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Joshua M. Green

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# The Russian IPR Problem: How Accession to the WTO is Not the Magical Solution, Rather a Step in the Right Direction

## **Keywords**

russian IPR, WTO, patent, copyright

# The Russian IPR Problem: How Accession to the WTO is Not the Magical Solution, Rather a Step in the Right Direction

by Joshua M. Green\*

## I. INTRODUCTION

International failures to enforce and protect intellectual property rights (IPRs) have a lasting impact on economic growth,<sup>1</sup> consumer safety,<sup>2</sup> and even national security.<sup>3</sup> These failures are costing companies and consumers billions of dollars annually.<sup>4</sup>

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\* Joshua M. Green is a graduate of Gonzaga University School of Law.

1. See Frontier Economics, *Estimating the Global Economic and Social Impacts of Counterfeiting and Piracy*, 6, 9 (Feb. 2011) (commissioned by Business Actions to Stop Counterfeiting & Piracy (BASCAP)), available at <http://www.iccwbo.org/uploadedFiles/BASCAP/Pages/Global%20Impacts%20-%20Final.pdf>; see also INTERNATIONAL ANTI-COUNTERFEITING COALITION, SUBMISSION OF THE INTERNATIONAL ANTI-COUNTERFEITING COALITION TO THE UNITED STATES TRADE REPRESENTATIVE: SPECIAL 301 RECOMMENDATIONS, 4 (Feb. 11, 2011) [hereinafter IACC] [https://www.law.stanford.edu/display/images/dynamic/events\\_media/IACC%202011%20Special%20301.pdf](https://www.law.stanford.edu/display/images/dynamic/events_media/IACC%202011%20Special%20301.pdf) (concluding that “the global scale of counterfeiting and piracy estimate the total global value of counterfeit and pirated products to be US\$455-650 billion each year, with the projected annual global value of counterfeit and pirated products to exceed \$1 trillion by 2015”).

2. See e.g., 8 *Arrested for Selling Counterfeit Rabies Vaccine*, DESK OF BRIAN, Sept. 27, 2010, [http://deskofbrian.com/2010/09/8-arrested-for-selling-counterfeit-rabies-vaccine/?utm\\_source=rss&utm\\_medium=rss&utm\\_campaign=8-arrested-for-selling-counterfeit-rabies-vaccine](http://deskofbrian.com/2010/09/8-arrested-for-selling-counterfeit-rabies-vaccine/?utm_source=rss&utm_medium=rss&utm_campaign=8-arrested-for-selling-counterfeit-rabies-vaccine) (revealing that eight people were arrested for selling fake rabies vaccine which killed one and endangered over a thousand); Martin Cassidy, *Trading Standards Issues Counterfeit Brake Pads Warning*, BBC, Aug. 2, 2010, <http://www.bbc.co.uk/news/uk-northern-ireland-10846035> (detailing counterfeit brake pads in Northern Ireland that failed friction tests and were held together by glue); *Former Bellevue Salon Owner Sentenced for Fake Botox Injections*, SEATTLE PI, Jan. 15, 2010, [http://www.seattlepi.com/sound/414309\\_sound81776672.html](http://www.seattlepi.com/sound/414309_sound81776672.html) (reporting inflammation, swelling, and hardening of patients faces after receiving counterfeit Botox and Restylane injections, causing one woman to undergo plastic surgery); Leslie Meredith, *Counterfeit Phones May Explode*, TECHNEWS DAILY, Sept. 28, 2010, <http://www.technewsdaily.com/counterfeit-phones-may-explode-1339/> (detailing twenty hospitalizations and one death in India due to recent counterfeit cell phone explosions).

3. See e.g., Grant Gross, *U.S. Agencies Crack Down on Counterfeit Networking Hardware*, PCWORLD, May 6, 2010, [http://www.pcworld.com/article/195791/us\\_agencies\\_crack\\_down\\_on\\_counterfeit\\_networking\\_hardware.html](http://www.pcworld.com/article/195791/us_agencies_crack_down_on_counterfeit_networking_hardware.html) (describing how Ehab Ashoor, a Saudi citizen who purchased counterfeit Cisco Gigabit Interface Converters, was sentenced for intending to sell them to the U.S. Marines for use in transmitting troop movements, relaying intelligence, and maintaining security at a military base in Iraq).

4. See Rachael King, *Fighting a Flood of Counterfeit*

Furthermore, the highest burden is carried by G20 countries, which lose billions annually because of counterfeiting and piracy.<sup>5</sup> These figures include billions in lost tax revenues, billions of increased welfare spending, “\$25 billion in increased costs of crime, \$18.1 billion in the economic cost of deaths resulting from counterfeiting, and \$125 million for the additional cost of health services to treat injuries caused by dangerous fake products.”<sup>6</sup> Needless to say, bolstering worldwide IPR enforcement would plausibly save G20 countries billions of dollars every year and should be a top priority for every nation.<sup>7</sup> However, counterfeiting and piracy continue to be an international problem.<sup>8</sup>

Every year the U.S. Trade Representative publishes a report detailing the failures of other nations in enforcing IPRs.<sup>9</sup> In the Trade Representative’s latest report, the Russian Federation topped the list as one of the biggest infringing nations, second only to China.<sup>10</sup> Indeed, Russia has been a leading infringer for quite some time.<sup>11</sup> Much scholarly attention has addressed the challenges international trade organizations place on developing nations, which in turn makes regulating

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*Tech Products*, BLOOMBERG BUSINESSWEEK, Mar. 1, 2010, [http://www.businessweek.com/technology/content/feb2010/tc20100228\\_486251.htm](http://www.businessweek.com/technology/content/feb2010/tc20100228_486251.htm).

5. See IACC, *supra* note 1, at 5.

6. *Id.*

7. See *id.*

8. See OFFICE OF THE U.S. TRADE REPRESENTATIVE, 2011 *Special 301 Report 25* (April 30, 2011) [http://www.ustr.gov/webfm\\_send/2841](http://www.ustr.gov/webfm_send/2841).

