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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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**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'.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 worldwide, \$40-billion-a-year industry that reaches people in numerous countries across legal, lingual and cultural barriers.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 those who offered songs were responsible for potential copyright infringements, Fanning did not give much thought to the legal implications 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 realize that

* J.D., University of Tulsa College of Law, Tulsa, Oklahoma, May 2006; B.A., Psychology, University of Iowa, Iowa City, Iowa, May 2003. The author would like to dedicate this note to his father, and would like to thank his mother for her support and encouragement. The author also wishes to thank the staff of the Tulsa Journal of Comparative & International Law for their assistance and hard work in preparing this comment.

¹ BOB DYLAN, LYRICS 1962-1985 127-8 (Harper Collins 1994) (1987).

² RIAA website, <http://www.riaa.com/news/marketingdata/default.asp> (last visited October 13, 2005). The RIAA, or Recording Industry Association of America, is a trade group whose members account for about 90% of all legitimate sound recordings in the United States. *Id.* at <http://www.riaa.com/about/default.asp> (last visited October 13, 2005).

³ MP3 is the short name for ISO-MPEG Audio Layer-3, an audio-compression technique developed in Germany for encoding music. MP3 technology removes data conveying silences, thereby increasing possible storage capacity in fewer bits and facilitating easier transmission across the internet. JOSEPH MENN, ALL THE RAVE: THE RISE AND FALL OF SHAWN FANNING'S NAPSTER 31 (Crown Business 2003).

⁴ *Id.* at 34-9.

⁵ *Id.* at 34.

⁶ *Id.*

this is going to change everything?”⁷ Fanning replied, “Yeah, I know.”⁸ 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).⁹ 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.”¹⁰ 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.¹¹ Napster went bankrupt and sold to the highest bidder in September 2002.¹²

Since the Napster case, the battle between the giant record companies and consumers has raged in full force.¹³ 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.¹⁴ 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[.]”¹⁵

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 *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1020-22 (9th Cir. 2001) (holding that where computer system operators do not remove copyright infringing materials from their system, they are deemed to possess knowledge of direct infringement and are guilty of contributory infringement), *aff’d*, 284 F.3d 1091 (9th Cir. 2002); *contra In re Aimster Copyright Litigation*, 334 F.3d 643 (7th Cir. 2003) (stating that actual knowledge of specific infringing materials is not sufficient reason for contributory infringement).

¹¹ Bergen, *supra* note 9, at 186.

¹² *Id.*

¹³ *Id.* at 203.

¹⁴ *Id.* at 203.

¹⁵ *Id.*

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.¹⁶ 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.”¹⁷ Music pirating comes in two forms—physical piracy and Internet piracy.¹⁸ 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.¹⁹ This amounts to an estimated \$4.5 billion, or 15% of the legitimate music market.²⁰ This figure does not account for the loss of dollars from Internet piracy.²¹ 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.”²² According to Rosen, these unauthorized digital

¹⁶ *Examining the Theft of American Intellectual Property at Home and Abroad: Hearing Before the S. Comm. on Foreign Relations, 107th Cong. 59 (2002)* [hereinafter *Hearings*] (prepared statement of Hilary Rosen, president and CEO of RIAA).

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.

¹⁹ Int’l Fed’n of the Phonographic Indus., *The Recording Industry Commercial Piracy Report 2* (2004), <http://www.ifpi.org/site-content/library/piracy2004.pdf> [hereinafter *The Recording Industry Piracy Report 2004*]. The International Federation of the Phonographic Industry (IFPI) is an international organization that represents the recording industry worldwide, acting in affiliation with the RIAA to represent copyright interests. See *Hearings, supra* note 18, at 59; see also <http://www.ifpi.org/site-content/about/mission.html>.

²⁰ *The Recording Industry Piracy Report 2004, supra* note 19, at 3.

²¹ See *Hearings, supra* note 16, at 59.

²² *Hearings, supra* note 16, at 60.

broadcasts and Internet transmissions are just as illegal as their physical counterparts.²³

Among the world leaders in global music piracy, Russia has one of the largest piracy problems.²⁴ Its pirate market value currently stands at \$332 million.²⁵ 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.²⁶ 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 Organization²⁷ 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.²⁸ In order to fight Internet

²³ See generally *Hearings*, *supra* note 16.

²⁴ *The Recording Industry Commercial Piracy Report 2004*, *supra* note 19, at 10.

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.²⁹ Ten countries initially attended the convention "with the objective of protecting copyrights between their respective boundaries."³⁰ 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

²⁹ Heather Nehila, *International Copyright Law: Is It Music to American Ears?*, 16 TEMP. INT'L & COMP. L.J. 199, 200 (2002).

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

³¹ 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).

³² MIHALY FICSOR, *THE LAW OF COPYRIGHT AND THE INTERNET* 3-4 (Oxford University Press 2002) (2002).

³³ Nehila, *supra* note 29, at 200.

