

CARNEGIE

P A P E R S

**INTELLECTUAL
PROPERTY
RIGHTS AS A KEY
OBSTACLE TO
RUSSIA'S WTO
ACCESSION**

*Sherman Katz
Matthew Ocheltree*

**Trade, Equity, and
Development Project**



CARNEGIE ENDOWMENT
for International Peace

**Number 73
October 2006**

© 2006 Carnegie Endowment for International Peace. All rights reserved.

No part of this publication may be reproduced or transmitted in any form or by any means without permission in writing from the Carnegie Endowment. Please direct inquiries to:

Carnegie Endowment for International Peace
Publications Department
1779 Massachusetts Avenue, NW
Washington, DC 20036
Phone: 202-483-7600
Fax: 202-483-1840
www.CarnegieEndowment.org

This publication can be downloaded for free at **www.CarnegieEndowment.org/pubs**. Limited print copies are also available. To request a copy, send an e-mail to pubs@CarnegieEndowment.org.

Carnegie Papers

Carnegie Papers present new research by Endowment associates and their collaborators from other institutions. The series includes new time-sensitive research and key excerpts from larger works in progress. Comments from readers are most welcome; please reply to the author at the address above or by e-mail to pubs@CarnegieEndowment.org.

About the Authors

Sherman E. Katz is a senior associate at the Carnegie Endowment for International Peace. His research focuses on WTO global trade negotiations in the Doha Round, economic integration in East Asia, Aid for Trade to developing countries, implications of Chinese accession to the WTO, and the distribution of benefits from U.S. Free Trade Agreements.

Before joining Carnegie, Katz was the William M. Scholl Chair in International Business at The Center for Strategic & International Studies (CSIS). During his 30 years of practice in international trade law, he has represented U.S. and foreign corporations, governments, and multilateral institutions in trade policy issues, including national trade regulation and litigation, World Trade Organization negotiations, agreements, and dispute settlement. He has made countless media appearances and is widely published in newspapers and academic journals. He also edited the volume *Trade Policy Challenges* in 2005.

Matthew Ocheltree has been with the Trade, Equity and Development Project since February 2006. He is a graduate of Harvard College and holds a Master of Studies in English literature from Oxford University.

CONTENTS

Executive Summary	3
Introduction	5
The Russian Enforcement Problem	6
IPR Enforcement as a Problem of Political Will	13
Russia's Latest Enforcement Efforts	17
The Case of Ukraine: Lessons in a Bilateral Context	22
The Case of China: Further Lessons on Preaccession Commitments and Postaccession Performance	25
Conclusion	29
Notes	30

EXECUTIVE SUMMARY

RUSSIA HAS BEEN IN THE PROCESS of seeking membership in the World Trade Organization (WTO) since June 1993. Currently, the United States is the only major economic power that has yet to finalize a bilateral market access agreement with the Russian Federation. Most observers of the situation concur that the enforcement of intellectual property rights laws remains, along with agriculture, one of the two major hurdles to Russian accession to the World Trade Organization.

The International Intellectual Property Alliance, a leading U.S. industry advocacy organization, estimates that Russian piracy of intellectual property cost U.S. industries \$1.7 billion in 2005 alone and more than \$6.5 billion over the past five years. Unless the intellectual property rights issue is addressed, it could delay a United States–Russia bilateral accession agreement and could also result in Congress not extending permanent normal trade relations to Russia. The general consensus in the international community is that the Russian legal framework on intellectual property rights is, if not perfect, at least adequate to meet accepted norms. Russia’s enforcement record, however, presents a problem that is as different in kind as it is in degree, one that cannot be solved by incremental change but instead requires a radical shift away from current practices as well as significant demonstrations of political will and concrete action.

Some recent enforcement initiatives have shown promise in principle and demonstrate a limited willingness to reform. But significant improvements are necessary in a number of key enforcement areas, including optical disc production, Internet piracy, the retail sale of copyrighted goods, and prosecutions in the administrative, criminal, and civil arenas. Common to all these areas is a set of underlying problems involving the transparency of Russia’s enforcement regime, the fragmentation of its federal bureaucracy, and the influence of organized crime syndicates. These problems have been documented by international rights holders and governments, but the Russian administration continues to downplay an epidemic of piracy that is growing worse.

The latest wave of enforcement efforts remains insufficient to achieve real reductions in the levels of intellectual property rights infringement, despite the vocal protestations of the Russian government. A recently reconstituted Government Commission for Counteracting Intellectual Property Infringement and a new law enforcement coordination initiative run through the General Prosecutor’s Office are good ideas on paper, but they have yet to produce concrete results. Optical disc plants, some located on properties controlled by the Russian military, continue to pump out millions of pirated discs while policy makers persist in refusing to institute a comprehensive licensing and inspection regime. Allofmp3.com, widely acknowledged as the most notorious pirate web site in the world, continues to operate in Russia despite documented intellectual property rights violations because of ill-conceived technicalities in Russia’s copyright law governing collective rights management. The number of administrative and criminal prosecutions has increased due in part to legal reform, but the number of convictions and deterrent fines has not. And senior Russian officials have resurrected a proposal for a Soviet-style Civil Code that would roll back much of the hard-fought progress on intellectual property rights that has been achieved over the course of fifteen years.

These failures are indicative of a deeper lack of political will in Russia, whether due to an erroneous sense of confident expectation, a misplaced pride in Russian legal standards, or an equally troubling incompetence within the federal bureaucracy. They are also symptomatic of deeply rooted cultural assumptions and a lack of awareness about intellectual property rights that dates back to the Soviet era, when intellectual property goods were owned by the state and made available to the people either for free or at heavily subsidized prices. Whatever the reason, Russia's enforcement failures and cultural consciousness must be confronted, and efforts must be made to address them before Russia can expect to be able to join the World Trade Organization.

The examples of Ukraine, which wrapped up bilateral talks with the United States in early 2006, and China, which accepted a uniquely comprehensive accession package in 2000, demonstrate the kind of political will Russia must show before it can hope to complete accession. To prove its resolve to be a responsible member of the international trading regime, Russia must further strengthen its copyright laws and regulations governing optical disc plants, step up its enforcement efforts in areas of priority to WTO members, impose deterrent fines, and follow through with substantial increases in criminal convictions.

Russian negotiators have rejected more detailed intellectual property rights provisions in Russia's accession agreement than had been accepted by previous entrants. But greater detail in enforcement provisions represents the natural evolution of the collective understanding among WTO members about how these agreements work and what they need to include. Strengthened provisions are more accurately thought of as an elaboration of existing obligations that are standard for all members rather than discriminatory "World Trade Organization-Plus" commitments. Contrary to the protestations of Russia's negotiators, the obligations Russia is being asked to accept are no different in principle from those already acknowledged by China, Ukraine, and others.

Despite intense bargaining with the United States in the first half of 2006 and reports of fresh "momentum" leading up to the Group of Eight's July 2006 summit in Saint Petersburg, no bilateral accession bargain was struck. The parties have agreed to seek to resolve their differences by October 2006, but with the Group of Eight deadline having passed, the time horizon for ongoing negotiations remains unclear. The tremendous influx of petrodollars into Russian coffers during the past three years has made Russia less inclined to accommodate the inconvenient demands that WTO accession imposes. Significant political and bureaucratic effort will need to be invested to bring Russia through the final stages of accession negotiations. This paper seeks to elucidate the challenges and policy options that Russia faces on enforcing intellectual property rights, highlighting lessons learned from the experiences of China and Ukraine. Its goal is to advance the United States-Russia dialogue on accession and to help achieve the kind of progress desired by all parties.

INTRODUCTION

Russia has been seeking membership in the World Trade Organization (WTO) since June 1993. The United States is the only major economic power that has yet to finalize a bilateral market access agreement with Russia. A major push by these parties in the first half of 2006 before the Group of Eight's (G-8's) July summit in Saint Petersburg did not produce an agreement. The United States and Russia will seek to conclude negotiations by the fall of 2006, but without the landmark opportunity presented by the G-8 summit to focus their attention, the time horizon for ongoing negotiations remains unclear. The continued economic security provided by profitable energy sales will only make Russia more reluctant to accommodate the inconvenient demands that WTO accession imposes. This context presents a significant challenge to negotiators on both sides of the table.

Several points of contention now obstruct a bilateral deal, including agricultural market access and Russian regulations on foreign participation in the banking and insurance sectors as well as enforcement of laws on intellectual property rights (IPR). The International Intellectual Property Alliance (IIPA), a leading U.S. industry advocacy organization, estimates that Russian intellectual property piracy cost U.S. industries \$1.7 billion in 2005 alone and more than \$6.5 billion over the past five years.¹ Unless the IPR issue is addressed, it will delay a United States–Russia agreement, and it could cause Congress not to extend permanent normal trade relations to Russia.

The general consensus in the international community is that the Russian legal framework on IPR is, if not perfect, at least adequate to meet accepted norms.² There has been a steady stream of amendments to these laws during Russia's WTO push, notably in 1993 and 2004, and deficiencies will continue to be addressed within the context of multilateral WTO Working Party negotiations.³ Despite the promise of some recent initiatives described below, it is clear that Russia's poor record of enforcing these laws presents a problem that requires a radical shift away from current practices as well as significant demonstrations of political will and concrete action. If Russia does not reform, the profound sense of disillusionment that arose as a result of China's postaccession performance will only deepen and could derail Russia's WTO membership application indefinitely. Alongside the current Russian predicament, the cases of China and Ukraine are considered here. Though no one disputes that IPR enforcement in both these countries is still very much a work in progress, each demonstrated a substantial commitment to enforcement before accession. In light of what the international community has learned from these recent experiences with China and Ukraine, the steps that Russia is being asked to take before accession are not unreasonable.

Although many forms of counterfeiting are sources of concern for the Russian business community and civil society, this paper focuses on copyright industries—specifically audio and audiovisual products—because the persistence of infringements in these industries is the main sticking point on IPR in the bilateral accession talks with the United States. The goal of this paper is to advance the United States–Russia dialogue on WTO accession and to help achieve the kind of progress desired by all parties.⁴

THE RUSSIAN ENFORCEMENT PROBLEM

Russia has been on the Special 301 Priority Watch List of the Office of the U.S. Trade Representative (USTR) since 1997.⁵ Despite continued improvements in its IPR laws and the steadily increasing international pressure that accompanies intensified WTO accession talks, Russia has not successfully tackled the problem of IPR enforcement. On the contrary, the USTR's "2006 National Trade Estimate Report on Foreign Trade Barriers" claims that pirate production for both domestic consumption and export has increased in recent years. The USTR now estimates, for example, that pirated products represent 80 percent of the Russian market for digital video discs (DVDs) and 66 percent for music compact discs.⁶ In addition, pirated products originating in Russia have been found in 27 countries worldwide.⁷ Consideration of some of the key areas where IPR enforcement could be improved follows below.

The Nature of the IPR Enforcement Problem: Key Areas

Those familiar with Russia's intellectual property regime universally cite optical disc piracy, Internet piracy, and the proposed Civil Code as its most egregious shortcomings. While these three topics do not exhaustively capture the full scope of the piracy and law enforcement challenges, they are exemplary and instructive cases in a broader context that also includes retail piracy and prosecutions.

