

THIEVES IN CYBERSPACE: EXAMINING MUSIC PIRACY AND COPYRIGHT LAW DEFICIENCIES IN RUSSIA AS IT ENTERS THE DIGITAL AGE

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I. INTRODUCTION

Come senators, congressmen
please heed the call
Don't stand in the doorway
Don't block up the hall
For he that gets hurt
Will be he who has stalled
There's a battle outside
And it is ragin'
It'll soon shake your windows
And rattle your walls
For the times they are a-changin'.¹

Although Bob Dylan did not have copyright law in mind when he wrote “the times they are a-changin’,” his lyrics certainly ring true with the ongoing battle over Internet piracy. Music is a \$40-billion-dollar-a-year industry that touches people in every corner of the globe, making it a universal form of communication.² Armed with the newly developed MP3,³ a nineteen-year-old college student named Shawn Fanning dramatically changed this form of communication in 1998 from his dorm room.⁴ Fanning, the creator of Napster, was looking for a way to develop a real-time index to allow computer users to share songs in MP3 format in a quick and fluent fashion.⁵ Reasoning that users would take responsibility for the songs they offered, he did not give much thought to the legal issues of his invention.⁶ With uncanny intuition, a friend and early Napster program tester sent Fanning a private e-mail containing one sentence, “Do you

¹ Lyrics from Bob Dylan’s song “the times they are a-changin’”, *available at* <http://search.bobdylan.com/lyricsearch/searchResults.jsp?doSearch=true&q=the+times+they+are+a+changin&range=50> (last visited March 30, 2005).

² Info from RIAA website *at* <http://www.riaa.com/news/marketingdata/default.asp> (last visited March 30, 2005).

³ The MP3 is the short name of the ISO-MPEG Audio Layer-3, an audio-compression technique developed in Germany that fits much more sound into fewer bits by eliminating data used to convey silences. JOSEPH MENN, *ALL THE RAVE, THE RISE AND FALL OF SHAWN FANNING’S NAPSTER* 30 (2003).

⁴ *Id.* at 29-33.

⁵ *Id.* at 34.

⁶ *Id.*

realize that this is going to change everything?”⁷ Fanning replied with ““Yeah, I know.””⁸ The rest, as they say, is history.

By the fall of 1999, Napster had millions of adoring fans in colleges around the country, as well as some not so adoring fans like the Recording Industry Association of America (RIAA).⁹ Both sides drew their lines, and the battle began.¹⁰ By March 2002, in response to a lawsuit filed by A&M Records, Inc., and seventeen other record companies, the Northern District Court of California held that Napster “knowingly encourage[d] and assist[ed] the infringement of [the record companies’] copyrights.”¹¹ After a modified preliminary injunction was issued by the District Court, the United States Court of Appeals for the Ninth Circuit enjoined Napster from operating and determined that it must remain offline until it could remove all infringing material from its website.¹² Napster went bankrupt and sold to the highest bidder in September 2002.¹³

Since the Napster case, the battle between the giant record companies and consumers has raged in full force.¹⁴ The recording industry, through the guise of the RIAA,¹⁵ has taken the litigation path and at the same time has attempted to revise its business model to cater to its customers’ new thirst for downloading music online.¹⁶ Consumers have been fighting back with

⁷ *Id.* at 37.

⁸ *Id.*

⁹ Grace J. Bergen, *Litigation as a Tool Against Digital Piracy*, 35 MCGEORGE L. REV. 181, 185 (2004).

¹⁰ *Id.*

¹¹ *A&M Records, Inc. v. Napster, Inc.* 239 F.3d 1004, 1020 (9th Cir. 2001).

¹² *Bergen, supra* note 9, at 186.

¹³ *Id.*

¹⁴ *Id.* at 203.

¹⁵ The RIAA, or Recording Industry Association of America, is the trade group that represents the U.S. recording industry. RIAA members account for about 90% of all legitimate sound recordings in the U.S. Information from RIAA website, at <http://www.riaa.com/about/default.asp> (last visited March 30, 2005).

¹⁶ *Bergen, supra* note 9, at 203.

more peer-to-peer services and have expanded their legal theories to include ideas such as “free speech, due process, privacy protection, fair use, and anti-trust[.]”¹⁷

Ancillary to the domestic music piracy problem is an international piracy problem that is much more pervasive and just as harmful to the U.S. economy.¹⁸ On February 12, 2002, Hilary Rosen¹⁹ testified at a Senate Foreign Relations Committee that “[s]tifling piracy levels in many parts of the globe undermine the stability and growth of U.S. entertainment industries, affecting not only U.S. creators and jobs, but also robbing other countries of much needed foreign investment and cultural and economic development.”²⁰ Music pirating comes in two forms—physical piracy²¹ and Internet piracy.²² According to the 2004 Recording Industry Commercial Piracy Report,²³ an estimated 35 percent of the music CDs sold worldwide in 2003 were pirated.²⁴ This amounts to an estimated \$4.5 billion dollars, or 15 percent of the legitimate music market.²⁵ This figure does not even account for the loss of dollars from Internet piracy.²⁶ Hilary Rosen further stated to the Senate Foreign Relations Committee that “Internet piracy poses a

¹⁷ *Id.*

¹⁸ *Examining the Theft of American Intellectual Property at Home and Abroad: Hearing Before the Senate Committee on Foreign Relations*, 107th Cong. (2002) [hereinafter *Hearings*] (prepared statement of Hilary Rosen, president and CEO of RIAA).

¹⁹ Hilary Rosen is the president and CEO of the Recording Industry Association of America (RIAA).

²⁰ *Hearings*, *supra* note 18, at 59 (written statement of Hilary Rosen).

²¹ Physical piracy involves any unauthorized copying of works in an actual physical form, such as DVD’s and CD’s. *Hearings*, *supra* note 18, at 60 (written statement of Hilary Rosen).

²² *Id.* Piracy is defined as “the unauthorized and illegal reproduction or distribution of materials protected by copyright” BLACK’S LAW DICTIONARY (8th ed. 2004). Internet Piracy is therefore any such form of piracy that takes place through the internet, such as the sale, sharing, or transfer of music files without the copyright owners permission.

²³ The Recording Industry Commercial Piracy Report is a yearly report of countries who consistently fail to guard against piracy. Summary of IFPI from website, at <http://www.ifpi.org/site-content/about/mission.html> (last visited April 3, 2005). The report is prepared by the International Federation of the Phonographic Industry (IFPI), which is an international organization that represents the recording industry worldwide, acting in affiliation with the RIAA to represent copyright interests. *Id.*

²⁴ *The Recording Industry Commercial Piracy Report*, INTERNATIONAL FEDERATION OF THE PHONOGRAPHIC INDUSTRY, ANNUAL GLOBAL PIRACY REPORT 2 (2004), at <http://www.ifpi.org/site-content/antipiracy/piracy-report-current.html> (last visited April 3, 2005) [hereinafter *The Recording Industry Piracy Report 2004*].

²⁵ *Id.* at 3.

²⁶ *See Hearings*, *supra* note 18 (written statement of Hilary Rosen).

global and borderless threat to the future success of American creators.”²⁷ According to Rosen, these unauthorized digital broadcasts and Internet transmissions are just as illegal as their physical counterparts.²⁸

Among the world leaders in global music piracy, Russia has one of the largest piracy problems.²⁹ Its pirate market value currently stands at \$332 million.³⁰ In the past, Russia’s piracy problem was restrained to physical piracy of CDs, but as the country has quickly entered the digital age, a new problem has emerged.³¹ Russia has now developed a thriving online music sales business, and these websites are slowly gaining popularity in the U.S. and elsewhere.

These websites prove that despite constant pressure by the U.S. and the international community, Russia has consistently failed to curb its piracy problem. Even pressure from the World Trade Organization³² to conform to its standards required for admission has failed. Copyright infringers are finding novel ways such as the Internet to pirate their goods, while the Russian government still struggles to police and prosecute the more traditional types of piracy.³³ In order to fight Internet piracy and prevent it from becoming an even larger problem, the U.S. must take a two-pronged approach. First U.S. copyright owners must set an example to Russia by suing the infringers, regardless of their chance of success. Second, the U.S. must take drastic

²⁷*Hearings, supra* note 18, at 60 (written statement of Hilary Rosen).

²⁸ *Id.*

²⁹ *The Recording Industry Commercial Piracy Report 2004, supra* note 24 at 10.

³⁰ *Id.*

³¹ According to the Russian Economic Development and Trade Ministry, at the end of 2004 there were 18.5 million Internet users in Russia. *One-Twelfth of Russians are Internet Users*, RUSSIAN BUS. MONITOR, Feb. 18, 2005, available at 2005 WLNR 2306656. This amounts to one-twelfth of the population. *Id.* In addition, at the end of 2004 there were over 15 million personal computers (PCs) used, which amounts to 10.4 PCs per one hundred people in Russia. *Id.* This figure was up 15 percent from the previous year. *Id.*

³² “The World Trade Organization (WTO) is the only global international organization dealing with the rules of trade between nations. Information from WTO website, at http://www.wto.org/english/thewto_e/whatis_e/whatis_e.htm (last visited April 3, 2005). At its heart are the WTO agreements, negotiated and signed by the bulk of the world’s trading nations and ratified in their parliaments. *Id.* The goal is to help producers of goods and services, exporters, and importers conduct their business.” *Id.*

³³ More traditional types of piracy mean piracy in the physical form for physical distribution. This includes such things as CDs, DVDs, audiocassettes, VHS, etc.

steps to pressure the Russian government to solve the piracy problem itself by imposing trade sanctions.

This comment will evaluate the Russian piracy problem in general, focusing on the legality of its new online music market, and what the U.S. should do to remedy these problems. This comment proceeds in four parts. Part II will briefly give a background of the current state of international copyright law. Part III will describe the history of Russia's copyright law, its piracy problem, and its recent attempts to reform and meet international standards. Part IV will evaluate the legality of Russia's music sales websites and how they compare to Internet standards in the United States. Part V will briefly discuss solutions to correct Russia's piracy problem and their problem with illegal online music sales.

II. HISTORY OF INTERNATIONAL COPYRIGHT LAW FOR SOUND RECORDINGS

A. *Berne Convention and Other Early Conventions*

A short history of international copyright law is needed to place the Russian problem in context. The beginning of global copyright protection occurred with the Convention for the Protection of Literary and Artistic works (hereinafter "Berne Convention"), which met on September 9, 1886, in Berne, Switzerland.³⁴ Ten countries initially attended the convention with the objective of establishing copyright protection between their country's respective boundaries.³⁵ The convention rested on three principles to determine a minimum amount of protection granted to authors' works:

- (a) Works originating in one of the contracting States (that is, works the author of which is a national of such a State or works which were first published in such a State) must be given the same protection in each of the other contracting States as the latter grants to the works of its own nationals (principle of "national treatment").

³⁴ Heather Nehila, *International Copyright Law: is it Music to American Ears?*, 16 TEMP. INT'L & COMP. L.J. 199, 200 (2002).

³⁵ *Id.*

(b) Such protection must not be conditional upon compliance with any formality (principle of “automatic” protection).

(c) Such protection is independent of the existence of protection in the country of origin of the work (principle of the “independence” of protection). If, however, a contracting State provides for a longer term than the minimum prescribed by the Convention and the work ceases to be protected in the country of origin, protection may be denied once protection in the country of origin ceases.³⁶

After its adoption in 1886, the Berne Convention was revised several times—most recently in 1971 in Paris—to respond to new technological developments such as phonography, photography, and television.³⁷

One of the major points of the Berne Convention, summarized in point (b) above, was that copyright protection for the signed parties did not depend on fulfilling any formal requirements, which means that the protection was automatic once an artistic work was created.³⁸ However, citizens inside their own country could still be required to follow formalities specified by their country.³⁹ In addition, the Berne Convention gave authors protected by the Convention “the exclusive right of authorizing the reproduction of these works, in any manner or form.”⁴⁰ A reproduction was defined as “any sound or visual recording.”⁴¹

In 1961, the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (hereinafter “Rome Convention”) was signed in Rome.⁴² This convention was important because it allowed producers of phonograms⁴³ to enjoy

³⁶ Summary of Berne Convention for the Protection of Literary and Artistic Works from WIPO website, *at* http://www.wipo.int/treaties/en/ip/berne/summary_berne.html (last visited April 3, 2005).