³⁴ *Id.*

right of authorizing the reproduction of these works, in any manner or form.”³⁵

In 1961, the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (hereinafter “Rome Convention”) was signed in Rome.³⁶ 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.”³⁷ Article 3(e) of the Rome Convention defines reproduction as “the making of a copy or copies of a fixation.”³⁸ In addition, the Report of the Rapporteur-General³⁹ 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.”⁴⁰

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

³⁵ 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].

³⁶ FICSOR, *supra* note 32, at 4.

³⁷ International 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]. “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).

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”).⁴¹ 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.⁴²

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[.]”⁴³ 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.⁴⁴

B. World Intellectual Property Organization (WIPO)

The World Intellectual Property Organization (WIPO) is a specialized agency within the United Nations.⁴⁵ The Convention establishing the WIPO was signed at Stockholm on July 14, 1967.⁴⁶ Its purposes are to protect intellectual property throughout the world by

⁴¹ *Id.* at 4.

⁴² 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].

⁴³ *Id.* at art. 1(c).

⁴⁴ FICSOR, *supra* note 32, at 96.

⁴⁵ Nehila, *supra* note 29, at 201.

⁴⁶ 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).

encouraging the collaboration of international organizations and states and to ensure administrative cooperation among the Unions.⁴⁷ 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.⁴⁸ The WIPO produced two treaties at that conference—the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty.⁴⁹ These treaties are commonly referred to as the WIPO Internet treaties.⁵⁰ In addition to implementing these treaties, the WIPO also administers the Berne, Rome, and Phonograms Convention Treaties.⁵¹

The WIPO Copyright Treaty (WCT) strengthens copyright protection from the Berne Convention, but it does not pre-empt it.⁵² 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.”⁵³ 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.⁵⁴

⁴⁷ *Id.*

⁴⁸ Nehila, *supra* note 29, at 201.

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).

⁵¹ WIPO-Administered Treaties, available at <http://www.wipo.int/treaties/en/index.jsp> (last visited April 6, 2005).

⁵² Nehila, *supra* note 29, 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].

⁵³ WCT, *supra* note 52, at art. 6.

⁵⁴ *Id.* at art. 8.

The last part of the Article covers on-demand, interactive communication via the Internet.⁵⁵ 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.⁵⁶ 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.”⁵⁷

The WIPO Performances and Phonograms Treaty (WPPT) parallels the rights of the WCT concerning the rights of reproduction.⁵⁸ As in the WCT, the right of reproduction “fully [applies] in the digital environment.”⁵⁹ 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.”⁶⁰ Article 11 grants the same reproduction right, but it omits the words “performances fixed in,” clarifying the term even further to mean “any phonogram.”⁶¹

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.⁶² On March 6, 2002, the thirty party

⁵⁵ Summary of the WIPO Copyright Treaty (WCT) (1996), available at http://www.wipo.int/treaties/en/ip/wct/summary_wct.html (last visited April 6, 2005).

⁵⁶ Newton, *supra* note 50, at 144.

⁵⁷ *Id.*

⁵⁸ Nehila, *supra* note 29, at 202.

⁵⁹ 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].

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.⁶³ Then, on May 20, 2002, the thirty party requirement was met for the WPPT, and it entered into force.⁶⁴ As of March 7, 2005, there are 51 contracting countries for the WCT and 49 contracting countries for the WPPT.⁶⁵ 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.”⁶⁶

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.”⁶⁷ The WTO’s main function is “to enforce the rules of the international trading system.”⁶⁸ 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.”⁶⁹ Membership in the WTO comes with the advantages of “more stable trade relations, greater access

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 ratification by thirty states. *Id.*

⁶³ Summary of the WCT, *supra* note 55.

⁶⁴ Summary of the WIPO Performances and Phonograms Treaty (WPPT) (1996), available at http://www.wipo.int/treaties/en/ip/wppt/summary_wppt.html (last visited April 6, 2005).

⁶⁵ WCT Treaty Statistics from WIPO website, available at http://www.wipo.int/treaties/en/ShowResults.jsp?treaty_id=16 (last visited April 6, 2005); WPPT Treaty Statistics from WIPO website, available at http://www.wipo.int/treaties/en/ShowResults.jsp?treaty_id=20 (last visited April 6, 2005).

⁶⁶ Press Release, WIPO, *supra* note 62.

⁶⁷ 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).

⁶⁸ *Id.* at 998.

⁶⁹ *Id.* at 998-99.

to foreign markets for its products, and greater opportunity to attract foreign investment."⁷⁰

The WTO eventually grew out of the General Agreement on Trade and Tariffs (GATT), drafted in 1947.⁷¹ 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.'"⁷² The WTO was established on January 1, 1995 as a result of the most recent negotiation round—the Uruguay Round.⁷³ The WTO does not supersede GATT but instead supplements and enhances it by granting protection to trade in services and intellectual property.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.⁷⁵ Any party that becomes a member must also comply with the WTO's Multilateral Trade Agreements.⁷⁶ One of the most important agreements is the Trade Related Aspects of Intellectual Property (TRIPs).⁷⁷

TRIPs is a Multilateral Trade Agreement that "brought intellectual property into the GATT-WTO system for the first time."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."⁷⁹ TRIPs members are required to comply with the Berne and Rome Conventions and therefore protect copyright material in much the same way.⁸⁰ For

⁷⁰ *Id.* at 999.

