

## RUSSIA AND THE WORLD TRADE ORGANIZATION: WILL TRIPS BE A STUMBLING BLOCK TO ACCESSION?\*

### I. INTRODUCTION

The Agreement on Trade-Related Aspects of Intellectual Property Rights (“TRIPS”) codifies the international intellectual property standards that are prerequisites to accession to the World Trade Organization (“WTO”).<sup>1</sup> In the codification of these international standards, TRIPS provides unprecedented protection to intellectual property rights; in fact, TRIPS is considered to be the most comprehensive multilateral agreement on intellectual property.<sup>2</sup> The Russian Federation (“Russia”) is currently attempting to conform with TRIPS in order to accede to the WTO.<sup>3</sup>

The aim of this Note is to examine whether Russia will be able to fulfill its obligations to the extent necessary for WTO membership. Although Russia may have facially conformed with many of the requirements of TRIPS, its bid for WTO membership will be endangered if it cannot demonstrate that its laws actually have force and that Russia will effectively execute and enforce the intellectual property regime set in place.

After outlining the structure of the WTO and its accession process, this Note will discuss the international intellectual property agreements before TRIPS, and the five major parts of TRIPS that offer protection to intellectual property rights. Russia’s conformance with Parts I and II of TRIPS, the general provisions and substantive standards of protection, will then be analyzed. Russia’s conformance with its key obstacle to accession, the legal enforcement of intellectual property laws under Part III of TRIPS, will then be examined.

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1. See Adrian Otten & Hannu Wager, *Compliance with TRIPS: The Emerging World View*, 29 VAND. J. TRANSNAT’L L. 391, 393-94 (1996).

2. See *id.* at 391, 392; J.H. Reichman, *Compliance with TRIPS Agreement: Introduction to a Scholarly Debate*, 29 VAND. J. TRANSNAT’L L. 363, 366 (1996).

3. See generally *Accession of the Russian Federation: Treatment of Trade-Related Aspects of Intellectual Property Rights*, WT/ACC/RUS/7 (Oct. 25, 1995) (outlining Russia’s intellectual property regime and its conformance to TRIPS) [hereinafter *Russian Accession*].

Finally, this Note will conclude with a brief discussion on transitional arrangements under Part VI of TRIPS and how these arrangements will affect Russia's conformance with TRIPS.

## II. THE WORLD TRADE ORGANIZATION

During the 1940s, John Maynard Keynes and other individuals proposed the creation of the International Trade Organization ("ITO").<sup>4</sup> An attempt to create the ITO failed, however, largely because of a lack of support in the Truman administration for the principal agreement of the ITO, the Havana Charter.<sup>5</sup> In 1947, the General Agreement on Trade and Tariffs ("GATT") was drafted with the intent that it would encompass a series of conferences under the ITO.<sup>6</sup> GATT 1947 was only a "provisional legal instrument" based upon the Havana Charter;<sup>7</sup> it was intended to be merely a transitional document and to encompass only a "minimum institutional arrangement": the primary institution was to be the ITO.<sup>8</sup>

When the creation of the ITO failed, GATT 1947 surfaced as the sole document encompassing international trade rules,<sup>9</sup> and continued to govern the international trading system for nearly the next fifty years.<sup>10</sup> GATT developed gradually through a series of negotiation rounds,<sup>11</sup> and eventually became the "'constitution' for international trade law."<sup>12</sup> The most recent GATT negotiation round, the Uruguay Round, led to the creation of the WTO.<sup>13</sup>

The WTO was established on January 1, 1995 to encompass the Uruguay Round results and to succeed GATT.<sup>14</sup> While the WTO has become the foundation of the multilateral trading system,<sup>15</sup> it did not supercede GATT; instead, the results of the Uruguay Round sup-

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4. See *World Trade Organization*, [1995/96] 1 Y.B. INT'L ORG. (Union of International Associations) 1645.

5. See RAJ BHALA, *INTERNATIONAL TRADE LAW* 85 (1996).

6. See *id.* at 86.

7. *Id.* at 85.

8. Frederique Berrod & Eric Gippini Fournier, *The Common Institutional Framework of the New World Trade System*, in JACQUES H.J. BOURGEOIS ET AL., *THE URUGUAY ROUND RESULTS* 25 (J.H.J. Bourgeois et al. eds., 1995); see also *World Trade Organization*, *supra* note 4.

9. See *World Trade Organization*, *supra* note 4.

10. See BHALA, *supra* note 5, at 85-86.

11. See *id.* at 97.

12. *Id.* at 85.

13. See *id.* at 97.

14. See 1 WTO ANN. REP. 94 (1997); see also *World Trade Organization*, *supra* note 4.

15. See WTO ANN. REP., *supra* note 14.

plement and enhance GATT 1947 and other pre-WTO trade instruments.<sup>16</sup> For example, while GATT provided protection only to trade in goods, the WTO provides protection to trade in goods and services, and to intellectual property rights.<sup>17</sup> In addition, the WTO structure contemplates a “single undertaking” approach: WTO Members must accept all of the results of the Uruguay Round.<sup>18</sup>

Many industrialized nations have joined the WTO, thereby becoming WTO “Members.”<sup>19</sup> The WTO provides the framework for contractual obligations between Members, and these obligations may determine the confines of domestic trade policy.<sup>20</sup> Essentially, the WTO provides a forum in which Members may negotiate and address issues arising under WTO agreements, and a supervisory mechanism by which Members may enforce those agreements.<sup>21</sup>

The Marrakesh Agreement Establishing the World Trade Organization (“WTO Agreement”) is the central founding document of the WTO. The WTO Agreement establishes the WTO, and, *inter alia*, delineates the Organization’s scope, functions, and structure.<sup>22</sup> Parties who sign the WTO Agreement are also generally bound by additional agreements called Multilateral Trade Agreements (“MTAs”).<sup>23</sup> The MTAs are comprised of three Annexes: (1) the Multilateral Agreements on Trade in Goods, (2) the Understanding on Rules and Procedures Governing the Settlement of Disputes (“Understanding”), and (3) the Trade Policy Review Mechanism.<sup>24</sup> The three main parts of the first Annex are GATT 1994, the General Agreement on Trade in Services (“GATS”), and TRIPS.<sup>25</sup>

Membership in the WTO may be obtained by meeting the definition of an “original” Member, or by acceding to the WTO.<sup>26</sup> To be an original Member, there are four requirements: (1) the country

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16. See BHALA, *supra* note 5, at 86; see also Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 33 I.L.M. 1140 (1994), art. 2(4), 16(1-2) [hereinafter WTO Agreement].

17. See WTO ANN. REP., *supra* note 14.

18. *World Trade Organization*, *supra* note 4.

19. The signing parties to the WTO Agreements are referred to as Members. See WTO Agreement, *supra* note 16, art. 2(1).

20. See WTO ANN. REP., *supra* note 14.

21. See WTO Agreement, *supra* note 16, art. 3(1-2).

22. See *id.* arts. 1-4.

23. See *id.* art. 2(2).

24. See *id.*

25. See *id.* Annex I.

26. See *id.* arts. 11 & 12.

must have been a contracting party when the WTO Agreement came into force; (2) the country must have accepted the WTO Agreement and the MTAs; (3) the country must have annexed Schedules of Concessions and Commitments to GATT 1994; and (4) the country must have annexed Schedules of Specific Commitments to GATS.<sup>27</sup> For subsequent membership, the WTO Agreement provides that “[a]ny state customs or separate customs territory possessing full autonomy in the conduct of external commercial relations and of other matters provided for in this Agreement and the Multilateral Trade Agreements may accede to this Agreement, on terms to be agreed between it and the WTO.”<sup>28</sup>

There are four stages in the WTO accession process. The first stage involves the preliminary disclosure of information to WTO officials through a memorandum.<sup>29</sup> During this stage, the applicant describes all aspects of its trade and economic policies that might affect the WTO agreements.<sup>30</sup> The applicant’s memorandum provides the information that members of a WTO Working Party<sup>31</sup> will closely analyze.<sup>32</sup>

The second stage consists of bilateral accession negotiations, which encompass “every aspect of the applicant’s trade policies and practices, such as market access concessions and commitments on goods and services, legislation to enforce intellectual property rights, and all other measures which form a government’s commercial policies.”<sup>33</sup> These bilateral negotiations constitute a considerable part of the accession process and also determine the benefits that existing WTO Members will accrue by allowing the applicant to accede.<sup>34</sup>

The third stage finalizes the negotiations and analysis of the applicant’s trade regime.<sup>35</sup> During this stage, the Working Party com-

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27. See *id.* art. 11(1). In addition, there are special provisions for developing countries. See *id.* art. 11(2).