9. See *id.*

10. See *id.* at 19-24.

11. In fact, Russia has been second to China on the Priority Watch List since at least 2007. See generally, OFFICE OF THE U.S. TRADE REPRESENTATIVE, 2010 SPECIAL 301 REPORT, (April 30, 2010) [http://www.ustr.gov/webfm\\_send/1906](http://www.ustr.gov/webfm_send/1906); OFFICE OF THE U.S. TRADE REPRESENTATIVE, 2009 SPECIAL 301 REPORT, (April 30, 2009) <http://www.ustr.gov/sites/default/files/Full%20Version%20of%20the%202009%20SPECIAL%20301%20REPORT.pdf>; OFFICE OF THE U.S. TRADE REPRESENTATIVE, 2008 SPECIAL 301 REPORT, (April 30, 2008) [http://www.ustr.gov/sites/default/files/asset\\_upload\\_file553\\_14869.pdf](http://www.ustr.gov/sites/default/files/asset_upload_file553_14869.pdf); OFFICE OF THE U.S. TRADE REPRESENTATIVE, 2007 SPECIAL 301 REPORT, (April 30, 2007) [http://www.ustr.gov/sites/default/files/asset\\_upload\\_file230\\_11122.pdf](http://www.ustr.gov/sites/default/files/asset_upload_file230_11122.pdf).

and enforcing IPRs extremely difficult.<sup>12</sup> However, there is little dispute that there is a problem in Russia with guaranteeing protection of international IPRs within their borders,<sup>13</sup> which has the potential to affect the Russian Federation's economic development in the future.<sup>14</sup>

The World Trade Organization (WTO) has the most comprehensive and extensive series of international agreements, including the Trade Related Aspects of Intellectual Property Rights agreement (TRIPS),<sup>15</sup> which has been somewhat effective in regulating IPRs in member nations and has helped to improve the overall enforcement of IPRs in lesser-developed countries.<sup>16</sup> However, Russia is not a member of the WTO, although they are members of other international intellectual property agreements and are taking steps to win accession into the WTO.<sup>17</sup> One glaring question has emerged from discussions regarding Russia's imminent membership in the WTO: will Russia's accession to the WTO and more particularly TRIPS have any real impact in the

regulation and enforcement of IPRs in the Russian Federation? If China, which shares many geographical, political, and socio-economic similarities with Russia, is an indication of what is to come, accession into the WTO will have little impact on the staggering IPR infringement problem the Russian Federation faces, especially at first.<sup>18</sup>

This article will address the international IPR implications of Russia joining the WTO. Section II provides a background of current Russian laws as well as a brief history of the government's efforts to conform to world IPR enforcement standards. Section III it addresses the challenges the Russian Federation faces against the backdrop of China's progress as a neighboring nation that shares many of its limitations. Finally, section IV suggests practical changes for the WTO and Russia, which could make the Russian Federation's transition quicker, smoother, and more effective.

## II. BACKGROUND

### A. History of Russian IP Laws Leading Up to Contemporary IP Law

The Russian Federation has been trying to win accession into the WTO since 1993.<sup>19</sup> Until recently,<sup>20</sup> the U.S. had blocked all efforts by Russia to join the WTO community because of their failures to protect U.S. IPRs.<sup>21</sup> Unlike U.S. intellectual property law, which can trace its roots back to Article I, Section 8 of the Constitution,<sup>22</sup> the history of Russian IP protection has a blemished past.<sup>23</sup> Prior to the Communist Revolution in 1917, Russia's protection of IPRs was actually on par with the rest of the world.<sup>24</sup>

12. See Beatrice Lindstrom, *Scaling Back TRIPS-Plus: An Analysis of Intellectual Property Provisions in Trade Agreements and Implications for Asia and the Pacific*, 42 N.Y.U. J. INT'L L. & POL. 917, 944 (2010) (noting that compliance with TRIPS costs developing countries \$60 billion per year); see also Darya Haag, *Time to Pay the Dues or Can Intellectual Property Rights Feel Safe with the WTO?*, 8 RICH. J. GLOBAL L. & BUS. 427, 437 (2009) (addressing arguments "that an imposition of costly minimum standards deprives [developing countries] of finances necessary for medicine, education and the development of infrastructure"); Paulina Rezler, *Breaking Through the Great Wall: Problems of Enforcement of Intellectual Property Rights in China*, 14 TOURO INT'L L. REV. 194 (2010); Candace S. Friel, *The High Cost of Global Intellectual Property Theft: An Analysis of Current Trends, The TRIPS Agreement, and Future Approaches to Combat the Problem*, 7 WAKE FOREST INTELL. PROP. L.J. 209 (2007) (noting some of the problems with TRIPS and other international agreements).

13. See Leah Dow, *Russia Tackles Intellectual Property Piracy, But More Work Needed*, AMERICA.GOV ARCHIVE (May 4, 2009) <http://www.america.gov/st/business-english/2009/May/20090504182236SblebahC0.0366894.html>; Janet L. Hoffman, Denis Khabarov & Tom Thomson, *Navigating the Russian Legislative Maze* (Feb./Mar. 2010) [http://www.cipr.org/files/WTR\\_Feb\\_Mar\\_10.pdf](http://www.cipr.org/files/WTR_Feb_Mar_10.pdf).

14. See *Intellectual Property Rights: A Key to Russia's Economic Revival*, THE COALITION FOR INTELLECTUAL PROPERTY RIGHTS, <http://www.cipr.org/activities/articles/RBWipr.pdf> (last visited Sept. 13, 2011).

15. See Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Legal Instruments--Results of the Uruguay Round, 1869 U.N.T.S. 299, 33 I.L.M. 1125 (hereinafter TRIPS Agreement) [available at http://www.wto.org/english/docs\\_e/legal\\_e/legal\\_e.htm](http://www.wto.org/english/docs_e/legal_e/legal_e.htm).

16. See WORLD TRADE ORGANIZATION, *Least Developed Countries' Needs in Intellectual Property: Key Developments*, Nov. 4, 2011, [http://www.wto.org/english/tratop\\_e/trips\\_e/ldc\\_e.htm](http://www.wto.org/english/tratop_e/trips_e/ldc_e.htm).