⁷¹ Christian L. Broadbent & Amanda M. McMillian, *Russia and the World Trade Organization: Will TRIPS Be a Stumbling Block to Accession?*, 8 DUKE J. COMP. & INT'L L. 519, 520 (1998).

⁷² *Id.* at 520-21.

⁷³ *Id.* at 520.

⁷⁴ *Id.* at 520-21.

⁷⁵ *Id.* at 521.

⁷⁶ *Id.*

⁷⁷ Kovatch, *supra* note 67, at 1004.

⁷⁸ Broadbent & McMillian, *supra* note 71, at 528.

⁷⁹ Agreement on Trade-Related Aspects of Intellectual Property Rights, Annex 1C, art. 7, Apr. 15, 1994, 33 I.L.M. 1197 (1994) [hereinafter TRIPS].

⁸⁰ *Id.* at art. 2.

example, Article 14(2) of TRIPs allows producers of phonograms to “authorize or prohibit the direct or indirect reproduction of their phonograms.”⁸¹

Enforcement mechanisms are the biggest advantage that membership in the WTO and TRIPs provides.⁸² Members have general obligations to ensure that fair and equitable enforcement procedures are available under their law to permit actions against intellectual property infringement.⁸³ TRIPs outlines certain remedies that Members must provide, including injunctions, damages, and destruction or removal of certain goods.⁸⁴ 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.”⁸⁵

TRIPs also requires transparency between Members.⁸⁶ Members must publish laws, regulations, judicial decisions, and administrative rulings pertaining to intellectual property to allow other governments to “become acquainted with them.”⁸⁷ Members are also obliged to furnish this information to the Council for TRIPs for review and to other Member States upon written request.⁸⁸ 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.⁸⁹ 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.⁹⁰

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.⁹¹ 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),⁹³ 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.⁹⁴ 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

⁹¹ Description of the IIPA, available at <http://www.iipa.com/aboutiipa.html> (last visited April 6, 2005).

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/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 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.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.⁹⁶ It has over 1,450 members worldwide in seventy-five countries.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.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.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.¹⁰⁰ In response to rewarding

⁹⁵ *Id.*

⁹⁶ Summary of IFPI from website, available at <http://www.ifpi.org/site-content/about/mission.html> (last visited October 17, 2005).

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ 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, 1011-12 (2004).

¹⁰⁰ *Id.*

creativity in this way, Russian intellectual property law developed much differently than American law did.¹⁰¹

There are many potential benefits for Russia from membership in the WTO.¹⁰² These benefits include greater access to world markets for Russian products, attraction of greater foreign investment, and more job opportunities for Russian citizens.¹⁰³ In turn, these benefits would establish a more liberal trade environment and help reformers solidify Russia's economic transition.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.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 1973.¹⁰⁶ In 1993, Russia enacted the Law on Copyright and Neighboring Rights (Copyright Act),¹⁰⁷ and in 1995, it joined the Berne Convention and

¹⁰¹ *Id.*

¹⁰² Kovatch, *supra* note 67, at 1006.

¹⁰³ *Id.* at 1006-11.

¹⁰⁴ *Id.* at 1008.

¹⁰⁵ *Russia Still Retaining Flaws in Intellectual Property Protection Sphere - Expert*, INTERFAX: BUS. L. REP., May 25, 2004, available at 2004 WL 13797473.

¹⁰⁶ Collisson, *supra* note 99, at 1015.

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.¹⁰⁸ 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 1973,¹⁰⁹ as did the implementation of the Berne Convention, which is required by Article 18.¹¹⁰ 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, 1995.¹¹¹ 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 1995.¹¹²

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.”¹¹³ This provision, found in Article 8 of the WCT and Article 14 of the WPPT,

longer be able to interfere in contractual relations between authors and their foreign contractors, or in what they do with their profits. *See id.*

¹⁰⁸ Collisson, *supra* note 99, at 1016; International Intellectual Property Alliance, *2004 Special 301 Report: Russian Federation* 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*].

¹⁰⁹ 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. IIPA, *2004 Special 301 Report on Russia*, *supra* note 108.

¹¹⁰ *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 35, 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.

¹¹¹ IIPA, *2004 Special 301 Report on Russia*, *supra* note 108, at 194.

¹¹² International Intellectual Property Alliance, *2005 Special 301 Report: Russian Federation* 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*].

¹¹³ *Id.*

would be a useful enforcement tool for producers and authors of phonograms against digital piracy.¹¹⁴ The copyright holder would have the ability to decide whether his or her work would go onto the Internet.¹¹⁵ 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.¹¹⁶ These legislative deficiencies have led to a large problem with copyright infringement in Russia.¹¹⁷

Russia's biggest problem with copyright infringement comes from the factories—called physical plants—that operate throughout the country.¹¹⁸ In 2003, the country had a CD piracy rate of 64%, and Russian pirated discs were traced to more than twenty-six countries.¹¹⁹ These CDs come from plants operating illegally throughout the country, many of which have intimate ties to Russian organized crime.¹²⁰ In 1996, there were two illegal CD plants in Russia.¹²¹ Today, there are thirty-four plants operating in Russia, eighteen of which are located on government military sites.¹²² This puts Russia's manufacturing capacity at more than 390 million CDs annually, despite legitimate sales of only 30 million CDs in 2003.¹²³

To combat these illegal CD plants, the Russian government introduced licensing regulations in June of 2002.¹²⁴ The regulations make licensing mandatory and allow for the unannounced inspections of plants.¹²⁵ 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.¹²⁶ As a result, the government is unable to

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.*

¹¹⁸ The Recording Industry Piracy Report 2004, *supra* note 18, at 10.