Optical Disc Plants for the Unlicensed Production of Copyrighted Material

Russia is estimated to have between 45 and 52 optical plants operating within its territories with an estimated annual production capacity of more than 450 million discs. In the past three years, 23 of these plants have been found through forensic detection or law enforcement actions to have been engaged in pirate production.⁸ Between 8 and 18 of these plants are located on Russian State Restricted Access Regime Enterprise (RARE) territories owned or leased by the Russian government, usually former military bases. These RARE facilities are linked to various Russian state-owned enterprises, and access to them by civil authorities is severely restricted.⁹

Although the Russian authorities have increased the number of raids on these plants in recent years, such actions have not resulted in decreased levels of piracy, according to industry figures.¹⁰ Five aspects of this problem need to be addressed to effect real change: (1) The number of raids needs to be increased further with offending facilities shut down permanently rather than being allowed to continue operating; (2) the proportion of surprise raids needs to increase from current low levels; (3) seized goods and equipment need to be destroyed rather than merely confiscated, resold, or auctioned; (4) a strict licensing regime needs to be introduced to distinguish accurately between legal and illegal producers; and (5) criminal prosecutions against plant owners must be initiated and meaningful sentences meted out.¹¹

Russian officials are aware of the scope of optical disc piracy—data on piracy has been carefully documented by U.S. industry groups and presented by U.S. government negotiators for years—but have done little about it. Instead, they claim progress based on the absolute number of raids regardless of outcomes or successful prosecutions. Smaller countries, such as Bulgaria and Ukraine, have been able to create and enforce optical disc laws with far fewer resources than Russia could afford to devote to the problem. The IIPA provided the Russians with the same draft law in 2000

that it had previously given as a model to Bulgaria and Ukraine, and no convincing explanation has been offered as to why Russia should not be able to follow suit with its own legislative action.¹² In one sense, the absence of adequate regulations governing optical disc facilities is a legal issue, but it is also an issue of Russian enforcement practices. Raids that do occur usually lack the element of surprise and rarely result in the permanent seizure of pirated products or manufacturing equipment.¹³ Part of this problem is clearly regulatory, but much of it is also indicative of broader deficiencies in the Russian enforcement regime.

Particularly disturbing is the continued operation of the RARE facilities. In response to international pressure, President Vladimir Putin announced in September 2004 that a meeting of the owners of the RARE sites would be convened by the end of the year to consider the piracy issue. According to one industry source, this meeting never took place because the owners of the installations could not be properly identified—precisely the problem an optical disc law and licensing regime would be designed to solve. Since that time, there has been little follow-up regarding the announced meeting or any other sign of decisive action against the RARE facilities. In the face of heavy pressure, Russia has recently opened these plants to civil inspection for the first time (see the subsection below titled “Optical Disc Enforcement and Licensing Regime”). Yet the lack of concrete results after more than a year calls into question Russia’s commitment to eradicating piracy at these facilities and is a frustrating reminder of the inability or unwillingness of the Russian government to tackle illegal pirate activities, even when they occur on state-owned property.

Virtual Markets and Internet Piracy

Russia is home to some of the most notorious and widely used pirate web sites in the world, notably mp3search.ru and allofmp3.com, which the USTR’s “2006 Special 301 Report” labeled “the world’s largest server-based pirate music web site.”¹⁴ Although Russian authorities have received complaints about allofmp3.com for years, the site continues to operate online, adding new titles for downloading nearly every day, according to U.S. Embassy officials. In early 2005, Russian criminal prosecutors decided that they could not prosecute such illicit online transactions under the standing copyright laws, an interpretation that was, according to the IIPA, “contrary to all the assurances the Russian government gave the U.S. government and the private sector during the years-long adoption of amendments to the 1993 Copyright Law.”¹⁵

In addition, Russia is not yet a party to the two World Intellectual Property Organization (WIPO) “Internet Treaties,” which the “2006 Special 301 Report” notes are now a “part of the international IPR legal regime and represent a majority world community view.” These two treaties “clarify exclusive rights in the on-line environment and specifically prohibit the devices and services intended to circumvent technological protection measures for copyrighted works.”¹⁶

The continued operation of allofmp3.com undermines the credibility of the Russian bargaining position and erodes confidence in future improvement of the IPR enforcement regime. At one point during a series of talks, Russian negotiators claimed that the site’s servers had been shut down; their surprised American interlocutors left the room to verify the claim only to discover that the web site was still accessible in Washington, London, and Moscow, according to sources familiar with the talks. The U.S. government has extracted promises that the site will be closed on several occasions to no avail. Although Russian officials tend to dismiss pirate producers as small, isolated, and amateurish, allofmp3.com defies such characterization; on the contrary, this site is massive,

sophisticated, and professional, as are many of the major optical disc plants engaged in pirate activities, according to industry representatives.

The Russian government has not been entirely forthcoming about its efforts to combat Internet piracy, specifically as embodied by *allofmp3.com*, and this posture has damaged the trust that is vital to concluding complex accession negotiations. One senior U.S. official, calling *allofmp3.com* a “poke-you-in-the-eye issue,” has said that shutting the site down for good would go a long way toward reassuring Russia’s trading partners of its political will to be a law-abiding member of the WTO. For the latest on Russia’s efforts regarding *allofmp3.com* and the obstacles that remain, see the subsection below titled “Online Piracy and Collective Rights Management.”

Soviet-Style Civil Code

Also topping the list of complaints coming from U.S. negotiators and industry representatives is the threatened reintroduction of a Soviet-style Civil Code that would replace the legal provisions on IPR currently on the books and, according to one industry source, undo fifteen years of hard-won progress. First proposed in 1989 under the communist regime, the draft of a Civil Code on IPR was crafted by a group of Russian intellectuals as a “*sui generis* law” for the advancement of the Soviet state. According to industry sources, the draft law was shelved by President Boris Yeltsin when WTO accession negotiations were initiated on the basis of a recognition that the law would violate international norms.

One Russian legal expert explains that part four of the Civil Code represents an attempt to find a general formula that would protect both intellectual property and industrial property. Sources familiar with the code from the Duma’s Expert Council on Intellectual Property Legal Regulation and Protection praise the draft precisely because of its theoretical nature and expect it to eliminate many of the contradictions present in existing regulations. If adopted, they argue, the harmonized code would greatly simplify the lives of entrepreneurs engaged in manufacturing and distributing intellectual property–related goods. From the Expert Council’s point of view, the goal is to find a compromise position that preserves the best practices of the old legal framework while fixing its deficiencies with a new comprehensive approach. Regarding the passage of part four of the code, representatives from the council stated that they would support whichever option strengthens the fight against counterfeit goods.

Representatives of U.S. industry argue that, by decoupling IPR protections from enforcement provisions in the criminal code, part four of the draft Civil Code could render Russia’s existing patent and trademark protections virtually useless. It would certainly erode many of the protections added in recent reforms to Russia’s copyright law by (1) no longer mandating the destruction of confiscated products; (2) providing an exhaustive list of the scope of protections and thus curtailing the flexibility of future judicial interpretations; (3) clouding the legal definition of intellectual property; (4) eroding many copyright protections, including those on sound recordings; and (5) creating possible national treatment violations with weak protections for foreign products.¹⁷ They claim that all these changes would be inconsistent with WIPO and other international standards.

In recent months, the specter of the Civil Code has been revived and championed by certain forces within the Russian presidential administration. On the instigation of the Kremlin, a working group was convened to develop part four of the proposed code. It included the participation

of specialists from the Legal Department of the Government of the Russian Federation, the Government Judicial Administration of the President, the Research Center of Individual Rights, and Moscow State University.¹⁸ Coming at a crucial juncture in the WTO accession talks and at a time when many legal aspects of the Russian IPR regime seemed to be settled, both the timing and substance of the move are inexplicable. Some speculate that the looming threat posed by the Civil Code may be a negotiating tactic employed to induce the United States to accept fewer concessions in other areas of IPR enforcement in exchange for the code's withdrawal.

Physical Markets for the Retail Sale of Pirated and Counterfeit Goods

The Moscow metropolitan area has many markets selling pirated and counterfeit goods. Pirated optical discs are sold openly on the streets of Moscow, Saint Petersburg, and other cities, even after several highly publicized law enforcement sweeps. According to U.S. Embassy officials, the Gorbushka market, designated for closure by Russian officials, still houses dozens of kiosks selling pirated items. Threatened closures only cause vendors to migrate to the city's periphery and suburbs. New market centers have sprung up around the Rubin Trade Center and in the outlying areas of Tsaritsino and Mitino.¹⁹ Once again, despite increased government activity, known pirates continue to do a thriving business in Russia.

Prosecutions

Government raids have thus far proven ineffective because they have not been followed up with serious attempts to prosecute suspected offenders. Substantial impediments remain to punishing pirates in the administrative, criminal, and civil arenas.

Administrative prosecutions. Most cases of retail piracy are handled administratively, with distributors of illicit materials receiving paltry fines, averaging between \$50 and \$200. The few attempts made to trace the source of pirated goods and the penalties are, in the eyes of U.S. industry, "totally inadequate to deter over the long term."²⁰ The current version of the Russian Administrative Code is highly complex, making administrative procedures relatively slow and inefficient.

Criminal prosecutions. The proportion of criminal prosecutions remains unsatisfactory in relation to the amount of administrative penalties that are levied. The USTR's "2006 National Trade Estimate Report on Foreign Trade Barriers" claims that many Russian prosecutors and judges do not "consider IPR infringement a serious offense."²¹ When the government does decide to investigate, it is often the less qualified and underresourced municipal authorities rather than the criminal police who undertake the task. Prosecutions can be delayed for months or years following raids. Poor coordination between prosecutors and the police further decreases the chances of successful prosecutions. Actual jail sentences are rarely imposed and even more rarely served, with most cases resulting in conditional or suspended sentences. Fewer than 33 percent of criminal cases actually see a courtroom, with the rest being dismissed. Of the small number that made it to court, only 20 percent resulted in punishment and a mere 1 percent produced jail sentences, according to the IIPA.²²

The Criminal Code has several flaws, including overly burdensome prosecution thresholds, a lack of clear sentencing guidelines in its criminal procedures, and no ex officio authority for prosecutors to take independent action in the absence of the filing of a complaint by injured

parties.²³ Such authority has been granted to the Russian police, but they often operate separately or in isolation from the prosecutors responsible for trying cases.²⁴ In addition, it is unclear whether Russia's judicial system has the structural capacity or expertise to handle complex intellectual property cases effectively.

Civil prosecutions. The ineffectiveness of administrative and criminal recourse has increasingly led copyright holders to pursue civil actions against Russian infringers. In 2003 the International Federation of the Phonographic Industry (IFPI) brought the first civil suit against Russian optical disc plants. Since then, several more suits have been filed but, according to the IIPA, "those cases have been bogged down with procedural hurdles that will likely mean that there will be either no resolution, or a total vindication of the plant operators." Despite the overall adequacy of Russian laws, there are problems with the current civil enforcement procedures, including a lack of civil ex parte search procedures for obtaining a search warrant from a judge without an adverse party having shown "probable cause."²⁵ Maximum statutory damages are too low to serve a deterrent function. Fines can range from 18,000 rubles (\$680) per violation to a maximum of 500,000 rubles (\$18,868), with a typical award being approximately 100,000 rubles (\$3,774).²⁶ These levels are inadequate to enable rights holders to use civil procedures as a viable strategy against the broader problem of copyright infringement. The cost of filing and prosecuting civil suits can run into hundreds of thousands of dollars and is prohibitive relative to the damages awarded.

The Nature of the Intellectual Property Enforcement Problem: Underlying Causes

Compounding the Russian government's shortcomings in the IPR enforcement areas detailed above is a failure to address the structural problems that will continue to undermine the effectiveness of all future efforts to combat intellectual property piracy. These problems include a lack of transparency, bureaucratic fragmentation, the role of organized crime, cultural assumptions and the role of civil society, the concrete focus and undeveloped nature of Russian judicial practice, the concept of intellectual property, and the economics of distribution.