28. *Id.* art. 12(1).

29. See Jeremy B. Rosen, *China, Emerging Economies, and the World Trade Order*, 46 DUKE L.J. 1519, 1523 n.29 (1997); e-mail correspondence between Christian L. Broadbent, Editor-in-Chief Elect, *Duke Journal of Comparative & International Law*, and WTO Personnel 1 (Oct. 30, 1997) (on file with the *Duke Journal of Comparative & International Law*).

30. See Rosen, *supra* note 29; correspondence, *supra* note 29.

31. A WTO Working Party is established for governments when they apply to accede to the WTO. See WTO ANN. REP., *supra* note 14, at 95.

32. See Rosen, *supra* note 29; correspondence, *supra* note 29.

33. WTO ANN. REP., *supra* note 14, at 95; see also Rosen, *supra* note 29; correspondence, *supra* note 29, at 1-2.

34. See correspondence, *supra* note 29, at 1-2.

35. See *id.* at 2.

piles the information from its deliberations with the applicant and completes a draft protocol of accession.<sup>36</sup> The draft protocol may include several annexes, which are legally binding and address issues particular to the applicant's trade regime.<sup>37</sup> In addition, the annexes encompass timetables for the applicant's conformance with WTO obligations.<sup>38</sup>

The fourth stage involves the presentation of the draft protocol and other negotiation documents to the General Council or Ministerial Conference.<sup>39</sup> If the Ministerial Conference then approves the terms of the applicant's accession by a two-thirds majority vote of WTO Members,<sup>40</sup> the applicant may sign the protocol and accede to the WTO.<sup>41</sup>

The chronology and terms by which an applicant accedes are important aspects of the WTO accession negotiations.<sup>42</sup> The length and intensity of the negotiations will vary according to, and are highly dependent on, the ability of the applicant to meet WTO rules and obligations regarding free-market, pro-competition, and non-discriminatory economic principles.<sup>43</sup> Moreover, the conditions of the applicant's market access for goods and services granted to other WTO Members play a decisive role in the accession process.<sup>44</sup>

### III. DEVELOPING AN INTERNATIONAL INTELLECTUAL PROPERTY REGIME: THE EMERGENCE OF TRIPS

#### A. International Intellectual Property Law Before TRIPS

During the Uruguay Round negotiations, many countries pushed for the adoption of TRIPS into the WTO framework. However, there was already an existing international regime that covered certain aspects of intellectual property. TRIPS improved on this framework by providing for protective measures and enforcement mechanisms for all intellectual property rights.

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36. *See id.*

37. *See id.*

38. *See id.*

39. *See id.* at 2-3; Rosen, *supra* note 29.

40. *See* Rosen, *supra* note 29; correspondence, *supra* note 29, at 3; *see also* WTO Agreement, *supra* note 16, art. 12(2).

41. *See* correspondence, *supra* note 29, at 3.

42. *See id.*

43. *See id.*

44. *See id.*

1. *The Paris Convention*. The oldest intellectual property treaty, the Paris Convention for the Protection of Industrial Property<sup>45</sup> sets out standards and protections for “industrial property,” which includes patents, utility models, industrial designs, trademarks, service marks, trade names, and appellations of origin.<sup>46</sup>

Before TRIPS was implemented in 1995, the Paris Convention was the primary source of international authority on trademarks and service marks.<sup>47</sup> Although the Convention set forth a number of provisions on the registration and protection of trademarks, aspects of the Convention are vague and enforcement provisions are weak.<sup>48</sup>

The Paris Convention, along with the Lisbon Agreement,<sup>49</sup> was also the primary source of governance for geographical indications. Under the Convention, indications of source and appellations of origin are protected as geographical indications.<sup>50</sup> While geographical indications are protected under the Paris Convention as industrial property, few provisions under the Convention offer any substantive protection.<sup>51</sup>

Although not comprehensive in its treatment of patents, the Paris Convention also established for a patent applicant the often vital right of priority for the purpose of filing subsequent applications in other member countries.<sup>52</sup>

Additionally, until TRIPS was enacted the Paris Convention

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45. Paris Convention for the Protection of Industrial Property, Mar. 20, 1883, *as last revised* at the Stockholm Revision Conference, July 14, 1967, 21 U.S.T. 1583, 828 U.N.T.S. 305 [hereinafter Paris Convention].

46. *See id.* art. 1(2).

47. Russia has assumed the treaty obligations of the Soviet Union regarding intellectual property, which include the Paris Convention, the Madrid Agreement and the Protocol to the Madrid Agreement. The Russian government also recently signed on to the Trademark Law Treaty in 1994. *See* Cynthia V. Stewart, *Trademarks in Russia: Making and Protecting Your Mark*, 5 TEX. INTELL. PROP. L. J. 1, 11-12 (1996).

48. Article 9, which outlines enforcement provisions for the seizure of goods bearing an illegal trademark, has been interpreted as “watered down” as the convention does not bind authorities to seize goods in transit, and does not require signatories to modify their laws to allow seizure on importation of goods or prohibition of importation of goods illegally bearing a trademark. *See* Paris Convention, *supra* note 45, art. 9; *see also* Gerd F. Kunze, *Trademarks, in* INTELLECTUAL PROPERTY & INTERNATIONAL TRADE: A GUIDE TO THE URUGUAY ROUND TRIPS AGREEMENT 29, 30 (Daphne Yong-d’Hervé et al. eds., 1996).

49. Lisbon Agreement for the Protection of Appellations of Origin, Oct. 31, 1958, *as revised* July 14, 1967 [hereinafter Lisbon Agreement].

50. *See* Kunze, *supra* note 48.

51. *See id.*

52. *See* Paris Convention, *supra* note 45, art. 4(1); *see also* Hans Jurgen Schulze-Steinen, *Patents, in* INTELLECTUAL PROPERTY & INTERNATIONAL TRADE: A GUIDE TO THE URUGUAY ROUND TRIPS AGREEMENT 47, 47 (1996).

contained the most significant provision of international law regarding industrial designs. Article 5 *quinquies*<sup>53</sup> gave members extraordinary freedom in the organization of their design production and led to a diverse range of national design production laws.<sup>54</sup>

2. *The Berne Convention for the Protection of Literary and Artistic Works.* The Berne Convention, along with its amendments,<sup>55</sup> provides protection to literary and artistic works<sup>56</sup> in a fairly straightforward manner. The Convention does not condition protection of intellectual property upon meeting any formalities; qualifying intellectual property is automatically protected under the Convention. Article 5 of the Convention grants national treatment for Berne Union countries (Convention signatories).<sup>57</sup> Under the Convention, the basic rule is that the protection of copyrighted works exists until fifty years after the death of the author.<sup>58</sup>

Although the Convention provides substantive protections to a given author's works,<sup>59</sup> the Berne Convention does provide that

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53. "Industrial designs shall be protected in all the countries of the Union." Paris Convention, *supra* note 45, art. 5 *quinquies*.