³⁷ MIHALY FICSOR, *THE LAW OF COPYRIGHT AND THE INTERNET* 3-4 (Oxford University Press 2002) (2002).

³⁸ *Nehila*, *supra* note 34, at 200.

³⁹ *Id.*

⁴⁰ Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, art. 9(1), S. Treaty Doc. No. 99-27, *available at* http://www.wipo.int/treaties/en/ip/berne/trtdocs_wo001.html (last visited April 3, 2005) [hereinafter Berne Convention].

⁴¹ *Berne Convention*, *supra* note 40, at art. 9(3).

⁴² *Ficsor*, *supra* note 37, at 4.

⁴³ “Phonograms are defined in the Rome Convention as meaning any exclusively aural fixation of sounds of a performance or of other sounds.” Summary of the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations from WIPO website, *at* http://www.wipo.int/treaties/en/ip/rome/summary_rome.html (last visited April 3, 2005).

the right to “authorize or prohibit the direct or indirect reproduction of their phonograms.”⁴⁴

Article 3(e) of the Rome Convention defines reproduction as “the making of a copy or copies of a fixation.”⁴⁵ In addition, the Report of the Rapporteur-General⁴⁶ gives a useful explanation of the meaning of direct and indirect reproduction: “It was understood that direct or indirect reproduction includes, among other things, reproduction by means of: (a) moulding and casting; (b) recording the sounds produced by playing a pre-existent phonogram; and (c) recording off the air a broadcast of the sounds produced by playing a phonogram.”⁴⁷

The rights of phonogram producers were further protected against unauthorized duplication of their work in the 1971 Geneva Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms (hereinafter “Phonograms Convention”).⁴⁸ Article two of the convention specifies that:

Each Contracting State shall protect producers of phonograms who are nationals of other Contracting States against the making of duplicates without the consent of the producer and against the importation of such duplicates, provided that any such making or importation is for the purpose of distribution to the public, and against the distribution of such duplicates to the public.⁴⁹

The term “duplicate” is defined in Article 1(c) as “an article which contains sounds taken directly or indirectly from a phonogram and which embodies all or a substantial part of the sounds fixed in that phonogram[.]”⁵⁰ The Phonograms Convention has been described as a more narrow protection of rights because the words “an article” refer to a tangible copy of the

⁴⁴International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, Oct. 26, 1961, art. 10, *available at* http://www.wipo.int/treaties/en/ip/rome/trtdocs_wo024.html (last visited April 3, 2005) [hereinafter Rome Convention].

⁴⁵ *Id.* at art. 3(e).

⁴⁶ The Rapporteur-General, or Reporter General, is the person in charge of documenting the event and compiling a report.

⁴⁷ *Ficsor*, *supra* note 37, at 95.

⁴⁸ *Id.* at 4.

⁴⁹ Convention for the Protection of Phonograms Against Unauthorized Duplication of Their Phonograms, Oct. 29, 1971, art. 2, 25 U.S.T. 309, *available at* http://www.wipo.int/treaties/en/ip/phonograms/trtdocs_wo023.html (last visited April 3, 2005) [hereinafter Phonograms Convention].

⁵⁰ *Ficsor*, *supra* note 37, at 96.

phonogram, whereas the concept of “reproduction” used in the other conventions is broader and would include electronic intangible copies.⁵¹

B. *World Intellectual Property Organization (WIPO)*

The World Intellectual Property Organization (WIPO) is a specialized agency within the United Nations.⁵² The Convention establishing the WIPO was signed at Stockholm on July 14, 1967.⁵³ Its purpose is to protect intellectual property throughout the world by collaborating with other international organizations and states and to ensure administrative cooperation among the Unions.⁵⁴ Rapid advances in computer technology led to a Diplomatic Conference in Geneva, Switzerland, in 1996 in order to strengthen international protection for performers and producers of phonograms.⁵⁵ The WIPO produced two treaties at that conference—the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty.⁵⁶ These treaties are commonly referred to as the WIPO Internet treaties.⁵⁷ In addition to administering these treaties, the WIPO also administers the Berne, Rome, and Phonograms Convention Treaties.⁵⁸

The WIPO Copyright Treaty (WCT) strengthens copyright protection from the Berne Convention, but it does not pre-empt it.⁵⁹ Article 6 of the WCT states, “[a]uthors of literary and artistic works shall enjoy the exclusive right of authorizing the making available to the public of

⁵¹ *Id.*

⁵² *Nehila, supra* note 34, at 201.

⁵³ *See* Convention Establishing the World Intellectual Property Organization, July 14, 1967, 21 U.S.T. 1749, available at http://www.wipo.int/treaties/en/convention/trtdocs_wo029.html (last visited April 6, 2005).

⁵⁴ *Id.*

⁵⁵ *Nehila, supra* note 34, at 201.

⁵⁶ *Id.*

⁵⁷ Jennifer Newton, *Global Solutions to Prevent Copyright Infringement of Music Over the Internet: the Need to Supplement the WIPO Internet Treaties with Self-Imposed Mandated*, 12 *IND. INT’L & COMP. L. REV.* 125, 142 (2001).

⁵⁸ List of WIPO administered Treaties, available at <http://www.wipo.int/treaties/en/index.jsp> (last visited April 6, 2005).

⁵⁹ *Nehila, supra* note 18, at 201; WIPO Copyright Treaty, Dec. 20, 1996, art. 1, S. Treaty Doc. No. 105-17, available at http://www.wipo.int/treaties/en/ip/wct/trtdocs_wo033.html (last visited April 6, 2005) [hereinafter WCT].

the original and copies of their works through sale or other transfer of ownership.”⁶⁰

Additionally, Article 8 of the WCT states that

[A]uthors of literary and artistic works shall enjoy the exclusive right of authorizing any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them.⁶¹

The last part of the article covers on-demand, interactive communication via the Internet.⁶² The Berne Convention was further updated and clarified by an attached agreement to the WCT, which states that “reproduction” rights, as set out in the Berne Convention, fully apply in the digital world.⁶³ In addition, the agreement states, “it is understood that the storage of a protected work in digital form in an electronic medium constitutes a reproduction within the meaning of Article 9 of the Berne Convention.”⁶⁴

The WIPO Performances and Phonograms Treaty (WPPT) parallels the rights of the WCT concerning the rights of reproduction.⁶⁵ As in the WCT, the right of reproduction fully applies in the digital environment.⁶⁶ Article 7 of the WPPT states, “[p]erformers shall enjoy the exclusive right of authorizing the direct or indirect reproduction of their performances fixed in phonograms, in any manner or form.”⁶⁷ Article 11 grants the same reproduction right, but it omits the words “performances fixed in,” clarifying the term even further to mean “any phonogram.”⁶⁸

⁶⁰ WIPO Copyright Treaty, Dec. 20, 1996, art. 6, S. Treaty Doc. No. 105-17, *available at* http://www.wipo.int/treaties/en/ip/wct/trtdocs_wo033.html (last visited April 6, 2005) [hereinafter WCT].

⁶¹ *Id.* at art. 8.

⁶² Summary of WCT, *available at* http://www.wipo.int/treaties/en/ip/wct/summary_wct.html (last visited April 6, 2005).

⁶³ *Newton, supra* note 57, at 145.

⁶⁴ *Id.*

⁶⁵ *Nehila, supra* note 34, at 202.

⁶⁶ WIPO Performances and Phonograms Treaty, Dec. 20, 1996, attached agreement #6, S. Treaty Doc. No. 105-17, *available at* http://www.wipo.int/treaties/en/ip/wppt/trtdocs_wo034.html (last visited April 6, 2005) [hereinafter WPPT].

⁶⁷ *Id.* at art. 7.

⁶⁸ *Id.* at art. 11.

One hundred and fifty countries accepted the two Treaties, but acceptance did not imply ratification.⁶⁹ In order for the WCT and the WPPT to enter into force,⁷⁰ at least thirty parties had to ratify them.⁷¹ On March 6, 2002, the thirty party requirement was met, and the WCT was entered into force.⁷² Again, on May 20, 2002, the thirty party requirement was met for the WPPT, and it was entered into force.⁷³ As of March 7, 2005, there are 51 contracting countries for the WCT and 49 contracting countries for the WPPT.⁷⁴ These Treaties are important because they “lay down the legal groundwork to safeguard the interests of creators in cyberspace and open new horizons for composers, artists, writers and others to use the Internet with confidence to create, distribute and control the use of their works within the digital environment.”⁷⁵

C. *The World Trade Organization (WTO) and TRIPs*

The World Trade Organization (WTO) was created after World War II because of a need to create greater international economic stability.⁷⁶ The WTO’s main function is to enforce the rules of the international trading system.⁷⁷ It performs this function by playing three different roles: “(1) To promote trade liberalization; (2) to act as a forum for trade negotiations; and (3) to

⁶⁹ *Nehila*, *supra* note 34, at 201. Acceptance is defined as “[a]n offeree’s assent, either by express act or by implication from conduct, to the terms of an offer in a manner authorized or requested by the offeror, so that a binding contract is formed.” BLACK’S LAW DICTIONARY (8th ed. 2004). Ratification is defined in International Law as “[t]he final establishment of consent by the parties to a treaty to be bound by it . . . including the exchange or deposit of instruments of ratification[.]” BLACK’S LAW DICTIONARY (8th ed. 2004).

⁷⁰ To “enter into force” means to become effective law in the countries that are parties to the treaties. See Press Release, WIPO, WCT Enters Into Force (Mar. 6, 2002), *available at* http://www.wipo.int/edocs/prdocs/en/2002/wipo_pr_2002_304.html (last visited April 6, 2005). In this case, the Internet Treaties become law three months after they are ratified by thirty states. *Id.*

⁷¹ *Nehila*, *supra* note 34, at 201.

⁷² *Summary of the WCT*, *supra* note 62.

⁷³ Summary of the WPPT, *available at* http://www.wipo.int/treaties/en/ip/wppt/summary_wppt.html (last visited April 6, 2005).

⁷⁴ WCT Treaty Statistics from WIPO website, *available at* http://www.wipo.int/treaties/en/statistics/StatsResults.jsp?treaty_id=16 (last visited April 6, 2005); WPPT Treaty Statistics from WIPO website, *available at* http://www.wipo.int/treaties/en/statistics/StatsResults.jsp?treaty_id=20 (last visited April 6, 2005).

⁷⁵ *WIPO Press Release*, *supra* note 70.

⁷⁶ William J. Kovatch, Jr., *Joining the Club: Assessing Russia’s Application for Accession to the World Trade Organization*, 71 TEMP. L. REV. 995, 999 (1998).