¹¹⁹ *Id.*

¹²⁰ IIPA, 2005 Special 301 Report on Russia, *supra* note 112, at 16.

¹²¹ The Recording Industry Piracy Report 2004, *supra* note 19, at 10.

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.¹²⁷

Piracy in Russia is addressed criminally by two bodies of law—the Criminal Procedure Code (“CPC”) and the Criminal Code.¹²⁸ Specifically, Article 146 of the Criminal Code was the first law in Russian history to criminalize intellectual property violations.¹²⁹ Until 2003, the Criminal Code provided criminal prosecution for infringements that caused “grave harm/significant damage.”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.¹³¹ The language of “grave harm/significant damage” created much confusion until 2003, when the government changed the definition to a fixed threshold amount.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.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.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.¹³⁵ Second, Article 146 does not currently provide the police with explicit power to confiscate and destroy the “machinery” used in making illegal copies.¹³⁶ Article

¹²⁷ *Id.* at 16-17.

¹²⁸ Collisson, *supra* note 99, at 1017.

¹²⁹ *Id.*

¹³⁰ International Intellectual Property Alliance, *2003 Special 301 Report: Russian Federation* 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*].

¹³¹ *Id.*

¹³² IIPA, *2005 Special 301 Report on Russia*, *supra* note 112, at 27.

¹³³ *Id.*

¹³⁴ *See id.*

¹³⁵ IIPA, *2005 Special 301 Report on Russia*, *supra* note 112, at 28.

¹³⁶ *Id.*

146 only allows pirated and counterfeit goods to be confiscated and destroyed.¹³⁷ This is inconsistent with a 2004 amendment to article 49 of the Copyright Act.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.¹³⁹ 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.¹⁴⁰ Since prosecutors have larger workloads and fewer resources, less piracy cases are being pursued.¹⁴¹ The amendments also recategorized the term “public crime,” removing every crime from the definition except those conducted by an organized group.¹⁴² This means that in some cases, a right holder must file a formal complaint before the government takes any action.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.¹⁴⁴ In addition, the civil system is sluggish and inefficient, and many inexperienced judges have trouble imposing the laws.¹⁴⁵ The threat of strong criminal penalties, especially criminal sentences, will be the only effective deterrent against piracy.¹⁴⁶

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

¹³⁷ *Id.*

¹³⁸ See IIPA, 2005 Special 301 Report on Russia, *supra* note 112, at 28.

¹³⁹ IIPA, 2005 Special 301 Report on Russia, *supra* note 112, at 28.

¹⁴⁰ IIPA, 2003 Special 301 Report on Russia, *supra* note 130, at 266.

¹⁴¹ Collisson, *supra* note 99, at 1026.

¹⁴² IIPA, 2003 Special 301 Report on Russia, *supra* note 130, at 266.

¹⁴³ IIPA, 2004 Special 301 Report on Russia, *supra* note 108, at 195.

¹⁴⁴ Collisson, *supra* note 99, at 1025.

¹⁴⁵ *Id.* at 1026.

¹⁴⁶ IIPA, 2004 Special 301 Report on Russia, *supra* note 108, at 198.

good without adequate enforcement.¹⁴⁷ 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.”¹⁴⁸ The failure of the licensing regulations provides one example of the enforcement difficulties.¹⁴⁹ 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.¹⁵⁰ That year, a total of twenty-eight plants were inspected, none of them by surprise.¹⁵¹

The government took criminal action against eight illegal plants in 2004, but most had little or no effect.¹⁵² 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.¹⁵³ The technician was given a one-year suspended sentence, and the plant is still in operation today.¹⁵⁴ 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.¹⁵⁵ International organizations, such as the IFPI, have also put forth efforts to reduce piracy in Russia by assisting in cases and raids.¹⁵⁶ 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.¹⁵⁷ In the other three cases, the CDs were destroyed; however, no sentences were imposed, and almost all the plants are still in operation.¹⁵⁸ 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.

¹⁴⁸ *Russia company: Brand on the run*, EIU VIEWSWIRE RUSSIA, Aug. 25, 2004, available at 2004 WLNR 14008208 [hereinafter *Russia company: Brand on the run*].