Transparency

It is difficult to assess Russia's progress on IPR enforcement in the absence of its provision of accurate information to the United States and others, and this will continue to be a problem after its accession to the WTO. American industry groups cite significantly different statistics than the Russian government, and this discrepancy will have to be rectified before information exchange can provide a foundation of Russia's postaccession relationship with the United States. China, for example, has slowly begun to improve the transparency of its reporting. Though this reporting is by no means complete, the data China provided have greatly helped observers understand the nature and scope of its intellectual property piracy problem (see the subsection titled "China's Postaccession Enforcement and the Bilateral Framework on IPR").

Bureaucratic Fragmentation

There has never been a centralized authority in the Russian government charged with coordinating intellectual property enforcement efforts. The resulting lack of clear and transparent policy has undermined the effectiveness of these efforts. The primary government body with jurisdiction over

IPR is the Ministry of Education and Science, reflecting the fact that traditional Russian conceptions of intellectual property are primarily limited to patents and scientific inventions. Other ministries, services, and agencies²⁷ with partial responsibility in the IPR arena include the Ministry of Economic Development and Trade, the Ministry of the Interior, the Federal Service of Security, the State Service for Control over Drugs, the Federal Customs Service, the Federal Service for Supervising Compliance with Laws Regarding Mass Communications and the Protection of Cultural Heritage (part of the Ministry of Culture), the Federal Service on Intellectual Property (part of the Ministry of Education), the Institute of State Examination, and Rospatent.²⁸

Copyrights are an orphan within this bureaucratic framework, both conceptually and practically; they have largely been ignored by the Ministry of Science and Education and are only partially overseen by an unorganized patchwork of executive bodies, according to one Russian lawyer. (For Russia's latest initiatives geared toward improving coordination with the government, see the subsections titled "Interministerial Commission and Action Plan" and "The General Prosecutor's Office Initiative.") In the end, there is a lack of both institutional and personal responsibility within the government for seriously controlling the infringement of copyrights and other intellectual property rights.

The Role of Organized Crime

The scope of the involvement of criminal syndicates in Russian intellectual property piracy remains mysterious to many observers. Two prominent examples of organized crime's presence can be found in entertainment software piracy and DVD exports. According to the Entertainment Software Association, the black market for video games is so well established that Russian syndicates boldly place their own brand icons on the pirated goods they produce. According to the Motion Picture Association of America, pirated DVDs for export are "localized" in up to eight different languages by organized criminal syndicates.²⁹ Furthermore, many in Russia are wary of giving increased investigative authority to law enforcement officials because they are perceived as being more susceptible to corruption than public prosecutors. The activity of such powerful forces arrayed against reform must be understood and controlled to achieve meaningful progress.

Cultural Assumptions and the Role of Civil Society

Exacerbating the IPR enforcement problem are the perspective of the average Russian citizen on intellectual property and the relatively undeveloped state of Russian civil society. Russians tend to view intellectual property goods simply as commodities and, consequently, to undervalue them. For decades under the Soviet regime, Russia's rich cultural heritage of music and literature was owned collectively, and phonograph records and books were provided to citizens on a free or heavily subsidized basis. In the wake of the demise of the Soviet state, the idea that one should pay extra money for creative works, which used to belong to everyone collectively, has not come easily. In many respects, including IPR, Russia is still dealing with the remnants of its communist legacy.

Now Russia has a growing economic interest in its own nascent copyright-related industries, such as film and music. But Russian rights holders are reluctant to pursue their rights in court because they do not believe they will be supported by the Putin administration or the General Prosecutor's Office. They fear that court actions may be seen as a challenge to government authority

and, in a country where so much depends on the favor of those in power, they view the publicity that accompanies legal remedies as something to be avoided. One IPR litigator believes the problem for civil society is twofold: (1) The political environment must be changed to encourage full use of the legal system; and (2) Russian rights holders need to organize better and find strength in collective action. Russian industry groups, such as the Union of Industrialists and Entrepreneurs, could help on both counts by taking strong stands in favor of WTO accession with the government and in favor of rigorous enforcement of IPR with Russian content producers. On a broader level, one Russian industry representative has suggested that proper IPR enforcement would not only strengthen the rule of law in Russia but also might contribute to the beginnings of a more vibrant and engaged civil society.

The Concrete Focus and Undeveloped Nature of Russian Judicial Practice

Russian courts are often reluctant to look beyond the proximate physical circumstances of a particular intellectual property crime to the broader context that may have enabled or facilitated that crime. This feature partially explains the difficulties that many rights holders have encountered in addressing both the root causes and general climate of intellectual property piracy under the current system. There are essentially two types of Russian courts: (1) ordinary courts of general jurisdiction for crimes involving physical persons, and (2) commercial arbitration courts for contesting economic interests among legal entities. IPR cases are typically handled by the ordinary courts, where the judges are overburdened and underspecialized. When physical persons (entrepreneurs and other individuals) and economic persons (corporations and other entities created by law) are at loggerheads in these courts, there is a strong preference to protect the former, according to one Russian legal expert.

This bias for the physical means that to prosecute IPR cases in ordinary courts, physical evidence of a crime and the physical presence of an offender must first be established. Because of the lack of proper licensing and regulation of many commercial sectors, the increasingly free movement of people, and the activities of organized criminal elements, it has often proven difficult or impossible to identify the defendants who were physically responsible for the execution of a crime and therefore to establish liability in many piracy cases. The physical presence requirement applies to aggrieved parties as well. Though Russian government authorities call for more vigorous pursuit of legal remedies by individual rights holders, Russian law does not provide for class actions in copyright infringement cases. Prosecuting offenses on an individual basis is a time-consuming and costly process that frequently leads to insignificant results, according to one Russian industry representative.

The Concept of Intellectual Property

One expert on Russian IPR law emphasized the importance of the right enshrined in the Russian Constitution of reasonable access to education, culture, and knowledge. Because the practical definition of accessibility only has meaning relative to the low standard of living of the average Russian citizen, judges must balance the profitability of intellectual property against the constitutional right of access. That is, if a compact disc can be manufactured for 5 rubles, why should it be sold for 500 rubles? This perspective, when joined with the physical bias of the ordinary courts, has been one factor in the low valuation of pirated goods in the calculation of damages. When choosing between different approaches to valuation (market price, retail price, manufacturing cost), judges are inclined to assess the cost of the physical goods involved without regard for any larger

conception of the value of intellectual property, according to one Russian legal expert. This flies in the face of the now widely accepted view that the market price of the nonpirated good is the more valid measure. Such practices have produced small damage awards that do not act as deterrents.

The Economics of Distribution and the Market Problem

Although market access for imported copyright products is not the same problem for Russia that it is for China, market realities have had a decisive impact on piracy levels in Russia. The business model for pirate distribution is an attractive and risk-free one: suppliers approach potential retail distributors with a large quantity of product, require no payment up front, and agree to swap out unsold items for more marketable ones. Thus it is extremely easy to start distributing pirated goods. However, starting a legitimate distribution business for copyrighted goods requires a significant upfront investment in stock and point of sale. The risk associated with maintaining a proper inventory is high. Some Russian entrepreneurs in the distribution business have called for small business or commodity loans to alter the economic calculus of retailers, but no action has been taken. Confidential surveys taken by Russian industry associations suggest that most pirate distributors would prefer to abandon their illegal practices if a viable alternative were available.³⁰ But Russian representatives of international media companies counter the market economics argument by pointing out that even when copyright owners lowered prices to retailers, for example, to 450 rubles (\$17) for a DVD, there was almost no effect on piracy levels.

IPR ENFORCEMENT AS A PROBLEM OF POLITICAL WILL

Although it is not uncommon for countries—especially ones as large as Russia—to require several years to complete the process of WTO accession, Russia is a unique case. Once most countries have reached the late stage of the process when their laws are considered satisfactory, they demonstrate a readiness to implement reforms that carries them through any remaining hurdles and into membership. On the contrary, Russia has taken a baffling array of steps that have called into question both the seriousness of its resolve to join the WTO and the credibility of its promises to institute effective reforms.

In the eyes of many in Washington directly and indirectly involved in the WTO negotiations, the main ingredient now absent from Russia's side of the negotiating table is political will to take concrete steps to implement its obligations. Until this political will is demonstrated, senior U.S. officials and industry leaders agree that concerns about specific legal reforms, let alone the prospects for additional postaccession commitments, are largely secondary. High-level political commitments will not solve the IPR enforcement problem on their own, but they are vital to helping Russia come to terms with the United States on a bilateral agreement.

Russian Motivations

The areas described in the first section of this paper—particularly illegal optical disc production, online piracy, and the Soviet-style Civil Code—are the most striking instances of a common phenomenon: deliberate inaction on the part of the Russian government in the face of clear

enforcement imperatives. High-level Russian policy makers could easily fix these politically sensitive problems, but up to this point they have chosen not to—certainly a puzzling course of conduct if Russia were as eager to accede to the WTO as its trade officials insist. Russia has been supplying its partners and critics with commitments on IPR enforcement for more than ten years in some areas, with little on-the-ground progress. Pertinent technical and legal issues have been raised frequently by the U.S. government in bilateral discussions with little to show for it, according to former U.S. officials. Details and momentum continue to be lost as they make their way up the political chain of command. In addition to instituting the kinds of bureaucratic processes and mechanisms that have stabilized momentum in China (see the subsection below titled “China’s Postaccession Enforcement and the Bilateral Framework on IPR”), President Putin must himself intervene to send a message from the very top that the status quo is unacceptable.

It remains unclear why the Russian presidential administration and central bureaucracy have failed to intercede with a demonstration of political will that would calm anxious trading partners, despite numerous verbal assurances from President Putin to President George W. Bush. Nor is it obvious why Russia has recently assumed a more aggressive posture in the WTO accession negotiations. Some have suggested that apparent Russian complacency stems from a misplaced sense of confident expectation that WTO membership is an inevitability because the United States cannot afford to block accession when Russia holds so many geopolitical trump cards, such as the ability to hold European energy supplies hostage or the prospect of noncooperation on proliferation issues regarding Iran or North Korea.

Others attribute Russian intransigence to a deep-seated pride, a sense that Russia has a fundamentally different perspective than the West that it is unwilling to sacrifice for WTO membership. The proposed Soviet-style Civil Code exemplifies this brand of legalistic nationalism. Mikhail Dmitriev, the president of the Center of Strategic Research, has commented that the Russian perspective “grows out of the Soviet times when the entire intellectual property belonged to the Soviet state and the concept of intellectual property as something owned by a private individual did not exist.”³¹ Conversely, several senior Russian business representatives say the IPR enforcement problem is characteristic of a transitional or developing economy and is not a relic of the Soviet era or a particularly Russian phenomenon. They blame the breakdown of the Soviet system of registering intellectual property in 1991 for throwing national markets and manufacturers into a state of chaos from which they have yet to emerge fully.

Still others wonder whether the presidential administration’s excessive insulation from the likely consequences of its actions—on display in the Civil Code controversy—or the nefarious influence of organized criminal elements might explain Russia’s posture.

Russian Incentives

Asking the Russian government to crack down on IPR infringement is without question a costly proposition. For Russian officials to see better enforcement as a politically viable strategy, they must also see a set of convincing incentives and gains for the state. It is perhaps worth reminding all parties what is at stake not only for the international community but also for Russia in complying with the WTO’s IPR obligations.

First and foremost among the benefits of a strong IPR regime is the protection of indigenous rights holders. This would foster the development and global expansion of Russia’s rich cultural

traditions and provide a boost to the Russian economy from an important industry outside the energy sector. Extending similarly robust protections to foreign rights holders—something that would be required by the WTO's national treatment disciplines—would send a powerful signal to the international business community that Russia is becoming a safer and more stable place in which to conduct commerce. Strengthening the rule of law would reassure those who are wary of Russia's business climate and likely result in increased levels of foreign investment. Given the precarious state of its economy once the lucrative energy sectors are excluded, Russia would undoubtedly benefit from such an injection of commercial credibility. In addition, the reduction of tariff rates from 50 percent and higher in many cases to the most-favored-nation rates mandated for all 149 WTO members would substantially improve the gains from trade enjoyed by all Russian exporters. Though the costs of IPR enforcement are steep, the benefits are more than commensurate.

