Thieves In Cyberspace: Examining Music Piracy And Copyright Law Deficiencies In Russia As It Enters The Digital Age

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

Michael Mertens*

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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'.

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 worldwide, $40-billion-a-year industry that reaches people in numerous countries across legal, lingual and cultural barriers. Armed with the newly developed MP3, a nineteen-year-old college student named Shawn Fanning dramatically changed this form of communication in 1998 from his dorm room. 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. Reasoning that those who offered songs were responsible for potential copyright infringements, Fanning did not give much thought to the legal implications of his invention. With uncanny intuition, a friend and early Napster program tester sent Fanning a private e-mail containing one sentence, "'Do you realize that..."
this is going to change everything?" Fanning replied, "'Yeah, I know.'" The music industry was about to experience a radical shift in the way music would be bought and sold.

By the fall of 1999, Napster had millions of adoring fans in colleges around the country, as well as some formidable enemies like the Recording Industry Association of America (RIAA). 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." After a the District court issued a modified preliminary injunction, 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. Napster went bankrupt and sold to the highest bidder in September 2002.

Since the Napster case, the battle between the giant record companies and consumers has raged in full force. The recording industry, through the guise of the RIAA, has taken the litigation path and, at the same time, has attempted to revise its business model to cater to its customers' desire for downloading music online. Consumers have been fighting back with more peer-to-peer services and arguing "legal theories such as free speech, due process, privacy protection, fair use, and anti-trust[.]"
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. On February 12, 2002, Hilary Rosen testified at a Senate Foreign Relations Committee that “[p]iracy 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.”

Music pirating comes in two forms—physical piracy and Internet piracy. According to the International Federation of the Phonographic Institute’s 2004 Recording Industry Commercial Piracy Report, an estimated 35% of the music CDs sold worldwide in 2003 were pirated. This amounts to an estimated $4.5 billion, or 15% of the legitimate music market. This figure does not account for the loss of dollars from Internet piracy. Hilary Rosen further stated to the Senate Foreign Relations Committee that “Internet piracy poses a global and borderless threat to the future success of American creators.” According to Rosen, these unauthorized digital

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17 Id.
18 Id. at 59-60. Piracy is defined as “[t]he unauthorized and illegal reproduction or distribution of materials protected by copyright . . . .” BLACK’S LAW DICTIONARY (8th ed. 2004). Physical piracy involves any unauthorized copying of works in an actual physical form, such as DVD’s and CD’s. 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. See generally Hearings, supra note 16, at 56-61.
22 Hearings, supra note 16, at 60.
broadcasts and Internet transmissions are just as illegal as their physical counterparts.  

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

Despite constant pressure by the U.S. and the international community, these websites prove that Russia has consistently failed to curb its piracy problem. Even pressure from the World Trade Organization to conform to its required admission standards 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. In order to fight Internet

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23 See generally Hearings, supra note 16.
25 Id.
26 According to the Russian Economic Development and Trade Ministry, by the end of 2004, 18.5 million Russians, or one-twelfth of the Russian population, were Internet users. One-Twelfth of Russians are Internet Users, RUSSIAN BUS. MONITOR, Feb. 18, 2005, available at 2005 WLNR 2306656. 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% from the previous year. Id.
27 "The World Trade Organization (WTO) is the only global international organization dealing with the rules of trade between nations ... WTO agreements [are] negotiated by ... the world’s trading nations. The goal is to help producers of goods and services, exporters, and importers conduct their business.” http://www.wto.org/english/thewto_e/whatis_e/whatis_e.htm (last visited October 16, 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.
28 “More traditional types of piracy” refers to piracy in the physical form for physical distribution. This includes such things as CDs, DVDs, audiocassettes, and VHS See generally Hearings, supra note 16.
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 copyright infringers, regardless of their chances for success. Second, the U.S. must take drastic 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, focus on the legality of its new online music market, and examine the remedies available to these problems for the U.S. This comment proceeds in four parts. Part II will give a brief 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 in order to 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. Ten countries initially attended the convention “with the objective of protecting copyrights between their respective boundaries.” 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

30 Id.
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”).

(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.31

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.32

One of the major principles 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 meant that the protection was automatic once an artistic work was created.33 However, authors seeking protection could still be required to follow formalities specified by their country.34 In addition, the Berne Convention gave authors protected by the Convention “the exclusive

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33 Nehila, supra note 29, at 200.
34 Id.
right of authorizing the reproduction of these works, in any manner or form."

In 1961, the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (hereinafter "Rome Convention") was signed in Rome. This convention was important because it allowed producers of phonograms to enjoy the right to "authorize or prohibit the direct or indirect reproduction of their phonograms." Article 3(e) of the Rome Convention defines reproduction as "the making of a copy or copies of a fixation." In addition, the Report of the Rapporteur-General sets forth a more comprehensive 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."

The rights of phonogram producers were further protected against unauthorized duplication in the 1971 Geneva Convention for the Protection of Producers of Phonograms Against Unauthorized

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36 FICSOR, supra note 32, at 4.


38 Rome Convention, supra note 37, at art. 3(e).

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

40 FICSOR, supra note 32, at 95.
Duplication of Their Phonograms (hereinafter "Phonograms Convention"). 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.