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.*

CDs.¹⁵⁹ 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.¹⁶⁰ The operators received no deterrent criminal penalties or imprisonment.¹⁶¹

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."¹⁶² A number of Russian officials have recently suggested that the high prices for legitimate goods are to blame for the piracy problem.¹⁶³ The IIPA says that this view evinces that Russia does not understand the real problem.¹⁶⁴ High prices have little or no bearing on the problem because most of the goods are being sent to foreign markets.¹⁶⁵ Instead, the opportunity for easy profits with little threat of penalty is the primary cause of the piracy explosion in Russia.¹⁶⁶

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.¹⁶⁷

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

¹⁵⁹ *Id.* at 19.

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² Collisson, *supra* note 99, at 1036 (citing Daniel J. Gervais, *The Internalization of Intellectual Property: New Challenges From the Very Old and the Very New*, 12 *FORDHAM INTEL. PROP. MEDIA & ENT. L.J.* 929, 933 (2002)).

¹⁶³ IIPA, *2005 Special 301 Report on Russia*, *supra* note 112, at 22.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Russia company: Brand on the run*, *supra* note 148.

offering legal music sales are becoming increasingly popular.¹⁶⁸ From 2001 until 2003, the amount of music purchased by “digital download” from the Internet increased from 0.2 million to 1.3 million.¹⁶⁹ Popular paid music websites such as MusicMatch, iTunes, Napster, and Wal-Mart have recently attracted up to eleven million users.¹⁷⁰ 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.¹⁷¹

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.¹⁷² This site, as well as others like MP3search.ru and 3MP3.ru, are catching the attention of many Americans looking for cheap downloads.¹⁷³ 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.¹⁷⁴ The biggest attraction for consumers to the website is the price.¹⁷⁵ Songs are sold on a per megabyte basis, which

¹⁶⁸ *US Music Swappers Change Their Tune*, THE REGISTER, Apr. 27, 2004, http://www.theregister.co.uk/2004/04/27/us_swappers_change_tune/ (last visited April 8, 2005).

¹⁶⁹ *2003 Consumer Profile*, THE RECORDING INDUSTRY ASSOCIATION OF AMERICA (2003), <http://www.riaa.com/news/marketingdata/purchasing.asp> (last visited April 8, 2005) [hereinafter *2003 Consumer Profile*].

¹⁷⁰ *US Music Swappers Change Their Tune*, *supra* note 168.

¹⁷¹ See Vauhini Vara, *Russian Web Sites Offer Cheap Songs, But Piracy Is Issue*, WALL ST. J., Jan. 26, 2005, at d10, <http://proquest.umi.com/pdqweb?did=784187561&Fmt=3&clientid=19504&RQT=309&VName=PQD> (last visited Oct. 11, 2005).

¹⁷² See information about allofmp3.com from website, at <http://music.allofmp3.com/help/help.shtml> (last visited April 8, 2005).

¹⁷³ Vara, *supra* note 171.

¹⁷⁴ John Borland, *MP3s for Pennies? Russian Cops Say No*, CNET NEWS.COM, Feb. 22, 2005, http://news.com.com/MP3s+for+pennies+Russian+cops+say+no/2100-1027_3-5586034.html (last visited April 8, 2005).

¹⁷⁵ See Vara, *supra* note 171.

equates to roughly ten cents or less per song.¹⁷⁶ This is considerably cheaper than the 99-cent per-song rate that iTunes and other American websites charge.¹⁷⁷ 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.¹⁷⁸ Vadim Medvedev, an Allofmp3.com representative, claims that the site targets Russian-speaking users, inside and outside of Russia.¹⁷⁹ He claims the English version was developed only to make it easier to access on computers outside of Russia.¹⁸⁰

A. Russian Websites' Legal Authority

Allofmp3.com's success and popularity has sparked considerable controversy over whether it is legal.¹⁸¹ 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."¹⁸² 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).¹⁸³ Under the terms of the ROMS license, Allofmp3.com claims it pays for all the materials used according to the Russian Copyright Act.¹⁸⁴

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

¹⁷⁶ Charles Wright, *Russian Site is Music to the Ears*, THE AGE, Apr. 27, 2004, <http://www.theage.com.au/articles/2004/04/26/1082831475556.html> (last visited Oct. 11, 2005); Vara, *supra* note 171.

¹⁷⁷ Vara, *supra* note 171.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ See Borland, *supra* note 174.

¹⁸² Legal information from Allofmp3.com website, at <http://music.allofmp3.com/help/help.shtml?prm=legal> (last visited April 8, 2005).

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."¹⁸⁵ ROMS operates by signing licensing agreements with users and businesses who want to take advantage of copyrighted material.¹⁸⁶ 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.¹⁸⁷ ROMS's authority to operate in this fashion comes from Title IV of the Russian Copyright Act.¹⁸⁸

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.¹⁸⁹ 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.¹⁹⁰ 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.¹⁹¹ 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

¹⁸⁵ Russian Organization for Multimedia and Digital Systems, <http://www.roms.ru/?lang=eng> (last visited April 8, 2005).

¹⁸⁶ *See generally id.*

¹⁸⁷ *See generally id.*

¹⁸⁸ Russian Organization for Multimedia and Digital Systems, <http://www.roms.ru/?fms=2> (last visited April 8, 2005).

