as amended 30 December 2001, followed in each case by a substantial body of subordinate acts issued by the President and the government of Russia and individual ministries and departments.

Id. at xii.

75. For several years, the International Intellectual Property Alliance ("IIPA") called for many key reforms in the Russian system, concerned especially with drastically increasing amounts of piracy of optical discs. In 2002 they stated that "Russia's legal regime [though relatively good was] still deficient in a few key areas" and proposed the following "crucial legal reforms" to improve enforcement. INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE, 2002 SPECIAL 301 REPORT: RUSSIAN FEDERATION 216 (2002), <http://www.iipa.com/rbc/2002/2002SPEC301RUSSIA.pdf>.

These include the need to adopt: (1) proper optical media regulations; (2) amendments to the Criminal Procedure Code to provide police with the proper *ex officio* authority . . . ; (3) amendments to the Criminal Code (the problems with Art. 146 "grave harm" provision); (4) amendments to the Arbitration Procedure Code and Civil Procedure Code (to provide for *ex parte* search provisions); (5) amendments to strengthen the Administrative Code; (6) amendments to the Customs Code (to provide *ex officio* seizure authority).

Id. Similar changes were called for in the International Intellectual Property Alliance's *Special 301 Reports* for 2003, 2004, 2005, and 2006, evidencing a standstill in improvement of legislation and enforcement of intellectual property rights in Russia. INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE, 2003 SPECIAL 301 REPORT: RUSSIAN FEDERATION (2003), <http://www.iipa.com/rbc/2003/2003SPEC301RUSSIA.pdf> [hereinafter IIPA, 2003 SPECIAL 301 REPORT]; INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE, 2004 SPECIAL 301 REPORT: RUSSIAN FEDERATION (2004), <http://www.iipa.com/rbc/2004/2004SPEC301RUSSIA.pdf> [hereinafter IIPA, 2004 SPECIAL 301 REPORT]; IIPA, 2005 SPECIAL 301 REPORT, *supra* note 13; INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE, 2006 SPECIAL 301 REPORT: RUSSIAN FEDERATION (2006), <http://www.iipa.com/rbc/2006/2006SPEC301RUSSIA.pdf> [hereinafter IIPA, 2006 SPECIAL 301 REPORT].

76.

The Patent Law applies to legal relations which arose after 14 October 1992, the date on which the Law entered into force. This approach left open the fate of objects of industrial property previously registered or applications in process. All previously issued USSR protection documents for inventions and industrial designs . . . are deemed to operate in the territory of Russia. . . . But patents issued previously and patents received in place of author's

In the new millennium there have been many key changes to intellectual property protection legislation in Russia.⁷⁷ The most notable and recent reform was the adoption of Part IV of the Civil Code (“Part IV”), which was signed on December 19, 2006 and went into force on January 1, 2008. This legislation replaced the then existing Russian intellectual property rights regime.⁷⁸ However, after years of international pressure to improve intellectual property right protection, the enactment of Part IV left many unsatisfied, citing difficulties in amending the Civil Code and Russia’s continual lack of compliance with international treaties.⁷⁹ There is also concern that under Part IV, criminal remedies will continue to be avoided in favor of pertinent administrative fines and, when coupled with the still limited nature of civil remedies, progress made in the adequate enforcement of these new laws will be limited.⁸⁰ This concern is

certificates will be deemed invalid on the basis of procedural rules set out in the 1992 Patent Law

BUTLER, *supra* note 34, at xxvi–xxvii.

77. For a brief overview of recent legal reforms in the Russian intellectual property rights regime, see INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE, 2008 SPECIAL 301 REPORT: RUSSIAN FEDERATION 109 (2008), <http://www.iipa.com/rbc/2008/2008SPEC301RUSSIA.pdf> [hereinafter IIPA, 2008 SPECIAL 301 REPORT].

78. IIPA, 2007 SPECIAL 301 REPORT, *supra* note 23, at 133. Part IV of the Civil Code also replaced the Russian patent and trademark laws. *Id.*

79.