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

B. World Intellectual Property Organization (WIPO)

The World Intellectual Property Organization (WIPO) is a specialized agency within the United Nations. The Convention establishing the WIPO was signed at Stockholm on July 14, 1967. Its purposes are to protect intellectual property throughout the world by

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41 Id. at 4.
43 Id. at art. 1(c).
44 FICSOR, supra note 32, at 96.
45 Nehila, supra note 29, at 201.
encouraging the collaboration of international organizations and states and to ensure administrative cooperation among the Unions. Brisk progress 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. The WIPO produced two treaties at that conference—the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty. These treaties are commonly referred to as the WIPO Internet treaties. In addition to implementing these treaties, the WIPO also administers the Berne, Rome, and Phonograms Convention Treaties.

The WIPO Copyright Treaty (WCT) strengthens copyright protection from the Berne Convention, but it does not pre-empt it. 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 the original and copies of their works through sale or other transfer of ownership." 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.

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47 Id.
48 Id.
49 Id.
50 Jennifer Newton, Global Solutions to Prevent Copyright Infringement of Music over the Internet: The Need to Supplement the WIPO Internet Treaties with Self-Imposed Mandates, 12 IND. INT’L & COMP. L. REV. 125, 142 (2001).
53 Id. at art. 8.
The last part of the Article covers on-demand, interactive communication via the Internet. 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. 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."

The WIPO Performances and Phonograms Treaty (WPPT) parallels the rights of the WCT concerning the rights of reproduction. As in the WCT, the right of reproduction "fully [applies] in the digital environment." 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." Article 11 grants the same reproduction right, but it omits the words "performances fixed in," clarifying the term even further to mean "any phonogram."

One hundred and fifty countries accepted the two Treaties, but before the WCT and the WPPT could enter into force, at least thirty parties had to ratify them. On March 6, 2002, the thirty party

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56 Newton, supra note 50, at 144.
57 Id.
58 Nehila, supra note 29, at 202.
60 Id. at art. 7.
61 Id. at art. 11.
62 Nehila, supra note 29, 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 12 (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 1289-90 (8th ed. 2004). To "enter
requirement was met, and the WCT entered into force. Then, on May 20, 2002, the thirty party requirement was met for the WPPT, and it entered into force. As of March 7, 2005, there are 51 contracting countries for the WCT and 49 contracting countries for the WPPT. 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."

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." The WTO's main function is "to enforce the rules of the international trading system." 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 act as a forum for the settlement of trade disputes between member-states." Membership in the WTO comes with the advantages of "more stable trade relations, greater access
to foreign markets for its products, and greater opportunity to attract foreign investment.\footnote{70}

The WTO eventually grew out of the General Agreement on Trade and Tariffs (GATT), drafted in 1947.\footnote{71} Designed to protect trade in goods, the GATT was developed “through a series of negotiation rounds, and eventually became the ‘constitution for international trade law.’”\footnote{72} The WTO was established on January 1, 1995 as a result of the most recent negotiation round—the Uruguay Round.\footnote{73} The WTO does not supersede GATT but instead supplements and enhances it by granting protection to trade in services and intellectual property.\footnote{74} Membership in the WTO takes an all or nothing approach because it requires its members to accept all the results of the Uruguay Round.\footnote{75} Any party that becomes a member must also comply with the WTO’s Multilateral Trade Agreements.\footnote{76} One of the most important agreements is the Trade Related Aspects of Intellectual Property (TRIPs).\footnote{77}

TRIPs is a Multilateral Trade Agreement that “brought intellectual property into the GATT-WTO system for the first time.”\footnote{78} The objective of TRIPs is for “[t]he protection and enforcement of intellectual property rights” to 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.”\footnote{79} TRIPs members are required to comply with the Berne and Rome Conventions and therefore protect copyright material in much the same way.\footnote{80} For

\footnotesize{\begin{itemize}
  \item \textit{Id.} at 999.
  \item \textit{Id.} at 520-21.
  \item \textit{Id.} at 520.
  \item \textit{Id.} at 520-21.
  \item \textit{Id.} at 521.
  \item \textit{Id.}
  \item Kovatch, supra note 67, at 1004.
  \item Broadbent \& McMillian, supra note 71, at 528.
  \item \textit{Id.} at art. 2.
\end{itemize}}
example, Article 14(2) of TRIPs allows producers of phonograms to “authorize or prohibit the direct or indirect reproduction of their phonograms.”

Enforcement mechanisms are the biggest advantage that membership in the WTO and TRIPs provide. Members have general obligations to ensure that fair and equitable enforcement procedures are available under their law to permit actions against intellectual property infringement. TRIPs outlines certain remedies that Members must provide, including injunctions, damages, and destruction or removal of certain goods. 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.”

TRIPs also requires transparency between Members. Members must publish laws, regulations, judicial decisions, and administrative rulings pertaining to intellectual property to allow other governments to “become acquainted with them.” Members are also obliged to furnish this information to the Council for TRIPs for review and to other Member States upon written request. 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 revision. 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.