17. See WORLD TRADE ORGANIZATION, *Status of Accession Working Party*, (last visited Sept. 13, 2011) [http://www.wto.org/english/thewto\\_e/acc\\_e/a1\\_russie\\_e.htm](http://www.wto.org/english/thewto_e/acc_e/a1_russie_e.htm).

18. See China has been a member of the WTO since November 10, 2001. Press Release, World Trade Organization, WTO Ministerial Conference Approves China's Accession, (November 10, 2001) [available at http://www.wto.org/english/news\\_e/pres01\\_e/pr252\\_e.htm](http://www.wto.org/english/news_e/pres01_e/pr252_e.htm). Regardless of their 10 year tenure as a WTO nation, they still remain at the top of the U.S. Trade Representative's priority watch list. See OFFICE OF THE U.S. TRADE REPRESENTATIVE, 2010 SPECIAL 301 REPORT, (April 30, 2010) [http://www.ustr.gov/webfm\\_send/1906](http://www.ustr.gov/webfm_send/1906).

19. See Esprit Eugster, *Evolution and Enforcement of Intellectual Property Law in Russia*, 9 WASH. U. GLOB. STUD. L. REV. 131, 150 (2010); WORLD TRADE ORGANIZATION, *Accessions: Russian Federation*, [http://www.wto.org/english/thewto\\_e/acc\\_e/a1\\_russie\\_e.htm](http://www.wto.org/english/thewto_e/acc_e/a1_russie_e.htm) (last visited Sept. 14, 2011).

20. See Steve Gutterman, *Update 1- U.S. Vice President Biden Backs Russia WTO Bid*, REUTERS (March 9, 2011) <http://www.reuters.com/article/2011/03/09/russia-usa-biden-idUSLDE7281LC20110309>.

21. See Eugster, *supra* note 19, at 132.

22. See U.S. CONST. art. 1, § 8.

23. See Eugster, *supra* note 19, at 136-151 (chronicling the history of intellectual property laws in Russia).

24. See *id.* at 136.

However, with the rise of the Soviet era, Russia's concept of property changed drastically and, unsurprisingly, notions of intellectual property rights changed with it, albeit not immediately.<sup>25</sup> By 1931, IPRs under Soviet rule devolved into nonexistence—the new laws abolished private ownership of intellectual property.<sup>26</sup> IPRs did not receive any national attention again until 1991, spurred by the cultural and political paradigm shift under President Mikhail Gorbachev's economic, ideological, and social reforms of the mid 1980s.<sup>27</sup> Actual legislative changes did not surface until 1992, when the new republican government of the Russian Federation enacted a series of intellectual property laws.<sup>28</sup> Between 1994 and 2004, Russia's legislative body enacted a host of laws that would directly regulate trademarks, copyrights, patents, and even trade secrets.<sup>29</sup>

### B. Part IV of the Russian Civil Code: A New Day of IP Protection

In 2006, the Russian Federation proposed and adopted Part IV of the Russian Civil Code,<sup>30</sup> a hotly controversial piece of legislation,<sup>31</sup> which amended and essentially replaced the existing intellectual property laws.<sup>32</sup> The 2006 legislation was largely a knee-jerk reaction to the vast amount of negative national attention the Federation was receiving regarding its IP laws.<sup>33</sup> It was also an effort by the Federation to finally win accession into the WTO.<sup>34</sup> The new legislation appeared to satisfy the U.S., which, up until that point, had vigorously opposed Russia's admission into the WTO.<sup>35</sup>

Even though Part IV of the Russian Civil Code

essentially replaced all prior IP laws, much of the preexisting provisions were incorporated into the new legislation.<sup>36</sup> Although the amendments were accepted and signed into law with little public debate,<sup>37</sup> the new legislation established a framework of IP laws that meet the international standards established by TRIPS.<sup>38</sup>

#### 1. Trademarks

When President Putin signed Part IV of the Russian Civil Code into law on December 19, 2006, many questions regarding trademark protection still remained.<sup>39</sup> For example, some questioned the absence of a uniform infringement standard, the insufficient protection of famous and other well-known marks, the absence of opposition procedures, and the lack of transparency at Rospatent, Russia's version of the United States Patent and Trademark Office (USPTO).<sup>40</sup> However, despite the controversy, Part IV made few substantive changes with regard to trademarks.<sup>41</sup>

Contrary to the many concerns that nations and businesses had about the 2006 law, Part IV complies with TRIPS requirements<sup>42</sup> and actually mirrors the Lanham Act on many provisions.<sup>43</sup> For example, Part IV has a similar definition of trademarks and service marks,<sup>44</sup> provides legal protection for registered marks,<sup>45</sup> lays out the rights of trademark holders,<sup>46</sup> establishes statutory

25. See *id.* at 137.

26. See *id.* at 136.

27. See *id.*

28. See *id.*

29. See Sergey Budylin & Yulia Osipova, *Total Upgrade: Intellectual Property Law Reform in Russia*, 1 COLUM. J. E. EUR. L. 1, 4 (2007) (reviewing the history of Russian IP legislation after the collapse of the Soviet Union).

30. See Eugster, *supra* note 19 at 145.

31. See *Russia Proposes New Civil Code*, COALITION FOR INTELLECTUAL PROPERTY RIGHTS, (March 2006) [http://www.cipr.org/activities/advocacy/civil\\_code/index.htm](http://www.cipr.org/activities/advocacy/civil_code/index.htm); see also *Part IV of the Russian Civil Code: Summary of Key Trademark Protection Issues*, COALITION FOR INTELLECTUAL PROPERTY RIGHTS, [http://www.cipr.org/activities/advocacy/files/CIPR\\_PartIVSummary\\_12-06.pdf](http://www.cipr.org/activities/advocacy/files/CIPR_PartIVSummary_12-06.pdf) (last visited Sept. 13, 2011) (highlighting the key trademark issues in the new law even after they were enacted); Olga Barannikova, *An Intellectual Property Rights Headache*, MOSCOW TIMES (March 14, 2006), [http://www.cipr.org/activities/publications/intellectual\\_property\\_rights/index.htm](http://www.cipr.org/activities/publications/intellectual_property_rights/index.htm).