The adoption of Part IV was undertaken over the strong objections of the U.S. Government, the European Union, and other governments, as well as the advice of many copyright law experts. First, the Civil Code is very hard to and rarely amended, so the repeal of the copyright law will be replaced (in 2008) with an inflexible law that needs to regulate new as well as developing technologies. Second, there are many deficiencies in the law . . . some even acknowledged by its drafters, which means the current Civil Code does not comply with TRIPs or the WIPO digital treaties, among other concerns. The law is in some instances unclear—a fact not surprising given its breadth and the expeditious manner in which it was drafted and adopted without input from copyright experts. . . . In addition, repeal of the Copyright Law will, it is feared, create confusion about the enforcement of IPR [intellectual property rights] violations via the Criminal Code, the Criminal Procedure Code, the Administrative Code, and the Customs Code.

Id.

80.

The problems of civil actions are further exacerbated by the very limited scope of available relief. Civil enforcement inadequacies include: remedies generally limited to the seizure of repertoire in any specific instance; the failure to award preliminary injunctions, or to freeze assets and evidence; low damage awards, which, like all awards, are also very difficult to enforce; burdensome evidentiary requirements, including rights ownership information; the absence of personal liability for the directors of infringing companies or enterprises; and, inadequate contributory liability.

IIPA, 2008 SPECIAL 301 REPORT, *supra* note 77, at 101.

even greater when dealing with the organized crime aspect of piracy.⁸¹ Part IV, despite many shortcomings,⁸² is not a complete failure, and clarifies legal terms from prior legislation while broadening protection of some forms of intellectual property, such as computer programs.⁸³

Overall, Russian intellectual property legislation in recent years has been successful. Recent changes in the Criminal Procedure Code have also increased the amount of police activity in combating piracy.⁸⁴ Though it has not, in many ways, met international standards, Russia has made great strides to improve and clarify legislation. As further measures (many of them unmet as of July 1, 2008, which was Russia's stated goal) prescribed by the Side Letter with the United States are implemented, it is evident that on some level, Russia has shown itself willing to comply with international markets. However, until enforcement of intellectual property rights is effective enough to actually deter offenders, these legal reforms will be little more than lip service to the international community and violations will continue, costing local and foreign markets billions of dollars while funding organized crime.

ENFORCEMENT

Despite evolving legislation and increasing numbers of police raids, losses due to piracy are still growing.⁸⁵ It is estimated that U.S. industries

81.

The music industry emphasizes the need for criminal, rather than civil, enforcement directed at optical disc piracy—namely against the criminal enterprises dedicated to the manufacture, distribution and sale of pirated materials Addressing commercial-scale piracy through criminal measures is identified as an obligation of WTO members for a reason—it is only nation states that have the capacity to deal with these problems. Civil measures are intended for “civil” actions—better understood as disagreements between parties. Massive and organized criminal activity is most fundamentally not in the nature of a disagreement, and civil measures are not capable of delivering the requisite level of deterrence.

Id.

82. For a description of amendments to Part IV of the Civil Code recommended by the International Intellectual Property Alliance, see *id.* at 111–12.

83. For a description of positive features of Part IV of the Civil Code, see *id.* at 112.

84.

Changes of the Russian Criminal Procedure Code, which entered into force in 2006, allowing Russian police to initiate criminal cases of copyright infringement, have had a positive impact on Russian police activities, as reflected in a sharp increase in the number of police raids. A change to the Russian Criminal Code, introduced in 2006 and expected to be finally adopted in 2007, would re-categorize copyright infringement as a “serious” crime. This too, will have a positive effect on enforcement.

IIPA, 2007 SPECIAL 301 REPORT, *supra* note 23, at 129.

85. See *infra* note 86.

lost \$1.430 billion to Russian piracy in 2007, and \$1.955 billion in 2006.⁸⁶ Though the numbers of raids have increased over the past several years,⁸⁷ the percentage of criminal penalties following these raids remains low.⁸⁸ Criminal trials against intellectual property violators are needed. Instead of criminal penalties, sanctions have been primarily civil or administrative penalties, with few offenders facing heavy fines or jail time.⁸⁹ Furthermore, despite the growing number of raids,⁹⁰ the capacity to

86. Press Release, International Intellectual Property Alliance, The Copyright Industries in the International Intellectual Property Alliance (IIPA) Submit to USTR Their 2008 Report on Piracy in 51 Countries/Territories: China and Russia Remain Key Problem Countries app. A (Feb. 11, 2008), available at <http://www.iipa.com/pdf/IIPAFeb2008Special301PressRelease.pdf>. These numbers do not include loss from motion picture or entertainment software piracy. *Id.* These numbers have been on a steep incline since the turn of the century, likely owing in part to the growing accessibility and use of optical discs.