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81 Id. at art. 14(2).
82 Kovatch, supra note 67, at 1006.
83 TRIPS, supra note 79, at art. 41.
84 Broadbent & McMillian, supra note 71, at 530; TRIPS, supra note 79, at art. 44-46.
85 TRIPS, supra note 79, at art. 61.
86 Id. at art. 63.
87 Id.
88 Id.
89 Id. at art. 64; Legal Texts: The WTO Agreements, A Summary of the Final Act of the Uruguay Round, Agreement on Trade-Related Aspects of Intellectual Property Rights, available at http://www.wto.int/english/docs_e/legal_e/ursum_e.htm#nAgreement (last visited April 6, 2005).
90 Broadbent & McMillian, supra note 71, at 531.
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 are often comprised of artists and private organizations from the U.S. and other countries around the world, and they 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. The goal of the IIPA is to help promote a legal system that "deters piracy, . . . fosters technological and cultural development, and encourages local investment and employment."92

The IIPA works closely with the U.S. Trade Representative (USTR), 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. In addition, the IIPA is involved with the implementation of the WTO TRIPs agreement, it participates in discussions with the WIPO, it works for the ratification and

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92 Id.
93 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/TradeSectors/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 an 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.
94 Description of the IIPA, supra note 91.
implementation of the WCT and the WPPT in various countries, and it works closely with the RIAA.\textsuperscript{95}

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.\textsuperscript{96} It has over 1,450 members worldwide in seventy-five countries.\textsuperscript{97} 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.\textsuperscript{98}

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.\textsuperscript{99} Under Communism, the government forced an inventor to relinquish all rights to his or her creation and in return compensated the inventor with a voucher for limited rewards provided by the state.\textsuperscript{100} In response to rewarding

\textsuperscript{95} Id.
\textsuperscript{96} Summary of IFPI from website, available at http://www.ifpi.org/site-content/about/mission.html (last visited October 17, 2005).
\textsuperscript{97} Id.
\textsuperscript{98} Id.
\textsuperscript{100} Id.
creativity in this way, Russian intellectual property law developed much differently than American law did.\textsuperscript{101}

There are many potential benefits for Russia from membership in the WTO.\textsuperscript{102} These benefits include greater access to world markets for Russian products, attraction of greater foreign investment, and more job opportunities for Russian citizens.\textsuperscript{103} In turn, these benefits would establish a more liberal trade environment and help reformers solidify Russia’s economic transition.\textsuperscript{104} Unfortunately, Russia cannot accede to the WTO until it complies with certain standards, namely TRIPs standards for protection of copyrights and other intellectual property rights.\textsuperscript{105} 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 by joining the Paris Convention for the Protection of Industrial Property in 1965 and the Universal Copyright Convention in 1973.\textsuperscript{106} In 1993, Russia enacted the Law on Copyright and Neighboring Rights (Copyright Act),\textsuperscript{107} and in 1995, it joined the Berne Convention and

\textsuperscript{101} Id.
\textsuperscript{102} Kovatch, supra note 67, at 1006.
\textsuperscript{103} Id. at 1006-11.
\textsuperscript{104} Id. at 1008.
\textsuperscript{106} Collisson, supra note 99, at 1015.
\textsuperscript{107} Law of the Russian Federation No. 5351-1 of July 9, 1993 on Copyright and Neighbouring Rights, translation available at http://www.fips.ru/avpen/docs.htm (last visited October 17, 2005) [hereinafter Russian Copyright Act]. 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 significant, because the government will no
Geneva Convention. 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, as did the implementation of the Berne Convention, which is required by Article 18. 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. It was not until 2004 that Russia adopted amendments to the Copyright Act, finally giving protection to pre-existing works created prior to 1973 and sound recordings created prior to 1995.

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." 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. The copyright holder would have the ability to decide whether his or her work would go onto the Internet. 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. These legislative deficiencies have led to a large problem with copyright infringement in Russia.

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

To combat these illegal CD plants, the Russian government introduced licensing regulations in June of 2002. The regulations make licensing mandatory and allow for the unannounced inspections of plants. 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 material. As a result, the government is unable to

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114 *Id.*
115 *Newton, supra note 50, at 144.*
116 *IIPA, 2005 Special 301 Report on Russia, supra note 112, at 28-29.*
117 See *id.*
119 *Id.*
120 *IIPA, 2005 Special 301 Report on Russia, supra note 112, at 16.*
122 *IIPA, 2005 Special 301 Report on Russia, supra note 112, at 16.*
123 *Id.; The Recording Industry Piracy Report 2004, supra note 19, at 10.*
124 *IIPA, 2005 Special 301 Report on Russia, supra note 112, at 16.*
125 *Id.*
126 *Id.*
close down illegal plants without going through the courts, and many plants remain in operation despite their illegal actions.\textsuperscript{127}

Piracy in Russia is addressed criminally by two bodies of law—"the Criminal Procedure Code ("CPC") and the Criminal Code."\textsuperscript{128} Specifically, Article 146 of the Criminal Code was the first law in Russian history to criminalize intellectual property violations.\textsuperscript{129} Until 2003, the Criminal Code provided criminal prosecution for infringements that caused "grave harm/significant damage."\textsuperscript{130} It provided for fines of either 200 to 400 times the minimum wage ($600 to $1,200) or two to four months of the defendant's income; correctional labor from 180 to 240 hours; or up to two years in prison.\textsuperscript{131} The language of "grave harm/significant damage" created much confusion until 2003, when the government changed the definition to a fixed threshold amount.\textsuperscript{132} 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.\textsuperscript{133} 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.\textsuperscript{134}