⁷⁷ *Id.* at 998.

act as a forum for the settlement of trade disputes between member-states.”⁷⁸ Membership in the WTO comes with the advantages of more stable trade relations, increased access to foreign markets, and an increased opportunity to attract foreign investment.⁷⁹

The WTO eventually grew out of the General Agreement on Trade and Tariffs (GATT), drafted in 1947.⁸⁰ The GATT, designed to protect trade in goods, was developed through a series of negotiation rounds and eventually became the “constitution for international trade law.”⁸¹ The WTO was established on January 1, 1995, as a result of the most recent negotiation round—the Uruguay Round.⁸² The WTO does not supersede GATT but instead supplements and enhances it by granting protection to trade in services and intellectual property.⁸³ Membership in the WTO takes the all or nothing approach because it requires its members to accept all the results of the Uruguay Round.⁸⁴ Any party that becomes a member must also comply with the WTO’s Multilateral Trade Agreements.⁸⁵ One of the most important agreements is the Trade Related Aspects of Intellectual Property (TRIPs).⁸⁶

TRIPs is a Multilateral Trade Agreement that brought intellectual property into the GATT-WTO system for the first time.⁸⁷ The objective of TRIPs is defined as:

The protection and enforcement of intellectual property should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations.⁸⁸

⁷⁸ *Id.* at 998-99.

⁷⁹ *Id.* at 999.

⁸⁰ *Russia and the World Trade Organization: Will TRIPs be a Stumbling Block to Accession?*, 8 DUKE J. COMP. & INT’L L. 519, 520 (1998) [hereinafter *Russia and WTO*].

⁸¹ *Id.* at 520-21.

⁸² *Id.* at 520.

⁸³ *Id.* at 521.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Kovatch, supra* note 76, at 1104.

⁸⁷ *Russia and the WTO, supra* note 80, at 528.

⁸⁸ Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Annex 1C, art. 7, 33 I.L.M. 1197 (1994) [hereinafter TRIPs].

TRIPs members are required to comply with the Berne and Rome Conventions and therefore protect copyright material in much the same way.⁸⁹ For example, Article 14(2) of TRIPs allows producers of phonograms to “authorize or prohibit the direct or indirect reproduction of their phonograms.”⁹⁰

Enforcement mechanisms are the biggest advantage that membership in the WTO and TRIPs provides.⁹¹ Members have general obligations to ensure that fair and equitable enforcement procedures are available under their law to permit action against intellectual property infringement.⁹² TRIPs outlines certain remedies that Members must provide, including injunctions, damages, and destruction or removal of certain goods.⁹³ In addition, Article 61 of TRIPs requires members to provide, at a minimum, criminal procedures and penalties for willful copyright piracy on a commercial scale.⁹⁴

TRIPs also requires transparency between members.⁹⁵ Members must publish laws, regulations, judicial decisions, and administrative rulings pertaining to intellectual property to allow other governments to become acquainted with them.⁹⁶ Members are also obliged to furnish this information to the Council for TRIPs for review and to other Member States upon written request.⁹⁷ The Council for TRIPs provides a forum for the settlement of trade disputes by utilizing the GATT dispute-settlement procedures from the most recent Uruguay Round

⁸⁹ *Id.* at art. 2.

⁹⁰ *Id.* at art. 14(2).

⁹¹ *Kovatch, supra* note 76, at 1006.

⁹² *TRIPS, supra* note 88, at art. 41.

⁹³ *Russia and WTO, supra* note 80, at 530; *TRIPS, supra* note 88, at art. 44-46.

⁹⁴ *TRIPS, supra* note 88, at art. 61.

⁹⁵ *Id.* at art. 63.

⁹⁶ *Id.*

⁹⁷ *Id.*

revision.⁹⁸ This forum is very important for insuring proper adherence to TRIPs obligations, and Members face consequences and risk loss of benefits if they fail to adhere to their obligations.⁹⁹

D. Other International Copyright Organizations

In addition to the various treaties and international governmental organizations that work for the harmonization of copyright law, various private organizations also exist to promote the effort. These organizations often comprise artists and private organizations from the U.S. and other countries around the world, and work to protect and represent their respective members' interests on an international setting. One such organization is the International Intellectual Property Alliance (hereinafter IIPA). The IIPA is a private-sector coalition formed in 1984 to represent U.S. copyright-based industries in an effort to improve international protection of copyrighted materials.¹⁰⁰ The goal of the IIPA is to help promote a legal system that deters piracy, fosters technological and cultural development, and encourages investment and employment.¹⁰¹

The IIPA works closely with the U.S. Trade Representative (USTR),¹⁰² especially during its "Special 301" reviews, to determine if any foreign country's policies or practices deny the intellectual property rights of a U.S. citizen.¹⁰³ In addition, the IIPA is involved with the implementation of the WTO TRIPs agreement, it participates in discussions with the WIPO, it

⁹⁸ *Id.* at art. 64; Summary of TRIPs from WTO website, *available at* http://www.wto.int/english/docs_e/legal_e/ursum_e.htm#nAgreement (last visited April 6, 2005).

⁹⁹ *Russia and WTO*, *supra* note 80, at 531.

¹⁰⁰ Summary of IIPA from website, *available at* <http://www.iipa.com/aboutiipa.html> (last visited April 6, 2005).

¹⁰¹ *Id.*

¹⁰² The USTR is the United States office that is responsible for developing and coordinating U.S. international trade, and overseeing negotiations with other countries. Information from USTR website, *available at* http://www.ustr.gov/Trade_Sectors/Intellectual_Property/The_Work_of_USTR_-_Intellectual_Property.html (last visited April 6, 2005). To protect intellectual property, the USTR works closely with Congress, the WTO and the WIPO. *Id.* The USTR's most effective tool is its annual "special 301" review. *Id.* If a country has exceptionally high prevalence of copyright piracy the USTR will warn that country and potential investors by placing them on the Special 301 list. *Id.* Over time, if the country does not improve its intellectual property enforcement, the USTR will recommend the U.S. government impose trade sanction. *Id.* In addition, preferential tariff benefit treatment is given to certain countries provided they retain adequate protection of intellectual property. *Id.*

¹⁰³ *Summary of IIPA*, *supra* note 100.

works for the ratification and implementation of the WCT and the WPPT in various countries, and it works closely with the RIAA.¹⁰⁴

Another such organization is the International Federation of the Phonographic Industry (hereinafter IFPI). The IFPI is an international organization that represents the recording industry worldwide, acting in affiliation with the RIAA to represent U.S. copyright interests.¹⁰⁵ It has over 1,450 members worldwide in seventy-five countries.¹⁰⁶ It frequently lobbies various governmental and international agencies—such as the WIPO—for improved copyright laws, and it involves itself worldwide with anti-piracy litigation and offers training and support to international investigators.¹⁰⁷

In sum, all of these international conventions, treaties, and organizations play an important role in the harmonization of copyright law around the world. Harmonization is crucial to a world economy that is increasingly unrestricted. These conventions, treaties, and organizations are very influential to how copyright law in Russia has developed in the past and how it will develop in the future.

III. RUSSIAN COPYRIGHT HISTORY AND PIRACY PROBLEM

With the fall of communism in 1991, Russia was thrust head first into the realm of a market economy and has been playing catch up with the Western world ever since. Because of its history, Russia has struggled to change not only its laws but also its attitude toward the protection of intellectual property.¹⁰⁸ Under Communism, the government forced an inventor to

¹⁰⁴ *Id.*.

¹⁰⁵ Summary of IFPI from website, *available at* <http://www.ifpi.org/site-content/about/mission.html> (last visited April 6, 2005).

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ Alina M. Collisson, *The End of Software Piracy in Eastern Europe? A Positive Outlook with International Help*, 14 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1005, 1011 (2004).

relinquish all rights to his or her creation and in return compensated the inventor with a voucher for limited rewards provided by the state.¹⁰⁹ In response to rewarding creativity in this way, Russian intellectual property law developed much differently than did American law.¹¹⁰

Much of Russia's intellectual property law today is the result of its desire to join the WTO.¹¹¹ Russia would receive many potential benefits from membership in the WTO.¹¹² These benefits include greater access to world markets for Russian products, attraction of greater foreign investment, and more job opportunities for Russian citizens.¹¹³ In turn, these benefits would establish a more liberal trade environment and help reformers solidify Russia's economic transition.¹¹⁴ Unfortunately, Russia has been prevented from acceding to the WTO until it complies with certain standards, namely TRIPs standards for protection of copyrights and other intellectual property rights.¹¹⁵ It is important for this discussion to know the kind of legal deficiencies Russia has and the affect they have on the country.

A. *Legislative Deficiencies in Russia*

At first glance, Russia seems to have invested a large amount of effort into establishing an effective legal system to protect copyrights.¹¹⁶ In 1993, Russia enacted the Law on Copyright and Neighboring Rights (Copyright Act),¹¹⁷ and in 1995, it joined the Berne Convention and

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ Kovatch, *supra* note 76, at 1006.

¹¹² *Id.*

¹¹³ *Id.* at 1006-11.

¹¹⁴ *Id.* at 1008.

¹¹⁵ *Russia Still Retaining Flaws in Intellectual Property Protection Sphere-Expert*, INTERFAX: BUS. L. REP., June 8, 2004, available at 2004 WL 62192788.

¹¹⁶ Collisson, *supra* note 108, at 1015.

¹¹⁷ Law of the Russian Federation No. 5351-1 of July 9, 1993 on Copyright and Neighbouring Rights, *translation available at* LEXIS, garant 10001423, *also available at* <http://www.fips.ru/avpen/docs.htm> (last visited April 6, 2005). This Copyright Act for the first time in Russian history gave authors, not the state, the exclusive right to commercial use of their artistic works. *Russia to Pass Copyright Bill*, 5 NO. 3 J. PROPRIETARY RTS. 45 (1993). Until this time, the exclusive right to authors' works was granted and regulated by the state. *See Id.* The law gives an author the natural right to his/her creation as soon as it is created. *See Id.* The author is now able to permit reproduction, sell or distribute copies of the work, or export the work. *See Id.* The right to export the work is very

Geneva Convention.¹¹⁸ In reality, however, much of the legislation is lacking. For example, the Copyright Act failed to provide protection to pre-existing sound recordings created prior to 1973,¹¹⁹ as did the implementation of the Berne Convention, which is required by Article 18.¹²⁰ In addition, the implementation of the Geneva Convention provided no protection for pre-existing foreign sound recordings prior to the accession date of March 13, 1995.¹²¹ It was not until 2004 that Russia adopted amendments to the Copyright Act finally giving protection to pre-existing works prior to 1973 and sound recordings prior to 1995.¹²²

The 2004 amendments were also intended to implement the WIPO Internet treaties, but one important provision does not become effective until 2006; this provision pertains to the “exclusive right of making available and right of communication to the public.”¹²³ This provision, found in Article 8 of the WCT and Article 14 of the WPPT, would be a useful enforcement tool for producers and authors of phonograms against digital piracy.¹²⁴ The copyright holder would have the ability to decide whether his or her work would go onto the

significant, because the government will now longer be able to interfere in contractual relations between authors and their foreign contractors, or in what they do with their profits. *See Id.*

¹¹⁸ *Collisson, supra* note 108, at 1016; *2004 Special 301 Report Russian Federation*, INT’L INTELLECTUAL PROPERTY ALLIANCE 194 (2004), available at <http://www.iipa.com/rbc/2004/2004SPEC301RUSSIA.pdf> (last visited April 6, 2005) [hereinafter IIPA 2004 Special 301 Report on Russia].

¹¹⁹ Pre-existing sound recordings in the context of the Copyright Act includes any foreign sound recordings and other foreign works including filmed entertainment, which were created before the date of 1973. During passage of the Copyright Act, the Russian Government committed to include this protection, but in the 1993 implementing decree they denied the protection. *2004 Special 301 Report Russian Federation*, INT’L INTELLECTUAL PROPERTY ALLIANCE 194 (2004), available at <http://www.iipa.com/rbc/2004/2004SPEC301RUSSIA.pdf> (last visited April 6, 2005) [hereinafter IIPA 2004 Special 301 Report on Russia].