54. See Tibor S. Pataky, *Industrial Designs*, in INTELLECTUAL PROPERTY & INTERNATIONAL TRADE: A GUIDE TO THE URUGUAY ROUND TRIPS AGREEMENT 42, 42 (1996).

55. Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, as last revised at Paris, July 24, 1971, 828 U.N.T.S. 221 [hereinafter Berne Convention]. Officials at the Uruguay Round negotiations agreed that TRIPS should expand and modify on the most recent standards provided by the Convention in the Paris Act of 1971. See Otten & Wager, *supra* note 1, at 397.

56. The Berne Convention defines literary and artistic works as follows:

[E]very production in the literary, scientific, and artistic domain, whatever may be the mode or form of its expression, such as books, pamphlets and other writings; lectures, addresses, sermons and other works of the same nature; dramatic or dramatico-musical works; choreographic works and entertainments [sic] in dumb show; musical compositions with or without words; cinematographic works to which are assimilated works expressed by a process analogous to cinematography; works of drawing, painting architecture, sculpture, engraving, and lithography; photographic works to which are assimilated works expressed by a process analogous to photography; works of applied art; illustrations, maps, plans, sketches and three-dimensional works relative to geography, topography, architecture or science.

Berne Convention, *supra* note 55, art. 2(1). Article 2 also grants protection to the translations of works (2(3)), establishes protection for a collection of works (2(5)), and allows Members to require that the protected materials be fixed in some material form before they may receive protection (2(2)).

57. See *id.* art. 5(1). In addition, Article 3(1)(b) protects foreigners if they publish their works within the Berne Union originally or simultaneously to publication outside the Union.

58. See *id.* art. 7.

59. Article 6*bis* of the Berne Convention delineates the extent of the control that authors may have over their work, and contains provisions for the protection of the author's moral rights (*droit moral*). In addition, Articles 8-14 provide the substance of the author's rights. For example, the author has the right to control the translation (art. 8), reproduction (art. 9), and

Members are authorized to make exceptions to the rules regarding the rights of authorship, as long as the exceptions do not unreasonably damage such rights.<sup>60</sup> Conversely, Members may also provide for higher levels of protection than those under the Berne Convention as long as such enhanced protection does not conflict with any other provisions of the Convention.<sup>61</sup> The baseline of protection, however, is a rebuttable presumption that the individual whose name appears on an artistic or literary work shall be regarded as the author.<sup>62</sup>

3. *Other Relevant International Intellectual Property Agreements.* In addition to the Paris and Berne Conventions, a number of other international agreements deal specifically with some of the intellectual property covered by TRIPS. For instance, other international agreements that deal with copyrights and related rights include the Universal Copyright Convention (1952),<sup>63</sup> the Phonogram Convention (1971),<sup>64</sup> and the Rome Convention (1961).<sup>65</sup> While TRIPS does not require that Members abide by specific provisions of the Rome Convention, it does state that nothing in Parts I to IV of TRIPS shall derogate from existing obligations that Members have to each other under the Rome Convention.<sup>66</sup>

Other international agreements dealing with trademarks include

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public distribution of his copyrighted works (arts. 11, 11 *bis*, 11 *ter*), as well as the modification or arrangement of the work (art. 12); see also Stefan Bernhard, *Copyright and Related Rights*, in *INTELLECTUAL PROPERTY & INTERNATIONAL TRADE: A GUIDE TO THE URUGUAY ROUND TRIPS AGREEMENT* 22, 23 (1996).

60. See Bernhard, *supra* note 59; see also Berne Convention, *supra* note 55, art. 9(2).

61. See Bernhard, *supra* note 59; see also Berne Convention, *supra* note 55, arts. 19 (concerning domestic legislation), 20 (concerning bilateral treaties).

62. See Berne Convention, *supra* note 55, art. 15. When an infringement of copyrighted works occurs, individuals may institute legal proceedings in the courts of other Members against those who infringe the copyrighted work. See *id.* art. 15(4); see also Bernhard, *supra* note 59.

63. Universal Copyright Convention, *opened for signature* Sept. 6, 1952, 6 U.S.T. 2731, 216 U.N.T.S. 133, *as last revised* July 24, 1971, 55 U.S.T. 1341.

64. Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms, done at Geneva, Switzerland, Oct. 29, 1971, 25 U.S.T. 309, 866 U.N.T.S. 67.

65. International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, done at Rome, Italy, Oct. 26, 1961, 12 U.S.T. 2377, 496 U.N.T.S. 43.

66. 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 vol. 31; 33 I.L.M. 81, art. 2(2) [hereinafter TRIPS].

the Madrid Agreement (1891),<sup>67</sup> the Protocol to the Madrid Agreement (1989),<sup>68</sup> the Nice Agreement (1957),<sup>69</sup> and the Vienna Agreement.<sup>70</sup> In addition, the Trademark Law Treaty<sup>71</sup> was concluded in 1994, and is important in that it (1) obliges contracting parties to provide for registration of service marks, and (2) declares that all provisions of the Paris Convention relating to trademarks shall also relate to service marks.<sup>72</sup>

Concluded in 1958, the Lisbon Agreement protects appellations of origin.<sup>73</sup> While the Agreement affords unlimited registration of geographic indications, appellations of origin must be registered with the World Intellectual Property Organization (“WIPO”),<sup>74</sup> as well as recognized and protected in the country of origin.<sup>75</sup> Once registered with the WIPO, such appellations are protected against usurpation or

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67. Madrid Agreement Concerning the International Registration of Marks, Apr. 14, 1891, 828 U.N.T.S. 389.

The Madrid Agreement . . . allows international registration of a trademark or service mark based on a home registration for a renewable 20-year period, with extension of protection to up to 40 countries. The countries concerned treat the international registration as a national trademark application to be examined on absolute and/or relative grounds for refusal.

Kunze, *supra* note 48, at 31.

68. Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks, adopted June 27, 1989, WIPO Pub. No. 204(E). The Madrid Protocol, which came into effect in 1995, introduces certain changes which allow countries such as the United Kingdom and Northern European countries, which had no difficulties with some features of the Madrid agreement, to adhere to the Madrid system without altering their basic features. See Kunze, *supra* note 48, at 31.

69. Nice Agreement Concerning the International Classification of Goods and Services to Which Trademarks are Applied, June 15, 1957, 23 U.S.T. 1336, 550 U.N.T.S. 45. “[T]he Nice Agreement (1957) . . . establishes a list of 34 classes of goods and 8 classes of services . . . indicating the class in which each good or service is classified.” Kunze, *supra* note 48, at 31.

70. Vienna Agreement Establishing an International Classification of the Figurative Elements of Marks, June 12, 1973, *as amended* Oct. 1, 1985, T.C. Resmi Gazete No. 22373, at 12.24 (1995).

71. Trademark Law Treaty (adopted at Geneva on Oct. 27, 1994), in *WIPO, Industrial Property and Copyright*, INDUSTRIAL PROPERTY LAWS AND TREATIES, MULTILATERAL TREATIES, Jan. 1995, at 1-12.

72. See Kunze, *supra* note 48, at 31.

73. See *id.* at 35. Appellations of origin are “the geographical name of a country, region, or locality which serves to designate a product originating therein, the quality and characteristics of which are due exclusively or essentially to the geographical environment, including natural and human factors.” Lisbon Agreement, *supra* note 49, art. 20.

74. WIPO is the U.N. organization charged with “the promotion of the protection of intellectual property throughout the world through cooperation among States, and for the administration of various multilateral treaties dealing with the legal and administrative aspects of intellectual property.” *What is WIPO?* (last visited May 15, 1998) <<http://www.wipo.org/eng/dgtext.htm>>.