Other deficiencies in the Criminal Code contribute to its inadequate deterrence of commercial piracy. First, the fine amounts are so low that they do little to deter infringement.\textsuperscript{135} Second, Article 146 does not currently provide the police with explicit power to confiscate and destroy the "machinery" used in making illegal copies.\textsuperscript{136} Article

\textsuperscript{127} Id. at 16-17.
\textsuperscript{128} Collisson, supra note 99, at 1017.
\textsuperscript{129} Id.
\textsuperscript{131} Id.
\textsuperscript{132} IIPA, 2005 Special 301 Report on Russia, supra note 112, at 27.
\textsuperscript{133} Id.
\textsuperscript{134} See id.
\textsuperscript{135} IIPA, 2005 Special 301 Report on Russia, supra note 112, at 28.
\textsuperscript{136} Id.
146 only allows pirated and counterfeit goods to be confiscated and destroyed.\textsuperscript{137} This is inconsistent with a 2004 amendment to article 49 of the Copyright Act.\textsuperscript{138} The amendment does grant police power over the equipment and machinery, but Russian local counsel has unreasonably stated that it will not use this new provision in criminal cases simply because the criminal code does not specifically provide for its use.\textsuperscript{159} Finally, the 1996 amendments to the Criminal Procedure Code took the power to investigate away from the police and gave it to the prosecutors, thereby requiring the police to obtain consent to investigate.\textsuperscript{140} Since prosecutors have larger workloads and fewer resources, less piracy cases are being pursued.\textsuperscript{141} The amendments also recategorized the term “public crime,” removing every crime from the definition except those conducted by an organized group.\textsuperscript{142} This means that in some cases, a right holder must file a formal complaint before the government takes any action.\textsuperscript{143}

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.\textsuperscript{144} In addition, the civil system is sluggish and inefficient, and many inexperienced judges have trouble imposing the laws.\textsuperscript{145} The threat of strong criminal penalties, especially criminal sentences, will be the only effective deterrent against piracy.\textsuperscript{146}

\section*{B. Enforcement Deficiencies in Russia}

Although Russia has made considerable progress in developing a legal framework to match world standards, these changes will do little

\begin{thebibliography}{99}
\item Id.
\item See IIPA, 2005 Special 301 Report on Russia, supra note 112, at 28.
\item IIPA, 2005 Special 301 Report on Russia, supra note 112, at 28.
\item IIPA, 2003 Special 301 Report on Russia, supra note 130, at 266.
\item Collisson, supra note 99, at 1026.
\item IIPA, 2003 Special 301 Report on Russia, supra note 130, at 266.
\item IIPA, 2004 Special 301 Report on Russia, supra note 108, at 195.
\item Collisson, supra note 99, at 1025.
\item Id. at 1026.
\item Id., at 1026.
\item IIPA, 2004 Special 301 Report on Russia, supra note 108, at 198.
\end{thebibliography}
good without adequate enforcement. 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." The failure of the licensing regulations provides one example of the enforcement difficulties. 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. That year, a total of twenty-eight plants were inspected, none of them by surprise.

The government took criminal action against eight illegal plants in 2004, but most had little or no effect. The first conviction 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. The technician was given a one-year suspended sentence, and the plant is still in operation today. 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. International organizations, such as the IFPI, have also put forth efforts to reduce piracy in Russia by assisting in cases and raids. In the last two years, the IFPI has assisted in twenty-four cases against the illegal CD plants, and in twenty-one of the cases, there has been no resolution. In the other three cases, the CDs were destroyed; however, no sentences were imposed, and almost all the plants are still in operation. With IFPI’s assistance, 1,530 police raids were carried out in 2004, which resulted in the seizure of 2,086,000

147 IIPA, 2005 Special 301 Report on Russia, supra note 112, at 13.
149 See IIPA, 2005 Special 301 Report on Russia, supra note 112, at 16-17.
150 See id.
151 Id.
152 Id. at 17.
153 Id. at 17-18.
154 Id. at 17.
155 IIPA, 2005 Special 301 Report on Russia, supra note 112, at 18.
156 Id. at 19.
157 Id. at 18.
158 Id.
As with the other raids, only a few of the cases made it to the courts, and even then it was mainly in administrative proceedings. The operators received no deterrent criminal penalties or imprisonment.

These cases are evidence that the problem of enforcement dwarfs Russia's legislative problems 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." A number of Russian officials have recently suggested that the high prices for legitimate goods are to blame for the piracy problem. The IIPA says that this view evinces that Russia does not understand the real problem. High prices have little or no bearing on the problem because most of the goods are being sent to foreign markets. Instead, the opportunity for easy profits with little threat of penalty is the primary cause of the piracy explosion in Russia.

Considering its severe problem with this traditional type of piracy, Russia's battle with the new Internet market will be even harder to win. The continuing weakness in its legal system means that companies and rights holders will have to take their own measures to combat piracy.

IV. RUSSIAN ONLINE MUSIC SALES

Online music sales open a world of opportunity for artists and record labels. This is certainly true in the U.S., where Internet sites...
offering legal music sales are becoming increasingly popular. From 2001 until 2003, the amount of music purchased by “digital download” from the Internet increased from 0.2 million to 1.3 million. Popular paid music websites such as MusicMatch, iTunes, Napster, and Wal-Mart have recently attracted up to eleven million users. 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.