¹²⁰ *Id.* Article 18(1) of the Berne Convention states that “This convention shall apply to all works which, at the moment of its coming into force, have not yet fallen into the public domain in the country of origin through the expiry of the term of protection.” *Berne Convention, supra* note 40, at art. 18. This term of protection of a work lasted for 50 years after the death of the author, as prescribed by article 7(1) of the Berne Convention. *Id.* at art. 7.

¹²¹ *IIPA 2004 Special 301 Report on Russia, supra* note 119, at 194.

¹²² *2005 Special 301 Report Russian Federation*, INT’L INTELLECTUAL PROPERTY ALLIANCE 27 (2005), available at <http://www.iipa.com/rbc/2005/2005SPEC301RUSSIA.pdf> (last visited April 6, 2005) [hereinafter IIPA 2005 Special 301 Report on Russia].

¹²³ *IIPA 2005 Special 301 Report on Russia, supra* note 122, at 27.

¹²⁴ *Id.*

Internet.¹²⁵ The IIPA has urged Russia to move up the effective date of accession and implementation of this provision and other provisions of the WIPO Internet treaties because of the explosion of Internet piracy.¹²⁶ These legislative deficiencies have led to a large problem with copyright infringement in Russia.¹²⁷

Russia's biggest problem with copyright infringement comes from the factories—called physical plants—that operate throughout the country.¹²⁸ In 2003, the country had a CD piracy rate of 64 percent, and Russian pirated discs were traced to more than 26 countries.¹²⁹ These CDs come from plants operating illegally throughout the country, many of which have intimate ties to Russian organized crime.¹³⁰ In 1996, there were two illegal CD plants in Russia.¹³¹ Today, there are 34 plants operating in Russia, 18 of which are located on government military sites.¹³² This puts Russia's manufacturing capacity at 390 million CDs annually, despite legitimate sales of only 30 million CDs in 2003.¹³³

To combat these illegal CD plants, the Russian government introduced licensing regulations in June of 2002.¹³⁴ The regulations make licensing mandatory and allow for the unannounced inspections of plants.¹³⁵ However, they are deficient because absent a court order they only allow for suspension and not the withdrawal of licenses for plants found to be pirating

¹²⁵ *Newton, supra note 57, at 143.*

¹²⁶ *IIPA 2005 Special 301 Report on Russia, supra note 122, at 28-29.*

¹²⁷ *See Id.*

¹²⁸ *The Recording Industry Piracy Report 2004, supra note 24, at 10.*

¹²⁹ *Id.*

¹³⁰ *IIPA 2005 Special Report on Russia, supra note 122, at 16.*

¹³¹ *The Recording Industry Piracy Report 2004, supra note 24, at 10.*

¹³² *IIPA 2005 Special Report on Russia, supra note 122, at 16.*

¹³³ *IIPA 2005 Special Report on Russia, supra note 122, at 16; The Recording Industry Piracy Report 2004, supra note 24, at 10.*

¹³⁴ *IIPA 2005 Special Report on Russia, supra note 122, at 16.*

¹³⁵ *Id.*

material.¹³⁶ As a result, the government is unable to close down illegal plants without going through the courts, and many plants remain in operation despite their illegal actions.¹³⁷

Piracy in Russia is addressed criminally by two bodies of law—“the Criminal Procedure Code (“CPC”) and the Criminal Code.”¹³⁸ Specifically, Article 146 of the Criminal Code was the first law in Russian history to criminalize intellectual property violations.¹³⁹ Until 2003, the Criminal Code provided criminal prosecution for infringements that caused grave harm/significant damage.¹⁴⁰ It provided for fines of 200 to 400 times the minimum wage (\$600 to \$1,200) or two to four months of the defendant’s income, or correction labor from 180 to 240 hours, or up to two years in prison.¹⁴¹ The language of grave harm/significant damage created much confusion until 2003, when the government changed the definition to a fixed threshold amount.¹⁴² The IIPA still expressed some concern over these changes, however, because the threshold for the lowest criminal violation—50,000 rubles (about \$1,775)—means that any criminal activity below that amount cannot be prosecuted as a criminal matter.¹⁴³ Given that almost all retail and some wholesale illegal activities do not engage in business of this magnitude, many copyright infringers will be left outside the scope of criminal prosecution.¹⁴⁴

Other deficiencies in the Criminal Code contribute to its inadequate deterrence of commercial piracy. First, the fine amounts are so low that they provide little deterrence effect.¹⁴⁵ Second, Article 146 does not currently provide the police explicit power to confiscate and

¹³⁶ *Id.*

¹³⁷ *Id.* at 16-17.

¹³⁸ *Collisson, supra* note 108, at 1017.

¹³⁹ *Id.*

¹⁴⁰ *2003 Special 301 Report Russian Federation*, INT’L INTELLECTUAL PROPERTY ALLIANCE 265 (2003), available at <http://www.iipa.com/rbc/2003/2003SPEC301RUSSIA.pdf> (last visited April 6, 2005) [hereinafter *IIPA 2003 Special 301 Report on Russia*].

¹⁴¹ *Id.*

¹⁴² *IIPA 2005 Special 301 Report on Russia, supra* note 122, at 27.

¹⁴³ *Id.*

¹⁴⁴ *See Id.*

¹⁴⁵ *Id.* at 28.

destroy the “machinery” used in making illegal copies.¹⁴⁶ Article 146 only allows pirate and counterfeit goods to be confiscated and destroyed.¹⁴⁷ This is inconsistent with a 2004 amendment to article 49 of the Copyright Act.¹⁴⁸ This amendment does grant police power over the equipment and machinery, but Russian local counsel has unreasonably stated that this new provision will not be used in criminal cases simply because the criminal code does not specifically provide for it.¹⁴⁹ Finally, the 1996 amendments to the Criminal Procedure Code took investigation power away from the police and gave it to the prosecutors, thereby requiring the police to get consent to investigate.¹⁵⁰ Since prosecutor’s have larger workloads and less resources, less piracy cases are being pursued.¹⁵¹ It also recategorized the term “public crime,” removing every crime from the definition except those conducted by an organized group.¹⁵² This means that in most cases, a right holder must file a formal complaint before the government takes any action.¹⁵³

Despite the promising changes made to the Criminal Code, continued progress is desperately needed. Civil and administrative fines are grossly inadequate, mostly because many of the operations are run by criminal organizations with numerous resources that are undeterred by small fines.¹⁵⁴ In addition, the civil system is sluggish and inefficient, and many inexperienced judges have trouble imposing the laws.¹⁵⁵ The threat of strong criminal penalties, especially criminal sentences, will be the only effective deterrent against piracy.¹⁵⁶

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *IIPA 2005 Special 301 Report on Russia, supra* note 122, at 28.

¹⁴⁹ *Id.*

¹⁵⁰ *IIPA 2003 Special 301 Report on Russia, supra* note 140, at 266.

¹⁵¹ *Collisson, supra* note 108, at 1026.

¹⁵² *IIPA 2003 Special 301 Report on Russia, supra* note 140, at 266.

¹⁵³ *IIPA 2004 Special 301 Report on Russia, supra* note 119, at 195.

¹⁵⁴ *Collisson, supra* note 108, at 1025.

¹⁵⁵ *Id.*

¹⁵⁶ *IIPA 2004 Special 301 Report on Russia, supra* note 119, at 198.

B. Enforcement Deficiencies in Russia

Although Russia has made considerable progress in developing a legal framework to bring it up to world standards, these changes will do little good without adequate enforcement.¹⁵⁷ The IIPA vice-president recently stated that “the latest additions to copyright law are a step in the right direction, but that pirates will continue to profit until the state enforces the law properly.”¹⁵⁸ The failure of the licensing regulations to be effective provides one example.¹⁵⁹ In 2004, only four licenses were withdrawn: one for failure to pay fees and three because the plants asked to have them withdrawn, perhaps because they found it superfluous to pay.¹⁶⁰ This is despite the fact that 28 plants were inspected, none of them by surprise.¹⁶¹

The government took criminal action against eight illegal plants in 2004, but most had little or no effect.¹⁶² The first conviction ever for piracy of DVDs was handed down in January 2004 against the chief technician of a plant that was caught with 37,000 CDs and DVDs.¹⁶³ The technician was given a one year suspended sentence, and the plant is still in operation today.¹⁶⁴ In all the other raids the government seized items, but the plants remained in operation and the owners and operators of the plants went unpunished.¹⁶⁵ International organizations, such as the IFPI, have also put forth efforts to reduce piracy in Russia by assisting in cases and raids.¹⁶⁶ In the last two years, the IFPI has assisted in 24 cases against the illegal CD plants, and in 21 of the

¹⁵⁷ *IIPA 2005 Special 301 Report on Russia*, *supra* note 122, at 13.

¹⁵⁸ *Russia Risk: Legal & Regulatory Risk*, ECONOMIST INTELLIGENCE UNIT-RISKWIRE, Jan. 24, 2005, at 10, available at 2005 WL 65236790 [hereinafter *Russia Risk: Legal & Regulatory Risk*].

¹⁵⁹ *IIPA 2005 Special 301 Report on Russia*, *supra* note 122, at 17.

¹⁶⁰ *See Id.*

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *IIPA 2005 Special 301 Report on Russia*, *supra* note 122, at 18.

¹⁶⁶ *Id.* at 19.

cases, there has been no resolution.¹⁶⁷ In the other three cases, the CDs were destroyed but no sentences were imposed, and almost all the plants are still in operation.¹⁶⁸ With IFPI's assistance, 1,530 police raids were carried out in 2004 which resulted in the seizure of 2,086,000 CDs.¹⁶⁹ As with the other raids, however, only a few of the cases made it to the courts, and even then it was mainly in administrative proceedings.¹⁷⁰ The operators received no deterrent criminal penalties or imprisonment.¹⁷¹

All of these cases are evidence that the problem of enforcement dwarfs the legislative problems Russia has with intellectual property protection. "The difficulty, however, is not that these countries are unwilling to comply, but that their governments lack knowledge on the issues, as they barely have a history of intellectual property rights and protection."¹⁷² A number of Russian officials have recently suggested that the high prices for legitimate goods are to blame for the piracy problem.¹⁷³ The IIPA says that this view evinces that Russia does not understand the real problem.¹⁷⁴ High prices have little or no bearing on the problem because most of the goods are being sent to foreign markets.¹⁷⁵ Instead, the opportunity for easy profits with little threat of penalty is the primary cause of the piracy explosion in Russia.¹⁷⁶

Considering Russia's severe problem with this traditional type of piracy, its battle with the new Internet market will be even harder to win. The continuing weakness in its legal system

¹⁶⁷ *Id.* at 18.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* at 19.

¹⁷⁰ *Id.*

¹⁷¹ *IIPA 2005 Special 301 Report on Russia, supra* note 122, at 19.

¹⁷² *Collisson, supra* note 108, at 1036.

¹⁷³ *IIPA 2005 Special 301 Report on Russia, supra* note 122, at 22.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

means that companies and rights holders will have to take their own measures to combat piracy.¹⁷⁷

IV. RUSSIAN ONLINE MUSIC SALES

“Buying off the web opens a world of opportunity.”¹⁷⁸ This is certainly true in the U.S., where Internet sights offering legal music sales are becoming increasingly popular.¹⁷⁹ From 2001 until 2003, the amount of music purchased by “digital download” from the Internet increased from 0.2 million to 1.3 million.¹⁸⁰ Popular paid music websites such as MusicMatch, iTunes, Napster, and Wal-Mart have recently attracted up to eleven million users.¹⁸¹ Because the Internet is borderless, however, this new opportunity invites some international players that may not conform to the legal standards of the U.S.¹⁸²

Russian websites have been selling music via the Internet for many years. One such website, Allofmp3.com, has been operating for over four years and is one of the oldest and most popular Russian websites.¹⁸³ This site, as well as others like MP3search.ru and 3MP3.ru, are catching the attention of many Americans looking for cheap downloads.¹⁸⁴ Allofmp3.com offers a wide selection of music, including many artists such as the Beatles who have not yet authorized

¹⁷⁷ *Russia Risk: Legal & Regulatory Risk*, *supra* note 158, at 10.

