



IIPA SUMMARY: RUSSIA CIVIL CODE (CH. IV) REFORM PROPOSAL

The Russian government is proposing a sweeping overhaul of the Russian Civil Code, with complete reform of the copyright laws in Chapter IV. The Chapter IV amendments were proposed with no input from the domestic or international copyright community and are universally opposed by copyright experts in and outside of Russia. The amendments are inconsistent with Russia's existing bilateral (U.S. NTR Agreement) and multilateral treaty obligations (Berne Convention and Geneva Phonograms Convention), and are entirely inconsistent with the WTO/TRIPs Agreement, moving Russia even further away from WTO compliance and imperiling its accession. Most important, the amendments would weaken, not strengthen on-the-ground enforcement of IPR in Russia.

In short, the Russian government must immediately withdraw the proposed Chapter IV of the Civil Code. The proposal to entirely replace the existing copyright regime with civil code amendments is a structural reform that cannot be "fixed" with revisions or improvements to the draft. IIPA is very concerned that adoption of the proposed Chapter IV of the Civil Code will result in a complete undermining of the past 13 years of legal reforms in Russia meant to improve its intellectual property regime by the adoption of the 1993 Copyright Law (as amended in 2004), and administrative, criminal, customs and civil code enforcement provisions, all of which would be replaced with an entirely new set of rights and remedies.

The whole exercise of adopting sweeping new copyright laws diverts attention and resources from the more critical problem in Russia – that of enforcement, especially the unregulated and rampant production and distribution of discs at the optical media facilities. Worse, the proposal to repeal and replace the entire copyright legal regime with Civil Code reforms will only undermine whatever existing enforcement activities are underway and, in the future, further frustrate the efforts of police, prosecutors and judges, resulting in diminished, not enhanced enforcement activity.

History of and Substantive Deficiencies in the Civil Code Reform Effort

After first being proposed in the mid-1990s, five years ago this effort resurfaced with draft amendments to the Civil Code that would separate the IPR provisions into Part IV of the Civil Code. At that time and for over 10 years, IIPA and the U.S. government have urged the Government of Russia to prevent this attack on copyright protection and enforcement.

Our preference, and that of the international copyright community (including the WIPO), has always been to focus on improving the copyright law consistent with international norms, and to defeat the incorporation of broad IPR provisions in the Civil Code. However, if the Russian Government insists that Civil Code reform pertaining to IPR is necessary, it should ensure that:

- (1) a bare minimal number of provisions are adopted (we have repeatedly suggested no more than 10 such general principle provisions as existed under the former Soviet Civil Code for IPR);
- (2) that any such provisions provide “skeletal” protections and that it clearly state that the copyright law continues to be the prevailing law and that the latter provide the details of IPR protection and enforcement; and
- (3) it provide clear instructions to courts and prosecutors that the copyright law is the prevailing law to avoid judicial confusion or any weakening of the existing copyright system.

Draft Civil Code (as of March 26)—some of the specific substantive deficiencies

The draft, as it pertains to IPR, consists of: Chapter 69 on common provisions, Chapter 70 on copyright, Chapter 71 on related (neighboring) rights – in draft Part IV of the Civil Code. As part of the legislative package, there are also provisions of a separate draft federal law on the implementation of Part IV some of which are relevant to copyright and related rights. The proposal is set to enter into force (if adopted by the Duma) on January 1, 2007; it would replace all Russian laws on IP, including the 1993 Copyright Law and 1992 Law on the protection of computer programs and databases. There are several places in the draft where it refers to other laws that would be repealed or replaced by the Civil Code and others where there is no reference at all, for example, to enforcement provisions.

Some of the deficiencies in the draft are that it:

1. Implements discriminatory treatment of the works of U.S. and other foreign nationals (Art. 1231).
2. Limits the scope of exclusive rights of copyright owners inconsistent with international treaties in:
 - a. Article 1255(1) and (2) on the scope of application (points of attachment) of copyright;
 - b. Article 1255(3) which appears to try to implement Article 18 of the Berne Convention;
 - c. Article 1280 on the term of protection of works;
 - d. Article 1315 on the term of protection of performances;

- e. Article 1318 on the scope of application (points of attachment) of performers' rights;
 - f. Article 1324 on the term of protection of phonograms;
 - g. Article 1325 on the scope of application (points of attachment) of the rights of phonogram producers.
3. Fails to adequately provide the "tri-partite test" of fair use required by the Berne Convention (Art. 9(2), the WTO/TRIPs Agreement (Art. 13), and the WIPO digital treaties (WCT/WPPT, Arts. 10 and 16, respectively).
 - a. Parts of the test are applied only for software programs, and even then incompletely
 4. Fails to adequately implement the digital treaties (WCT/WPPT):
 - a. Articles 1269.2(1); 1314.2(6), 1321.2(6) and 1327.2(6) regarding the right of reproduction and temporary copies;
 - b. Articles 1262.4, 1269.2(12), 1314.2(4) and (8), 1321.2(5) and 1327.2(4) regarding the required right of (interactive) making available;
 - c. Article 1299 regarding the required technological protection measures;
 - d. Fails completely to apply these required rights to neighboring rights;
 - e. Fails to provide any protection for copyright management information as required by both treaties.
 5. Fails completely to legislate the enforcement of rights (including the application of civil, criminal, administrative and customs enforcement).
 6. Fails to meet international norms or treaty obligations in the following provisions:
 - a. Unclear or ill-defined protections, such as definition and scope of protection for computer programs (as a category separate from scientific, literary and artistic works in Article 1225); the use of "works" when concerning folklore; the concepts of "disclosure" and "publication"; and protection for acts as a "result of a performance";
 - b. Article 1327.2(10)—permitting (ill-defined) the transformation of phonograms and videograms into other formats;
 - c. Article 1258.6—fails to provide protection for news, including television reports beyond what is allowed under Article 2(8) of the Berne Convention;
 - d. Article 1310--on the definition of "performers" is unclear and is not in compliance with Article 2(a) of the WPPT;
 - e. Article 1315.1—incorrectly protects performers by limiting its scope only to the first public performance (in a series of performances), not for each separate performance;
 - f. Article 1318—provides an inadequate point of attachment for performances.

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