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. This site, as well as others like MP3search.ru and 3MP3.ru, are catching the attention of many Americans looking for cheap downloads. Allofmp3.com offers a wide selection of music, including many artists, such as the Beatles, who have not yet authorized their work for digital distribution. The biggest attraction for consumers to the website is the price. Songs are sold on a per megabyte basis, which

170 US Music Swappers Change Their Tune, supra note 168.
173 Vara, supra note 171.
175 See Vara, supra note 171.
equates to roughly ten cents or less per song. This is considerably cheaper than the 99-cent per-song rate that iTunes and other American websites charge. 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. Vadim Medvedev, an Allofmp3.com representative, claims that the site targets Russian-speaking users, inside and outside of Russia. He claims the English version was developed only to make it easier to access on computers outside of Russia.

A. Russian Websites’ Legal Authority

Allofmp3.com’s success and popularity has sparked considerable controversy over whether it is legal. The websites’ legal disclaimer says, “[u]sers are responsible for any usage and distribution of all materials received from AILOFMP3.com. This responsibility depends on the local legislation of each user’s country of residence. AIOFMP3.com’s Administration does not keep up with the laws of different countries and is not responsible [for] the actions of non-Russian users.” 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). Under the terms of the ROMS license, Allofmp3.com claims it pays for all the materials used according to the Russian Copyright Act.

ROMS is a national organization that claims it is “the national Russian organization providing professional collective management of

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177 Vara, supra note 171.
178 Id.
179 Id.
180 Id.
181 See Borland, supra note 174.
183 Id.
184 Id.
authors' property rights and protection of interests of rights-holders in cases of use of their works in digital interactive networks, including the Internet. ROMS operates by signing licensing agreements with users and businesses who want to take advantage of copyrighted material. 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. ROMS's authority to operate in this fashion comes from Title IV of the Russian Copyright Act.

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. 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. Article 45 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. 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

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186 See generally id.
187 See generally id.
189 See Russian Copyright Act, supra note 107, at art. 44.
190 Id. at art. 46.
191 Id. at art. 45.
rights, including those who have not mandated the organization under paragraph 2 of this Article.\textsuperscript{192}

This provision means a license can grant use of any copyrighted work, regardless of whether the original copyright holder has given permission.\textsuperscript{193} In a press release, ROMS cites this as part of their legal authority to grant licenses.\textsuperscript{194}

Another loophole that allows for the use of copyrighted material on these websites without the copyright holders’ permission is Article 39.\textsuperscript{195} 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[.]”\textsuperscript{196} Phonogram is defined in the Copyright Act as “any exclusive sound recording of performances or of other sounds[.]”\textsuperscript{197} 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[.]”\textsuperscript{198} The Internet could fall into the definition of wire, optic fiber, or comparable means.\textsuperscript{199} 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.\textsuperscript{200}

Entities such as ROMS, Allofmp3.com, and other Russian Internet music sites are taking advantage of these poorly worded Articles to license and sell Western music without obtaining permission from the

\textsuperscript{192} Id.
\textsuperscript{193} See id.
\textsuperscript{194} Russian Organization for Multimedia and Digital Systems, supra note 188.
\textsuperscript{195} Russian 5c MP3 Site “Unlicensed”, THE REGISTER, May 5, 2004, http://www.theregister.co.uk/2004/05/05/russian_mp3_site/print.html (last visited April 9, 2005).
\textsuperscript{196} Russian Copyright Act, supra note 107, at art. 39.
\textsuperscript{197} Id. at art. 4.25.
\textsuperscript{198} Id. at art. 4.24.
\textsuperscript{199} Russian 5c MP3 Site “Unlicensed,” supra note 195.
\textsuperscript{200} Russian Copyright Act, supra note 107, art. 39.
These Articles are disharmonious with international protection of phonograms on the Internet. Comparatively, the United States “has some of the most comprehensive copyright protection legislation in the world.” While Internet piracy is still rampant in the U.S., music transmission is allowed legally on the Internet in two basic forms—webcasting and MP3. A short explanation of these two forms is helpful 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.” Congress sought to protect these transmissions on the Internet through the Digital Performance Right in Sound Recordings Act of 1995 (DPRA). “The DPRA was the first modern attempt at regulating the digital transmission of music.” It “gave owners of sound recordings the exclusive right of public performance” through certain digital audio transmissions. “The DPRA distinguished between interactive and non-interactive services.” “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...”