75. See Lisbon Agreement, *supra* note 49.

imitation.<sup>76</sup>

In addition to the Paris Convention and Lisbon Agreement, which both deal with appellations of origin, the Madrid Agreement on the Repression of False or Deceptive Indications of Source on Goods (1891) deals with procedural issues and outlines enforcement of intellectual property rights, including the seizure of importation of any products with false and deceptive indications.<sup>77</sup> Bilateral agreements have also been important in the protection of geographical indications.<sup>78</sup> Finally, the Treaty on Intellectual Property in Respect of Integrated Circuits<sup>79</sup> provided the international standard prior to the enactment of TRIPS.

## B. TRIPS

The Uruguay Round brought intellectual property into the GATT-WTO system for the first time through TRIPS,<sup>80</sup> which is a significant component of the tripartite foundation upon which the WTO is established.<sup>81</sup> While there have been other attempts to create international standards for intellectual property protection, TRIPS strengthens and enlarges the scope of earlier accords such as the Berne and Paris Conventions.<sup>82</sup>

While TRIPS establishes only the minimum protection that Members must give to intellectual property rights,<sup>83</sup> the scope of TRIPS is comprehensive: the Agreement encompasses both general and specific intellectual property rights. The protection that TRIPS affords to these rights are contained in five parts of the Agreement.

First, Part I of TRIPS addresses the general provisions and basic principles of the Agreement. TRIPS provides that while Members

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76. *See id.* The Lisbon Agreement affords this protection to registered appellations even if the actual origin is cited, the appellation is used only in a translated form, or is qualified by terms such as "kind" or "type." The Lisbon Agreement also protects against the classification of an appellation as "generic," as long as the country of origin still protects the appellation. *See id.*

77. *See id.* at 35.

78. *See id.*

79. Treaty on Intellectual Property in Respect of Integrated Circuits, 28 I.L.M. 1477 (1989).

80. *See* RT. HON. DENZIL DAVIES, *THE WORLD TRADE ORGANIZATION AND GATT '94: A GUIDE TO THE NEW INTERNATIONAL ECONOMIC LAW* 10 (1995).

81. *See* Otten & Wager, *supra* note 1, at 391, 393. Otten and Wager argue that the other two important components that form the base of the WTO are trade in goods and trade in services. *See id.*

82. *See* BHALA, *supra* note 5, at 991-92.

83. *See* TRIPS, *supra* note 66, art. 1(1); WTO Ann. Rep., *supra* note 14, at 124.

must give effect to the provisions of the Agreement, they may provide more extensive protection than the TRIPS provisions mandate as long as such protection does not contravene TRIPS in any way.<sup>84</sup> In addition, as long as Members adhere to the minimum requirements in TRIPS, they may determine the appropriate methods to implement the Agreement within their own legal system and practice.<sup>85</sup> Part I of the Agreement does affirmatively require, however, that Members abide by many of the obligations of the Paris Convention,<sup>86</sup> and states that TRIPS does not derogate from the Members' existing obligations under other major intellectual property accords.<sup>87</sup> Part I also generally requires Members to grant national<sup>88</sup> and most-favored-nation treatment<sup>89</sup> to the nationals of other Members, and provides that Members should implement TRIPS according to the Agreement's objectives<sup>90</sup> and principles.<sup>91</sup>

Second, Part II of TRIPS provides the substantive standards of protection for seven categories of intellectual property. These cate-

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84. See TRIPS, *supra* note 66, art 1(1).

85. See *id.*

86. See Otten & Wager, *supra* note 1, at 396-97; discussion *infra* Part III.C.1.

87. See TRIPS, *supra* note 66. In general, it is argued that TRIPS attempts to make the application of these agreements more effective. See, e.g., Otten & Wager, *supra* note 1, at 397.

88. National treatment under TRIPS requires that "[e]ach Member shall accord to the nationals of other Members treatment no less favourable than that it accords to its own nationals with regard to the protection of intellectual property. . . ." TRIPS, *supra* note 66, art. 3(1) (footnote omitted). However, TRIPS provides exceptions to this requirement for, *inter alia*, provisions in the Berne, Paris and Rome Conventions, and for performers, producers of phonograms, and broadcasting organizations. See *id.* art. 3(1-2).

89. Most-favored-nation treatment under TRIPS requires that "with regard to the protection of intellectual property, any advantage, favour, privilege or immunity granted by a Member to the nationals of any other country shall be accorded immediately and unconditionally to the nationals of all other Members." *Id.* art. 4. TRIPS does provide exceptions to this treatment for advantages, favors, privileges or immunities which a Member accords under the following circumstances: (1) pursuant to certain international agreements, (2) pursuant to certain provisions of the Berne or Paris Conventions, and (3) pursuant to certain rights of performers, producers of phonograms, and broadcasting organizations. See *id.* art. 4(a)-(d).

90. TRIPS requires that Members should protect and enforce intellectual property rights in ways that "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." *Id.* art. 7.

91. To avoid legal measures which abuse intellectual property rights or restrict international trade and the dissemination of technology, TRIPS allows Members to amend or formulate their laws according to certain principles. See *id.* art. 8(2). Specifically, TRIPS allows Members to tailor laws and regulations in a manner which protects public health and nutrition, and to promote the public interest, so long as the measures do not contravene TRIPS. See *id.* art. 8(1).

gories include the following: copyright and related rights; trademarks (and service marks); geographical indications; industrial designs; patents, layout designs (topographies) of integrated circuits (e.g., microchips); and undisclosed information (including trade secrets).<sup>92</sup> In addition, Part II of TRIPS contains provisions addressing anti-competitive practices in contractual licenses, a category generally not included in the definition of intellectual property.<sup>93</sup> Experts note that TRIPS provides protection to each of these categories by requiring Members to abide by several important sections of the Berne and Paris Conventions,<sup>94</sup> and by enhancing the protection provided in these previous intellectual property agreements.<sup>95</sup> It is generally thought that TRIPS standards are similar to those in industrialized countries.<sup>96</sup>

Third, Part III of TRIPS outlines the provisions that Members must follow to enforce intellectual property rights. According to the TRIPS enforcement provisions, Members must adhere to general obligations such as ensuring effective enforcement<sup>97</sup> and fair and equitable procedures.<sup>98</sup> The Agreement also outlines the civil and administrative remedies that Members must provide, including injunctions,<sup>99</sup> damages,<sup>100</sup> and under certain circumstances, the removal from commerce or destruction of the infringing goods.<sup>101</sup> Part III also contains enforcement provisions regarding provisional measures,<sup>102</sup> special requirements related to border measures,<sup>103</sup> and crimi-

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92. See *id.* Part II.