Political Dialogue and Credible Pressure

It is now widely agreed that there is a need for a high-level political dialogue to promote engagement and sustain momentum toward Russia's WTO accession. A bilateral United States–Russia IPR Working Group does exist, but the general perception in Washington is that the political level of the current dialogue is not sufficiently elevated on the Russian side to have a significant impact on accession issues. This dialogue has facilitated the exchange of information and achieved some notable results on technical and legal levels, but it has not altered the calculus of political will. That is not to say that IPR issues have not been discussed at high levels. On the contrary, numerous conversations at the ambassadorial and ministerial levels have taken place, but on balance they have yielded more frustration than progress. IPR enforcement has even percolated up to the presidential level and entered discussions between Putin and Bush. At the 2004 G-8 summit at Sea Island, Georgia, Putin publicly admitted that IPR was a genuine problem for the first time following years of denial, but only after the United States threatened to suspend the \$550 million in benefits that Russia was receiving through the U.S. Generalized System of Preferences (GSP). Six weeks later, amendments to Russia's copyright law that had been languishing for eleven years were expeditiously passed, according to industry sources.

In that case, the United States was able to recast Moscow's incentive structure and thus demonstrate that the Russian presidential administration and central bureaucracy can act effectively to enforce intellectual property protections when the political will to do so is mustered. Unfortunately, this lone example has proven the exception to the rule, and Russia's piracy epidemic has only worsened since 2004. As one representative of the media industry who is active in Russia has pointed out, in the days preceding the G-8's July 2006 summit in Saint Petersburg, with many Western delegations in the area, it was impossible to find a pirated DVD of the movie *Pirates of the Caribbean*, which had been released less than two weeks before the summit. But after the summit, illegal copies could be found on nearly every street corner. This example suggests that the Russian authorities can limit the sale of pirated goods when they want to do so.

The Position of the United States

Senior U.S. negotiators recognize that not all problems can be solved in the United States–Russia bilateral accession talks and that each WTO multilateral accession compact necessarily strikes a delicate balance along the continuum of commitments in which some are up front, some come

immediately after accession, and some are gradually phased in. But there has been rising pressure within the U.S. Congress—and increasingly within the executive branch—to draw a line in the sand and, rather than settling for additional promises on paper, to hold out for concrete enforcement and the manifestation of a certain degree of political will in the bilateral context before allowing Russia to advance to the multilateral dialogue. Industry representatives advocate a shift away from trusting to the future and toward verifying results in the present. Congress's recent actions suggest that its members agree with this assessment.

On December 22, 2005, House Congressional Resolution 230, “Expressing the Sense of the Congress that the Russian Federation Must Protect Intellectual Property Rights,” was passed in the U.S. House of Representatives by a vote of 421–2 and adopted by the Senate by unanimous consent.³² It sent a clear message to the Russian government that Congress was not inclined to overlook the issue of IPR enforcement in Russia. In May 2006, this resolution was followed by two strongly worded letters to President Bush on the subject of Russian accession to the WTO, one from an unlikely coalition of leaders from the House Ways and Means and Senate Finance committees—Representatives Bill Thomas (R-Calif.), Charles Rangel (D-N.Y.), Charles Grassley (R-Iowa), and Max Baucus (D-Mont.)—and another from Senators Orrin Hatch (R-Utah) and Evan Bayh (D-Ind.) of the Senate Judiciary Committee. These letters cited Russia's “consistent disregard” for international rules governing trade and investment, especially regarding “the protection of intellectual property rights,” and lamented “inadequate enforcement action by Russian authorities [that] allow piracy rates to remain at nearly 70 percent.” They urged President Bush to “refrain from entering into a bilateral agreement supporting Russian accession to the WTO, until the Russian Government takes strong affirmative action in these areas, which can be quantified, verified and have been sustained over a period of time [*sic*].”³³

The issue of Russian accession to the WTO is becoming a focal point for channeling congressional anxiety about President Putin's leadership and the overall direction of Russian foreign policy. Irritation over several developments—including Russia's role in the Yukos affair and the Ukrainian Orange Revolution, the crackdown on foreign nongovernmental organizations, and the recent disruption of Europe's energy supply—has eroded support for Russia within Congress. According to industry representatives, there is no constituency for concluding a bilateral accession agreement in light of the present state of negotiations. The general sentiment is that it will be difficult to market any agreement on Russian accession to Congress given current attitudes and deep ideological divisions over the direction of trade liberalization, particularly without support from the business community. The vote on extending permanent normal trade relations to Russia will be greatly affected by the widespread disillusionment with China's IPR record and by congressional determination not to “make the same mistakes” again. Achieving real progress on IPR enforcement will be in Russia's own interest if it hopes to benefit from the freer trade with the United States that WTO membership offers.

Despite tremendous pressure and widely reported momentum leading up to the G-8 summit in Saint Petersburg, no bilateral accession bargain was struck. The parties have agreed to seek to resolve their differences by October 2006, but with the G-8 deadline having passed, the time horizon for ongoing negotiations remains unclear.

RUSSIA'S LATEST ENFORCEMENT EFFORTS

Russia's latest enforcement initiatives show promise in principle—particularly in certain areas of IPR enforcement not covered at length in this paper, such as patent and trademark protection—and most of them testify to the presence of a limited willingness to reform.³⁴ Although none has produced particularly impressive concrete results, the trend should be encouraging for those who would like to see Russia enter the WTO. But Russia's level of demonstrated political will still trails that of previous candidates for accession and suffers particularly in comparison with China, in no small part due to the latter's extraordinary interest in being perceived as a responsible member of the international trading system.

Interministerial Commission and Action Plan

Since 2002, the Government Commission for Counteracting Intellectual Property Infringement has been the primary interministerial body within Russia's central bureaucracy charged with coordinating IPR policy and enforcement efforts. Newly reconstituted in 2004, the commission is chaired by Dmitri Medvedev, the first deputy prime minister of the Russian Federation, with Andrei Fursenko, minister of education and science, serving as deputy chairman.³⁵ It meets several times a year to develop a semiannual action plan, which is then presented to relevant ministries for implementation by federal agencies and services. Before drafting a new plan, agencies solicit information from provincial and local authorities about issues of concern. Responses to these inquiries are then submitted to the commission for consideration during the next meeting. Initiatives can also be submitted to the commission through various bodies, such as Rospatent, the Expert Council of the State Duma, or the Center of Private Law, an advisory body that serves the presidential administration. The commission released a "Working Plan" in 2004 and a meeting memo in March 2005, but action plans for 2005 and 2006 have not been forthcoming, though they seem to have circulated internally.³⁶ The findings of the most recent meeting of the commission, held in March 2006, have not yet been publicly released.

Despite the commission's efforts, bureaucratic fragmentation remains a serious obstacle to effective enforcement. On this point, Alexei Likhachev, the chairman of the Expert Council on Intellectual Property Legal Regulation and Protection, has admitted,

We think the main problem now is that IPR work has been spread too thinly among different agencies. The same problem exists in the State Duma. We are trying to bring most of the IPR work under the umbrella of our Expert Council.³⁷

This sentiment is confirmed by the analysis of Anna Bessanova of the Carnegie Moscow Center:

It looks like information is available only at the top level. Executive officials further down on the power hierarchy are unaware of the activities of their colleagues. Lack of coordination and exchange of information between offices on the same level is still a real structural problem, and no attempts to address this problem have been made. For example, judges of different districts of Moscow have no information about each others' decisions on similar cases.³⁸

The Inter-Ministerial Commission, described by some Russian businesspeople familiar with its operations as a complete failure so far, nonetheless represents a promising recognition of the need to translate high-level political commitment into effective action by mid-level and low-level bureaucratic agents.

The General Prosecutor's Office Initiative

The General Prosecutor's Office held the first of a series of regular meetings designed to coordinate the efforts of law enforcement agencies to prosecute IPR infringements on September 9, 2005. More than ten ministers and top officials participated in the meeting, which featured a report from Sergei Fridinsky, deputy to the general prosecutor.³⁹ The report reiterated that IPR protection was a high priority for the Russian government and would be a key factor in Russia's political and economic development. Expert sources cited by Fridinsky contended that piracy levels for audiovisual products had dropped from 80 percent in 2005 to 68 percent in 2006, but the report conceded that law enforcement activities were still inadequate.⁴⁰

Fridinsky attributed the legal system's shortcomings to inefficient work preceding prosecutions and poor interaction between officials in the Ministry of the Interior, Customs Services, and various prosecutors' offices during pretrial investigations. Furthermore, the report acknowledged that administrative fines were too low relative to the income of pirate producers and distributors, and that criminal sanctions were not strict enough. Criminal trials can be so time consuming and costly that as many as 20 percent of rights holders choose to settle with offenders out of court. Though there have been some encouraging prosecutions against retail vendors, very few large-scale optical disc pirates have been successfully prosecuted. The report is, however, virtually silent on the key question, that is, concrete ways that interagency cooperation through the General Prosecutor's Office can be used to improve Russia's enforcement regime. President Putin's June 3, 2006, sacking of Vladimir Ustinov, who had served as general prosecutor since 2000 and was a prominent member of the *siloviki*, certainly does not inspire confidence in the future of this initiative.⁴¹

Optical Disc Enforcement and Licensing Regime

Russia's existing regulatory framework for licensing optical disc plants was amended on April 28, 2006, to strengthen the licensing regime. Applicants for production licenses must now present documents verifying an order to produce a certain number of copies of an audio or audiovisual work. Applicants must also identify the names of their organizations and number of licenses in their possession on all products. Finally, the new regulations require that strict production records now be kept.

Even with these improvements, significant gaps in optical disc enforcement procedures remain, notably the lack of a regularly monitored registry of production lines, insufficient provisions dictating the destruction of pirated materials and the equipment used to produce them, and the absence of genuine surprise inspection procedures.⁴² The optical disc enforcement regime should also be codified in a law, which would enjoy higher legal status than the regulations currently on the books. For the most part, these steps have already been taken by Ukraine and China (see the subsection below titled "Ukraine Allayed the Fears of Rights Holders en Route to a Bilateral Accord with the United States").

The enforcement record on optical disc production is disputed. Officials in the Russian government claim that in the first eleven months of 2005, 19 optical disc plants were inspected, 12 licensed operations were forced to cease operations, and 11 million pirated products were seized and designated for future destruction.⁴³ The number of raids saw a large increase in the closing months of 2005 as part of the “Kontrafakt-2005” program, which resulted in the suspension of three licenses in January 2006. But, according to the IIPA, “[I]n virtually all cases where plants were raided in 2005, it is reported that the plants remain in operation.”⁴⁴ In addition, officials of the Ministry of the Interior were finally given access to RARE facilities in March 2005. Though this access has not produced significant results thus far, it represents a positive step on an important symbolic issue and should thus be commended.⁴⁵ Ministry of the Interior statistics report that between January and May 2006, 2,141 cases of copyright and related rights infringement were uncovered during raids (a 72 percent increase from the same period in 2005), 1,228 criminal suits were initiated (a 50 percent increase), and 758 offenders were convicted (a 49.5 percent increase). The picture painted by these numbers, one in which the vast majority of IPR infringements is uncovered by authorities, is different than the on-the-ground reality reported by international rights holders.