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201 See generally IIPA, 2005 Special 301 Report on Russia, supra note 112, at 27.
202 See id.
203 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).
206 Delchin, supra note 204, at 352.
207 Id. at 354.
209 Delchin, supra note 204, at 352.
Under the DPRA, these interactive services—also called pay-per-listen or audio on-demand—must be licensed.\textsuperscript{211} Non-interactive transmissions are services in which "the user cannot request particular songs at particular times."\textsuperscript{212} There are two types of non-interactive services: subscription and non-subscription.\textsuperscript{213} The subscription service types are those "controlled and limited to particular recipients, and for which consideration is required to be paid."\textsuperscript{214} These services require licensing from the copyright owners before the music can be transmitted.\textsuperscript{215} If the subscription service is voluntary, then the copyright owners can refuse licenses at will; however, for compulsory subscription services, record companies are required to grant compulsory licenses by using rates set by the Copyright Office\textsuperscript{216} or by those individually negotiated.\textsuperscript{217} These compulsory


\textsuperscript{211} Delchin, supra note 204, 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. Robin Jeweler, Copyright Issues in Online Music Delivery, in COPYRIGHT: CURRENT ISSUES AND LAWS 100 (John V. Martin ed., Nova Science Publishers, Inc.) (2002) [hereinafter Jeweler]. 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.

\textsuperscript{212} Delchin, supra note 204, at 353.

\textsuperscript{213} Id.

\textsuperscript{214} Id.; DPRA, supra note 210.

\textsuperscript{215} Delchin, supra note 204, at 353.

\textsuperscript{216} In 1897, the Library of Congress undertook the United States Copyright Office as a separate department. Background Information from U.S. Copyright Office website, at http://www.copyright.gov/circs/circ1a.html (last visited October 16, 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.
licenses allow a webcaster to “play unlimited recordings without receiving a license for each one.”

The second type of non-interactive service is a non-subscription service. This type includes the “internet radio station[s]” that entail no user interaction, as well as traditional broadcast radio stations that simulcast their programs over the internet. These webcasts were not seen to present 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 hears or might hear next; therefore, the disincentive to purchase the record was not present. As a result, these non-interactive, non-subscription services were exempted from the licensing requirements under DPRA.

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

217 Delchin, supra note 204, at 353.
219 Delchin, supra note 204, at 353.
220 Id.
221 See Harwood, supra note 218, at 680.
222 Delchin, supra note 204, at 353.
224 Harwood, supra note 218, at 680.
225 Id. at 681; 17 U.S.C. § 114(d)(1)(A) (2000); Digital Millennium Copyright Act, Pub. L. No. 105-304, § 405, 112 Stat. 2860 (1998) (codified in various sections of 17 U.S.C.). 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).
C.  **Digital Download**

The second way a song is transmitted legally over the Internet is through digital download.\(^{226}\) United States Copyright law confers to owners of copyright material the exclusive right to "reproduce their copyrighted works in copies or phonorecords."\(^{227}\) 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[.]"\(^{228}\) 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.\(^{229}\) This is called a master recording license and it is not compulsory.\(^{230}\) 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.\(^{231}\) 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.\(^{232}\) 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[,]\(^{233}\)

In 1995, Congress passed the DPRA, which amended § 115 to include "digital phonorecord deliveries" (DPDS).\(^{234}\) A DPDS is

\[^{226}\] 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.*

\(^{227}\) 17 U.S.C. §106(1).

\(^{228}\) 17 U.S.C. §106(3).

\(^{229}\) *See* Jeweler, *supra* note 211, at 103.

\(^{230}\) Rose, *supra* note 205, at 341-42.

\(^{231}\) Jeweler, *supra* note 211, at 102.


\(^{233}\) *Id.*

defined as “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 recording . . .”

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

**D. Russia Compared to the United States**

A comparison of Russian and U.S. law plainly illustrates Russia’s deficiencies in protecting works over the Internet. The United States has clearly established that downloading music and broadcasting music over the Internet are two entirely different things; however, Russian law has no such distinction. 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. A “copy of a phonogram” is defined as the duplicate of the phonogram, on any material medium. Finally, a “reproduction of a phonogram” is defined as the making of a copy of phonogram on any physical medium. 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 do not qualify as broadcasts or performances because users download a permanent copy of the work to their hard drive. Instead, they would be labeled as a reproduction and would require permission from the copyright owner.

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236 See Rose, supra note 205, at 359.
237 Russian Copyright Act, supra note 107, at art. 4.26.
238 Id. at art. 4.27.
239 Id. at art. 4.5.
E. Other Reactions to Internet Piracy in Russia

Many organizations have expressed their concern over illegal Internet distribution of music in Russia. 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. The IFPI has also complained about Russia's lack of copyright law enforcement. 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. Article 47, paragraph 2 gives those copyright owners who have not allowed collection agencies to use their works the right to demand that the agencies pay them royalties or exclude their work from user licenses. However, Russia's IFPI legal advisor has expressed doubt over the success of any legal action, and 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."

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. Some of these amendments were introduced in an effort to implement the WIPO Internet treaties. Specifically, Russian Copyright Act Article 16 (Economic Rights), Article 37 (Rights of the Performer), Article 38 (Rights of the Phonogram Producer), and Article 38.5c MP3 Site "Unlicensed", supra note 195.