93. See Reichman, *supra* note 2, at 363, 367; see also TRIPS, *supra* note 66, Part II.

94. See discussion *infra* Part III.C.1.

95. See Otten & Wager, *supra* note 1, at 396-97.

96. See, e.g., *id.* at 396.

97. See TRIPS, *supra* note 66, art. 41(1).

98. See *id.* art. 41(2).

99. See *id.* art. 44.

100. See *id.* art. 45.

101. See *id.* art. 46.

102. Article 50 of TRIPS addresses the judicial authority and procedures that Members must follow in respect to provisional measures. For example, TRIPS requires that Members grant judicial authorities with the ability to order prompt and effective provisional measures to prevent an infringement or to prevent certain goods from entering commerce and to preserve evidence of an infringement. See *id.* art. 50(1). Article 50 also requires that judicial authorities have the ability to adopt provisional measures *inaudita altera parte* in appropriate situations, that applicants provide evidence that they are the right holders and their rights are being infringed (or will be infringed), and that applicants provide security or other assurance to protect the alleged infringer. See *id.* art. 50(2-3). In addition, Article 50 contains provisions regarding the procedural aspects of adopting measures *inaudita altera parte*, the information that that applicant must supply, the revocation of provisional measures, and the payment of compensation

nal procedures.<sup>104</sup>

Fourth, Part V of TRIPS provides the parameters of dispute resolution and settlement. TRIPS requires that Members publish or otherwise make available laws, regulations, and certain other legal documents,<sup>105</sup> and generally disclose information regarding its compliance with transparency requirements to requesting Members.<sup>106</sup> Also, Members must usually “notify [their] laws” and regulations to the WTO Council for TRIPS, so that the Council may “review . . . the operation of TRIPS.”<sup>107</sup> In addition, Part V outlines how Members shall utilize certain sections of GATT 1994 and the Understanding<sup>108</sup> during consultations and disputes arising under TRIPS,<sup>109</sup> and how the Council for TRIPS shall handle complaints.<sup>110</sup> Members risk the loss of certain benefits and other adverse consequences if they fail to adhere to their obligations under TRIPS.<sup>111</sup>

Fifth, Part VI of TRIPS explains how Members may apply certain transitional arrangements. The TRIPS transitional arrangements provide a grace period and grant exceptions to the applicability of

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to a defendant when a court revokes the provisional measures or the measures lapse. *See id.* art. 50(4-7).

103. Part III, Section 4 of TRIPS contains several articles regarding special requirements related to border measures: suspension of release by customs authorities (art. 51); applications (for the customs authorities to take actions against infringement) (art. 52); security or equivalent assurance (art. 53); notice of suspension (art. 54); duration of suspension (art. 55); indemnification of the importer and the owner of the goods (art. 56); right of inspection and information (art. 57); *ex officio* action (art. 58); remedies (art. 59); and de minimis imports (art. 60).

104. Part III, Section 5 of TRIPS addresses criminal procedures relating to intellectual property infringement. Article 61 states the following:

Members shall provide for criminal procedures and penalties to be applied at least in cases of wilful [sic] trademark counterfeiting or copyright piracy on a commercial scale. Remedies available shall include imprisonment and/or monetary fines sufficient to provide a deterrent, consistently with the level of penalties applied for crimes of a corresponding gravity. In appropriate cases, remedies available shall also include the seizure, forfeiture and destruction of the infringing goods and of any materials and implements the predominant use of which has been in the commission of the offence. Members may provide for criminal procedures and penalties to be applied in other cases of infringement of intellectual property rights, in particular where they are committed wilfully [sic] and on a commercial scale.

105. *See id.* art. 63(1).

106. *See id.* art. 63(3)(4).

107. *Id.* art. 63(2).

108. The Understanding on Rules and Procedures Governing the Settlement of Disputes is found in Annex II to the MTAs.

109. *See* TRIPS, *supra* note 66, art. 64(1-2).

110. *See id.* art. 64(3).

111. *See* Otten & Wager, *supra* note 1, at 394. For example, Otten & Wager state the following: “Under the WTO, the failure of a country to meet its TRIPS obligations can put its market access rights and other benefits in jeopardy.” *Id.*

TRIPS to certain Members. For example, under certain circumstances, TRIPS allows developing country Members and Members which are transforming their economies from centrally-planned to market-oriented economies more time in which to adhere to TRIPS provisions.<sup>112</sup> TRIPS also grants special exceptions for least-developed country Members,<sup>113</sup> and may require Members to provide technical and financial cooperation to developing and least-developed country Members.<sup>114</sup>

Besides the five major parts of TRIPS which protect intellectual property rights, the origin of TRIPS also provides important insights into the scope of protection under the Agreement. Industrialized countries such as the United States were strong catalysts for TRIPS, as proprietors in these countries were losing substantial profits to foreign producers who infringed intellectual property rights.<sup>115</sup> For this reason, it is argued that TRIPS is not necessarily designed to protect intellectual property rights, but instead is an attempt to balance industrial concerns against the need to make information available.<sup>116</sup> Thus, States with high piracy rates, such as Russia,<sup>117</sup> might experience difficulty in gaining the approval of industrialized Members

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112. See TRIPS, *supra* note 66, art. 65(1-4).

113. Article 66 of TRIPS states the following:

In view of their special needs and requirements of least-developed country Members, their economic, financial and administrative constraints, and their need for flexibility to create a viable technological base, such Members shall not be required to apply the provisions of this Agreement, other than Articles 3, 4, [and] 5, for a period of 10 years from the date of application as defined under paragraph 1 of Article 65. The Council for TRIPS shall, upon duly motivated request by a least-developed country Member, accord extensions of this period. . . . Developed country Members shall provide incentives to enterprises and institutions in their territories for the purpose of promoting and encouraging technology transfer to least-developed country Members in order to enable them to create a sound and viable technological base.

*Id.* art 66(1-2).

114. Article 67 of TRIPS provides the following:

In order to facilitate the implementation of this Agreement, developed country Members shall provide, on request and on mutually agreed terms and conditions, technical and financial cooperation in favour of developing and least-developed country Members. Such cooperation shall include assistance in the preparation of laws and regulations on the protection and enforcement of intellectual property rights as well as on the prevention of their abuse, and shall include support regarding the establishment or reinforcement of domestic offices and agencies relevant to these matters, including the training of personnel.

115. See BHALA, *supra* note 5, at 979; see also Otten & Wager, *supra* note 1, at 393.

116. See BHALA, *supra* note 5, at 980.

117. In 1994, the piracy rate in Russia was seventy-nine percent. See Eric H. Smith, *Worldwide Protection Under the TRIPS Agreement*, 29 VAND. J. TRANSNAT'L L. 559, 570 (1996). U.S. trade losses incurred in 1994 due to piracy in Russia are estimated to be a total of \$805 million. See *id.* at 565. Such trade losses are the largest in central and eastern Europe. See *id.* at 564-65.

during WTO negotiations.

### C. The TRIPS Era: Russia Attempts to Conform to the Letter of the Law

In 1994, Russia applied for WTO membership,<sup>118</sup> but the WTO has granted it only WTO Observer Government status.<sup>119</sup> There is evidence that Russia may still be in the intermediate stages of the WTO accession process, because as late as July 1997, the members of Russia's Working Party were still examining Russia's legislative developments, support mechanisms for agriculture, trade regime, and current and proposed laws regarding the enforcement of intellectual property rights.<sup>120</sup> As WTO Chairman William Rossier had proposed, however, the Working Party was attempting to complete detailed examinations of Russia's trade regime, issue a draft report by the end of 1997, and move toward bilateral negotiations.<sup>121</sup> By the beginning of 1998, Russia was engaged in consultations with WTO Members, who have made demands for intellectual property reforms in Russia.<sup>122</sup>

Presidents Yeltsin and Clinton have targeted 1998 as the year in which Russia will join the WTO.<sup>123</sup> Despite such ambitious intentions,<sup>124</sup> Russian analysts remain skeptical about their country's ability to sufficiently modify its legislation and make other requisite changes before the end of 1998.<sup>125</sup> Aside from the daunting prospect of getting market-based legislation through a communist-dominated Duma, there is speculation that the speed at which Russia's economy is changing and Moscow's ties with the former Soviet republics may

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118. See *Talks on Russia's Accession to World Trade Organization*, ITAR-TASS News Agency, Apr. 14, 1997, available in LEXIS, News Library, Mostms File.

119. See Jim Kennett, *Russia Seeks Fair Play for WTO Entry*, MOSCOW TIMES, June 9, 1995, available in LEXIS, News Library, Mostms File.

120. See correspondence, *supra* note 29, at 4-5; Stephanie Baker-Said, *EU Official in Moscow to Discuss WTO, Trade*, MOSCOW TIMES, June 17, 1997, available in LEXIS, News Library, Mostms File; Irina Bolshova, *Russia-WTO Talks to Resume Later This Week*, ITAR-TASS News Agency, May 27, 1996, available in LEXIS, News Library, Mostms File.