32. See Budylin & Osipova, *supra* note 29, at 8.

33. See *id.* at 2.

34. See *id.* at 3.

35. See *id.*

36. See *id.* at 8; Eugster, *supra* note 19, at 145.

37. See Barannikova, *supra* note 31 (noting that the new legislation “appeared like a bolt out of the blue. None of the organizations that had been working on this issue with the government had seen the draft or even known of its preparation until it” was proposed to the Duma); *Russia Proposes New Civil Code*, COALITION FOR INTELLECTUAL PROPERTY RIGHTS, (March 2006) [http://www.cipr.org/activities/advocacy/civil\\_code/index.htm](http://www.cipr.org/activities/advocacy/civil_code/index.htm) (stating that there were concerns “because the draft legislation was not the subject of public discussion”).

38. See Budylin & Osipova, *supra* note 29, at 38 (concluding that Part IV “corresponds to the current international standards and treaties, and can be tentatively characterized as ‘WTO-ready’”).

39. See *Part IV of the Russian Civil Code: Summary of Key Trademark Protection Issues*, COALITION FOR INTELLECTUAL PROPERTY RIGHTS, [http://www.cipr.org/activities/advocacy/files/CIPR\\_PartIVSummary\\_12-06.pdf](http://www.cipr.org/activities/advocacy/files/CIPR_PartIVSummary_12-06.pdf) (last visited Sept. 13, 2011).

40. See *id.*

41. Pavel Sodovsky, *Part IV of the Civil Code: A Mixed Blessing*, AEB BUS. QUARTERLY No. 4 (2007), available at <http://www.magisters.com/publication.php?en/592/articles/>.

42. See TRIPS Agreement, *supra* note 15, at art. 15.

43. Compare LAW OF THE RUSSIAN FEDERATION ON TRADEMARKS, SERVICE MARKS AND APPELLATIONS OF ORIGIN *English translation available at* <http://www.liapunov.com/legislation-tm.html>, with 22 U.S.C. §1051 *et seq.*

44. See LAW OF THE RUSSIAN FEDERATION ON TRADEMARKS, SERVICE MARKS AND APPELLATIONS OF ORIGIN, *supra* note 43, at art. 1.

45. *Id.* at art. 2.

46. *Id.* at art. 4.



bars to registration,<sup>47</sup> and clearly establishes a system for registration.<sup>48</sup> Trademarks can be denied if they are confusingly similar to “a company name, commercial designation, or a domain name that is already protected in the Russian Federation.”<sup>49</sup> In fact, the new features that Part IV incorporated into its trademark statutes were mostly procedural, although Part IV also expanded notions of trademark use and introduced new sanctions.<sup>50</sup> In totality, the trademark provisions are actually rather complete.

## 2. Copyrights

The Russian Federation is already a member of the Berne and Rome Conventions.<sup>51</sup> Although Russia is not yet a member of the WTO, the copyright provisions in Part IV were written with the TRIPS agreement in mind.<sup>52</sup> From a copyright standpoint, the 2006 legislation protects expressions of authorship “that are the product of creative work, regardless of the purpose, the merit and the manner of expression thereof.”<sup>53</sup> This concept is similar to American provisions for copyright, which protect any “original works of authorship fixed in a tangible medium of expression.”<sup>54</sup> Article 7 of the Russian Copyright statute has an almost identical list of protectable works as the list found in § 102 of the U.S. statute on copyrights.<sup>55</sup> Furthermore, like in the United States, an author need not register to receive authors’ rights or neighboring rights.<sup>56</sup> Even the duration of copyright protection, life plus 70 years, emulates the U.S. provision.<sup>57</sup>

The changes to previous copyright statutes in Part IV go a long way to protect authors and “will undoubtedly shape a new system of intellectual law and

law-enforcement practice in Russia.”<sup>58</sup> To be sure the level of protection extended to copyright holders is on the rise and this should be cause for encouragement.<sup>59</sup> The laws currently in place securing authors in their intellectual property rights is currently on par with the WTO and other nations, including the United States.<sup>60</sup> It also shows that Russia is firmly committed to the legislative protection of intellectual property rights.<sup>61</sup>

## 3. Patents

Russia’s patent laws under Part IV protect inventions, utility models, and industrial designs.<sup>62</sup> It is noteworthy that Article 1 protects each of the objects contemplated in the Paris Convention<sup>63</sup> and contains very similar language to Section 5 of TRIPS.<sup>64</sup> Until recently, the patent laws in the United States granted patent protection to the first to invent or conceive.<sup>65</sup> Congress recently passed legislation that placed the U.S. on par with the rest of the world,<sup>66</sup> including Russia, by granting patent protection to the first party to file.<sup>67</sup> A patent will only be granted to those objects that are new or novel, which require an “inventive step,” and they must be “industrially applicable.”<sup>68</sup> These concepts are strikingly similar to the U.S. counterpart, which requires that inventions be novel, non-obvious, and useful.<sup>69</sup> Conversely, discoveries, scientific theories, mathematical methods, aesthetic designs, business methods, and computer programming are not considered inventions and thus not patentable under Part IV.<sup>70</sup>

Part IV formally establishes a meticulous method for applying for a patent.<sup>71</sup> As part of the application process, the applicant must disclose the patentee, clearly describe the invention so that it can be reduced to practice,

47. *Id.* at art. 6, 7.

48. *Id.* at ch. 2.

49. Sodovsky, *supra* note 41; *see also* LAW OF THE RUSSIAN FEDERATION ON TRADEMARKS, *supra* note 43, at art. 7.

50. *See* Sodovsky, *supra* note 41.

51. Russia joined the Berne Convention in March of 1995 and later joined the Rome Convention in May of 2003 and the Universal Copyright Convention. *See* Dmitry Golovanov, *Transformation of Author’s Rights and Neighbouring Rights in Russia 3* (2008), *available at* [http://www.obs.coe.int/oea\\_publ/iris/iris\\_plus\\_iplus2\\_2008.pdf](http://www.obs.coe.int/oea_publ/iris/iris_plus_iplus2_2008.pdf).

52. *See id.*

53. LAW OF THE RUSSIAN FEDERATION ON COPYRIGHT AND RELATED RIGHTS, art. 6, English translation *available at* <http://www.liapunov.com/legislation-co.html>.

54. 17 U.S.C. § 102(a) (1990).