Online Piracy and Collective Rights Management

In February 2005, the IFPI launched a criminal case against allofmp3.com in the southwestern administrative region of Moscow, but the suit was dismissed. According to an interpretation offered by the General Prosecutor’s Office, the distribution of creative works over the Internet does not constitute a violation of Russian copyright law because there is no transfer of physical materials. In addition, the operators of allofmp3.com have a license to sell music from the Russian Society for Multimedia and Digital Networks (ROMS), a collective rights management organization. Organizations such as ROMS assert their ability to issue licenses even when content producers have not authorized them to do so, and Russian courts have done little to restrain these practices.⁴⁶

There are a few other countries that permit so-called extended licensing, primarily former Soviet Republics. But there is no precedent outside the Commonwealth of Independent States region or in international intellectual property practice for extended licensing in the face of refusal by the rights owner to strike a deal. Rights holders argue that Russian law is clear and precise on this point, but authorities have been unwilling to address the illegality of collective rights management practices directly. Russian authorities have shown no indication that they plan to rectify the current situation, and it is unclear how part four of the proposed Soviet-style Civil Code would affect this area of law if it is adopted.

Both problems—poor copyright laws and questionable judicial interpretations on collective rights management—have prevented effective prosecution of web sites such as allofmp3.com. To satisfy the demands of the international community and exhibit a level of political will that would be acceptable to the United States, Russia should take prompt action against allofmp3.com, accede to the WIPO Internet Treaties, reject the Civil Code, and issue a judicial directive reforming the system of collective rights management.

Soviet-Style Civil Code and Legal Reform

The Duma's Expert Council (see the subsection above titled "Soviet-Style Civil Code"), established under the aegis of the Committee on Economic Policy, Entrepreneurship, and Tourism in December 2004, has been deliberating for approximately eighteen months. More than half its membership is made up of business leaders, with additional participation from judges, representatives from the General Prosecutor's Office, and legislators. The council meets monthly to consider and offer its opinion on draft amendments to Russian law, including the proposed Civil Code, and its work produced the first-ever Duma hearing devoted to IPR on February 14, 2004. Though the council has broadened the group of stakeholders included in the process of legal reform and has made some contributions to strengthening the legal framework on IPR—notably article 146 of the Criminal Code⁴⁷—many Russian observers continue to question its independence and efficacy.

IIPA representatives and other sources report that the Duma's Expert Council finally submitted the text of part four of the Civil Code to the Duma in late July 2006.⁴⁸ Despite the repeated assurances of Russian officials, the Civil Code appears to be gaining momentum, especially after the Saint Petersburg summit failed to result in a bilateral accession deal with the United States. Critics of the code continue to argue that it would undermine Russian copyright protections and criminal enforcement efforts in a misguided attempt to create a Russian alternative to standard international IPR practices. Its passage would be a blow to Russia's international credibility.

Prosecutions

Although the absolute number of IPR prosecutions has increased in recent years, their effectiveness in deterring future infringements and putting offenders in jail has not.

Administrative prosecutions. Amendments to the Code of Administrative Misdemeanors were adopted in December 2005 and went into effect the following month. The amendments increase liabilities for IPR infringement and raise administrative fines for the import, sale, and distribution of unlicensed intellectual property to 30,000 to 40,000 rubles (approximately \$1,110–\$1,480). No other reforms to pre-action investigations or statutes of limitations were made.

Criminal and civil prosecutions. The Criminal Code was amended in 2003 and 2005, and it is expected to receive further changes in 2006. Previous reforms increased fines for plagiarism from 20,000 to 40,000 rubles (\$740–1,480) to 200,000 rubles.⁴⁹ They also stipulated that penalties based on the offender's income should be calculated according to an eighteen-month time horizon rather than the old standard of two to four months. Fines for copyright violations were raised to 20,000 to 40,000 rubles, although these are still too low to serve as a deterrent. Crimes committed by organized syndicates or government officials, as well as those involving damages greater than 250,000 rubles (\$9,260), are now punishable by a maximum jail sentence of five years and a 500,000 ruble fine (\$18,500). Russian officials claim that the Ministry of the Interior initiated 5,456 criminal cases, completed 1,763 criminal investigations, and charged 1,050 offenders with criminal offenses in the first eleven months of 2005.⁵⁰ This would be, in the ministry's estimation, a 60 percent increase in the number of criminal cases between 2004 and 2005.

The Russian Anti-Piracy Organization, however, finds evidence that only ten people received criminal sentences for copyright related offenses in 2005. At the December 8, 2005, American

Chamber of Commerce “Roundtable on IPR Enforcement in Russia,” the representative of the Supreme Arbitration Court of the Russian Federation attributed the scarcity of successful prosecutions to a lack of effort on the part of rights holders:

While we have more than 5,000 criminal cases, we only have less than 500 civil cases, those brought by rights holders and launched by them.... I repeat, they should not shift costs of protection on their intellectual property on the [Russian] state.... What prevents you from coming to court and filing your suits? I can count suits file[d] by American rights holder[s] on the fingers of one hand, this year. Court[s] work and they are waiting for you, but you would not come there.

Industry representatives, such as Vladimir Dragunov of the IFPI, challenge this contention. Dragunov noted at the same roundtable that the IFPI has had some litigation held up in the Moscow Regional Arbitration Court for over two years while the facilities under investigation are allowed to maintain operations. He also said that “civil legal means cannot defeat piracy in any country ... because compensation cannot compare with profits this business yields every day.” The lack of specialized patent, trademark, and copyright courts to develop a sound body of precedents along with the underlying cultural biases against rights holders further undermine the power of civil prosecutions to address the piracy problem (see the following subsection titled “Judicial Directives and Reforms”).

The Criminal Code remains unclear on the confiscation and destruction of goods and equipment used in pirate production, as well as on the definition of “grave harm” in articles 146 and 151.⁵¹ According to sources associated with the Duma’s Expert Council on Intellectual Property Legal Regulation and Protection, the Russian government plans to consider legislation in the fall of 2006 that would increase the maximum sentence for piracy from five to six years, which would place IPR infringement in the category of “grave” offenses.

Judicial directives and reforms. Industry groups have long advocated clearer and stricter judicial directives on IPR litigation and sentencing as a means of improving Russia’s prosecution record. Andrei Sharonov, the deputy minister of economic development and trade, announced at the “Roundtable on IPR Enforcement in Russia” that “the Russian Supreme Court will convene a plenary session at the beginning of [2006] to summarize judicial practices and give recommendations to judges on deterrent punishment in cases involving intellectual property rights.” This effort will be reinforced by a new judicial initiative, called “Justice,” that will establish an informational-analytical database to improve cooperation between judicial authorities from different regions and agencies. The database will make available statistical data, information on court practices (including precedents and prior decisions), and access to juridical publications and a database of Russian legislation. Courts in several locations are in the process of being equipped with the information technology and telecommunications architecture to implement the “Justice” system, and the government hopes to launch the program in December 2006. Both of these improvements to the Russian judiciary, if carried out, would be most encouraging.

Many agree that judicial reform and education will be an important component of any comprehensive effort to address the IPR enforcement problem. Several lawyers experienced in the IPR practice believe that Russia should follow China’s example and establish specialized courts to

deal with IPR infringement cases. China instituted such courts in Beijing and Shanghai in 1992 and is more advanced than Russia in this respect.⁵² Allowing judges to develop expertise and extensive experience by presiding only over IPR cases would produce a much better understanding of the field and more solidly grounded rulings by those courts.

Public Awareness

Finally, it is worth noting the need to educate both the Russian business community and civil society about the importance of IPR protection as well as the mechanisms at their disposal to guard their own intellectual property. Several Russian retail distributors believe the key to counteracting the forces that produce high levels of copyright infringement is creating a “climate of total intolerance” among consumers. Consequently, Natalya Zolotykh of Opora Rossi, an association dealing with small and medium-sized enterprises in Russia, has praised an initiative recently undertaken by the Ministry of Science and Education that aims to create a “Federal Intellectual Property Center whose goal is clarifying issues related to the protection of intellectual property.”⁵³ If, as many seem to agree, corporate managers and average citizens alike really do misunderstand the concept of intellectual property, then projects such as this will help change the deeply rooted cultural assumptions and simple lack of awareness that aggravate the piracy problem. Many in the Russian business community believe that legal or government action by itself will prove insufficient.

THE CASE OF UKRAINE: LESSONS IN A BILATERAL CONTEXT

The United States completed its bilateral market access agreement with Ukraine in March 2006, thus potentially putting Ukraine on track to accede to the WTO before Russia. Both countries began the accession process at approximately the same time in 1993. The case of Ukraine offers a useful point of comparison for Russia of the kinds of political commitments it should be willing to undertake as it works to conclude its own bilateral agreement on WTO accession with the United States.

The Foundation the Russians Are Lacking: An Action Plan

In 2000, U.S. president Bill Clinton and Ukrainian president Leonid Kuchma signed a landmark Joint Action Plan to fight intellectual property infringement in Ukraine. According to the IIPA, in adopting the plan, Ukraine agreed:

- To close the illegal optical disc plants, to seize illegal material, and only to reopen the plants when there was a legal licensing scheme in place;
- To adopt proper optical media production and distribution regulations, including [source] identification (SID) coding and the monitoring of raw material and manufacturing equipment, as well as of exports of product; and
- To improve significantly the copyright law and to introduce other legal reforms, including criminal and administrative penalties, necessary to implement a modern copyright regime.⁵⁴

Although the plan initially languished, it nevertheless demonstrated political commitment and laid the foundation for future progress. It represented an official, top-level recognition from the Ukrainian government that intellectual property enforcement was a problem that had to be solved. This demonstration of the will to reform gradually became a reality when improvements to laws and enforcement practices began to emerge between 2001 and 2005. Such will is still lacking at the highest levels of the Russian government, as evidenced by the absence of a collaborative action plan analogous to the one accepted by Ukraine.

Ukraine Allayed the Fears of Rights Holders en Route to a Bilateral Accord with the United States

Since 2001, the Ukrainians have steadily improved their legal framework on IPR and enforcement cooperation efforts with international rights holders. Cases in point include the following:

- A 2001 amendment to the Copyright Law included previously missing protections for preexisting works and sound recordings, with further reforms still being contemplated.⁵⁵
- In 2005, the government adopted a strong optical disc law and “agreed to participate cooperatively with the copyright industries in Ukraine on enforcement, including the commencement of joint surprise plant inspections,” to the great satisfaction of U.S. industry groups, which had provided the model draft upon which the law was based.⁵⁶
- In December 2005, in a dramatic step, the Government of Ukraine’s State Department of Intellectual Property engaged with U.S. industry and the International Federation of the Phonographic Industry to create an “Enforcement Cooperation Group” (ECG). The ECG would, by “conducting future joint [optical disc plant] inspections,” “provide greater transparency about the enforcement efforts that are being undertaken by Ukrainian authorities.” Its function would be (1) to hold regular meetings hosted by the U.S. Embassy in Kiev that would “provide an opportunity to increase mutual communication between Ukrainian authorities and industry representatives”; and (2) to share “information and expertise,” including “collaboration in forensic analysis.”⁵⁷ The ECG has no Russian counterpart.