121. See correspondence, *supra* note 29, at 5.

122. See Sergei Mingazhev, *Russo-Japanese Consultations Held in Moscow*, ITAR-TASS News Agency, Mar. 19, 1998, available in LEXIS, News Library, Mostms File; see also Sergei Mingazhev, *Japan Satisfied with Results of Talks with Russia on WTO*, ITAR-TASS News Agency, Mar. 20, 1998, available in LEXIS, News Library, Mostms File.

123. See Stephanie Baker-Said, *Russia's Bid for WTO in '98 Looks Slim*, MOSCOW TIMES, Apr. 16, 1997, available in LEXIS, News Library, Mostms File [hereinafter Baker-Said, *Russia's Bid for WTO*]; Baker-Said, *supra* note 120.

124. See Ian MacWilliam, *Summit Set to Target Trade, EU Expansion*, MOSCOW TIMES, Mar. 1, 1997, available in LEXIS, News Library, Mostms File.

125. See Baker-Said, *Russia's Bid for WTO*, *supra* note 123.

be retarding Russia's progress toward WTO accession.<sup>126</sup>

In addition, there is evidence that Russia is experiencing difficulty during accession negotiations because of its weak enforcement of intellectual property rights. For example, the United States and the European Union have already demanded that Russia more effectively enforce such rights.<sup>127</sup> In response to these demands and to heightened scrutiny of Russia's intellectual property regime, Russian officials openly admit to struggling with ineffective protection of intellectual property rights; they vow, however, to make efforts to improve.<sup>128</sup> As previously mentioned, the progress of accession negotiations depends on a country's readiness to meet the WTO rules, obligations, and underlying principles. It seems unlikely, therefore, given Russia's current state of enforcement of intellectual property rights, that Russian officials will be able to convince WTO Members that they are able to protect the rights outlined in TRIPS.

Under the Russian Constitution, which was passed into law in 1993, "Generally recognized principles and norms of international law and the international treaties of the Russian Federation are a constituent part of its legal system. If an international treaty of the Russian Federation establishes these rules other than those stipulated by law, the rules of the international treaty shall apply."<sup>129</sup> As such, the TRIPS regime adopted by Russia in many ways would supplant the heretofore existing legal regime. Some notable gaps in the resulting regime still exist, however, particularly regarding implementation and enforcement.

While any difficulties that these gaps might entail and the details regarding Russia's accession to the WTO are left to negotiations,<sup>130</sup> it is important to identify the potential problem areas for Russia. To delineate these areas, an analysis of Russia's conformance with TRIPS is particularly instructive.

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126. *See id.*

127. *See* Vladimir Krivosheyev, *MVES Head Mikhail Fradkov: By Joining WTO Russia Upholder [sic] Her Interests*, RUSSICA Info. Inc. RusData DiaLine- BizEkon News, Jan. 26, 1998, available in LEXIS, News Library, Mostms File.

128. *See* Gannady Yezhov, *Chernomyrdin Meets Business People of US West Coast*, ITAR-TASS News Agency, June 25, 1997, available in LEXIS, News Library, Mostms File.

129. *Constitution of the Russian Federation*, art. 15(4), in *RUSSIA AND THE REPUBLICS LEGAL MATERIALS* 1, 7 (John N. Hazard & Vratislav Pechota eds., 1998) [hereinafter *Russian Const.*].

130. *See* TRIPS, *supra* note 66, art. 12(1).

1. *General Provisions and Basic Principles.* An important part of TRIPS is its interactive relationship with other intellectual property accords such as the Berne and Paris Conventions. In fact, Part I of TRIPS requires Members to comply with Articles 1-12 and 19 of the Paris Convention, and states that TRIPS will not derogate from the obligations that Members have under the Paris, Berne, and Rome Conventions, and the Treaty on Intellectual Property in Respect of Integrated Circuits.<sup>131</sup> Russia is already a party to the Berne and Paris Conventions,<sup>132</sup> and therefore meets TRIPS requirements in this respect.

In addition, it does not appear that the national and most-favored-nation treatment requirements in TRIPS will present a problem for Russia. For example, Russia already grants national treatment to the nationals and legal entities of parties to the Berne, Paris, and Universal Copyright Conventions.<sup>133</sup> Moreover, Russian law allows national treatment both through its Constitution,<sup>134</sup> which "provides for the direct application and prevalence of international agreements,"<sup>135</sup> and through its intellectual property legislation. Russian officials have noted that when Russia accedes to the WTO, the legal entities and nationals of other Members will then be granted national and most-favored-nation treatment.<sup>136</sup>

2. *Substantive Standards of Protection.* For the most part, it appears that Russian intellectual property laws provide a sufficient standard of protection to the rights outlined in TRIPS. However, there are some potential problem areas for Russia, and an analysis of each category of intellectual property protected under TRIPS, and anti-competitive practices in contractual licenses, is provided below.

(a) *Copyrights.* President Yeltsin signed the Law of the Russian Federation On Copyright and Neighboring Rights ("Copyright Act") on July 9, 1993, and the Law became effective on August 3, 1993.<sup>137</sup>

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131. See *id.* art. 2(1), (2).

132. See *Russian Accession*, *supra* note 3, at 2.

133. See *id.* at 2-3.

134. See *Russian Const.*, *supra* note 129.

135. *Russian Accession*, *supra* note 3, at 2.

136. See *id.* at 3.

137. RF Copyright Act, RF Act No. 5351-1; RF Supreme Soviet Decree No. 5351-1/1-1; RF Supreme Soviet Decree No. 5352-1, July 9, 1992, in BUSINESS AND COMMERCIAL LAWS OF RUSSIA: TRANSLATIONS WITH EXPERT COMMENTARY 9-79 (Russica Information, Inc. trans.; John P. Hupp ed., 1994) [hereinafter Copyright Act]; see also Michiel Elst, *The Rehabilitation of Copyright in the Russian Federation*, in INTELLECTUAL PROPERTY IN THE RUSSIAN

Simultaneously, the Russian government abolished the copyright provisions of the Fundamentals of Civil Litigation of the USSR and the Republics of May 31, 1991 ("1991 Fundamentals"), which had governed copyrights in Russia following the collapse of the USSR.<sup>138</sup>

The adoption of the Copyright Act allowed Russia to accede to the Berne Convention,<sup>139</sup> and is considered to be more effective than the 1991 Fundamentals, because the 1991 Fundamentals contained only the "basic provisions that were then to be incorporated in more detailed enactments . . . [and the] copyright provisions were by their nature too vague to provide a satisfactory basis for the enforcement of author's rights."<sup>140</sup>

Experts note that the Copyright Act, the Law on the Legal Protection of Programs for Computers and Databases, and any subsequent legislation encompass the legal copyright protection in Russia.<sup>141</sup> With the major exception of enforcement,<sup>142</sup> Russian copyright law does not appear to significantly diverge from the TRIPS Agreement.

In fact, Russia meets the copyright protection required by TRIPS in four main ways: first, Russian law appears to provide adequate protection according to Article 10 of TRIPS, which protects computer programs and compilations of data;<sup>143</sup> second, Russian law meets the Article 11 TRIPS provision regarding rental rights to authors and successors;<sup>144</sup> third, Russian law meets the terms of protection required by TRIPS;<sup>145</sup> and fourth, Russian law protects the rights of performers and producers of phonograms and broadcasting organizations as required under TRIPS.<sup>146</sup>

(b) Trademarks. The Russian Federation Trademarks, Brand Names and Country of Origin Act ("Trademarks Act") clearly emphasizes its conformity with international law. The Act states in

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FEDERATION: A SYSTEM IN TRANSITION 129, 129 (Michiel Elst & Katlijn Malfliet eds., 1994).