55. *Compare* LAW OF THE RUSSIAN FEDERATION ON COPYRIGHT AND RELATED RIGHTS, *supra* note 53, at art. 7.1, 53, with 17 U.S.C §§ 102(a)(1)-(8) (2006).

56. *See* Golovanov, *supra* note 51, at 3.

57. *Compare* Law of the Russian Federation on Copyright and Related Rights, *supra* note 53, at art. 27, 53, with 17 U.S.C. 302(a) (2006).

58. Golovanov, *supra* note 51, at 8.

59. *See id.*

60. *See* Budylin & Osipova, *supra* note 29, at 38 (concluding that Part IV “corresponds to the current international standards and treaties, and can be tentatively characterized as ‘WTO-ready’”).

61. *See* Eugster, *supra* note 19, at 150.

62. PATENT LAW OF THE RUSSIAN FEDERATION at art. 1 [hereinafter *Patent Law*] English translation *available at* <http://www.liapunov.com/legislation-pat.html>; Budylin & Osipova, *supra* note 29, at 17.

63. Budylin & Osipova, *supra* note 29, at 17.

64. *Compare* Patent Law of the Russian Federation, *supra* note 62, at art. 1, 62, with TRIPS Agreement, *supra* note 15, at art. 5.

65. *See* 35 U.S.C. § 102(g)(2) (1952).

66. *See*, Press Release, US House of Representatives Committee on the Judiciary, Smith Patent Reform Bill Becomes Law (Sept. 16, 2011) <http://judiciary.house.gov/news/Patent%20Reform%20Law.html>.

67. Patent Law, *supra* note 62, at art. 19.

68. *Id.* at art. 4.

69. 35 U.S.C. §§ 102, 103; U.S. CONST. art. 1, § 8, cl. 8.

70. *See* Patent Law, *supra* note 62, at art. 4.2.

71. *See id.* at tit. V.

list the claims made by the patented object, include drawings where necessary, and provide a synopsis.<sup>72</sup> The application process, which is administered by Rospatent, permits patent applications to be filed by foreign nationals.<sup>73</sup> Once a patent is granted, the patent holder has an exclusive right to the invention, utility model, or industrial design.<sup>74</sup> Part IV protects patent owners from infringement and grants them with a cause of action to stop infringement and to disgorge the profits resulting from infringement.<sup>75</sup>

The protections afforded to patent holders in under Part IV are robust and on par with the patent protections afforded in other TRIPS nations, including the United States. Russia has established a legal framework that parallels some provisions within Section 5 of the TRIPS agreement.<sup>76</sup> The protections extended to patent holders meet the minimum standards established by the WTO and should not hinder their accession in to the world organization.

### III. DISCUSSION

Given the trademark, copyright and patent provisions in Part IV, on paper Russia should be a decent candidate to be the next member of the WTO. However, the Russian Federation's problem stems not from a lack laws, but a lack of enforcement.<sup>77</sup> Despite new laws and increased raids, piracy in Russia still continues to grow.<sup>78</sup> U.S. losses resulting from Russian piracy totaled nearly 2 billion dollars in 2006 when Russia passed Part IV and 1.4 billion dollars in 2010.<sup>79</sup> According to the International Anti Counterfeiting Coalition (IACC), the sale of counterfeit goods accounted for 24% of the retail goods sold in key product sectors in Russia in 2009.<sup>80</sup> Although Russia has improved its efforts in combating infringing activities, these efforts have not had a meaningful impact on curtailing piracy.<sup>81</sup>

Some argue that the reason Russia is not seeing any improvement is the lack of criminal prosecutions against those caught trafficking pirated goods.<sup>82</sup> However, Russia has a host of unique geographic, socioeconomic, and political limitations, which make IPR enforcement very difficult. These limitations are also shared to some

degree with China, which is the top infringer among all nations, despite being a member of the WTO.<sup>83</sup> The two nations can be compared in terms of these shared limitations as well as their ability and willingness to zealously enforce IPRs.

#### A. Geographic Size

Russia is the largest nation in the world with over 17,098,242 square kilometers of terrain within its boundaries.<sup>84</sup> Most of this vast territory is harsh and undeveloped and its over 138 million citizens are spread all across the nation.<sup>85</sup> Furthermore, Russia shares a border with China, which remains the top manufacturer of counterfeit goods.<sup>86</sup> If the U.S. thinks it has a border problem with Mexico, it pales in comparison to the border problem between Russia and China, which is currently one of the longest borders in the world stretching 3,645 km.<sup>87</sup> This creates a custom officer's nightmare, where customs personnel are looking for a needle in a haystack.

Similarly, China is the fourth largest nation by area in the world with a population of over 1.3 billion people.<sup>88</sup> Although it is slightly smaller geographically than the United States, its population is almost three times as large.<sup>89</sup> Millions of people are packed into the large cities, with many more spread out across the vast Chinese landscape.<sup>90</sup> The size of the country combined with the population is overwhelming. Effective IPR enforcement in this environment is nearly impossible as is evident from China's track record.

Russia has been making positive customs improvements through their 2010 Customs Union with Belarus and Kazakhstan, which hopes to increase enforcement against counterfeit goods.<sup>91</sup> Presently, the current customs operation in regard to the Chinese border is a huge concern.<sup>92</sup> Efforts have been made by both countries to improve their customs agents' ability to identify and seize counterfeit goods.<sup>93</sup> These efforts are

72. *Id.* at art. 16.2.

73. *See id.* at art. 15.

74. *Id.* at art. 10.1.

75. *Id.* at art. 14.2.

76. TRIPS Agreement, *supra* note 15, at Section 5.

77. Eugster, *supra* note 19, at 146-47.

78. *Id.*

79. 2011 SPECIAL 301 REPORT, *supra* note 8, at 32.

80. IACC, *supra* note 1, at 35-36.

81. Eugster, *supra* note 19, at 146-48.

82. *Id.* at 147 (“[T]hough the numbers of raids have increased over the past several years, the percentage of criminal penalties following these raids remains low.”).

83. 2011 SPECIAL 301 REPORT, *supra* note 8, at 19.