The United States Created Economic Incentives for Ukraine to Muster Political Will

Ukraine’s progress on IPR laws and enforcement was encouraged by the application of economic pressure by the United States when it suspended GSP benefits on August 24, 2001.⁵⁸ Many in U.S. industry cite this example as a powerful argument for taking a tougher posture toward Russia, which enjoyed \$740 million in GSP benefits for exports to the United States in 2005, primarily in the heavy metal and chemical sectors.⁵⁹ Commenting on the positive developments that paved the way for a deal with Ukraine, the then–U.S. trade representative, Rob Portman, “praised the IPR provisions of the bilateral, pointing out that the measures Ukraine took to bolster IPR enforcement led to its conclusion” and noted that “this commitment helped us get over the finish line on this accession.”⁶⁰

Lessons for Russia: Problem Solved? Not Quite

Although it is still too early for definitive judgments, progress on translating legal reform and enforcement cooperation into decreased piracy levels in the Ukraine is still limited.⁶¹ The following observations come from the perspective of U.S. industry groups that are always seeking more stringent reforms, but they nonetheless tell a cautionary tale:

- Levels of optical disc piracy have dropped only slightly in recent years, causing the IIPA to declare in its 2006 Special 301 assessment of Ukraine: “Passage of the new optical disc law is not a substitute for enforcement.”⁶²
- Production capacity remains at 90 million optical discs, compared with approximately 22 million in estimated domestic demand.⁶³
- Despite government commitments to cooperate with industry on plant inspections, “there have been to date no actual invitations to join inspections since that announcement.... The failure of [the State Department of Intellectual Property (SDIP)] to disclose to the rights holders the evidence SDIP has obtained, and the conclusions it has reached, based on past raids has been a stumbling block to effective plant enforcement.”⁶⁴
- The existing copyright law continues to overregulate collective rights management in Ukraine, “undermin[ing] the right of phonogram producers to freely negotiate their fees with users” through ubiquitous government involvement.⁶⁵
- Administrative fines have had some effect on minor infringements but criminal thresholds are “too high to commence a criminal copyright piracy case ... (and getting higher),” with the “substantial material damage” and “intentional circumvention” criteria continuing to be overly burdensome standards of proof.⁶⁶

Assessment

From the perspective of Russian accession to the WTO, the Ukraine case demonstrates that political will was essential to produce a bilateral agreement on accession. At the same time, it is also a reminder that the IPR enforcement problem cannot be solved immediately. Ukraine's early commitment to take prompt enforcement action against existing pirate operations as well as its approval of a long-awaited optical disc law—still the number one priority for U.S. industry groups focused on Russia—were important steps in making a bilateral agreement palatable to U.S. industry. At the same time, the bilateral agreement and full Ukrainian accession will only open the door on the long and painstaking process of implementing solid IPR laws and other new WTO commitments.

THE CASE OF CHINA: FURTHER LESSONS ON PREACCESSION COMMITMENTS AND POSTACCESSION PERFORMANCE

The complex postaccession experience of China with regard to intellectual property rights protection offers important lessons for Russia as it navigates the increasingly demanding dynamics of the multilateral accession negotiations. It also has much to teach about the importance of creating mechanisms to facilitate and sustain the progress that preaccession political will can only set in motion.

The Preaccession Bilateral Agreements

China's accession to the WTO was just as protracted as Russia's, lasting almost fifteen years. In contrast to Russia, however, China recognized at an early stage the importance of IPR protections to good citizenship in the world trading system. Three years before the Trade-Related Aspects of Intellectual Property Rights (TRIPS) Agreement became part of the General Agreement on Tariffs and Trade's legal framework, China completed a Memorandum of Understanding (MOU) with the United States on IPR protection in 1992 that included mutual understandings on patents and copyrights, trade secrets, border control, enforcement and implementation of commitments, and the eventual accession of China into international IPR conventions.

The looming threat of a trade war in early 1995 resulted in a second MOU focused on enforcement concerns that led to the temporary closing of several optical disc plants, including some allegedly owned by senior officers in the People's Liberation Army.⁶⁷ Although these MOUs did not solve the piracy problem, they signaled China's desire to be a responsible member of the international trading system and represented a high-level engagement with the United States on IPR at an early stage of the accession process. China's drive to come to terms with its negotiating partners continued to intensify as the prospect of accession drew closer. Russia, however, has not demonstrated the type of commitment or political will on IPR protection that is present in China's 1992 or 1995 bilateral agreements, considering its claims that it is ready for and fully deserving of WTO membership.

Multilateral Negotiations with the WTO Working Party and WTO-Plus Commitments

While Russia's will to make the reforms necessary to accede to the WTO withered in the first half of 2006, China's remained strong throughout the preaccession process. China's eagerness was largely grounded in an aspiration to be perceived as a responsible member of the international economic community. Such an ambition seems to be lacking from senior Russian officials. Consequently, China was willing to undertake a number of obligations in its preaccession negotiations with the WTO Working Party both in the IPR area and elsewhere that went beyond the standard template of previous accession protocols. These obligations included commitments on transparency, judicial review, transitional review and enforcement, uniform administration, market economy practices (privatization and regulation of monopolies and state-trading enterprises, nonintervention in price levels), investment regime, and national treatment.⁶⁸ Critics of China's postaccession performance, particularly on IPR enforcement, have called for additional commitments to be imposed on Russia during the preaccession negotiations.

For their part, Russian negotiators have flatly rejected the possibility of extraordinary or “WTO-Plus” commitments,⁶⁹ stating that they will not accept any conditions that have not already been agreed to by prior entrants. Going forward, it will be crucial to see if Russian commitments meet the high standards established by China during its accession in areas such as transparency, judicial review, and transitional review, all of which have proven to be important elements of continuing engagement with the Chinese on the issue of IPR enforcement.⁷⁰ It will be particularly telling to see if Russia is willing to undertake an implementation review schedule commensurate with China’s unprecedented program of nine reviews by the WTO over a ten-year period.⁷¹ The best barometer of Russia’s readiness to make thorough IPR commitments before accession at the multilateral level will be the final text of the “Working Party Report.”⁷²

Postaccession Aftermath: Lost Leverage and the Need for Greater Specificity in Enforcement Provisions

Although China made some efforts to curb IPR infringement in the five to seven years leading up to accession, piracy continued to expand in all its forms (optical disc, Internet, retail) after membership had been secured. Industry sources now complain that China’s responses to questions in the enforcement sections of the “Working Party Report” were overly vague.⁷³ Such questions are designed to create “legislative history” on China’s interpretation of certain laws and principles that will become legally binding in future WTO dispute settlement. The section of the Chinese compact on TRIPS enforcement contains repeated Chinese avowals of steps that had already or “would” be taken. Characteristic are statements such as,

The representative of China stated that the measures for cracking down on intellectual property piracy were always severe in China.⁷⁴

Similarly,

The representative of China confirmed that the government would continue to enhance its enforcement efforts, including through the application of more effective administrative sanction.⁷⁵

As international rights holders subsequently realized, given the rapid increase in piracy levels after accession, this language was simply not sufficiently specific, and a greater demonstration of enforcement should have been required before accession. The experience with China suggests that the leverage of the international community is at its greatest before and not, as some have argued, following WTO accession. In private interviews, more than one Russian directly involved in IPR litigation confirmed that U.S. pressure surrounding the issue of WTO membership had been a positive force in compelling the government to focus on the IPR problem and expressed fear that little will be accomplished after accession. Representatives of Russian industry are hopeful that WTO accession will ultimately enable the Russian government to be tough in calling for IPR enforcement based on rigorous international standards.

Increasingly detailed provisions on IPR in the texts of recent accession documents are designed to supplement and correct deficiencies in the TRIPS Agreement. As noted above, international rights holders are pushing for greater specificity than ever before in the enforcement provisions of Russia's multilateral accession commitments, and the Russians are resisting. Russian representatives have claimed that requests for further specification on IPR in the accession documents go beyond what normal WTO agreements require and thus constitute "WTO-Plus" commitments.

However, an important distinction needs to be made between spelling out the nature of TRIPS obligations and the questionable practice of asking some countries to undertake WTO rules obligations above and beyond what are normally required. Greater detail in enforcement provisions represents the natural evolution of the collective understanding among WTO members about what accession agreements need to include. So, for example, TRIPS requires transparency in changes to regulations, but experience has taught that transparency without opportunity to comment can be meaningless, so "comment periods" are now required. Strengthened provisions are more accurately thought of as elaborations of existing obligations that are standard for all members rather than discriminatory "WTO-Plus" commitments.

China's Postaccession Enforcement and the Bilateral Framework on IPR

China's record on IPR protection as a WTO member indicates that enforcement efforts have indeed improved since accession. The progress that China has made since the first MOU has been sustained and extended through a series of bilateral mechanisms with the United States. China's preaccession commitments demonstrated a baseline level of political will that Russia should be expected to match if not exceed in its membership bid. Beyond that, China's postaccession enforcement framework offers a lesson to Russia and its trading partners about mechanisms that need to be put in place to increase the likelihood of successfully implementing IPR obligations.

Joint Commission on Commerce and Trade

First and foremost among the mechanisms designed to help implement China's IPR obligations has been the IPR Working Group under the United States–China Joint Commission on Commerce and Trade (JCCT). The JCCT had been inactive for many years until it was elevated to a higher political level by Chinese Vice Premier Wu Yi in 2003 in order to help manage the politics of trade and to diffuse rising tensions between China and the United States over issues such as currency flexibility and bilateral trade imbalances, according to a former USTR official. Although the IPR Working Group operates on a more technical level and with a different schedule from the plenary sessions of the JCCT, it also benefits from being a central part of the broader political dialogue. Some believe the JCCT's primary function is to serve as a basis for U.S. presidential claims of good relations with China and thereby deflect congressional criticism. But there is no doubt that the JCCT and its IPR Working Group have contributed to useful incremental change. The United States and Russia also maintain a Bilateral IPR Working Group, but engagement on both sides leaves much to be desired. Sources familiar with the group's work say the talks are not a priority for U.S. officials and are little more than a forum for Russian obstructionism. Meetings tend to devolve into arguments over metrics or dubious statistics. Only active political engagement at the highest levels was able to revitalize the JCCT dialogue, and that is precisely what is needed in the case of Russia if there is to be a foundation for gradual progress on IPR enforcement.

Action Plan

An important element of the achievements of the JCCT mechanism has been the issuance of a clear annual Action Plan. Some have criticized China's plans for being virtually the same every year and for being heavy on commitment with little follow-up activity, but they remain high-level expressions of political will endorsed by senior officials in the Chinese government with the authority to implement reforms. Although the Russians have produced some plans in the past, notably through the Government Commission on Counteracting Intellectual Property Infringement (see the subsection titled "Interministerial Commission and Action Plan"), their plans have lacked the elements of clarity, conviction, and consistency. No plans are publicly available for 2005 or 2006.

Review Mechanisms

Besides China's acceptance of an unprecedented number of reviews as part of its accession package, China also agreed to a WTO Transitional Review Mechanism covering the submission of economic data, economic policy information (on nondiscrimination, foreign exchange and payments, investment regime, and pricing policies), enforcement practices including uniform administration of laws, policies affecting trade in goods and services, and TRIPS compliance.⁷⁶ Russia has shown little inclination to match China's reporting commitments or to accept a rigorous review framework as part of its accession deal. Securing reliable data on Russia's enforcement activities remains a formidable challenge.

Bilateral Cooperation Activities

Finally, the United States has instituted a bevy of cooperative activities with China that are aimed at improving practical, on-the-ground enforcement efforts. These include data and technical exchanges between U.S. and Chinese customs agencies, an expanded case referral mechanism run through the Department of Commerce, the installation of a Chinese IPR ombudsman in the Washington embassy, and an increased presence for staff members of the U.S. Patent and Trademark Office and State Department attachés in Beijing and Guangzhou. Sources in the U.S. government cite cooperative criminal investigation programs between customs officials and the work of IPR attachés stationed in China as particularly effective and replicable initiatives. On this topic, Jolanta Pranckeviciene, the legal adviser for the Business Software Alliance in Russia has said, "Of course, the issue of law enforcement is urgent, but practice shows that only joint cooperation can deliver the desired results."⁷⁷

Assessment

The postaccession mechanisms adopted by China represent constructive ways to stabilize and reinforce progress on IPR enforcement through regular, predictable processes. Any of them could be implemented bilaterally by the United States and Russia, but all require significant investments of political and bureaucratic capital that the Russian government does not seem willing to make either bilaterally or multilaterally.