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.¹⁹²

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

Another loophole that allows for the use of copyrighted material on these websites without the copyright holders' permission is Article 39.¹⁹⁵ 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[.]"¹⁹⁶ Phonogram is defined in the Copyright Act as "any exclusive sound recording of performances or of other sounds[.]"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[.]"¹⁹⁸ The Internet could fall into the definition of wire, optic fiber, or comparable means.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.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

¹⁹² *Id.*

¹⁹³ *See id.*

¹⁹⁴ Russian Organization for Multimedia and Digital Systems, *supra* note 188.

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).

¹⁹⁶ Russian Copyright Act, *supra* note 107, at art. 39.

¹⁹⁷ *Id.* at art. 4.25.

¹⁹⁸ *Id.* at art. 4.24.

¹⁹⁹ *Russian 5c MP3 Site "Unlicensed," supra* note 195.

²⁰⁰ Russian Copyright Act, *supra* note 107, art. 39.

copyright holders.²⁰¹ These Articles are disharmonious with international protection of phonograms on the Internet.²⁰² Comparatively, the United States “has some of the most comprehensive copyright protection legislation in the world.”²⁰³ While Internet piracy is still rampant in the U.S., music transmission is allowed legally on the Internet in two basic forms—webcasting and MP3.²⁰⁴ 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.”²⁰⁵ Congress sought to protect these transmissions on the Internet through the Digital Performance Right in Sound Recordings Act of 1995 (DPRA).²⁰⁶ “The DPRA was the first modern attempt at regulating the digital transmission of music.”²⁰⁷ It “gave owners of sound recordings the exclusive right of public performance” through certain digital audio transmissions.²⁰⁸ “The DPRA distinguished between interactive and non-interactive services.”²⁰⁹ “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

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).

²⁰⁴ See Robert J. Delchin, *Musical Copyright Law: Past, Present and Future of Online Music Distribution*, 22 CARDOZO ARTS & ENT. L.J. 343, 350 (2004).

²⁰⁵ Richard D. Rose, *Connecting the Dots: Navigating the Laws and Licensing Requirements of the Internet Music Revolution*, 42 IDEA 313, 344 (2002).

²⁰⁶ Delchin, *supra* note 204, at 352.

²⁰⁷ *Id.* at 354.

²⁰⁸ *Id.* at 352; 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)).

²⁰⁹ Delchin, *supra* note 204, at 352.

the recipient.”²¹⁰ Under the DPRA, these interactive services—also called pay-per-listen or audio on-demand—must be licensed.²¹¹

Non-interactive transmissions are services in which “the user cannot request particular songs at particular times.”²¹² There are two types of non-interactive services: subscription and non-subscription.²¹³ The subscription service types are those “controlled and limited to particular recipients, and for which consideration is required to be paid.”²¹⁴ These services require licensing from the copyright owners before the music can be transmitted.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 Office²¹⁶ or by those individually negotiated.²¹⁷ These compulsory

²¹⁰ *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.) [hereinafter DPRA].

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.*

²¹² Delchin, *supra* note 204, at 353.

²¹³ *Id.*

²¹⁴ *Id.*; DPRA, *supra* note 210.

²¹⁵ Delchin, *supra* note 204, at 353.

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.”²¹⁸

The second type of non-interactive service is a non-subscription service.²¹⁹ 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.²²⁰ 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.²²¹ As a result, these non-interactive, non-subscription services were exempted from the licensing requirements under DPRA.²²²

In 1998, the United States granted even more authority to copyright holders with the passage of the Digital Millennium Copyright Act (DMCA).²²³ Under the DMCA, non-interactive, non-subscription Internet webcasters were no longer exempt from licensing and paying royalties.²²⁴ Now, even non-subscription non-interactive webcasters must adhere to numerous requirements for obtaining a license.²²⁵

²¹⁷ Delchin, *supra* note 204, at 353.

²¹⁸ 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).

²¹⁹ Delchin, *supra* note 204, at 353.

²²⁰ *Id.*

²²¹ See Harwood, *supra* note 218, at 680.

²²² Delchin, *supra* note 204, at 353.

²²³ Harwood, *supra* note 218, at 680.

²²⁴ *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.).

²²⁵ Harwood, *supra* note 218, 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).

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.

²³² 17 U.S.C. § 115(a)(1).

²³³ *Id.*

²³⁴ Jeweler, *supra* note 211, at 103; Digital Performance Right in Sound Recordings Act of 1995, Pub. L. No. 104-39, 109 Stat. 336 (1995).

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”²³⁵

As a result, copyright owners’ exclusive right to reproduce their copyrighted works in copies or phonograms now applies to downloading music from the Internet.²³⁶

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.²³⁷ A “copy of a phonogram” is defined as the duplicate of the phonogram, on any material medium.²³⁸ Finally, a “reproduction of a phonogram” is defined as the making of a copy of phonogram on any physical medium.²³⁹ 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.

²³⁵ 17 U.S.C. § 115(d).