¹⁷⁸ Charles Wright, *Going For a Song On The Net*, THE AGE, May 4, 2004, available at 2004 WL 76348134.

¹⁷⁹ *US Music Swappers Change Their Tune*, THE REGISTER, Apr. 27, 2004, available at http://www.theregister.co.uk/2004/04/27/us_swappers_change_tune/ (last visited April 8, 2005).

¹⁸⁰ *2003 Consumer Profile*, THE RECORDING INDUSTRY ASSOCIATION OF AMERICA (2003), available at <http://www.riaa.com/news/marketingdata/purchasing.asp> (last visited April 8, 2005) [hereinafter 2003 Consumer Profile].

¹⁸¹ *US Music Swappers Change Their Tune*, *supra* note 179.

¹⁸² See Vauhini Vara, *Russian Web Sites Offer Cheap Songs, But Piracy is Issue*, WALL ST. J., Jan. 26, 2005, available at 2005 WL-WSJ 59838869.

¹⁸³ See information about allofmp3.com from website, at <http://www.allofmp3.com> (last visited April 8, 2005).

¹⁸⁴ *Vara*, *supra* note 182.

their work for digital distribution.¹⁸⁵ The biggest attraction for consumers to the website is the price.¹⁸⁶ Songs are sold on a per megabyte basis, which equates to roughly ten cents or less per song.¹⁸⁷ This is considerably cheaper than the 99-cent per-song rate that iTunes and other American websites charge.¹⁸⁸ In addition, the site contains an English-language version and prices in U.S. dollars, which makes it extremely easy for foreign users to gain access.¹⁸⁹ Vadim Medvedev, an Allofmp3.com representative, claims that the site targets Russian-speaking users, inside and outside of Russia.¹⁹⁰ He claims the English version was developed only to make it easier to access on computers outside of Russia.¹⁹¹

A. Russian Websites' Legal Authority

Allofmp3.com's success and popularity has sparked considerable controversy over whether it is legal.¹⁹² The websites' legal disclaimer says, "[u]sers are responsible for any usage and distribution of all materials received from ALLOFMP3.com. This responsibility depends on the local legislation of each user's country of residence. ALLOFMP3.com's Administration does not keep up with the laws of different countries and is not responsible [for] the actions of non-Russian users."¹⁹³ The website claims that all the materials in MediaServices, its parent company, are available for distribution through the Internet according to a private license obtained from the Russian Multimedia and Internet Society (hereinafter ROMS).¹⁹⁴ Under the

¹⁸⁵ John Borland, *MP3s for Pennies? Russian Cops Say No*, CNET NEWS.COM, Feb. 22, 2005, at http://news.com.com/MP3s+for+pennies+Russian+cops+say+no/2100-1027_3-5586034.html (last visited April 8, 2005).

¹⁸⁶ See *Vara*, *supra* note 182.

¹⁸⁷ Charles Wright, *Russian Site is Music to the Ears*, THE AGE, Apr. 27, 2004, available at 2004 WL 76347313; *Vara*, *supra* note 182.

¹⁸⁸ *Vara*, *supra* note 182.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² See *Borland*, *supra* note 185.

¹⁹³ Legal information from Allofmp3.com website, at <http://help.allofmp3.com/help/help.shtml?prm=legal> (last visited April 8, 2005).

¹⁹⁴ *Id.*

terms of the ROMS license, Allofmp3.com claims it pays for all the materials used according to the Russian Copyright Act.¹⁹⁵

ROMS is a national organization that claims it is “the national Russian organization providing professional collective management of authors’ property rights and protection of interests of rightsholders in cases of use of their works in digital interactive networks, including the Internet.”¹⁹⁶ ROMS operates by signing licensing agreements with users and businesses who want to take advantage of copyrighted material.¹⁹⁷ These licensing agreements give ROMS authority to collect fees for using the copyrighted material and to distribute them as royalties to authors, performers, record producers, other copyright holders it represents.¹⁹⁸

ROMS’s authority to operate in this fashion comes from Title IV of the Russian Copyright Act.¹⁹⁹

Title IV, Articles 44-47 of the Copyright Act were developed to allow for the creation of organizations that exercise collective economic rights of authors, performers, phonogram producers, and other copyright holders when it is unpractical for them to exercise their rights individually.²⁰⁰ Article 46 of the Copyright Act lays out the functions of these organizations, which include such things as the granting of licenses, negotiating with users for appropriate royalty amounts, collecting the royalties, allocating the royalties to the respective owners of the copyrights, and performing any legal act essential to the defense of the rights.²⁰¹ Article 45

¹⁹⁵ *Id.*

¹⁹⁶ Introductory Information about ROMS from website, *available at* <http://www.roms.ru/?lang=eng> (last visited April 8, 2005).

¹⁹⁷ *See generally Id.*

¹⁹⁸ *See generally Id.*

¹⁹⁹ Background information about ROMS from website, *available at* <http://www.roms.ru/?fms=2> (last visited April 8, 2005).

²⁰⁰ *See* Law of the Russian Federation No. 5351-1 of July 9, 1993 on Copyright and Neighbouring Rights, art. 44, *translation available at* LEXIS, *garant* 10001423, *also available at* <http://www.fips.ru/avpen/docs.htm> (last visited April 6, 2005) [hereinafter Russian Copyright Act].

²⁰¹ Russian Copyright Act, art. 46.

paragraph 2 permits ROMS and the other collective rights organizations to obtain consent to administer these rights by signing written contracts with the original rights holders, or by obtaining contracts from the foreign organizations that administer equivalent rights.²⁰²

Furthermore, paragraph 3 of Article 45 says in part that

[t]he licenses in question shall authorize the use, by the means that they specify, of all the works and subject matter of neighboring rights, and shall be granted in the name of all the owners of copyright or neighboring rights, including those who have not mandated the organization under paragraph 2 of this Article.²⁰³

This provision means a license can grant use of any copyrighted work, regardless of whether the original copyright holder has given permission.²⁰⁴ In a press release, ROMS cites this as part of their legal authority to grant licenses.²⁰⁵

Another loophole that allows for the use of copyrighted material on these websites without the copyright holders' permission is Article 39.²⁰⁶ This Article states, "communication of the phonogram to the public by cable" shall be allowed "without consent from the producer of a phonogram published for commercial purposes and from the performer whose performance is recorded on the phonogram[.]"²⁰⁷ Phonogram is defined in the Copyright Act as "any exclusive sound recording of performances or of other sounds[.]"²⁰⁸ In addition, "communication to the public by cable" in the Copyright Act "means to communicate works, phonograms, performances or programs of broadcasting or cable distribution organizations to the public by cable, wire, optic fiber or comparable means[.]"²⁰⁹ The Internet could fall into the definition of

²⁰² Russian Copyright Act, art. 45.

²⁰³ Russian Copyright Act, art. 45.

²⁰⁴ See Russian Copyright Act, art. 45.

²⁰⁵ *Background information about ROMS from website, supra* note 199.

²⁰⁶ *Russian 5c MP3 Site "unlicensed"*, THE REGISTER, May 5, 2004, available at http://www.theregister.co.uk/2004/05/05/russian_mp3_site/print.html (last visited April 9, 2005).

²⁰⁷ Law of the Russian Federation No. 5351-1 of July 9, 1993 on Copyright and Neighbouring Rights, art. 39, translation available at LEXIS, garant 10001423, also available at <http://www.fips.ru/avpen/docs.htm> (last visited April 6, 2005)

²⁰⁸ Russian Copyright Act, art. 4.25.

²⁰⁹ Russian Copyright Act, art. 4.24.

wire, optic fiber, or comparable means.²¹⁰ Payment of royalties to the phonogram producer and performer is still required under this Act, and the royalties are to be collected by the collection agencies created by Title IV of the Copyright Act.²¹¹

Entities such as ROMS, Allofmp3.com, and other Russian Internet music sites are using these poorly worded Articles to illegally license and sell Western music without obtaining permission from the copyright holders.²¹² These Articles are disharmonious with international protection of phonograms on the Internet.²¹³ For example, the United States has some of the most comprehensive copyright protection legislation in the world.²¹⁴ In the United States, despite the fact that Internet piracy is still rampant, music is allowed legally on the Internet in two basic forms—webcasting and digital download.²¹⁵ A short explanation of these two forms is prudent to understand the Russian Internet problem.

B. *Webcasting in the United States*

Webcasting is the act of “transmitting music to an end-listener without making a permanent copy of the song on the end-listener’s computer hard-drive.”²¹⁶ Congress protected these transmissions on the Internet through the Digital Performance Right in Sound Recordings Act of 1995 (DPRA).²¹⁷ The DPRA was the first modern attempt at regulating the digital transmission of music.²¹⁸ It gave owners of sound recordings the exclusive right of public

²¹⁰ *Russian 5c MP3 Site “unlicensed”*, *supra* note 206.

²¹¹ Russian Copyright Act, art. 39.

²¹² *IIPA 2005 Special 301 Report on Russia*, *supra* note 122, at 27.

²¹³ *Id.*

²¹⁴ Eliza Shardlow Clark, *Online Music Sharing in a Global Economy: The U.S. Effort to Command (Or Survive) the Tidal Wave*, 14 MINN. J. GLOBAL TRADE 141, 147 (2004).

²¹⁵ See Robert J. Delchin, *Musical Copyright Law: Past, Present and Future of Online Music Distribution*, 22 CARDOZO ARTS & ENT. L.J. 343, 350 (2004).

²¹⁶ Richard D. Rose, *Connecting the Dots: Navigating the Laws and Licensing Requirements of the Internet Music Revolution*, 42 IDEA 313, 344 (2002).

²¹⁷ *Delchin*, *supra* note 215, at 352.

²¹⁸ *Id.* at 354.

performance through digital audio transmissions.²¹⁹ The DPRA distinguishes between interactive and non-interactive services.²²⁰ An interactive service is “one that enables a member of the public to receive, on request, a transmission of a particular sound recording chosen by or on behalf of the recipient.”²²¹ Under the DPRA, these interactive services—often called pay-per-listen or audio on-demand—must be voluntarily licensed.²²²

Non-interactive transmissions are defined as services in which a listener cannot request certain songs at any given time.²²³ They are divided into two different types, subscription and non-subscription services.²²⁴ The first type is subscription services, which are “controlled and limited to particular recipients, and for which consideration is required to be paid.”²²⁵ These services require licensing from the copyright owners before the music is transmitted.²²⁶ If the subscription to the service is voluntary, the copyright owners are free to refuse licenses if they choose; but if the subscription service is compulsory, record companies are required to grant compulsory licenses by using rates determined by the Copyright Office²²⁷ or individually

²¹⁹ 17 U.S.C. § 106(6) (enacted under the Digital Performance Right in Sound Recordings Act of 1995, Pub. L. No. 104-39, § 2(3), 109 Stat. 336, 336 (1995)).

²²⁰ *Delchin*, *supra* note 215, at 352.

²²¹ *Id.*; Digital Performance Right in Sound Recordings Act of 1995, Pub. L. No. 104-39, 109 Stat. 336 (1995) (Codified as various amendments to 17 U.S.C.)

²²² *Delchin*, *supra* note 215, at 352. Most of the time, permission to use a song obtained through a voluntary licensing agreement is a private, contractual matter between the parties. Dorothy Schrader, *Copyright Term Extension and Music Licensing: Review of Recent Developments*, in *COPYRIGHT: CURRENT ISSUES AND LAWS* 100 (John v. Martin ed., Nova Science Publishers, Inc.) (2002). However, “when the law creates a compulsory or statutory license, no negotiation is necessary.” *Id.* The user of the song simply complies with the statutory conditions for its use and pays the royalty laid out by the statute. *Id.*

²²³ *Delchin*, *supra* note 215, at 353.