84. Central Intelligence Agency, Russia World Factbook, <https://www.cia.gov/library/publications/the-world-factbook/geos/rs.html> (last visited May 7, 2011).

85. *Id.*

86. IACC, *supra* note 1, at 37.

87. Li Xiaokun, *China, Russia Sign Border Agreement*, CHINA DAILY, (July 7, 2008) [http://www.chinadaily.com.cn/china/2008-07/22/content\\_6865847.htm](http://www.chinadaily.com.cn/china/2008-07/22/content_6865847.htm).

88. Central Intelligence Agency, *China World Factbook*, <https://www.cia.gov/library/publications/the-world-factbook/geos/ch.html> (last visited May 7, 2011).

89. *Id.*

90. *Most Populated Cities in China*, [http://www.nationsonline.org/oneworld/china\\_cities.htm](http://www.nationsonline.org/oneworld/china_cities.htm) (last visited May 7, 2011).

91. IACC, *supra* note 1, at 37.

92. *Id.*

93. *Id.* (noting that Russia and China underwent joint

commendable, but the tenuous relationship between the two nations over their shared border<sup>94</sup> needs to evolve into bilateral discussions regarding border security.

Russia's geographic size, combined with its border with China, certainly plays a role in its enforcement of IPRs. Emphasis should be placed on the fact that it shares an extremely large border with the leading international infringer.<sup>95</sup> While Russia can improve its customs procedures, the international community must be realistic. Indeed, more international assistance from the WTO and member nations would likely assist Russian in addressing its deficiencies at the Russian-Chinese border.

## B. Socioeconomic Factors: A Lack of Home Grown Intellectual Property

Although Russia and China are certainly world economic powers, they both lack substantial and exportable goods for which they need IPR protections.<sup>96</sup> Russia relies heavily on its vast reserve of natural resources.<sup>97</sup> Even then, its exports are primarily to the European Union (EU), China, Japan, and the U.S.<sup>98</sup> Exports to the U.S., however, equal less than 7% of the total exports, which means that Russia is a very regional exporter.<sup>99</sup> Although certain IPRs apply to natural resource industries, particularly trademarks and possibly some patents, Russian goods are not in high demand around the world or even in Russia.<sup>100</sup>

China, on the other hand, is a major manufacturer and exporter, producing many of the world's goods.<sup>101</sup>

However, like Russia it does not have much stake in protecting its own IPRs.<sup>102</sup> In fact, one of the problems caused by China's stellar success has been a substantial drop in Chinese exports, which for the first time in seven years were less than the percentage of imports.<sup>103</sup> The steady drop in Chinese exports means that Chinese companies are producing and exporting fewer goods, especially in the market of value added products.<sup>104</sup> With a lack of value added products in the marketplace, China's concern about the protection of its own IPRs is somewhat diminished.

Furthermore, China is the manufacturer and supplier of most of the world's counterfeit goods.<sup>105</sup> In this way, China's economy provides a boon to the black market. Since much of China's manufacturing and exports are not made by Chinese companies, but rather those of multinational corporations currently using Chinese labor to create their products more cheaply,<sup>106</sup> China has less incentive to protect even their own IPRs because few of their own companies have an actual international presence.

Although Russia and China have drastically different economies and socioeconomic factors that influence their views on protecting IPRs, comparisons can still be made between them. Both countries share a common thread: neither has a strong international presence from the IPR perspective. Russia is rich in natural resources but demand for Russian goods, music, art, literature, movies, and cars is low. Conversely, China produces everyone else's goods, but has few of its own that demand IPR protection.<sup>107</sup> Without national demand for stronger IPR protections, political incentives are low to make significant progress in protecting foreign intellectual property rights.

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Customs training on IPR in 2010).

94. See Li Xiaokun, *supra* note 87.

95. See 2011 SPECIAL 301 REPORT, *supra* note 8, at 19-20 (asserting that China is the leading international infringer).

96. *China's Export Growth Expected to Plummet*, ENGLISH NEWS.CN, (April 26, 2011, 10:26 AM), [http://news.xinhuanet.com/english2010/china/2011-04/26/c\\_13846260.htm](http://news.xinhuanet.com/english2010/china/2011-04/26/c_13846260.htm); Isabel Gorst, *Russian exporters forced to drop grain prices*, FINANCIAL TIMES (Jul. 4, 2011 6:14 PM), <http://www.ft.com/cms/s/0/ac1314fa-a653-11e0-ae9c-00144feabdc0.html#axzz1b6MagWPd>; Richard Higgs, *Russian resin exports drop as domestic demand rises*, PLASTICS NEWS.COM (Sept. 26, 2011) <http://plasticsnews.com/china/english/headlines2.html?id=1316810206>; *Russian oil production increases 1.23% in three quarters, exports drop*, RIA NOVOSTI (Oct. 3, 2011 13:19 PM), <http://en.rian.ru/business/20111003/167338551.html>; *Russia Metals Report Q4 2011*, BUSINESS MONITOR INTERNATIONAL (Oct. 7, 2011), <http://www.marketresearch.com/Business-Monitor-International-v304/Russia-Metals-Q4-6620001/>.

97. U.S. DEP'T OF STATE, *Background Note: Russia*, <http://www.state.gov/t/pa/ei/bgn/3183.htm> (last visited May 7, 2011).

98. *Id.*

99. *Id.*

100. Mikhail Khmelev, *Russian Economy Has Little Hope of Becoming Competitive*, RIANOVOSTI (Jan. 5, 2007, 2:17 PM), <http://en.rian.ru/analysis/20070501/64714338.html>.

101. U.S. DEP'T OF STATE, *Background Note: China*, <http://www.state.gov/t/pa/ei/bgn/18902.htm> (last visited May 7, 2011).

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(finding that China had more than 1.1 trillion in exports in 2010).

102. See *China's Export Growth Expected to Plummet*, ENGLISH NEWS, (April 26, 2011, 10:26 AM), [http://news.xinhuanet.com/english2010/china/2011-04/26/c\\_13846260.htm](http://news.xinhuanet.com/english2010/china/2011-04/26/c_13846260.htm) (with the lack of Chinese goods in the marketplace, there will be fewer infringers of Chinese goods).