240 IIPA, 2005 Special 301 Report on Russia, supra note 112, at 14.
243 Russian Copyright Act, supra note 107, at art. 47, para. 2.
244 Russian 5c MP3 Site "Unlicensed", supra note 195.
246 IIPA, 2005 Special 301 Report on Russia, supra note 112, at 27.
39 (Use of a Published Phonogram for Commercial Purposes Without Consent from the Phonogram Producer and the Performer), were all amended.\textsuperscript{247} 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.\textsuperscript{248} This is referred to as the right of "making available to the public."\textsuperscript{249} 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.\textsuperscript{250}

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.\textsuperscript{251} 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.\textsuperscript{252} The amendments strengthen authors' and performers' control over their works and recognize their rights in a digital world.\textsuperscript{253} In addition, they closed 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.\textsuperscript{254} 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.\textsuperscript{255}

\section{F. Hopeful Developments}

Although the Internet piracy problem remains the same, some hopeful developments on the part of Russia illustrate an attempt to move in line with international standards of digital copyright protection. Until

\begin{itemize}
\item \textsuperscript{247} See Russian Copyright Act with 2004 Amendments, supra note 245.
\item \textsuperscript{248} Id.
\item \textsuperscript{249} Id.
\item \textsuperscript{250} Id.
\item \textsuperscript{251} See id.; WCT, supra note 52; WPPT, supra note 59.
\item \textsuperscript{252} See Summary of the WCT, supra note 55.
\item \textsuperscript{253} See IIPA, 2005 Special 301 Report on Russia, supra note 112, at 27.
\item \textsuperscript{254} See id.
\item \textsuperscript{255} See id.
\end{itemize}
January 2004, ROMS, the collection agency, transferred all the royalties they collected through their licenses to the Russian Authors Organization (RAO) per their agreement.\(^\text{256}\) RAO is a noncommercial public organization created by Russian authors in 1993 to protect copyrights for the entire Russian Federation.\(^\text{257}\) 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, as well as abroad.\(^\text{258}\)

In addition, ROMS was also a member of the International Confederation of Societies of Authors and Composers (CISAC).\(^\text{259}\) CISAC is a non-governmental, non-profit international organization founded in 1926 that works towards increased recognition and protection of creators’ rights.\(^\text{260}\) As of 2004, CISAC possessed a membership of 207 authors’ societies in 109 countries, and indirectly represented more than two million creators.\(^\text{261}\) In 2003, its members collected more than 6.2 billion Euros in royalties.\(^\text{262}\) Its activities are aimed at improving the position of authors and composers as well as enhancing the quality of the collective administration\(^\text{263}\) of their rights around the world.\(^\text{264}\)

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\(^{258}\) Id.

\(^{259}\) ROMS Press Release, supra note 256.


\(^{261}\) Id.

\(^{262}\) Id.

\(^{263}\) "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 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
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 of copyrighted works. In 2004, both CISAC and RAO expelled ROMS from their membership. ROMS is no longer licensed to issue their own licenses for use of copyright works on the Internet in Russia because of their exclusion from RAO. RAO claimed it ended its agreement with ROMS because of "extremely ineffective activity." RAO maintained that in the last two years, ROMS has only collected a total of $3,000 in royalty amounts. In addition, RAO claimed 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. RAO asserted that ROMS had not obtained permission from western foreign authors and was therefore engaging in piracy "in the pure form." CISAC also expelled ROMS from its organizations in 2004 on the grounds that "it has been issuing licenses to copyright users without contribution to society." They operate by granting licenses to use authors' works for the payment of royalties.

264 Background Information from CISAC Website, supra note 260.
267 See Parthenon, supra note 266.
268 See id.
269 See id.
270 See id.; Russian Copyright Act with 2004 Amendments, supra note 245.
271 Parthenon, supra note 266.
the authority to do so from all relevant copyright owners."272 CISAC stated that these unauthorized licenses contravened internationally accepted collective administration principles and injured the artists represented by CISAC.273

In response, ROMS claimed that the figure of royalties that RAO said ROMS paid was clearly understated.274 ROMS also claimed that the 2004 amendments to the Copyright Act did not change their legal basis for operating because under Title IV, which was not amended, it still had 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.275 In view of the fact that ROMS is no longer a member of RAO or CISAC, it has no authority to award licenses on behalf of these organizations.276 Therefore, Allofmp3.com and any other website claiming to be licensed by ROMS should be aware of the legal limitations of their license.277

In light of Allofmp3.com’s actions, the Moscow City police opened an investigation into the website.278 Allofmp3.com and its principles are alleged to be involved in large-scale copyright infringement by selling music without permission from Russian rights holders and international rights holders.279 On February 8, 2004, the Moscow City police submitted the results of its investigation to the Moscow City Prosecutors Office.280 On the same day, the IFPI, on behalf of its members, also submitted a formal complaint to the Moscow City Prosecutors Office in support of further legal action.281 In response to Moscow’s decision to investigate Allofmp3.com, the IFPI announced:

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273 Id.
275 Id.
276 See ROMS No Longer a CISAC Member, supra note 272.
277 Id.
278 Copyright Enforcement Comes to Russia, supra note 241.
279 Id.
280 Id.
281 Id.
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 authorization of the rights holders.282

Unfortunately, shortly after receiving the investigation results, the Moscow Prosecutors Office Attorney refused to file charges against the website.283 The refusal to prosecute was based on the proposition that Russian copyright law does not cover digital media.284 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.285 Furthermore, the downloading 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.286 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. In general, this decision demonstrates the misguided and outdated views of intellectual property in Russia.

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 infringers to stabilize 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. Lawsuits 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 that are distributing their music without obtaining permission. 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. In addition, these suits will make Russia aware of the fact that copyright owners are serious about enforcing their rights over the Internet. Copyright holders could also sue the websites in the United States. Copyright owners have had some recent success in U.S. courts against websites similar to Allofmp3.com.