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.²⁴⁰ The IFPI has also complained about Russia's lack of copyright law enforcement.²⁴¹ 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.²⁴² 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.²⁴³ 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."²⁴⁴

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.²⁴⁵ Some of these amendments were introduced in an effort to implement the WIPO Internet treaties.²⁴⁶ Specifically, Russian Copyright Act Article 16 (Economic Rights), Article 37 (Rights of the Performer), Article 38 (Rights of the Phonogram Producer), and Article

²⁴⁰ IIPA, 2005 Special 301 Report on Russia, *supra* note 112, at 14.

²⁴¹ See *Copyright Enforcement Comes to Russia*, ONLINE REP. (U.K.), Feb. 26, 2005, available at 2005 WLNR 3162648.

²⁴² 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.

²⁴³ Russian Copyright Act, *supra* note 107, at art. 47, para. 2.

²⁴⁴ *Russian 5c MP3 Site "Unlicensed"*, *supra* note 195.

²⁴⁵ 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].

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.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.²⁴⁸ This is referred to as the right of “making available to the public.”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.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.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.²⁵² The amendments strengthen authors’ and performers’ control over their works and recognize their rights in a digital world.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.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.²⁵⁵

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

²⁴⁷ See Russian Copyright Act with 2004 Amendments, *supra* note 245.

²⁴⁸ *Id.*

²⁴⁹ *Id.*

²⁵⁰ *Id.*

²⁵¹ See *id.*; WCT, *supra* note 52; WPPT, *supra* note 59.

²⁵² See *Summary of the WCT*, *supra* note 55.

²⁵³ See IIPA, 2005 Special 301 Report on Russia, *supra* note 112, at 27.

²⁵⁴ See *id.*

²⁵⁵ See *id.*

January 2004, ROMS, the collection agency, transferred all the royalties they collected through their licenses to the Russian Authors Organization (RAO) per their agreement.²⁵⁶ RAO is a noncommercial public organization created by Russian authors in 1993 to protect copyrights for the entire Russian Federation.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.²⁵⁸

In addition, ROMS was also a member of the International Confederation of Societies of Authors and Composers (CISAC).²⁵⁹ CISAC is a non-governmental, non-profit international organization founded in 1926 that works towards increased recognition and protection of creators' rights.²⁶⁰ As of 2004, CISAC possessed a membership of 207 authors' societies in 109 countries, and indirectly represented more than two million creators.²⁶¹ In 2003, its members collected more than 6.2 billion Euros in royalties.²⁶² Its activities are aimed at improving the position of authors and composers as well as enhancing the quality of the collective administration²⁶³ of their rights around the world.²⁶⁴

²⁵⁶ ROMS Press Release, at <http://www.museekster.com/files/press-release%20ROMS.doc> (last visited April 9, 2005).

²⁵⁷ RAO Introductory Information from website, translation available at http://babelfish.altavista.com/babelfish/trurl_pagecontent?lp=ru_en&trurl=http%3a%2f%2fao.ru%2forao%2f (last visited April 9, 2005).

²⁵⁸ *Id.*

²⁵⁹ ROMS Press Release, *supra* note 256.

²⁶⁰ 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).

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 its copyrighted works.²⁶⁵

In 2004, both CISAC and RAO expelled ROMS from their membership.²⁶⁶ 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.²⁶⁷ RAO claimed it ended its agreement with ROMS because of “extremely ineffective activity.”²⁶⁸ RAO maintained that in the last two years, ROMS has only collected a total of \$3,000 in royalty amounts.²⁶⁹ 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.²⁷⁰ RAO asserted that ROMS had not obtained permission from western foreign authors and was therefore engaging in piracy “in the pure form.”²⁷¹ 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. *Id.* They operate by granting licenses to use authors' works for the payment of royalties. *Id.*

²⁶⁴ Background Information from CISAC Website, *supra* note 260.

²⁶⁵ 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).

²⁶⁶ 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).

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:

²⁷² *ROMS No Longer a CISAC Member*, Statement from CISAC, at <http://www.cisac.org/web/content.nsf/Builder?ReadForm&Page=Article&Lang=EN&Alias=Web-2005-03-ROMS> (last visited April 9, 2005).

²⁷³ *Id.*

²⁷⁴ 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).

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

²⁸² *Id.*

²⁸³ *Russian DA Clears Allofmp3.com of Copyright Infringement Charges*, ONLINE REP. (U.S.) 7, Mar. 12, 2005, available at 2005 WLNR 4377353.

²⁸⁴ *Id.*

²⁸⁵ *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).

²⁸⁶ *Id.*

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.²⁸⁷ 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.²⁸⁸ In addition, these suits will make Russia aware of the fact that copyright owners are serious about enforcing their rights over the Internet.²⁸⁹ Copyright holders could also sue the websites in the United States.²⁹⁰ Copyright owners have had some recent success in U.S. courts against websites similar to Allofmp3.com.²⁹¹

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.²⁹² 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

²⁸⁷ See generally David E. Miller, *Combating Copyright Infringement in Russia: A Comprehensive Approach for Western Plaintiffs*, 33 VAND. J. TRANSNAT'L L. 1203 (2000).

²⁸⁸ See generally *id.*

²⁸⁹ See generally *id.*

²⁹⁰ See generally John Borland, *MP3 Site Settles for \$10 Million with RIAA*, CNET NEWS.COM, Oct. 25, 2004, at http://news.com.com/2102-1027_3-5425885.html?tag=st.util.print (last visited April 9, 2005).