²²⁴ *Id.*

²²⁵ *Id.*; DPRA, 109 Stat. 336 (1995).

²²⁶ *Delchin*, *supra* note 215, at 353.

²²⁷ The United States Copyright Office was created in 1897 as a separate department of the Library of Congress. Background Information from U.S. Copyright Office website, at <http://www.copyright.gov/circs/circ1a.html> (last visited April 9, 2005). Its mission is to promote creativity by administering a national copyright system. *Id.* It provides expert assistance to Congress on Intellectual Property matters; it assists in drafting copyright legislation, conducts studies, and gives advice regarding compliance with multilateral agreements. *Id.* In addition, it is in charge of administering compulsory and statutory licenses. *Id.* These licenses are issued for the public performance of, among other things, digital audio transmissions. *Id.* The office sets the rates of royalty payments for use of the compulsory licenses. *Id.* In addition, it collects and administers the royalty fees collected from the licenses. *Id.*

negotiated.²²⁸ These compulsory licenses allow a webcaster to “play unlimited recordings without receiving a license for each one.”²²⁹

The second type of non-interactive service is a non-subscription non-interactive service.²³⁰ This type involves what are commonly referred to as pure “internet radio station[s]” that entail absolutely no user interaction, as well as traditional broadcast radio stations that simulcast their programs over the internet.²³¹ These webcasts were not seen to represent as large a threat to the recording industry as did interactive and subscription services because the user had no control over what he or she was hearing or might hear next; therefore the disincentive to purchase the record was not present.²³² As a result, these non-interactive non-subscription services were exempted from licensing.²³³

In 1998, the United States granted even more authority to copyright holders with the passage of the Digital Millennium Copyright Act (DMCA).²³⁴ According to the DMCA, non-interactive non-subscription Internet webcasters were no longer exempt from licensing and paying royalties.²³⁵ Now, in order to be eligible for a license, even non-subscription non-interactive webcasters must adhere to numerous requirements.²³⁶

C. Digital Download

²²⁸ *Delchin, supra* note 215, at 353.

²²⁹ Emily D. Harwood, *Staying Afloat in the Internet Stream: How to Keep Web Radio from Drowning in Digital Copyright Royalties*, 56 FED. COMM. L.J. 673, 680 (2004).

²³⁰ *Delchin, supra* note 215, at 353.

²³¹ *Id.*

²³² *See Generally Harwood, supra* note 229, at 680.

²³³ *Delchin, supra* note 215, at 353.

²³⁴ *Harwood, supra* note 229, at 680.

²³⁵ *Harwood, supra* note 229, at 681; 17 U.S.C. § 114(d)(1)(A) (2000); Digital Millennium Copyright Act, Pub. L. No. 105-304, § 405 (codified in various sections of 17 U.S.C.).

²³⁶ *Harwood, supra* note 229, at 681. Webcasters are required to ensure that (1) a listener may only have limited input on the songs selected, such as choosing a particular genre or style of music. *Id.*; (2) The station cannot intentionally switch from one channel to another. 17 U.S.C. § 114(d)(2)(A)(ii); (3) No more than two songs from one album can be played in a three-hour period, and no more than two from the same album consecutively. 17 U.S.C. § 114(d)(2)(C)(i), (j)(13)(A); (4) Titles of the songs cannot be announced in advance. 17 U.S.C. § 114(d)(2)(C)(ii); (5) While the song is playing, the webcaster must include the title, artist, and CD pertaining to the song. 17 U.S.C. § 114(d)(2)(C)(ix).

The second way a song is used legally over the Internet is through digital download.²³⁷ United States Copyright law confers to owners of copyright material the exclusive right to “reproduce their copyrighted works in copies or phonorecords.”²³⁸ It also gives copyright owners the exclusive right to “distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending[.]”²³⁹ Therefore, in order to sell fixed sound recordings you must be the copyright owner—such as the recording artist or record studio—or you must have permission from the copyright owner.²⁴⁰ This is called a master recording license and it is not compulsory.²⁴¹ In order to ensure that copyright owners were compensated for the reproduction and distribution of their material, Congress created the compulsory mechanical license found in 17 U.S.C. § 115.²⁴² A person may obtain a compulsory license to make and distribute a work only if the primary purpose is to distribute it publicly for private use and the work has already been publicly distributed in the United States.²⁴³ In addition, one may not obtain a compulsory license for duplicating a sound recording unless “(i) such sound recording was fixed lawfully; and (ii) the making of the phonorecords was authorized by the owner of the copyright in the sound recording[.]”²⁴⁴

In 1995, Congress passed the DPRA, which amended § 115 to include ““digital phonorecord deliveries”” (DPDS).²⁴⁵ A DPDS is defined as

²³⁷ This type includes selling transmissions that include “the delivery of computer files that contain sounds playable on computers, portable players and wireless devices.” Cydney A. Tune, *Licensing Music on the Internet*, 22-SUM ENT. & SPORTS LAW. 1, 18 (2004). Digital distribution by download involves the “downloading of a complete audio content file from the Internet onto a computer hard drive . . .” *Id.* Once the music file is downloaded, it is stored on the computer’s hard drive and can be listened to at any time. *Id.*

²³⁸ 17 U.S.C. §106(1).

²³⁹ 17 U.S.C. §106(3).

²⁴⁰ See Dorothy Schrader, *Copyright Term Extension and Music Licensing: Review of Recent Developments*, in COPYRIGHT: CURRENT ISSUES AND LAWS 103 (John v. Martin ed., Nova Science Publishers, Inc.) (2002)

²⁴¹ *Rose*, *supra* note 216, at 341-42.

²⁴² *Schrader*, *supra* note 240, at 102.

²⁴³ 17 U.S.C. § 115(a)(1).

²⁴⁴ 17 U.S.C. § 115(a)(1).

²⁴⁵ *Schrader*, *supra* note 240, at 103.

each individual delivery of a phonorecord by digital transmission of a sound recording which results in a specifically identifiable reproduction by or for any transmission recipient of a phonorecord of that sound recording, regardless of whether the digital transmission is also a public performance of the sound recording²⁴⁶

As a result, copyright owners' exclusive right to reproduce their copyrighted works in copies or phonograms now applies to downloading music from the Internet.²⁴⁷

D. Russia compared to the United States

A comparison of the laws of Russia and the United States plainly illustrate the deficiencies Russia has in protecting works over the Internet. Where the United States has clearly established that the downloading of music and the broadcasting of music over the Internet are two entirely different things, Russian law has not. In addition, where the United States has defined a reproduction of a phonogram or a copy of a work to include a digital file, Russia has not. According to the Russian Copyright Act, a "copy of a work" is defined as an example of the work, regardless of the material in which it is made.²⁴⁸ A "copy of a phonogram" is defined as the duplicate of the phonogram, on any material medium.²⁴⁹ Finally, a "reproduction of a phonogram" is defined as the making of a copy of phonogram on any physical medium.²⁵⁰ All of these definitions only recognize phonogram duplication in a material form.

Because of these deficiencies, ROMS and Allofmp3.com are licensing and distributing music files without permission from the copyright owner. Under United States law, these distributions would clearly not be labeled as broadcasts or performances because users download a permanent copy of the work on their hard drive. Instead, they would be labeled as a reproduction and would require permission from the copyright owner.

²⁴⁶ 17 U.S.C. § 115(d).

²⁴⁷ See *Rose*, *supra* note 216, at 359.

²⁴⁸ Law of the Russian Federation No. 5351-1 of July 9, 1993 on Copyright and Neighbouring Rights, art. 4.26, translation available at LEXIS, garant 10001423, also available at <http://www.fips.ru/avpen/docs.htm> (last visited April 6, 2005).

²⁴⁹ Russian Copyright Act, art. 4.27.

²⁵⁰ Russian Copyright Act, art. 4.5.

E. Others' Reaction to Internet Piracy in Russia

Many organizations have expressed their concern over this illegal Internet distribution of music. The IIPA, in its 2005 Report on the Russian Federation, named the immediate takedown of websites such as Allofmp3.com as one of the seven critical steps that Russia must take in the next few months to begin effectively confronting piracy.²⁵¹ The IFPI has also complained about their activities.²⁵² They claim that foreign rights holders do not surrender the rights to their work in Russia because of Article 47 paragraph 2 of the Copyright Act.²⁵³ Article 47 paragraph 2 gives copyright owners who have not given collection agencies permission to use their works the right to demand that the agencies pay them royalties or exclude their work from user licenses.²⁵⁴ However, Russia's IFPI legal advisor has expressed doubt over the success of any legal action, as he stated in an interview that "[b]ecause of these loopholes we don't have much chance of succeeding if we attack these companies who are using music files on the Internet under current Russian laws."²⁵⁵

The Russian government has taken some small steps to address the Internet problems through legislation. As mentioned earlier, in July 2004, the Russian government passed some long awaited amendments to the Copyright Act.²⁵⁶ Some of these amendments were introduced in an effort to implement the WIPO Internet treaties.²⁵⁷ Specifically, Russian Copyright Act Article 16 Economic Rights, Article 37 the Rights of the Performer, Article 38 Rights of the

²⁵¹ *IIPA 2005 Special 301 Report on Russia*, *supra* note 122, at 14.

²⁵² *See Copyright Enforcement Comes to Russia*, ONLINE REP. (U.K.), Feb. 26, 2005, available at 2005 WLNR 3162648.

²⁵³ Ben Hammersley, *Online: Can't Stop the Music: Can't Stop the Music Continued from Back Page: Arcane Licensing Deals haven't Prevented the Growth of Many New Sites Offering a Wide Selection of Quality Music Downloads*, THE GUARDIAN, Mar. 18, 2004, available at 2004 WL 56439389.

²⁵⁴ Russian Copyright Act, art. 47 paragraph 2.

²⁵⁵ *Russian 5c MP3 Site "unlicensed"*, *supra* note 206.

²⁵⁶ *See* Federal Law No. 72-FZ of July 20, 2004 on Amending the Law of the Russian Federation on Copyright and Neighbouring Rights, translation available at LEXIS, garant 12036318, also available at <http://www.copyright.ru/english-1557.html> (last visited April 9, 2005) [hereinafter Russian Copyright Act with 2004 Amendments].

²⁵⁷ *IIPA 2005 Special 301 Report on Russia*, *supra* note 122, at 27.

Phonogram Producer, and Article 39 Use of a Published Phonogram for Commercial Purposes Without Consent from the Phonogram Producer and the Performer, were all amended.²⁵⁸ The amendments for Articles 16, 37, and 38 all grant the copyright owner the right to communicate the work in a way that enables any person to have access to it in an interactive regime, irrespective of place and time.²⁵⁹ This is referred to as the right of “making available to the public.”²⁶⁰ In addition, Article 39, which originally granted exceptions to the requirement of consent for the public performance or broadcast of phonograms, was amended to state that the exceptions do not apply to the right of making the phonogram available to the public.²⁶¹

The amendments pertaining to the exclusive “right of making available and right of communication to the public” are adopted from Article 8 of the WCT and Article 14 of the WPPT.²⁶² This means authors and producers of phonograms shall have the exclusive right to authorize their works to be placed on the Internet in such a way anyone can access the works at any place or time.²⁶³ The amendments strengthen authors and performers control over their works and recognize their rights in a digital world.²⁶⁴ In addition, they close the loophole in Article 39 allowing communication of phonograms to the public without consent, thereby giving rights holders an important enforcement tool against digital piracy.²⁶⁵ Unfortunately, these particular amendments were delayed and do not go into effect until September of 2006, which means it is likely that the same problems and legal obstacles will persist until they become effective.²⁶⁶

²⁵⁸ See Russian Copyright Act with 2004 Amendments.