138. See Michael Newcity, *Russian Intellectual Property Reform: Towards a Market Paradigm*, 36 GER. Y.B. INT'L L. 328, 361 (1993).

139. See Monica B. Vermeer, *A New Era in Russian Copyright Law: Protecting Computer Software in the Post-Soviet Russian Federation*, 5 TRANSNAT'L L. & CONTEMP. PROBS. 147, 165 (1995).

140. Newcity, *supra* note 138, at 359.

141. See, e.g., *id.*

142. See discussion *infra* Part IV.

143. See *Russian Accession*, *supra* note 3, at 3-4.

144. See *id.* at 5.

145. See *id.* at 6.

146. See *id.* at 7.

its final article that “if other rules have been established by an international treaty of the Russian Federation than those which are contained in the present Law, the rules of the international treaty shall apply.”<sup>147</sup>

In some instances, the Trademarks Act is even broader than TRIPS. For example, the Act also provides for the creation of a “collective mark,” which may be jointly owned (but not transferable) by a union or group of enterprises.<sup>148</sup>

There are, however, some issues that may hamper Russia’s complete compliance with TRIPS (and therefore its bid for WTO membership). As applications for trademarks have risen 500-600% within the last decade, it can take as long as three years for the State Patent Agency to approve a trademark application.<sup>149</sup> This may be problematic for potential trademark owners, whose initial term of ownership, if granted, begins on the date on which the application was filed. Such a problem is ameliorated in part by the ability of a trademark owner to request additional ten-year periods of ownership.<sup>150</sup> Another potential legal flaw with the current Russian law is that unless a mark qualifies as “notorious,” non-registered prior users are unprotected and trademarks are issued in accordance with a “first-come, first-served” basis.<sup>151</sup>

When a dispute arises regarding registration or invalidation of a trademark, an individual now has not only the Rospatent’s Chamber of Patent Appeals, but can also turn to the new Supreme Patent Chamber<sup>152</sup> to handle certain disputes. However, this benefit has not yet been realized by trademark owners, as the implementing legislation creating the Supreme Chamber has yet to be passed.<sup>153</sup> The recent *Smirnoff* case also established that trademark owners can turn to the judiciary as well as the administrative appeals process.<sup>154</sup> The

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147. Trademarks, Brand Names and Country of Origin Act, RF Act No. 3520-1; RF Supreme Soviet Decree No. 3521-1; RF Supreme Soviet Decree No. 3522, Sept. 23, 1992, art. 48, in BUSINESS AND COMMERCIAL LAWS OF RUSSIA: TRANSLATIONS WITH EXPERT COMMENTARY 9-53 (Russica Information, Inc. trans.; John P. Hupp ed., 1993) [hereinafter Trademarks Act].

148. See *id.* art. 20.

149. See Stewart, *supra* note 47, at 9.

150. See Newcity, *supra* note 138, at 350.

151. See Trademarks Act, *supra* note 147, art. 9.

152. See *id.* at art. 45(2) (stating that the Supreme Chamber of Patents will hear disputes in conformity with Articles 3, 21, 22, 28, 29, 34, and 42 of the Act).

153. See Stewart, *supra* note 47, at 9.

154. *Id.* at 9-10.

government also needs to shorten the waiting period for approval of trademark registration applications by the Rospatent office, whether by increased funding or by other means.

(c) Geographical Indications. Russian law provides protection to geographical indications in two primary ways: (1) protecting against unfair competition, and (2) controlling the registration of geographical indications.<sup>155</sup> First, the Russian Federation Law on Competition and Limiting Monopolistic Activities on Commodity Markets ("Anti-Monopoly Law") broadly protects geographical indications by prohibiting the use of information that "mislead[s] consumers concerning the character, mode, and place of manufacture, consumer properties, and quality of products."<sup>156</sup> Second, false or misleading geographical indications may not be registered under the Trademarks Act,<sup>157</sup> and the registration may later be declared null and void.<sup>158</sup>

TRIPS defines geographic indications as "indications which identify a good as originating in the territory of the Member, or a region or locality in that territory, where a given quality, reputation or other characteristic of the good is essentially attributable to its geographic origin."<sup>159</sup> There is some evidence that the protection for geographic indications under Russian law may not be as broad as that provided by TRIPS: the Trademarks Act explicitly protects only one category of geographical indications, appellations of origin, while excluding another category, (simple) indications of source.<sup>160</sup> However,

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155. See *Russian Accession*, *supra* note 3, at 9.

156. Law on Competition and Limiting Monopolistic Activities on Commodity Markets of March 22, 1991, amended on May 25, 1995, art. 10 [hereinafter Anti-Monopoly Law] (on file with authors).

157. See *Russian Accession*, *supra* note 3, at 11.

158. See Trademarks Act, *supra* note 147, art. 42(1-2).

159. TRIPS, *supra* note 66, art. 22(1).

160. The Trademarks Act designates the place of origin of goods as the following:

Designation of place of origin of goods shall be the title of the country, populated locality, area or other geographic object . . . used to denominate goods whose specific properties are exclusively or mainly determined by the natural conditions or human factors, or natural conditions and human factors simultaneously, as being characteristic of the given geographic object. . . .

Trademarks Act, *supra* note 147, art. 30(1). Commentators thus note that Russian law excludes a second subcategory of geographic indications, namely (simple) indications of source. See Adolf Dietz, *The New Law on Trademarks, Service Marks and Appellations of Origin of the Russian Federation*, in *INTELLECTUAL PROPERTY IN THE RUSSIAN FEDERATION* 198 (Michiel Elst & Katlijn Malfliet eds., 1994). (Simple) indications of source are defined as "any denomination, expression or sign indicating that a product or service originated in a geographic area without the product or service being determined by special natural and/or human factors." *Id.*

Russia is a party to the Paris Convention, which offers a broad scope of protection to geographical indications, and protects both indications of source and appellations of origin as industrial property.<sup>161</sup>

However, Russian law may be insufficient in furnishing the enhanced protection provided by TRIPS to geographical indications for wines and spirits. Beyond the protection that WTO Members must provide for geographical indications, Members must grant additional protection to indications of wines and spirits<sup>162</sup>—including homonymous indications for wines<sup>163</sup>—and must refuse or invalidate the registration of certain indications for such products.<sup>164</sup> It is important to note, however, that TRIPS grants special leeway regarding geographic indications in this area, and the issues pertaining to the protection of indications will be addressed during negotiations.<sup>165</sup>

(d) Industrial Designs. After a troubled and spotty history of providing, then refusing, legal protection for industrial designs,<sup>166</sup> Russian law on industrial designs now comports with TRIPS and the Paris Convention. The confusing standard of “independently created” under TRIPS may only serve to reemphasize that no imitations are allowed under this category, but its interpretation in the Russian context is unclear. One problem, however, is due to the fact that Soviet patents and other documents protecting industrial property (such as certificates) are still recognized.<sup>167</sup> This in part

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at 198.

161. See discussion *supra* Part III.A.1; Paris Convention, *supra* note 45, art. 1(2). However, note the criticisms of the Paris Convention in the same discussion.

162. See TRIPS, *supra* note 66, art. 23(1).

163. See *id.* art. 23(3).

164. See *id.* art. 23(2).

165. TRIPS provides that Members agree to negotiate regarding the protection of geographical indications for wines and spirits. See *id.* art. 24(1). TRIPS also provides special provisions for the following circumstances: (1) the use of geographic indications continuously or in good faith; (2) the use or registration of, or the application for a trademark in good faith; (3) the use of indications which are identical with another Member's terms or customary names for goods and services; and (4) the use of a person's name. See *id.* art. 24(4), (6), (8). In addition, Members are not obliged to protect geographical indications which in the country of origin (1) are not protected, (2) cease to be protected, or (3) have fallen into disuse. See *id.* art. 24(9).