103. See *id.* (finding that Chinese exports were predicted to drop to 20% in 2011).

104. See *id.*

105. See IACC, *supra* note 1, at 9.

106. See U.S. DEP'T OF STATE, *supra* note 101 (concluding that "China has become a preferred destination for the relocation of global manufacturing facilities").

107. See 2011 SPECIAL 301 REPORT, *supra* note 8, at 19.



**C. Political Corruption: The Biggest Barrier to Progress**

It is no secret that both Russian and China suffer from political corruption.<sup>108</sup> According to Transparency International, an international corruption watchdog, Russia and China both struggle with corruption.<sup>109</sup> Considering that piracy and counterfeiting thrive in a corrupt environment, the effects of political corruption likely impact IPR enforcement to some degree.<sup>110</sup>

Russia is among the top 20% of most corrupt nations.<sup>111</sup> In 2005, the Organization for Economic Cooperation and Development stated that, “[t]he weakness, inefficiency and corruption of all branches of government are the most important obstacles to further progress in reforming Russia.”<sup>112</sup> Bribing government officials has not just become a problem in the Russian Federation, but a way of life, and is often a determining factor as to whether a case is prosecuted.<sup>113</sup> Government corruption remains a significant obstacle to combating counterfeiting and piracy.<sup>114</sup>

In 2009, President Medvedev stated that the Russian Federation had only just begun creating a judicial system that was free of corruption.<sup>115</sup> With a judicial and regulatory system burdened with heavy corruption and a severe lack of transparency,<sup>116</sup> it is not surprising that Russia has become a prominent market for counterfeit goods.<sup>117</sup> It appears that those calling for more criminal prosecutions against perpetrators of IPRs have identified legitimate concerns with this system.<sup>118</sup> This situation also explains why the increase in raids and enforcement actions has had little effect in Russia’s multibillion-dollar

counterfeit market. Without the support of the courts and, specifically the judges, enforcement agents will simply be spinning their wheels.

Similarly, Chinese corruption is a significant impediment to effective IPR enforcement.<sup>119</sup> A 2007 report from the Carnegie Endowment for International Peace found that “endemic corruption among Chinese officials poses one of the most serious threats to the nation’s future economic and political stability.”<sup>120</sup> Despite public commitments to IPR protections, increased raids, and fundamental changes to the judicial system,<sup>121</sup> 71% of respondents to a research survey felt that IPR enforcement stayed the same or deteriorated over the past year.<sup>122</sup> One of the many explanations for these sentiments is that political corruption is still keeping counterfeiters out of court and keeping the laws unreasonably lenient.<sup>123</sup>

Clearly, both countries struggle with political corruption and dealing with it has become a way of life for companies doing business within their borders.<sup>124</sup> In Russia, the corruption is certainly a large part of the problem in regulating and enforcing IPRs and must be addressed. If Russia is ever going to crack down on counterfeiters, its government officials need to be willing to stop the endemic corruption that plagues the country.

**D. Practical Solutions: WTO Accession & Border Enforcement**

The first step in helping Russia in its quest to improve the country’s treatment of IPRs is to allow them to join the WTO. Russian officials have already made public statements regarding their waning patience as they still wait to be accepted into the World Trade Organization.<sup>125</sup> Russia has been waiting for approval

108. See *Corruption Perceptions Index 2010 Results*, TRANSPARENCY INTERNATIONAL, [http://www.transparency.org/policy\\_research/surveys\\_indices/cpi/2010/results](http://www.transparency.org/policy_research/surveys_indices/cpi/2010/results) (last visited May 9, 2011).

109. See *id.*

110. Compare *Corruption Perceptions Index 2010 Results*, *supra* note 108, with 2011 SPECIAL 301 REPORT, *supra* note 8, at 19-42 (of the 41 countries listed on the Trade Representatives’ Priority Watch List and Watch List, only 11 had a corruption rating above 5 (on a scale of 10), 14 had a rating between 3 and 4, and 15 had rating of under 3).

111. See *id.*

112. Stephen Lee Myers, *Pervasive Corruption in Russia Is Just Called Business*, N.Y. TIMES, Aug. 13, 2005, [www.nytimes.com/2005/08/13/international/europe/13russia.html](http://www.nytimes.com/2005/08/13/international/europe/13russia.html).

113. See *id.*

114. See Jim Nichol, CONG. RESEARCH SERV., RL 33407, RUSSIAN POLITICAL, ECONOMIC AND SECURITY ISSUES AND U.S. INTERESTS 21 (2011).

115. See *id.* at 6.

116. See *2011 Index of Economic Freedom*, THE HERITAGE FOUNDATION, <http://www.heritage.org/index/Country/Russia> (last visited Oct. 18, 2011).

117. See IACC, *supra* note 1, at 35-36.

118. See Eugster, *supra* note 19, at 147.

119. See EMBASSY OF THE UNITED STATES BEIJING CHINA, *Intellectual Property Rights*, [http://beijing.usembassy-china.org.cn/protecting\\_ipr.html](http://beijing.usembassy-china.org.cn/protecting_ipr.html) (last visited May 10, 2011).

120. Minxin Pei, *Policy Brief No. 55: Corruption Threatens China’s Future*, THE CARNEGIE ENDOWMENT, (Oct. 2007) available at <http://www.carnegieendowment.org/publications/index.cfm?fa=view&cid=19628>.

121. See *Lack of IPR Enforcement Key Concern*, THE GLOBAL TIMES (Jan. 21, 2011), <http://business.globaltimes.cn/china-economy/2011-01/615048.html>; see also 2011 SPECIAL 301 REPORT, *supra* note 8, at 19-21.

122. *Id.* (results based on the answers of 364 companies surveyed).

123. See 2011 SPECIAL 301 REPORT, *supra* note 8, at 21 (finding that “[h]igh thresholds for initiating criminal actions have always been a significant barrier to effective enforcement against the sale of counterfeits”).

124. See Myers, *supra* note 110; Pei, *supra* note 120.

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

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for almost 20 years.<sup>126</sup> Furthermore, since they are not a member nation, the penalties, sanctions, and discussions of the WTO mean little and have less bite. The U.S. has been a primary objector to Russian accession to the WTO over the past decade,<sup>127</sup> but this policy may have been misguided. Indeed, Russian membership in the WTO will likely benefit the U.S., and it might be in its best interest to clear a path for Russia. Once Russia joins, the U.S. will have the cooperation of other member nations in working with Russia to improve IPR protection.