²⁵⁹ Russian Copyright Act with 2004 Amendments.

²⁶⁰ Russian Copyright Act with 2004 Amendments.

²⁶¹ Russian Copyright Act with 2004 Amendments.

²⁶² See Russian Copyright Act with 2004 Amendments; *WCT*, *supra* note 60; *WPPT*, *supra* note 67.

²⁶³ *Summary of the WCT*, *supra* note 62.

²⁶⁴ See *IIPA 2005 Special 301 Report on Russia*, *supra* note 122, at 27.

²⁶⁵ See *Id.*

²⁶⁶ See *Id.*

F. *Hopeful Developments*

Although the Internet piracy problem remains the same, some hopeful developments on the part of Russia illustrate they are attempting to move in line with international standards of digital copyright protection. Until January 2004, the collection agency ROMS had transferred all the royalties they collected through their licenses to the Russian Authors Organization (RAO) per their agreement.²⁶⁷ RAO is a noncommercial public organization created by Russian authors in 1993 to protect copyrights for the entire Russian Federation.²⁶⁸ Its primary goals are to control the property rights of authors in the individual transfer of rights to the use of science, literature and skill, and to represent the legitimate interests of authors in the state and public organs, and abroad.²⁶⁹

In addition, ROMS was also a member of the International Confederation of Societies of Authors and Composers (CISAC). CISAC is a non-governmental, non-profit international organization founded in 1926 that works towards increased recognition and protection of creators' rights.²⁷⁰ As of 2004, CISAC possessed a membership of 207 authors' societies in 109 countries, and indirectly represented more than two million creators.²⁷¹ In 2003, its members collected more than 6.2 billion Euros in royalties.²⁷² Its activities are aimed at improving the position of authors and composers as well as enhancing the quality of collective administration²⁷³

²⁶⁷ ROMS Press Release, *available at* <http://www.museekster.com/files/press-release%20ROMS.doc> (last visited April 9, 2005).

²⁶⁸ RAO Introductory Information from website, *translation available at* http://babelfish.altavista.com/babelfish/trurl_pagecontent?lp=ru_en&trurl=http%3a%2f%2frael.ru%2forao%2f (last visited April 9, 2005).

²⁶⁹ *Id.*

²⁷⁰ Background information from CISAC website, *at* <http://www.cisac.org/web/Content.nsf/Builder?ReadForm&Page=Article&Lang=EN&Alias=A-US-CISAC> (last visited April 9, 2005).

²⁷¹ *Id.*

²⁷² *Id.*

²⁷³ "Collective administration is the exercise of author's right by organisations which represent creators and look after the enforcement of their rights." Information about Collective Administration from CISAC website, *at* <http://www.cisac.org/web/content.nsf/Builder?ReadForm&Page=Article&Lang=EN&Alias=MAN-AR-07> (last

of their rights around the world.²⁷⁴ Regarding musical works, RAO manages the rights of public performance and broadcasting by negotiating with users—such as television stations, cinemas, and bars—for payment and conditions for the use its copyrighted works.²⁷⁵

In 2004, both CISAC and RAO expelled ROMS from their membership.²⁷⁶ Because of their exclusion from RAO, ROMS is no longer licensed to issue their own licenses for use of copyright works on the Internet in Russia.²⁷⁷ RAO claims it ended its agreement with ROMS because of extremely ineffective activity.²⁷⁸ In the last two years, ROMS has only collected a total of \$3,000 in royalty amounts.²⁷⁹ In addition, RAO claims that per the 2004 amendments to the Copyright Act, namely the right of making available to the public, individual agreements with each author or an appropriate right holder must be obtained to allow use of works on the Internet.²⁸⁰ ROMS, claims RAO, has not obtained permission from western foreign authors and is therefore engaging in piracy “in the pure form.”²⁸¹ CISAC also expelled ROMS from its organizations in 2004 on the grounds that “it has been issuing licenses to copyright users without

visited April 9, 2005). Because of the difficulty of individual creators to monitor who is using their work and for users of works to contract with the proper right holder every time they want to use a work, collective administration societies were formed. *Id.* By managing the rights of creators, these organizations provide a valuable economic and cultural contribution to society. *Id.* They operate by granting licenses to use authors’ works for the payment of royalties. *Id.*

²⁷⁴ *Background Information from CISAC Website*, *supra* note 270.

²⁷⁵ Information about Musical Works from CISAC website, at <http://www.cisac.org/web/content.nsf/Builder?ReadForm&Page=Article&Lang=EN&Alias=man-ar-08-pop-01> (last visited April 9, 2005).

²⁷⁶ See Sergey Parthenon, *ROMS—“This is Piracy in Pure Form”*, WEBINFORM, Oct. 24, 2004, *translation available at*

http://babelfish.altavista.com/babelfish/trurl_pagecontent?lp=ru_en&trurl=http%3a%2f%2fwebinform.ru%2finterview%2f1857.html (last visited April 9, 2005); *ROMS No Longer a CISAC Member*, Statement from CISAC, *available at* <http://www.cisac.org/web/content.nsf/Builder?ReadForm&Page=Article&Lang=EN&Alias=Web-2005-03-ROMS> (last visited April 9, 2005).

²⁷⁷ See Sergey Parthenon, *ROMS—“This is Piracy in Pure Form”*, WEBINFORM, Oct. 24, 2004, *translation available at*

http://babelfish.altavista.com/babelfish/trurl_pagecontent?lp=ru_en&trurl=http%3a%2f%2fwebinform.ru%2finterview%2f1857.html (last visited April 9, 2005).

²⁷⁸ *See Id.*

²⁷⁹ *See Id.*

²⁸⁰ *See Id.*; See Federal Law No. 72-FZ of July 20, 2004 on Amending the Law of the Russian Federation on Copyright and Neighbouring Rights, *translation available at* LEXIS, garant 12036318, *also available at* <http://www.copyright.ru/english-1557.html> (last visited April 9, 2005).

²⁸¹ *Parthenon*, *supra* note 277.

the authority to do so from all relevant copyright owners.²⁸² It stated that this contravened internationally accepted collective administration principles and injured the artists represented by CISAC.²⁸³

In response, ROMS claimed that the figure of royalties that RAO claims they paid was clearly understated.²⁸⁴ ROMS also claims that the 2004 amendments to the Copyright Act did not change their legal basis for operating because under Title IV, which was not amended, they still have the right and obligation as a collection agency to issue user licenses on behalf of all rights holders and to gather royalties for their use.²⁸⁵ In view of the fact that ROMS is no longer a member of RAO or CISAC, they have no authority to award licenses on their behalf.²⁸⁶ Therefore, Allofmp3.com and any other website claiming to be licensed by ROMS no longer has the required legal authority.²⁸⁷

In light of Allofmp3.com's actions, the Moscow City police opened an investigation into the website.²⁸⁸ Allofmp3.com and its principles are alleged to be involved in large-scale copyright infringement by selling music without permission from Russian rights holders or international rights holders.²⁸⁹ On February 8, 2004, the Moscow City police submitted the results of its investigation to the Moscow City Prosecutors Office.²⁹⁰ On the same day, the IFPI, on behalf of its members, also submitted a formal complaint to the Moscow City Prosecutors

²⁸² *ROMS No Longer a CISAC Member*, Statement from CISAC, available at <http://www.cisac.org/web/content.nsf/Builder?ReadForm&Page=Article&Lang=EN&Alias=Web-2005-03-ROMS> (last visited April 9, 2005).

²⁸³ *Id.*

²⁸⁴ Sergey Parthenon, *ROMS: The Retaliatory Attack*, WEBINFORM, Nov. 11, 2004, translation available at http://babelfish.altavista.com/babelfish/trurl_pagecontent?lp=ru_en&trurl=http%3a%2f%2fwebinform.ru%2finterview%2f1912.html (last visited April 9, 2005).

²⁸⁵ *Id.*

²⁸⁶ See *ROMS No Longer a CISAC Member*, *supra* note 282.

²⁸⁷ See *Id.*

²⁸⁸ *Copyright Enforcement Comes to Russia*, *supra* note 252.

²⁸⁹ *Id.*

²⁹⁰ *Id.*

Office in support of further legal action.²⁹¹ In response to Moscow's decision to investigate Allofmp3.com, the IFPI announced

We have consistently said that Allofmp3.com is not licensed to distribute our members' repertoire in Russia or anywhere else. We are pleased that the police are bringing this important case to the attention of the prosecutor. We very much hope and expect that the prosecutor will proceed with this case, which involves the sale and digital distribution of copyrighted music without the consent or authorisation of the rights holders.²⁹²

Unfortunately, shortly after receiving the investigation results, the Moscow District Attorney refused to file charges against the website.²⁹³ Refusal was based on the proposition that Russian copyright law does not cover digital media.²⁹⁴ From the prosecutor's point of view, distribution of works via the Internet is impossible because current copyright law only dictates physical transfers of works.²⁹⁵ Furthermore, the downloading of these works does not result in the creation of a new copy of the work; it only creates conditions for use by the end consumer.²⁹⁶ This decision represents not only the deficiencies in Russian Copyright Law, but also the overall lack of understanding about the status of appropriate intellectual property protection for the Internet, and the misguided and outdated views of intellectual property in general.

V. SOLUTIONS TO RUSSIA'S PIRACY PROBLEM

It is evident that Russia is not taking adequate steps to enforce copyright protection. In order to protect copyrights, the United States and its copyright owners need to pursue a two-pronged approach. First, U.S. copyright owners need to pursue lawsuits against online copyright

²⁹¹ *Id.*

²⁹² *Id.*

²⁹³ *Russian DA Clears Allofmp3.com of Copyright Infringement Charges*, ONLINE REP. (U.S.) 7, Mar. 12, 2005, available at 2005 WLNR 4377353.

²⁹⁴ *Id.*

²⁹⁵ *The Prosecutor of the Moscow's South-Western District Rejected to Initiate a Criminal Case Against Distribution of Music Recordings by AllofMP3.com Internet Resource*, PRIME-TASS.RU, Mar. 4, 2004, translation available at

<http://www.museekster.com/allofmp3faq.htm#Will%20the%20RIAA%20or%20the%20IFPI%20have%20Allofmp3%20closed%20down%20in%20the%20near%20future?> (last visited April 9, 2005).

²⁹⁶ *Id.*

infringers to fix the Internet piracy problem in Russia before it gets worse. Second, the United States must take drastic steps to pressure the Russian government to solve the piracy problem itself by imposing trade sanctions.

A. *Lawsuit Against Websites*

Because of the Russian government's refusal to prosecute Allofmp3.com, copyright holders in the United States should file civil suits in Russia against this website and other Russian websites who are distributing their music without obtaining permission.²⁹⁷ Regardless of their success, it will alert the Russian courts to the problem and provide a model to the court for how copyrights for musical works should be applied in the digital world.²⁹⁸ In addition, it will make Russia aware of the fact that copyright owners are serious about enforcing their rights over the Internet.²⁹⁹ Copyright holders could also sue the websites in the United States.³⁰⁰ Copyright owners have had some recent success in U.S. courts against websites similar to Allofmp3.com.³⁰¹

On October 25, 2004, the RIAA agreed to a ten million dollar out-of-court settlement in a suit it brought last year in United States District Court for the District of Columbia against a Spanish online service called puretunes.com.³⁰² Puretunes.com, run by Spanish-based Sakfield Holding Co., was accused by the RIAA of violating copyrights and misleading the public by "claiming to be an authorized music distributor even though it hadn't obtained licenses from the

²⁹⁷ See generally David E. Miller, *Combating Copyright Infringement in Russia: A Comprehensive Approach for Western Plaintiffs*, 33 VAND. J. TRANSACT'L L. 1203 (2000).