Estimated trade losses to U.S. industries due to piracy, in millions of U.S. dollars:

1998: 963.9

1999: 873.6

2000: 637.0

2001: 847.2

2002: 1031.9

2003: 1424.0

2004: 1784.7

2005: 1901.8

See IIPA, 2003 SPECIAL 301 REPORT: *supra* note 75, at 249; IIPA, 2007 SPECIAL 301 REPORT, *supra* note 23, at 121.

87. The International Intellectual Property Alliance reported in 2008: “In 2007, the Russian Government conducted some significant raids and seizures and the Russian police stepped up enforcement against copyright infringers, particularly with respect to street vendor piracy and companies involved in the installation and use of pirated software.” IIPA, 2008 SPECIAL 301 REPORT, *supra* note 77, at 101.

88. *Id.* at 102.

89. *Id.* at 101.

90. Near the end of 2006, authorities attempted to step up raids of optical disc plants. For a long time raids were largely ineffective because they were not truly “surprise” raids, allowing the plants to cover their illegal activities. In 2008, the International Intellectual Property Alliance reported:

Raids have been undertaken at some optical disc plants, including two at the end of 2006 and seven plants in 2007. . . .

However, the optical disc enforcement regime continues to lack effectiveness evidenced by the continued operation of all the raided plants. . . . This highlights both the ineffectiveness of the optical disc enforcement regime in ceasing production at offending plants, and also the role of corruption, as the lines were never properly secured by the police as is required after a raid.

These cases highlight the weaknesses that must be addressed if Russia is to meet the [Side-Letter] IPR Agreement’s obligations for effective optical media regulation. With an estimated 50 plants in operation, raids at a handful of plants, and surprise inspections at very few, IIPA believes there is ample evidence that additional effective enforcement is needed to deter illegal activities, and that such enforcements needs to be called for from the highest levels within the Russian Government.

produce pirated optical discs continues to rise,⁹¹ some of the production of which occurs on state-owned property.⁹²

Id. at 102–03.

Further, the owners of these plants, often organized crime syndicates, are rarely, if ever, held responsible, and only rarely are managers of the plants responsible.

In general the copyright industries report that deterrent criminal penalties are not being imposed against optical disc plant owners or, with few exceptions, against plant operators and owners of commercial Internet operations. In fact, in the years since the adoption of the criminal penalties (Article 146), we are not aware of a single plant owner who has been convicted, and only a handful of plant operators (i.e., plant managers) have served jail time or been given suspended sentences. Far fewer criminal cases were initiated against optical disc plants in 2007 than in 2006, and, many cases have languished for a long time.

Id. at 101–02.

91. Number of optical disc plants and their capacity by year reported:

1996: 2 plants

1998: 3 plants

1999: 6 plants, 60 million capacity

2000: 10 plants, 90 million capacity

2001: 13 plants, 150 million capacity

2002: 17 plants, 150–183 million capacity

2003: 26 plants, over 300 million capacity

2004: 34 plants, 390 million capacity

2005: 47 plants, 395 million capacity

2006: 47 plants

2007: 53 plants (due to consolidation of two plants)

2008: 50 plants

See IIPA, 2005 SPECIAL 301 REPORT, *supra* note 13, at 16; IIPA, 2006 SPECIAL 301 REPORT, *supra* note 75, at 4; IIPA, 2007 SPECIAL 301 REPORT, *supra* note 23, at 116; IIPA, 2008 SPECIAL 301 REPORT, *supra* note 77, at 103.

Please note that these figures include all types of media contained on optical discs and the number of DVD plants rose as the prevalence of the media grew. Also note that not all (though certainly many) of these plants have been proven to produce pirated materials. *See supra* note 90.

92.

The Russian government has publicly stated that as many as 18 plants are located on government owned or leased property; these plants on former military bases are known as “Russian State (owned) Restricted Access Regime Enterprises” (RARE). These RARE plants are directly connected to state owned and state run enterprises, and are located on premises important to Russian state security officials. Thus, they not only pose a potential security risk for the Russian government, they also undermine the government’s campaign against piracy.