²⁹¹ See *id.*

²⁹² *Puretunes.com Settles Record Companies' Copyright Infringement Lawsuit*, Press Release from RIAA, Oct. 25, 2004, at <http://www.riaa.com/news/newsletter/102504.asp> (last visit April 10, 2005).

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

²⁹³ Jon Healey, *Record Labels Sue Owner of Puretunes Website*, DETNEWS.COM, July 10, 2003, <http://www.detnews.com/2003/technology/0307/13/technology-213852.htm> (last visited April 10, 2005).

²⁹⁴ See generally *Arista Records, Inc. v. Sakfield Holding Company*, 314 F. Supp. 2d 27 (2004).

²⁹⁵ See generally *id.*

²⁹⁶ 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).

²⁹⁷ *Id.* at 227.

²⁹⁸ 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).

countries that their practices are being monitored by the USTR.²⁹⁹ 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.”³⁰⁰

Once a country is identified as a Priority Foreign Country, the USTR must initiate an investigation against the country within thirty days.³⁰¹ 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.³⁰² 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.”³⁰³ If there are substantial violations, then the USTR is generally required to take action within thirty days of the determination.³⁰⁴ 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.”³⁰⁵

Russia has been on the priority watch list since 1997.³⁰⁶ In 2005, the IIPA recommended that Russia be upgraded from the priority watch list to a Priority Foreign Country.³⁰⁷ It also recommended that Russia’s eligibility for the duty-free trade benefits under the Generalized System of Preferences Program³⁰⁸ (GSP) should be suspended.³⁰⁹ Despite the

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.

³⁰⁶ Connie Neigel, *Piracy in Russia and China: A Different U.S. Reaction*, 63—*FALL LAW & CONTEMP. PROBS.* 179, 188 (2000).

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 2003.³¹⁰ 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.³¹¹ As a result, Russia's piracy problem has become worse each year.³¹² 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.³¹³ 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.³¹⁴ The United States pursued much more aggressive actions against China in the past to pressure them into protecting intellectual property.³¹⁵ On three separate occasions, the United States threatened trade sanctions.³¹⁶ 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.³¹⁷ The threats resulted in a comprehensive agreement that required China to join the Berne Convention and the Phonograms Convention.³¹⁸ Again, in 1994, the United States became frustrated with China's lack of intellectual property enforcement and threatened them with trade

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.*

³⁰⁹ IIPA, 2005 Special 301 Report on Russia, *supra* note 112, at 25.

³¹⁰ *Id.*

³¹¹ *See generally* IIPA, 2005 Special 301 Report on Russia, *supra* note 112.

³¹² *See generally id.*

³¹³ *See generally id.*

³¹⁴ Neigel, *supra* note 306, at 189-90.

³¹⁵ *Id.* at 196.

³¹⁶ *Id.*

³¹⁷ *Id.* at 193.

³¹⁸ *Id.*

sanctions worth \$1.08 billion in Chinese products.³¹⁹ After China threatened sanctions of their own, the two countries finally came to an agreement in 1995 that provided for enhanced enforcement measures.³²⁰ For the third time, in 1996, the United States classified China as a Priority Foreign Country and threatened trade sanctions.³²¹ 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.³²² 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.³²³

Another country in which the United States has had some success with Special 301 sanctions is Thailand.³²⁴ 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.³²⁵ 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.³²⁶ In order to display its efforts to the United States, the Thai government even publicly burned the seized pirated music and videos.³²⁷ Under pressure from U.S. industry, the United States again named Thailand as a Priority Foreign Country in 1993.³²⁸ Thailand quickly entered into negotiations to avoid sanctions.³²⁹ 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.³³⁰

³¹⁹ *Id.* at 194.

³²⁰ *Id.*

³²¹ *Id.* at 195.

³²² *Id.* at 196.

³²³ *Id.*

³²⁴ See Newby, *supra* note 298, at 45.

³²⁵ *Id.*

³²⁶ *Id.*

³²⁷ *Id.*

³²⁸ *Id.* at 46.

³²⁹ *Id.*

³³⁰ *Id.*

There is no question that Special 301 actions by the United States grab a country's attention.³³¹ The possible threat of sanctions at least compels countries to acknowledge and work with the United States.³³² In the past, countries like China and Thailand might not have reformed without pressure from Special 301 sanctions.³³³ One theory for enforcing stringent intellectual property protection upon other nations is that it benefits both the U.S. and the infringing nation.³³⁴ A country that has strong protection for intellectual property will be able to stimulate research, development, and production.³³⁵ 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.³³⁶ However, the mere fact that Special 301 sanctions are necessary questions the theory that strict intellectual property standards would benefit the infringing nation.³³⁷ Otherwise, more countries would be working unilaterally to protect against intellectual property violations.³³⁸ One explanation for the lack of protection is that freedom of access to goods is a value that many foreigners—including Russians—covet.³³⁹ 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.³⁴⁰ 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.³⁴¹

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

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.