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. 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

288 See generally id.
289 See generally id.
291 See id.
distributor even though it hadn’t obtained licenses from the labels.²⁹³ In its opinion, the District Court stated that personal jurisdiction existed because residents of the District of Columbia accessed the website and downloaded music files from it.²⁹⁴ This opinion is also important because the court found personal jurisdiction over a foreign online provider of unauthorized electronic copies of copyrighted music files.²⁹⁵ Depending on the abilities of copyright owner to prove that Allofmp3.com sold music to U.S. residents, they might be able to receive a favorable ruling in light of the case against Puretunes.com.

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 Special 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.”²⁹⁶ The law enables the United States Trade Representative (USTR) “to oversee international piracy, and sanction or bring disciplinary proceedings against those countries that neglect to invoke and execute copyright laws in accordance with established agreements.”²⁹⁷ 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.²⁹⁸ The USTR uses the watch list and priority watch list to alert

²⁹⁵ See generally id.
²⁹⁷ Id. at 227.
countries that their practices are being monitored by the USTR. A Priority Foreign Country, the highest level of classification, is a country “(1) 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.”

Once a country is identified as a Priority Foreign Country, the USTR must initiate an investigation against the country within thirty days. 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. Based on the negotiations and investigation, the USTR must make a determination about whether violations do exist and whether the offending country made “substantial progress.” If there are substantial violations, then the USTR is generally required to take action within thirty days of the determination. 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.”

Russia has been on the priority watch list since 1997. In 2005, the IIPA recommended that Russia be upgraded from the priority watch list to a Priority Foreign Country. It also recommended that Russia’s eligibility for the duty-free trade benefits under the Generalized System of Preferences Program (GSP) should be suspended. Despite the

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299 Id. at 36.
300 Id. at 35.
301 Id. at 36.
302 Id. at 37.
303 Id.
304 Id. at 37-38.
305 Id. at 38.
307 IIPA, 2005 Special 301 Report on Russia, supra note 122, at 13.
308 The U.S. Generalized System of Preferences (GSP) is a government program designed to promote economic growth in the developing world. Information
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. 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. As a result, Russia's piracy problem has become worse each year. 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. The United States should immediately suspend Russia's GSP benefits until the country recognizes the online piracy problem and 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, the United States has achieved some success in the past by doing so to other nations. The United States pursued much more aggressive actions against China in the past to pressure them into protecting intellectual property. On three separate occasions, the United States threatened trade sanctions. 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. The threats resulted in a comprehensive agreement that required China to join the Berne Convention and the Phonograms Convention. 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 in Chinese products. After China threatened sanctions of their own, the two countries finally came to an agreement in 1995 that provided for enhanced enforcement measures. For the third time, in 1996, the United States classified China as a Priority Foreign Country and threatened trade sanctions. Again, the countries averted a trade war when the United States withdrew its threats and the two countries reached another agreement almost identical to the 1995 agreement. China has made significant progress in combating piracy since the signing of the 1996 agreement, but the United States vowed to impose trade sanctions again if they reduce their efforts.

Another country in which the United States has had some success with Special 301 sanctions is Thailand. In 1991 and 1992, the United States listed Thailand as a Priority Foreign Country because of its persistent copyright violations and the resulting losses to United States industry. 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. In order to display its efforts to the United States, the Thai government even publicly burned the seized pirated music and videos. Under pressure from U.S. industry, the United States again named Thailand as a Priority Foreign Country in 1993. Thailand quickly entered into negotiations to avoid sanctions. As a result, Thailand passed amendments in 1994 that extended copyright protection to audiovisual works, books, and audio cassettes, as well as defined software as an artistic work and strengthened the penalties on infringers.
There is no question that Special 301 actions by the United States grab a country's attention. The possible threat of sanctions at least compels countries to acknowledge and work with the United States. In the past, countries like China and Thailand might not have reformed without pressure from Special 301 sanctions. One theory for enforcing stringent intellectual property protection upon other nations is that it benefits both the U.S. and the infringing nation. A country that has strong protection for intellectual property will be able to stimulate research, development, and production. These fields will in turn lead to a more highly skilled labor force and encourage other nations to invest and develop technology in that country. However, the mere fact that Special 301 sanctions are necessary questions the theory that strict intellectual property standards would benefit the infringing nation. Otherwise, more countries would be working unilaterally to protect against intellectual property violations. One explanation for the lack of protection is that freedom of access to goods is a value that many foreigners—including Russians—covet. As a result, little thought is given to whether someone living in the United States is not financially benefiting from the use of the work. It is hard to tell whether imposing sanctions on Russia will produce a reduction in piracy, but Russia's own prior failures to effectuate change requires action. Therefore, in order for the sanctions or the threat of sanctions to be effective, the cost must outweigh the economic benefit derived from piracy.

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

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331 Id. at 47.
332 Id.
333 Id.
334 Robbins, supra note 296, at 244.
335 Id.
336 Id.
337 Clark, supra note 203, at 173.
338 Id.
339 Id. at 174.
340 Id.
341 See Robbins, supra note 296, at 244.
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 several factors. 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 such time as 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.