CONCLUSION

The real question facing Russia is whether the gains from resisting the requests of the international community on IPR enforcement are substantial enough to be worth the risk of postponing WTO accession. Russia's negotiating partners are looking for commitments that are at least on a par with those made by China and likely some that are more extensive. For their part, Russian officials have not shown the kind of resolve on IPR that has come to be expected of prospective WTO entrants. This absence of high-level political will has emerged as perhaps the major obstacle to Russian accession. Decisive action with permanent consequences on one or more of the symbolic issues prioritized by U.S. industry representatives and government negotiators, such as optical disc production or Internet piracy, would do much to assuage concerns about the seriousness of Russian resolve. It would be a necessary, if not entirely sufficient, step on the long road to effective IPR enforcement. Senior representatives of the Russian business community believe that government and business alike cannot afford to wait any longer to address the piracy problem, for Russia's sake as much as that of the international community.

This paper has given extended consideration to the IPR enforcement issue in Russia because the last few years have taught the international community that enforcement is not a problem that can be easily solved by WTO accession alone. Russian piracy must be addressed comprehensively in its own right, and mechanisms must be established to lock in and sustain progress. It will be impossible to fully eliminate the problem before accession, but Russia must demonstrate political will through concrete action before its stated intention to be a responsible member of the world trading system will appear credible. Not to be forgotten in this debate are Russia's own burgeoning intellectual property-based industries. Russian rights holders demand and deserve effective IPR enforcement as much as their international counterparts. Russia would be wise to recognize the benefits to its own economic interests that a serious IPR protection regime—and the increased foreign investment that inevitably accompanies it—would bring. Russian officials should keep these factors in mind as they contemplate an impasse over accession that only continues to deepen.

NOTES

- ¹ International Intellectual Property Alliance, "2006 Special 301 Report: Russian Federation," 1; <http://www.iipa.com/rbc/2006/2006SPEC301RUSSIA.pdf>. This figure assumes that all pirate goods would be sold commercially at legitimate market prices; although this is not a realistic assumption, it does provide one measure of the scope of the problem. The authors acknowledge the IIPA, and Eric Schwartz in particular, for significant contributions to our understanding of the IPR enforcement problem in Russia and Ukraine.
- ² The one major exception to this is the lack of an optical disc law; see the subsection titled "Optical Disc Enforcement and Licensing Regime." As Dmitry Sokolov, the director of MP Software Suppliers, has stated, "The overall assessment of the situation is that major legislative problems have been solved over the past three years, and now the application of laws is not limited legislatively in any way." See American Chamber of Commerce in Russia et al., "Roundtable on IPR Enforcement in Russia"; http://www.economy.gov.ru/UnidocFileServlet/FileServlet?unidoc_id=1139312839734&template_id=4#search=%22american%20chamber%20of%20commerce%20%22roundtable%20on%20ipr%20enforcement%20in%20russia%22%22.
- ³ Emergency Committee for American Trade, International Intellectual Property Alliance, International Anti-Counterfeiting Coalition, Information Technology Industry Council, Pharmaceutical Research and Manufacturers of America, and National Association of Manufacturers Press Briefing on Business Community Concerns on IPR Protection and Russia's Accession, Washington, D.C., May 2, 2006.
- ⁴ A seminar held at the Carnegie Moscow Center on July 18, 2006, contributed substantially to the final form of this paper. The authors express their deep appreciation to Rose Gottemoeller, Anna Bessanova, and the Carnegie Moscow Center for their support, and to all who participated in the seminar—particularly seminar speakers Alexei Likhachev, deputy chairman, State Duma Committee on Economic Policy, Entrepreneurship, and Tourism; Konstantin Antipov, general director, Agency AM Consulting; Igor Pozhitkov, regional director for Russia and the Commonwealth of Independent States, International Federation of the Phonographic Industry; and Yevgeny Beginin, president, UIP Russia (a collaboration between Universal, Paramount, and DreamWorks)—for their contributions to this ongoing dialogue.
- ⁵ The "Special 301 Report" is an "annual review [that] examines in detail the adequacy and effectiveness of intellectual property rights (IPR) protection in 87 countries"; USTR, "2006 Special 301 Report," http://www.ustr.gov/Document_Library/Reports_Publications/2006/2006_Special_301_Review/Section_Index.html. Along with China and Russia, the USTR identified eleven other countries as part of Priority Watch List for the worst offenders in 2006. Also this year, Azerbaijan, Kazakhstan, the Slovak Republic, and Uruguay were graduated from the Watch List as recognition of their progress in IPR enforcement.
- ⁶ USTR, "2006 National Trade Estimate Report on Foreign Trade Barriers," 554; http://www.ustr.gov/Document_Library/Reports_Publications/2006/2006_NTE_Report/Section_Index.html. This number could have been as high as 90 percent in the business software market in 2001, according to the Business Software Association, with \$900 billion in revenue losses for Microsoft alone. Douglas Birch, "A Pirates' Bazaar in Moscow Offers Treasured Bootleg Media: Popular Market Poses Copyright Nightmare," *Baltimore Sun*, December 11, 2002.
- ⁷ Press Briefing, Emergency Committee for American Trade, et al., op. cit.
- ⁸ These figures were provided by the U.S. Embassy in Moscow.
- ⁹ U.S. Embassy figures differ from industry estimates about the exact number of Russian State Restricted Access Regime Enterprise facilities.
- ¹⁰ IIPA, "2006 Special 301 Report: Russian Federation," 1.
- ¹¹ This point was suggested to us by Eric Schwartz of the IIPA.
- ¹² Russia has optical disc plant licensing regulations, but not a comprehensive law; see the subsection titled "Optical Disc Enforcement and Licensing Regime."
- ¹³ IIPA, "2006 Special 301 Report: Russian Federation," 2; remarks delivered by Robert Strang at the "Roundtable on IPR Enforcement in Russia," American Chamber of Commerce in Russia et al., op. cit.
- ¹⁴ USTR, "2006 Special 301 Report," 6.
- ¹⁵ IIPA, "2006 Special 301 Report: Russian Federation," 12. See the subsection titled "Online Piracy and Collective Rights Management."
- ¹⁶ The two treaties are the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty. See IIPA, "2006 Special 301 Report: Russian Federation," 8.
- ¹⁷ Internal memo from Anna Bessanova, program coordinator, Carnegie Moscow Center; see also "Experts Are Averse to Draft Fourth Part of the Civil Code," *Russian Business Monitor*, July 24, 2006.
- ¹⁸ Bessanova, op. cit.
- ¹⁹ USTR, "2006 Special 301 Report," 6–7.
- ²⁰ IIPA, "2006 Special 301 Report: Russian Federation," 13.

- ²¹ USTR, “2006 National Trade Estimate Report on Foreign Trade Barriers,” 555.
- ²² IIPA, “2006 Special 301 Report: Russian Federation,” 12.
- ²³ “Ex officio” is defined as “by virtue or because of an office; by virtue of the authority implied by office”; *Black’s Law Dictionary*, 7th ed. (Saint Paul: West Group, 1999), 597. In this instance, “ex officio” refers to the ability of authorities to take independent action in the absence of complaint filed by injured parties.
- ²⁴ IIPA, “2006 Special 301 Report: Russian Federation,” 11–13. The Russian government claims that more than 70 percent of criminal cases were brought to court.
- ²⁵ “Ex parte” is defined as “done or made at the instance and for the benefit of one party only, and without notice to, or argument by, any person adversely interested”; *Black’s Law Dictionary*, 567. See also IIPA, “2006 Special 301 Report: Russian Federation,” 14.
- ²⁶ Bessanova, *op. cit.*
- ²⁷ The Russian executive branch is divided into three levels, from top to bottom: (1) ministries, which determine policy; (2) federal services, which perform supervisory functions; and (3) federal agencies, which carry out much of the implementation.
- ²⁸ IIPA, “2006 Special 301 Report: Russian Federation,” 15.
- ²⁹ *Ibid.*, 10.
- ³⁰ Russian industry representatives state that the average annual income for a legitimate distributor is 5,000 rubles (\$189), while a license for a single copyrighted work can cost as much as 300 rubles (\$11).
- ³¹ “Roundtable on IPR Enforcement in Russia,” American Chamber of Commerce in Russia et al., *op. cit.*
- ³² See <http://thomas.loc.gov/cgi-bin/bdquery/z?d109:h.con.res.00230>.
- ³³ House Committee on Ways and Means, U.S. Congress, Press Release, “Ways and Means and Senate Finance Leadership Urge White House to Address Russian Trade Practices in WTO Accession Talks: Thomas, Rangel, Grassley, Baucus Will Not Support PNTR Unless Russia Takes Definitive Action to Improve,” May 11, 2006; <http://waysandmeans.house.gov/news.asp>. Also see Senator Orrin G. Hatch’s Office, Press Release, “Hatch, Bayh Press White House to Address Russian Piracy: Senators Urge Administration to Block Russia’s WTO Membership,” May 11, 2006; <http://hatch.senate.gov/index.cfm?FuseAction=DataPipes.ViewPDF&Id=1572>.
- ³⁴ The authors are particularly grateful to Anna Bessanova of the Carnegie Moscow Center for her work on the state of Russia’s most recent enforcement initiatives. Portions of this section, including enforcement statistics, are drawn from her research. Her contributions elsewhere in this paper are acknowledged directly through citation.
- ³⁵ Other members of the commission are B. Boyarskov, V. F. Vinogradov, A. B. Kashevarov, M. F. Lesin, I. C. Materov, D. V. Molchanov, A. M. Moskovski, A. P. Nadirov, A. P. Novikov, G. G. Onischenko, A. L. Rybas, V. G. Savelivev, M. V. Seslavinski, B. P. Siminov, P. V. Stepanov, V. G. Strashko, A. A. Tyagunov, O. F. Khlupin, N. E. Tsirkunov, M. E. Shvydkoi, A. V. Yakovenko, and F. V. Yakovlev.
- ³⁶ It is reported by Anna Bessanova that publication of the commission’s plans on an official government web site is under consideration for 2006.
- ³⁷ “Roundtable on IPR Enforcement in Russia,” American Chamber of Commerce in Russia et al., *op. cit.*
- ³⁸ Bessanova, *op. cit.*
- ³⁹ Participants included Rashid Nurgaliev, minister of the interior; Victor Ivanov, President Putin’s assistant; German Gref, minister of economic development and trade; Alexander Sokolov, minister of culture and mass communications; Leonid Reiman, minister of information technology and communications; Andrei Fursenko, minister of education and science; Boris Siminov, head of the Federal Service for Intellectual Property; Gennadiy Onishchenko, head of the Federal Service for Supervision of Consumer Rights Protection and Human Well-Being; Mickael Sestlavinsky, head of the Federal Agency for Mass Media Communications; and Alexander Zherihov, head of the Federal Customs Services.
- ⁴⁰ The 67 percent figure comes from official Rospatent statistics; see *Profile Journal*, May 29, 2006.
- ⁴¹ The *siloviki* are “the former and present members of Russia’s security services who have gained enormous power under Mr. Putin.” Arkady Ostrovsky, “Putin Fires Hardline Prosecutor General in Turf War,” *Financial Times*, June 3, 2006.
- ⁴² Remarks by Robert Strang at the “Roundtable on IPR Enforcement in Russia,” American Chamber of Commerce in Russia et al., *op. cit.*
- ⁴³ Remarks by Andrei Sharonov at the “Roundtable on IPR Enforcement in Russia,” American Chamber of Commerce in Russia et al., *op. cit.* The IIPA estimates that 21 actions were taken against optical disc plants in 2005, compared with only 8 in 2004; IIPA, “2006 Special 301 Report: Russian Federation,” 8.
- ⁴⁴ IIPA, “2006 Special 301 Report: Russian Federation,” 5–8.
- ⁴⁵ The U.S. Embassy in Moscow reports that in the past year three directors of RARE sites have been fired after pirate optical disc production was discovered on their territories.

