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

Joshua M. Green

Follow this and additional works at: http://digitalcommons.wcl.american.edu/ipbrief

Part of the Intellectual Property Commons

Recommended Citation
3 Am. U. Intell. Prop. Brief 57 (Fall 2012)
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,1 consumer safety,2 and even national security.3 These failures are costing companies and consumers billions of dollars annually.4

* 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 (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").


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.5 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.6 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.7 However, counterfeiting and piracy continue to be an international problem.8

Every year the U.S. Trade Representative publishes a report detailing the failures of other nations in enforcing IPRs.9 In the Trade Representative's latest report, the Russian Federation topped the list as one of the biggest infringing nations, second only to China.10 Indeed, Russia has been a leading infringer for quite some time.11 Much scholarly attention has addressed the challenges international trade organizations place on developing nations, which in turn makes regulating
and enforcing IPRs extremely difficult.\textsuperscript{12} However, there is little dispute that there is a problem in Russia with guaranteeing protection of international IPRs within their borders,\textsuperscript{13} which has the potential to affect the Russian Federation’s economic development in the future.\textsuperscript{14}

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),\textsuperscript{15} 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.\textsuperscript{16} 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.\textsuperscript{17} 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


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


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.  

By 1931, IPRs under Soviet rule devolved into nonexistence—the new laws abolished private ownership of intellectual property. 

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. 

Actual legislative changes did not surface until 1992, when the new republican government of the Russian Federation enacted a series of intellectual property laws. 

Between 1994 and 2004, Russia’s legislative body enacted a host of laws that would directly regulate trademarks, copyrights, patents, and even trade secrets. 

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, a hotly controversial piece of legislation, which amended and essentially replaced the existing intellectual property laws. 

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. 

It was also an effort by the Federation to finally win accession to the WTO. 

The new legislation appeared to satisfy the U.S., which, up until that point, had vigorously opposed Russia’s admission into the WTO.

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. 

Although the amendments were accepted and signed into law with little public debate, the new legislation established a framework of IP laws that meet the international standards established by TRIPS. 

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. 

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). 

However, despite the controversy, Part IV made few substantive changes with regard to trademarks. 

Contrary to the many concerns that nations and businesses had about the 2006 law, Part IV complies with TRIPS requirements and actually mirrors the Lanham Act on many provisions. 

For example, Part IV has a similar definition of trademarks and service marks, provides legal protection for registered marks, lays out the rights of trademark holders, establishes statutory
bars to registration,47 and clearly establishes a system for registration.48 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.”49 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.50 In totality, the trademark provisions are actually rather complete.

2. Copyrights

The Russian Federation is already a member of the Berne and Rome Conventions.51 Although Russia is not yet a member of the WTO, the copyright provisions in Part IV were written with the TRIPS agreement in mind.52 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.”53 This concept is similar to American provisions for copyright, which protect any “original works of authorship fixed in a tangible medium of expression.”54 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.55 Furthermore, like in the United States, an author need not register to receive authors’ rights or neighboring rights.56 Even the duration of copyright protection, life plus 70 years, emulates the U.S. provision.57

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.”58 To be sure the level of protection extended to copyright holders is on the rise and this should be cause for encouragement.59 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.60 It also shows that Russia is firmly committed to the legislative protection of intellectual property rights.61

3. Patents

Russia’s patent laws under Part IV protect inventions, utility models, and industrial designs.62 It is noteworthy that Article 1 protects each of the objects contemplated in the Paris Convention63 and contains very similar language to Section 5 of TRIPS.64 Until recently, the patent laws in the United States granted patent protection to the first to invent or conceive.65 Congress recently passed legislation that placed the U.S. on par with the rest of the world,66 including Russia, by granting patent protection to the first party to file.67 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.”68 These concepts are strikingly similar to the U.S. counterpart, which requires that inventions be novel, non-obvious, and useful.69 Conversely, discoveries, scientific theories, mathematical methods, aesthetic designs, business methods, and computer programming are not considered inventions and thus not patentable under Part IV.70