IIPA, 2006 SPECIAL 301 REPORT, *supra* note 75, at 4. The connection between optical disk piracy and organized crime makes this presence on government lands especially problematic. Though the problem is not resolved,

On a positive note, the Russian Government has taken steps to address the problem of [RARE] that house or run optical disc plants. The Russian Government reported in the Fall of 2007 that there were ten of these RARE plants . . . and that it was taking steps against nine of the ten such plants to cancel their leases. . . . [However] at year’s end, there were seven such RARE plants still in operation.

IIPA, 2008 SPECIAL 301 REPORT, *supra* note 77, at 106.

The Russian market has not grown in proportion to the increasing capacity to produce pirated materials, which indicates that pirated goods made in Russia do not always stay in Russia.⁹³ Further, the international implications of the volume of pirated goods produced reflect an increased involvement by organized crime and its increased revenue, without corresponding criminal penalties to compensate for the lucrative, yet economically damaging, enterprise.⁹⁴

It is important for Russian courts to demonstrate that intellectual property rights enforcement is a priority. Without judicial support, political and police efforts will be without force. Because judicial support of intellectual property protection measures has been so lax in the past, the current courts have opportunities to set precedents that show judicial compliance with national and international standards. The frequent call for judicial enforcement puts the courts in positions of power as they begin to develop intellectual property jurisprudence because their imposition of available deterrent measures will undoubtedly spur progress and faith in Russian intellectual property enforcement.

93. In 2003, the International Intellectual Property Alliance reported:

Russia's present manufacturing capacity of CD plants . . . bears no relationship to present legitimate demand—probably close to 18 million units. . . . It was only a few years ago that Russia's production eclipsed the production capacity of the region's then worst offender, Ukraine. This was caused in part by some of the Ukrainian plants migrating to Russia. But in larger part, the explosive growth in Russia has been the result of the criminal syndicates operating in Russia expanding their operations, in the absence of any deterrence. The Russian optical media problem is one of both domestic production as well as lax border enforcement resulting in the receipt and distribution of product from Asian countries Russia remains a major destination and transshipment point for pirate optical media product from these other markets.

IIPA, 2003 SPECIAL 301 REPORT, *supra* note 75, at 250.

94.

[C]opyright industries report that although more criminal cases have been commenced than in prior years, most cases do not result in deterrent penalties as a final disposition. There have been some notable and important exceptions: in April, in a raid in Krasnodarsky Kray a jail sentence was imposed; and in May, in St. Petersburg, the first-ever jail sentence was imposed against a DVD/software shop owner (an 8-month sentence). Unfortunately, these examples remain the exception to the general practice of non-deterrent sentencing [such as suspended sentencing]. . . . The exception is the operator of the Mediasystem plant who was convicted and received a 3-year suspended sentence in December 2005 and is currently in prison awaiting the conclusion of a second criminal; [*sic*] investigation. The longest prison sentence imposed to date for copyright infringement is four and a half years against two DVD-R replicators in Rostov-on-Don

IIPA, 2008 SPECIAL 301 REPORT, *supra* note 77, at 102.

WTO AND THE BILATERAL SIDE LETTER

Russia has attempted to join the WTO since 1993.⁹⁵ Russian politicians have also stressed their eagerness to join the WTO.⁹⁶ For a long time, the United States was a main barrier to Russia's accession, in part because of the United States' opposition to Russia's lax intellectual property laws. After more than a decade of negotiations, the pressure put on Russia to improve its intellectual property laws concluded in the signing of an over eight hundred-page document in Hanoi, Vietnam on November 19, 2006 (intellectual property was not the only focus).⁹⁷ This bilateral agreement has proven to be partially effective at inducing Russia to continue raising enforcement standards, and as a result, the United States now supports Russia's bid to enter the WTO.⁹⁸

Despite some movement toward implementing the policies outlined in the Side Letter, there still remains much to be done, and some of the progress is less hopeful than it would initially seem.⁹⁹ Also, the June 1,

95. *Russia WTO Bid Gathers Pace*, BBC NEWS, June 25, 2001, <http://news.bbc.co.uk/2/hi/business/1406636.stm>.

96. *Medvedev Says Russia Certain to Join WTO*, RIA NOVOSTI, Oct. 21, 2009, <http://en.rian.ru/russia/20091021/156544077.html>.