²⁹⁸ See generally *Id.*

²⁹⁹ See generally *Id.*

³⁰⁰ See generally John Borland, *MP3 Site Settles for \$10 Million with RIAA*, CNET NEWS.COM, Oct. 25, 2004, available at http://news.com.com/2102-1027_3-5425885.html?tag=st.util.print (last visited April 9, 2005).

³⁰¹ See *Id.*

³⁰² *Puretunes.com Settles Record Companies' Copyright Infringement Lawsuit*, Press Release from RIAA, Oct. 25, 2004, available at <http://www.riaa.com/news/newsletter/102504.asp> (last visit April 10, 2005).

labels.”³⁰³ In its opinion, the District Court stated that personal jurisdiction was established because residents of the District of Columbia had accessed the website and downloaded music files from it.³⁰⁴ The opinion is also important because it applied personal jurisdiction to an online provider of unauthorized electronic copies of copyrighted music files.³⁰⁵ Depending on copyright owners’ ability to prove that Allofmp3.com sold music to U.S. residents, they might be able to receive a favorable ruling in light of this.

B. *Special 301 Sanctions*

As a result of Russia’s failure to control and reduce its piracy problem on its own, the United States should use section 301 sanctions to compel compliance. Section 301 grew out of the 1974 Trade Act and it is the principal statutory mechanism by which the United States “protects its exports of goods and services from unfair trade practices.”³⁰⁶ The law empowers the United States Trade Representative (USTR) to oversee international piracy and sanction or discipline those countries that fail to develop and enforce copyright laws in accordance with established agreements.³⁰⁷ Section 301 operates by requiring the USTR to make a yearly determination of countries that are denying adequate and effective protection of intellectual property rights and placing those countries on a watch list, priority watch list, or identifying a country as a Priority Foreign Country.³⁰⁸ The USTR uses the watch list and priority watch list to

³⁰³ Jon Healey, *Record Labels Sue Owner of Puretunes Website*, DETNEWS.COM, July 10, 2003, available at <http://www.detnews.com/2003/technology/0307/13/technology-213852.htm> (last visited April 10, 2005).

³⁰⁴ See generally *Arista Records, Inc. v. Sakfield Holding Company*, 314 F. Supp. 2d 27 (2004).

³⁰⁵ See generally *Id.*

³⁰⁶ Seth Robbins, *The U.S. Government’s Fight Against Napster and Online Music Piracy: The Inevitable Conflict*, 25 SUFFOLK TRANSNAT’L L. REV. 217, 226 (2001).

³⁰⁷ *Id.* at 227.

³⁰⁸ Kim Newby, *The Effectiveness of Special 301 In Creating Long Term Copyright Protection for U.S. Companies Overseas*, 21 SYRACUSE J. INT’L L. & COM. 29, 35-36 (1995).

alert countries that their practices are being monitored by the USTR.³⁰⁹ A Priority Foreign Country, the highest level of classification, is a country:

that has the most ‘onerous or egregious’ practices that deny protection or equitable market access; (2) whose practices have the ‘greatest adverse impact,’ either actual or potential, on the relevant U.S. products; or (3) that is not engaging in good faith negotiations to provide effective protection of intellectual property rights.³¹⁰

Once a country is identified as a Priority Foreign Country, the USTR must initiate an investigation against the country within thirty days.³¹¹ Once an investigation has been initiated, the USTR is required to request consultations with the country to discuss its practices and possible resolutions to the problem.³¹² Based on the negotiations and investigation, the USTR must make a determination about whether violations do exist, and whether substantial progress has been made by the offending country.³¹³ If there are substantial violations, then the USTR is generally required to take action within thirty days of the determination.³¹⁴ The three main tools that the USTR may use to force compliance or reform are “the suspension of trade benefits, the imposition of duties or other import restrictions, and the entering into of binding agreements committing the country either to stop the offending practices or provide the U.S. with compensatory trade benefits.”³¹⁵

Russia has been on the priority watch list since 1997.³¹⁶ In 2005, the IIPA recommended that Russia be upgraded from the priority watch list to a Priority Foreign Country.³¹⁷ It also recommended that Russia’s eligibility for the duty-free trade benefits under the Generalized

³⁰⁹ *Id.* at 36.

³¹⁰ *Id.* at 35.

³¹¹ *Id.* at 36.

³¹² *Id.* at 37.

³¹³ *Id.*

³¹⁴ *Newby, supra* note 308, at 37-38.

³¹⁵ *Id.* at 38.

³¹⁶ Connie Neigel, *Piracy in Russia and China: A Different U.S. Reaction*, 63—FALL LAW & CONTEMP. PROBS. 179, 188 (2000).

³¹⁷ *IIPA 2005 Special 301 Report on Russia, supra* note 122, at 13.

System of Preferences Program³¹⁸ (GSP) should be suspended.³¹⁹ Despite the fact that Russia has one of the highest piracy rates in the world, they still received 429.8 million dollars worth of trade benefits under the GSP program in 2003.³²⁰ Even though Russia has made amiable attempts over the years to pass adequate legislation, its attempt to enforce those laws against piracy have repeatedly failed.³²¹ As a result, Russia's piracy problem has become worse each year.³²² The popularity of illegal online distribution of music in Russia and the government's failure thus far to stop it is evidence that the piracy problem could become exponentially worse in the near future unless something is done.³²³ The United States should immediately suspend Russia's GSP benefits until the country recognizes the online piracy problem and until it enforces copyright protection to the extent that a noticeable reduction in piracy results.

Even though the United States has never threatened Russia with this type of trade sanctions, it has achieved some success in the past by doing so to other nations.³²⁴ The United States has pursued much more aggressive actions against China in the past to pressure them into protecting intellectual property.³²⁵ On three separate occasions, it has threatened trade sanctions.³²⁶ In 1992, the United States classified China as a Priority Foreign Country and threatened sanctions unless it provided more protection for U.S. intellectual property works.³²⁷ The threats resulted in a comprehensive agreement that required China to join the Berne

³¹⁸ The U.S. Generalized System of Preferences (GSP) is a government program designed to promote economic growth in the developing world. Information about Generalized System of Preferences from USTR website, available at http://www.ustr.gov/Trade_Development/Preference_Programs/GSP/Section_Index.html (last visited April 10, 2005). This program provides preferential duty-free entry for more than 4,650 products from 144 different countries. *Id.*

³¹⁹ *IIPA 2005 Special 301 Report on Russia*, *supra* note 122, at 25.

³²⁰ *Id.*

³²¹ *See generally IIPA 2005 Special 301 Report on Russia*, *supra* note 122.

³²² *See generally Id.*

³²³ *See generally Id.*

³²⁴ *Neigel*, *supra* note 316, at 189-90.

³²⁵ *Id.* at 196.

³²⁶ *Id.*

³²⁷ *Id.* at 193.

Convention and the Phonograms Convention.³²⁸ Again, in 1994, the United States became frustrated with China's lack of intellectual property enforcement and threatened them with trade sanctions worth 1.08 billion dollars in Chinese products.³²⁹ After China threatened sanctions of their own, the two countries finally came to an agreement in 1995 that provided for enhanced enforcement measures.³³⁰ For the third time, in 1996, the United States classified China as a Priority Foreign Country and threatened trade sanctions.³³¹ Again, the countries averted a trade war when China threatened its own sanctions because the United States withdrew its threats and the two countries reached yet another agreement almost identical to the 1995 agreement.³³² China has made significant progress in combating piracy since the signing of the 1996 agreement, but the United States has vowed to impose trade sanctions again if they reduce their efforts.³³³

Another country in which the United States has had some success with special 301 sanctions is Thailand.³³⁴ In 1991 and 1992, the United States listed Thailand as a Priority Foreign Country because of its persistent copyright violations and the losses to United States industry that was occurring.³³⁵ In response, the Thai government amended their laws to bring them to the international level and increased enforcement by conducting more government raids and seizing more copying equipment.³³⁶ In order to display its efforts to the United States, the Thai government even publicly burned the seized pirated music and videos.³³⁷ Under pressure from U.S. industry, the United States again named Thailand as a Priority Foreign Country in

³²⁸ *Id.*

³²⁹ *Id.* at 194.

³³⁰ *Neigel, supra* note 316, at 194.

³³¹ *Id.* at 195.

³³² *Id.* at 196.

³³³ *Id.*

³³⁴ *See Newby, supra* note 308, at 45.

³³⁵ *Id.*

³³⁶ *Id.*

³³⁷ *Id.*

1993.³³⁸ Thailand quickly entered into negotiations to avoid sanctions.³³⁹ As a result, Thailand passed amendments in 1994 that extended copyright protection to audio-visual works, books, and audio cassettes, as well as defined software as an artistic work and strengthened the penalties on infringers.³⁴⁰

There is no question that special 301 actions by the United States grab a country's attention.³⁴¹ The possible threat of sanctions at least compels countries to acknowledge and work with the United States.³⁴² In the past, countries like China and Thailand might not have reformed without pressure from special 301 sanctions.³⁴³ One theory for enforcing stringent intellectual property protection upon other nations is that it benefits both the U.S. and the infringing nation.³⁴⁴ A country that has strong protection for intellectual property will be able to stimulate research, development, and production.³⁴⁵ These things will in turn lead to a more highly skilled labor force and encourage other nations to invest and develop technology in that country.³⁴⁶ However, the mere fact that 301 sanctions are necessary questions the theory that strict intellectual property standards would benefit the infringing nation.³⁴⁷ Otherwise, more countries would be working unilaterally to protect against intellectual property violations.³⁴⁸ One explanation for the lack of protection is that freedom of access to goods is a value that many foreigners—including Russians—covet.³⁴⁹ As a result, little thought is given to whether

³³⁸ *Id.* at 46.

³³⁹ *Id.*

³⁴⁰ *Newby, supra* note 308, at 46.

³⁴¹ *Id.* at 47.

³⁴² *Id.*

³⁴³ *Id.*

³⁴⁴ *Robbins, supra* note 306, at 244.

³⁴⁵ *Id.*

³⁴⁶ *Id.*

³⁴⁷ *Clark, supra* note 214, at 173.

³⁴⁸ *Id.*

³⁴⁹ *Id.* at 174.

someone living in the United States is not financially benefiting from the use of the work.³⁵⁰ It is hard to tell whether imposing sanctions on Russia will produce a reduction in piracy, but the past failures of Russia to make changes by itself call for action. Therefore, in order for the sanctions or the threat of sanctions to be effective, the cost must outweigh the economic benefit to Russia to continue in its ways.³⁵¹

VI. CONCLUSION

Russia is one of the largest infringers of copyrighted music in the world. Its pirated works represent huge monetary losses to the United States every year. In addition to its large market for physical piracy, Russia is now developing a rapidly growing market for Internet music piracy. Because the Internet is borderless, this represents a direct threat to the United States. These websites, such as Allofmp3.com, are illegally selling large amounts of American music without permission from the appropriate rights holders. To this point, they have been able to operate because of a couple of reasons. First, outdated Russian laws fail to clearly define and apply copyright to the digital world. Second, the Russian government lacks the knowledge and motivation to enforce intellectual property rights in general, especially as they apply to the Internet. In order to remedy Russian Internet piracy and the country's piracy problem in general, a two-pronged approach must be taken. First, U.S. rights holders must sue the websites in U.S. courts and Russian courts. Second, the United States must issue sanctions on Russia until the country takes action to update its laws to conform to international standards and starts to enforce those laws to make a noticeable reduction in its piracy rates.

³⁵⁰ *Id.*

³⁵¹ *See Robbins, supra* note 306, at 244.