Accession into the WTO will likely have little immediate effect on Russia's treatment of IPRs. However, once it becomes a member of the WTO, other nations can help Russia can start the slow, arduous process of cleaning up its treatment of IPRs just like they have with China. China came to the WTO in 2001<sup>128</sup> and since then has remained of the leading infringers of U.S. IPRs.<sup>129</sup> In 2007, the U.S. began an action with the WTO where it claimed that China's criminal thresholds were insufficient in cases of willful infringement of IPRs.<sup>130</sup> The U.S. also claimed that China was not properly disposing of seized counterfeit goods nor were they meeting their obligations under TRIPS by denying copyrights and other related rights to authors whose works were not authorized for publication in China.<sup>131</sup> Considering these allegations, the panel concluded that China had violated multiple provisions of the TRIPS agreement.<sup>132</sup> Since then, there has been improvement in China's attempts to comply with WTO obligations and panel recommendations.<sup>133</sup>

If Russia were a member of the WTO, the United States could initiate a similar action, which would hopefully begin the slow process of improving Russia's treatment of IPRs. Denying Russia's accession simply preserves the status quo and does nothing to motivate Russia to improve the current environment. Since

Russia still wants to be a part of the WTO, bringing them into the world community could motivate them to make significant changes. At the very least, accession into the WTO would provide an environment for continued discussions, and the U.S. loses nothing if accession has little effect on the treatment of IPRs.

The second step in improving Russia's treatment of IPRs is to facilitate immediate bilateral discussions between Russia and China regarding their massive shared border. Both nations need to get serious about addressing the border enforcement problem both nations face. For the most part, Russia is not producing or manufacturing counterfeit goods.<sup>134</sup> However, Russia is a fertile market for black market and counterfeit goods.<sup>135</sup> Russia's "border control problems exacerbate the domestic availability of counterfeit goods manufactured in neighboring countries" and sold in their markets, kiosks, and stores.<sup>136</sup> Russia needs to clamp down on the border and stop the influx of counterfeit goods. Without consistent sources of counterfeit goods, prices for such goods would increase, shrinking the market.

However, Russia faces significant challenges if forced to face the border problem alone. Having an actual impact on the flood of counterfeit goods coming into the country requires bilateral efforts from China. The WTO has already concluded that China has a significant problem with its customs procedures.<sup>137</sup> Russia cannot make progress with regard to its border unless China makes similar efforts on its side of the border. A united effort would go a long way to curb the rampant smuggling of counterfeit goods across the Russian-Chinese border. Once Russia and China implement measures at the border, they could target the sources of counterfeit goods rather than collecting them once the goods have already been disseminated for public consumption.

## IV. CONCLUSION

Russia is a world power whose economic viability depends on its ability to present itself as a stable and safe market for international businesses. Currently, Russia's failures in the protection and regulation of IPRs are a large concern for most international businesses. For most companies, their ability to secure and protect their own IPRs is essential to remaining competitive in the market. Becoming a member of

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126. See Eugster, *supra* note 19, at 150.

127. See *id.* at 132 ("Until 2006, any legitimate attempts by Russia to join the WTO were blocked by the United States.").

128. World Trade Organization, *Members and Observers*, [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/org6\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm) (last visited May 11, 2011).

129. See OFFICE OF THE U.S. TRADE REPRESENTATIVE, *supra* note 8, at 20.

130. World Trade Organization, *China—Measures Affecting the Protection and Enforcement of Intellectual Property Rights*, (2009), [http://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds362\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds362_e.htm) (select link entitled "Panel Report" circulated on 26 January 2009).

131. *Id.* at 2-3.

132. *Id.* at 134.

133. See OFFICE OF THE U.S. TRADE REPRESENTATIVE, *supra* note 8, at 19 (monitoring various Chinese campaigns and programs designed to improve China's commitment to WTO obligations).

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134. See IACC, *supra* note 1, at 35-36 (pointing out that the main concerns with Russia relate to importation of a trafficking in counterfeit goods, rather than production).

135. *Id.*

136. *Id.*

137. World Trade Organization, *CHINA—MEASURES AFFECTING THE PROTECTION AND ENFORCEMENT OF INTELLECTUAL PROPERTY RIGHTS*, *supra* note 128, at 134.

the WTO would benefit Russia enormously through a renewed sense of economic stability and would help to attract international business. Although membership in the organization will not have any immediate effect on Russia's IPR problem, it will provide nations with a forum for bilateral discussions and make Russia part of the WTO's dispute resolution system, which is starting to have an impact on China, ten years after their accession.

Russia's membership in the WTO is a necessary first step to establishing a consistent dialogue regarding their treatment of IPRs. With membership come the obligations of TRIPS and the dispute resolution system, which are part of membership with the WTO. While Russia has much to do in the way of enforcement of its IP laws, the laws themselves are sound and comply with the standards established in the TRIPS Agreement. Membership in the WTO could help lead Russia to better enforcement.

Moreover, Russia shares one of the largest borders in the world with a top international infringer of intellectual property. Addressing the Russian-Chinese border is necessary. The fact that a large percentage of consumer goods sold in Russia are counterfeit goods and the fact that China is the largest manufacturer and supplier of pirated products is not an ideal combination. In order to make any kind of impact, Russia and China need to start immediate bilateral discussions on how to address the border problem. If both nations can find a way to limit the amount of counterfeit goods being smuggled into Russia, the world community could see significant changes in Russia.

Improving protections of IPRs will help Russia become a more attractive market for international business. Russian projects and industry will also see an influx of foreign investment in their businesses, which will hopefully help Russia develop their own homegrown intellectual property. With its national IPRs at stake, the government will have more pressure and be more invested in making sure adequate protections are in place. In the end, Russian progress will be like a matryoshka doll. Right now the problems are big and gaudy, but as you remove each layer, the problems become smaller and smaller. Russia is one big IPR matryoshka doll, yet with time and international cooperation, the problems it faces can slowly be solved, layer by layer.