97. This agreement has the status of an international agreement under U.S. and Russian law. The Side Letter deals with optical disc issues and it requires the Russian Government to:

1. Address the need for effective criminal enforcement, focusing in particular on piracy "committed for purposes of commercial advantage or private financial gain" by referring "to the Supreme Court of the Russian Federation a proposal for it to pass a resolution of the Plenum of the Supreme Court" to clarify for the courts their practices so that they impose stiff penalties for IPR violation, and requiring that judges "take into account the high degree of public harm from such infringement."
2. Address the need for effective border enforcement
3. Address the need to combat the growing threat of Internet piracy
4. Adopt legislation to "fully implement the TRIPs Agreement and other IPR-related international agreements" to which the United States and Russia are already parties
5. Ensure on-going dialog and work to implement the obligations above through a Bilateral Working Group, as well as to provide appropriate training to Russian enforcement officials.

IIPA, 2008 SPECIAL 301 REPORT, *supra* note 77, at 106–07.

98. *U.S. Supports Russia's Bid to Join WTO, Says Clinton*, CHINA VIEW, Oct. 15, 2009, http://news.xinhuanet.com/english/2009-10/14/content_12231991.htm.

99. For example, the internet music download site, *allofmp3.com*, which, during negotiations for the Side Letter, was cited as a particularly glaring offender of intellectual property rights violations, has been taken down. IIPA, 2008 SPECIAL 301 REPORT, *supra* note 77, at 105. However:

a nearly identical site is now in operation that is apparently owned and operated by the same or related parties—illustrating the need for corporate criminal liability and the criminal sentencing of principals of pirate operations, as well as the need for better information about and the investigation of these judicial entities.

Id. at 108.

2007 deadlines were not met for many of the aspects of the agreement, including optical disc production and criminal law enforcement.¹⁰⁰ It is a slow process, however, and it is important not to undermine positive movements by over focusing on areas of deficiency. For example, on April 26, 2007, the Supreme Court adopted a resolution detailing intellectual property rights enforcement practices.¹⁰¹ The adoption of Part IV has also been positive, not in the least for demonstrating that protecting intellectual property rights is a vital concern to the country.

Unfortunately, once the agreement with the United States was made, Russia's accession seems to have been blocked by a conflict with Georgia over trade and recognition of territories.¹⁰² Since there has been even more delay in their accession, Russian politicians, Prime Minister Putin in particular, have said that Russia is no longer eager to join the WTO and that it would instead be primarily a burden.¹⁰³ This also means, as stated by Russian First Deputy Prime Minister, a "withdrawal from accords that contradict its interests."¹⁰⁴ While this retreat from its previous position is primarily over concerns with Georgia,¹⁰⁵ it may tempt Russian officials to again place intellectual property enforcement on the backburner, allowing the corruption and apathy of the past to again overshadow positive movements to join the international economic community.

*Esprit Eugster**

100. Deadlines still need to be met by the Russian government in the following ways:

(1) address the problem of illegal optical disc manufacturing; (2) effectively enforce criminal laws with deterrent penalties for IPR violations (especially focusing on larger enterprises—and whether committed for purposes of commercial advantage, private financial gain, or resulting in substantial economic harm); (3) combat Internet piracy; (4) implement international IPR agreements, up to the WTO-TRIPS levels; (5) enact legislation . . . to provide Customs officials with the authority to take actions *ex officio*; and (6) implement and ratify the WIPO "digital" treaties (the WCT and the WPPT).

Id.

101. For an overview of other effective enforcement since the implementation of the Side Letter, see *id.* at 109.

102. *Georgia: Official Says Position Unchanged on Russian WTO Negotiations*, RADIO FREE EUROPE RADIO LIBERTY, Apr. 30, 2007, <http://www.rferl.org/content/article/1076202.html>.

103. *Doubts Grow on Russia's WTO Plans*, BBC NEWS, Aug. 26, 2008, <http://news.bbc.co.uk/2/hi/7582079.stm>.

104. *Id.*

105. "'The West has been saying that it won't allow Russia to join the WTO until it pulls out its troops from Georgia,' said Yevgeny Gavrilenkov, Troika Dialog investment bank's chief economist. 'Now (Russia is) virtually saying we don't want WTO membership on these terms.'" *Id.*

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