Part IV formally establishes a meticulous method for applying for a patent.71 As part of the application process, the applicant must disclose the patentee, clearly describe the invention so that it can be reduced to practice, 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.
63. Budylin & Osipova, supra note 29, at 17.
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.72 The application process, which is administered by Rospatent, permits patent applications to be filed by foreign nationals.73 Once a patent is granted, the patent holder has an exclusive right to the invention, utility model, or industrial design.74 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.75

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.76 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.77 Despite new laws and increased raids, piracy in Russia still continues to grow.78 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 2010.79 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 2009.80 Although Russia has improved its efforts in combating infringing activities, these efforts have not had a meaningful impact on curtailing piracy.81

Some argue that the reason Russia is not seeing any improvement is the lack of criminal prosecutions against those caught trafficking pirated goods.82 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.83 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.84 Most of this vast territory is harsh and undeveloped and its over 138 million citizens are spread all across the nation.85 Furthermore, Russia shares a border with China, which remains the top manufacturer of counterfeit goods.86 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.87 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.88 Although it is slightly smaller geographically than the United States, its population is almost three times as large.89 Millions of people are packed into the large cities, with many more spread out across the vast Chinese landscape.90 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.91 Presently, the current customs operation in regard to the Chinese border is a huge concern.92 Efforts have been made by both countries to improve their customs agents’ ability to identify and seize counterfeit goods.93 These efforts are

81. Eugster, supra note 15, at Section 5.
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.”).
commendable, but the tenuous relationship between the two nations over their shared border 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. 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. Russia relies heavily on its vast reserve of natural resources. Even then, its exports are primarily to the European Union (EU), China, Japan, and the U.S. Exports to the U.S., however, equal less than 7% of the total exports, which means that Russia is a very regional exporter. 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.

China, on the other hand, is a major manufacturer and exporter, producing many of the world’s goods.

However, like Russia it does not have much stake in protecting its own IPRs. 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. The steady drop in Chinese exports means that Chinese companies are producing and exporting fewer goods, especially in the market of value added products. 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. 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, 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. Without national demand for stronger IPR protections, political incentives are low to make significant progress in protecting foreign intellectual property rights.
C. Political Corruption: The Biggest Barrier to Progress

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

Russia is among the top 20% of most corrupt nations.\footnote{111} 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.”\footnote{112} 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.\footnote{113} Government corruption remains a significant obstacle to combating counterfeiting and piracy.\footnote{114}

In 2009, President Medvedev stated that the Russian Federation had only just begun creating a judicial system that was free of corruption.\footnote{115} With a judicial and regulatory system burdened with heavy corruption and a severe lack of transparency,\footnote{116} it is not surprising that Russia has become a prominent market for counterfeit goods.\footnote{117} It appears that those calling for more criminal prosecutions against perpetrators of IPRs have identified legitimate concerns with this system.\footnote{118} 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.\footnote{119} 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.”\footnote{120} Despite public commitments to IPR protections, increased raids, and fundamental changes to the judicial system,\footnote{121} 71% of respondents to a research survey felt that IPR enforcement stayed the same or deteriorated over the past year.\footnote{122} 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.\footnote{123}

Clearly, both countries struggle with political corruption and dealing with it has become a way of life for companies doing business within their borders.\footnote{124} 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.\footnote{125} Russia has been waiting for approval...
The Russian IPR Problem

for almost 20 years. 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, but this policy may have been misguided. Indeed, Russian membership in the WTO will likely benefit the U.S., and it might be 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 and since then has remained of the leading infringers of U.S. IPRs. 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. 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. Considering these allegations, the panel concluded that China had violated multiple provisions of the TRIPS agreement. Since then, there has been improvement in China's attempts to comply with WTO obligations and panel recommendations.

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. 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. However, Russia is a fertile market for black market and counterfeit goods. Russia's "border control problems exacerbate the domestic availability of counterfeit goods manufactured in neighboring countries' and sold in their markets, kiosks, and stores. 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. 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

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.").
129. See Office of the U.S. Trade Representative, supra note 8, at 20.
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).
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.
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.