- ⁴⁶ According to the IIPA, “This interpretation of the Russian law is contrary to all the assurances the Russian government gave the U.S. government and private sector during the years-long adoption of amendments to the 1993 Copyright Law.” See IIPA, “2006 Special 301 Report: Russian Federation,” 12.
- ⁴⁷ This article addresses criminal penalties for IPR crimes.
- ⁴⁸ Bessanova, *op. cit.*
- ⁴⁹ This is a term specified in the Criminal Code.
- ⁵⁰ Remarks by Andrei Sharonov at the “Roundtable on IPR Enforcement in Russia,” American Chamber of Commerce in Russia et al., *op. cit.*
- ⁵¹ This point was suggested to the authors by Eric Schwartz of the IIPA.
- ⁵² World Trade Organization, “Report of the Working Party on the Accession of China,” WT/MIN(01)/3, November 10, 2001, par. 37; <http://docsonline.wto.org/DDFDocuments/t/WT/min01/3.doc>.
- ⁵³ “Roundtable on IPR Enforcement in Russia,” American Chamber of Commerce in Russia et al., *op. cit.*
- ⁵⁴ IIPA, “2006 Special 301 Report: Ukraine,” 168; <http://www.iipa.com/rbc/2006/2006SPEC301UKRAINE.pdf>.
- ⁵⁵ IIPA, “2006 Special 301 Report: Ukraine,” 175.
- ⁵⁶ Another interesting form of cooperation was a 2003 initiative by the Ministry of Science and Education to create a “voluntary registry of software manufacturers and distributors”; IIPA, “2006 Special 301 Report: Ukraine,” 165, 170. According to the Business Software Alliance, this project has had little real impact.
- ⁵⁷ “Enforcement Cooperation Group,” provided by the Recording Industry Association of America.
- ⁵⁸ It should be noted that these sanctions were only recently removed on January 23, 2006. The IIPA and other industry groups opposed their reinstatement as late as August 8, 2005; the reasons why the IIPA changed its mind will be considered in the sections that follow.
- ⁵⁹ Russia did respond to the threat of GSP removal following the 2004 G-8 summit at Sea Island. See the subsection titled “Political Dialogue and Credible Pressure.”
- ⁶⁰ Furthermore, in support of extending permanent normal trade relations to Ukraine, Portman said, “[I]t sends a positive and strong signal to our Ukrainian partners who have instituted reforms that increase transparency, provide greater intellectual property protections and stronger enforcement of the rule of law.” “House Gives Ukraine Permanent MFN Status, U.S. Finalizes WTO Deal,” *Inside US Trade*, March 10, 2006.
- ⁶¹ The one exception to this rule—which holds true in China and Russia as well—has been a decrease in piracy levels for business software applications; the Business Software Alliance cites effective cooperation with the State Department of Intellectual Property and the Ministry of Internal Affairs for this positive result.
- ⁶² IIPA, “2006 Special 301 Report: Ukraine,” 165.
- ⁶³ *Ibid.*, 169.
- ⁶⁴ *Ibid.*, 169.
- ⁶⁵ *Ibid.*, 175. There are other legal shortcomings of a more technical nature, including the 2000 Hologram Sticker Law; IIPA, “2006 Special 301 Report: Ukraine,” 169–70.
- ⁶⁶ *Ibid.*, 176.
- ⁶⁷ Robert P. O’Quinn, “Integrating China into the World Economy,” in *Between Diplomacy and Deterrence: Strategies for U.S. Relations with China* (Washington, D.C.: Heritage Foundation, 1997), n. 82.
- ⁶⁸ Julia Ya Qin, “‘WTO-Plus’ Obligations and Their Implications for the World Trade Organization Legal System,” *Journal of World Trade* 37, no. 3 (2003): 483–522.
- ⁶⁹ In nonlegal terms, “WTO-Plus” provisions are those that “prescribe obligations exceeding the existing requirements of the WTO agreements.” Because market access commitments are by their very nature variable, “WTO-Plus” is usually thought of in terms of differential rules obligations. WTO accession protocols typically contain four kinds of commitments to (1) abide by existing WTO rules, (2) accept country-specific transition arrangements, (3) depart from specific WTO rules on a temporary basis, and (4) take on additional rules obligations not contained in any of the multilateral WTO agreements on a more permanent basis. “WTO-Plus” obligations properly fall into the last of these categories. See Qin, “‘WTO-Plus’ Obligations,” 483–88, for more on this, as well as the subsection below titled “Post-Accession Aftermath: Lost Leverage and the Need for Greater Specificity in Enforcement Provisions.”
- ⁷⁰ Qin, “‘WTO-Plus’ Obligations,” 491–97.
- ⁷¹ World Trade Organization, “Protocol on the Accession of the People’s Republic of China,” WT/L/432, November 23, 2001, sec. 18, par. 4; <http://docsonline.wto.org/DDFDocuments/t/WT/L/432.doc>. Typically, the frequency of Trade Policy Reviews is correlated with a country’s share of world trade. The heaviest traders (European Union, United States, Japan, and Canada) are reviewed every two years, the next sixteen largest every four years, and all other countries every six years.

- ⁷² The latest publicly available official document is World Trade Organization, “Draft Report of the Working Party on the Accession of the Russian Federation to the World Trade Organization: Revision,” WT/ACC/SPEC/RUS/25/Rev.3, October 15, 2004, 30–32, 178–84, 192–96.
- ⁷³ See WTO, “Report of the Working Party on the Accession of China,” 61–65.
- ⁷⁴ *Ibid.*, par. 38.
- ⁷⁵ *Ibid.*, par. 39.
- ⁷⁶ See WTO, “Protocol on the Accession of the People’s Republic of China,” annex 1A. Even with the Transitional Review Mechanism, gaps in Chinese reporting of data on IPR enforcement remain. Consequently, in October 2005 the United States, in concert with Japan and Switzerland, initiated the first ever information request filed under article 63.3 of the TRIPS Agreement, seeking “detailed information from China on its IPR enforcement efforts over the last four years.” As of January 2006, China had not fully complied with this information inquiry, but it had challenged the United States to further justify the request. With that said, China recently and for the first time provided disaggregated statistics on IPR enforcement (distinguishing among copyright, trademark, etc.) for the 2005 period, which is a step in the right direction.
- ⁷⁷ Quoted in the “Roundtable on IPR Enforcement in Russia,” American Chamber of Commerce in Russia et al., *op. cit.*

ABOUT THE CARNEGIE ENDOWMENT

THE CARNEGIE ENDOWMENT FOR INTERNATIONAL PEACE is a private, nonprofit organization dedicated to advancing cooperation between nations and promoting active international engagement by the United States. Founded in 1910, Carnegie is nonpartisan and dedicated to achieving practical results.

Through research, publishing, convening, and, on occasion, creating new institutions and international networks, Endowment associates shape fresh policy approaches. Their interests span geographic regions and the relations between governments, business, international organizations, and civil society, focusing on the economic, political, and technological forces driving global change.

Through its Carnegie Moscow Center, the Endowment helps to develop a tradition of public policy analysis in the former Soviet Republics and to improve relations between Russia and the United States. The Endowment publishes *Foreign Policy*, one of the world's leading magazines of international politics and economics, which reaches readers in more than 120 countries and in several languages.

For more information, visit www.CarnegieEndowment.org.

THE TRADE, EQUITY, AND DEVELOPMENT PROJECT

GLOBAL ECONOMIC INTEGRATION HAS PRODUCED rapid advances in trade, investment, and production links between societies. At the same time, there has been a backlash against globalization by those who see unwanted side effects on jobs and income distribution. In developing countries there are growing complaints that the anticipated benefits of liberalized trade and investment have not been realized. These issues must be addressed if the world is to proceed to deeper economic integration that is widely embraced as a successful path for the twenty-first century.

The Trade, Equity, and Development Project seeks to develop innovative, workable solutions to the tensions now plaguing trade, globalization, and development. The project works with governments, intergovernmental organizations, businesses, labor, and civil society to harness the forces of trade and investment to achieve economic growth that is widely shared.

For more information, visit www.CarnegieEndowment.org/trade.

Carnegie Papers

2006

73. *Intellectual Property Rights as a Key Obstacle to Russia's WTO Accession* (S. Katz and M. Ocheltree)
72. *Pakistan-Afghanistan Relations in the Post-9/11 Era* (F. Grare)
71. *Morocco: From Top-Down Reform to Democratic Transition?* (M. Ottaway and M. Riley)
70. *Islam, Militarism, and the 2007–2008 Elections in Pakistan* (F. Grare)
69. *Reform in Syria: Steering between the Chinese Model and Regime Change*
68. *The Saudi Labyrinth: Evaluating the Current Political Opening* (A. Hamzawy)
67. *Islamist Movements and the Democratic Process in the Arab World* (N. Brown, A. Hamzawy, and M. Ottaway)
66. *Evaluating Egyptian Reform* (M. Dunne)
65. *Pakistan: The Resurgence of Baluch Nationalism* (F. Grare)
64. *Lebanon: Finding a Path from Deadlock to Democracy* (J. Choucair)

2005

63. *The Dangers of Political Exclusion: Egypt's Islamist Problem* (B. Kodmani)
62. *Why Did the Poorest Countries Fail to Catch Up?* (B. Milanovic)
61. *Legalism Sans Frontières? U.S. Rule-of-Law Aid in the Arab World* (D. Mednicoff)
60. *The Complexity of Success: The U.S. Role in Russian Rule of Law Reform* (M. Spence)
59. *Evaluating Palestinian Reform* (N. Brown)
58. *Judicial Reform in China: Lessons from Shanghai* (V. Hung)
57. *Lessons Not Learned: Problems with Western Aid for Law Reform in Postcommunist Countries* (W. Channell)
56. *Evaluating Middle East Reform: How Do We Know When It Is Significant?* (M. Ottaway)
55. *Competing Definitions of the Rule of Law: Implications for Practitioners* (R. Belton)

2004

54. *E.U.–Russia Relations: Interests and Values—A European Perspective* (R. Schuette)
53. *The Political-Economic Conundrum: The Affinity of Economic and Political Reform in the Middle East and North Africa* (E. Bellin)
52. *Political Reform in the Arab World: A New Ferment?* (A. Hawthorne)
51. *Cambodia Blazes a New Path to Economic Growth and Job Creation* (S. Polaski)
50. *Integrating Democracy Promotion into the U.S. Middle East Policy* (M. Dunne)
49. *Islamists in the Arab World: The Dance around Democracy* (G. Fuller)
48. *Democracy and Constituencies in the Arab World* (M. Ottaway)
47. *Development and Foreign Investment: Lessons Learned from Mexican Banking* (J. Steinfeld)
46. *Deterring Conflict in the Taiwan Strait: The Successes and Failures of Taiwan's Defense Reform and Modernization Program* (M. Swaine)
45. *Europe's Uncertain Pursuit of Middle East Reform* (R. Youngs)
44. *Middle Eastern Democracy: Is Civil Society the Answer?* (A. Hawthorne)
43. *Small Enterprises and Economic Policy* (A. Åslund, S. Johnson)
42. *Women's Rights and Democracy in the Arab World* (M. Ottaway)

2003

41. *Beyond Rule of Law Orthodoxy: The Legal Empowerment Alternative* (S. Golub)
40. *Strengthening Linkages between U.S. Trade Policy and Environmental Capacity Building* (J. Audley, V. Ulmer)

For a complete list of Carnegie Papers, go to www.CarnegieEndowment.org/pubs.