166. See generally Eduard P. Gavrilov, *The Legal Protection of Industrial Designs*, in INTELLECTUAL PROPERTY & INTERNATIONAL TRADE: A GUIDE TO THE URUGUAY ROUND TRIPS AGREEMENT 85-98 (1996).

167. See RF Supreme Soviet Decree Enacting the RF Patent Law, No. 3518-2, Sept. 23, 1992, at clause (3). The RF Government has tackled the problem in part by allowing use of inventions and industrial designs protected under the Soviet regime in return for compensation for such use. See Use of Inventions and Industrial Design Protected by Author's Certificates of Invention and Certificates of Industrial Design in Effect on RF Territory and Payment of

leaves in place two separate (and inconsistent) legal regimes for recognizing industrial designs.

(e) Patents. The Russian Federation Law of Patents Act ("Patents Act") protects industrial property consisting of inventions, industrial designs and utility models.<sup>168</sup> Although the new Patents Act is a substantial improvement over the Soviet legal regime, problems from the old system still persist and may interfere with effective implementation of TRIPS. During the Soviet era, entities of the government could lawfully exploit many patents because patents held a "semi-public domain" status.<sup>169</sup> As a result of the shift from a centralized to a market economy, and "the recent privatization of state enterprises and R & D institutes, it is currently unclear who holds patent rights to the inventions that formerly belonged to the state-owned enterprises."<sup>170</sup> The lack of proper enforcement mechanisms may also prove to be a problem in the realm of patents, as Article 32 of TRIPS specifically provides that "[a]n opportunity for judicial review of any decision to revoke or forfeit a patent shall be available."<sup>171</sup> The slow approval process outlined in Article 21 of the Patents Act will also frustrate efforts to register patents in Russia.<sup>172</sup>

(f) Layout Designs of Integrated Circuits. Russia has essentially adopted the language of TRIPS regarding integrated circuits. Under TRIPS, the term of protection for rights holders is extended to ten years from the filing date of the application.<sup>173</sup> Article 37 of the Agreement grants immunity to an individual although he or she performed an unlawful act (under Article 36) if "the person performing or ordering such acts did not know and had no reasonable

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Compensation to Authors, RF Government Decree No. 648, July 12, 1993, art 1.

168. RF Law of Patents Act, RF Act No. 3517-1; RF Supreme Soviet Decree No. 3518-1 and No. 3519-1, Sept. 23, 1992, art. 1 [hereinafter Patents Act]. For legislation establishing the agencies and agents responsible for overseeing effective implementation of the Patents Act, see Statute of the RF Committee on Patents and Trademarks, RF President's Edict No. 223, Feb. 12, 1993; Statute of Patent Agents, RF Government Decree No. 122, Feb. 12, 1993.

169. Andrew A. Baev, *Recent Changes In Russian Intellectual Property Law And Their Effect Upon The Protection Of Intellectual Property Rights In Russia*, 19 SUFFOLK TRANSNAT'L L. REV. 361, 366-67 (1996).

170. *Id.* at 369.

171. TRIPS, *supra* note 66, art. 32.

172. See Andrei Voitko, *Commentary: Intellectual Property-Patents*, in BUSINESS AND COMMERCIAL LAWS OF RUSSIA § 9.03.5 9-37 (Russica Information, Inc. trans.; John P. Hupp ed., 1996).

173. See TRIPS, *supra* note 66, art. 38.

ground to know, when acquiring the integrated circuit or article incorporating such an integrated circuit, that it incorporated an unlawfully reproduced layout-design.”<sup>174</sup> The Russian Federation Law On Legal Protection of Topographies of Integrated Circuits (“Integrated Circuit Act”)<sup>175</sup> mirrors the language of Article 37 of TRIPS. Additionally, it adds the provision that compensation should be remitted to the rightful holder for each integrated circuit or device containing an integrated circuit.<sup>176</sup>

Prior to TRIPS, the Treaty on Intellectual Property in Respect of Integrated Circuits provided the international standard. Many countries were dissatisfied with that treaty, however, and TRIPS addresses those concerns “with four additional provisions . . . relat[ing] to the term of protection (ten years instead of eight), the treatment of innocent infringers, the applicability of the protection to articles containing infringing integrated circuits, and compulsory licensing.”<sup>177</sup>

(g) Undisclosed Information. The protection of undisclosed information, such as trade secrets, is relatively new to Russia and the former Soviet republics. Experts note that trade secrets were not even addressed in Russian legislation until they were introduced during market-oriented reforms.<sup>178</sup>

The Russian Civil Code and Anti-Monopoly Law are the two important sources of Russian law that address undisclosed information.<sup>179</sup> Article 139 of the Russian Civil Code addresses employment and commercial secrets. The language of the Civil Code generally satisfies the TRIPS provisions on undisclosed information, with one exception: TRIPS provides protection for undisclosed information that is appropriated without the owner’s consent “in a manner that is contrary to honest commercial practices”;<sup>180</sup> the Civil Code, however,

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174. *Id.* art. 37(1).

175. See generally Integrated Circuit Lay-Out Protection Act, RF Act No. 3526-1; RF Supreme Soviet Decree No. 3527-1; RF Supreme Soviet Decree No. 3528-1 (Sept. 23, 1992) [hereinafter Integrated Circuit Act]. Specific rules in this area have also been included in the 1993 Copyright Act.

176. See *id.* art. 8(1).

177. Otten and Wager, *supra* note 1, at 401-02.

178. See Vera S. Shishkina, *Protection of Trade Secrets and Know-How and the Unfair Competition Aspects of Intellectual Property Rights*, in INTELLECTUAL PROPERTY IN THE RUSSIAN FEDERATION: A SYSTEM IN TRANSITION 209 (Michiel Elst & Katlijn Malfliet eds., 1994).

179. See *Russian Accession*, *supra* note 3, at 20-21.

180. TRIPS, *supra* note 66, art. 39(2). TRIPS defines a manner contrary to honest commercial practices as “at least practices such as breach of contract, breach of confidence and in-

provides for no such condition. This deficiency may be compensated, however, by the Anti-Monopoly Law. The Anti-Monopoly Law provides that unfair competition shall not be allowed by "obtaining, using, or disclosing research, technical, producer or trading information, including commercial secrets, without the owner's consent."<sup>181</sup> This language in the Anti-Monopoly Law may indeed encompass the honest commercial practices contemplated by TRIPS.

While the Anti-Monopoly Law and the Russian Civil Code may be construed *in pari materia* to adequately protect rights regarding undisclosed information, there is one facet of these rights under TRIPS that neither the Anti-Monopoly Law nor the Russian Civil Code protects. TRIPS generally provides protection to undisclosed test data and other data provided to the government for the purposes of approving the marketing of certain pharmaceutical or chemical products,<sup>182</sup> while the Russian laws appear to offer no protection in this area.

(h) Control of Anti-Competitive Practices in Contractual Licenses. Many of the conditions a licensor may attach to an intellectual property license may adversely affect international trade and the dissemination of information.<sup>183</sup> However, it is argued that because such licensing problems are not adequately addressed by domestic legislation and pre-TRIPS international agreements, it was therefore "necessary to establish a basis for cooperation between the member countries of the WTO to control practices."<sup>184</sup>

The TRIPS provisions regarding anti-competitive practices in contractual licenses differ from the protection that the Agreement offers to the categories of intellectual property previously mentioned, for TRIPS does not require any specific protection to contractual licenses. Instead, TRIPS makes a general statement regarding contractual licenses, and ensures that Members will enter into negotiations when problems arise.<sup>185</sup> The Agreement notes that "Members

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ducement to breach, and includes the acquisition of undisclosed information by third parties who knew, or were grossly negligent in failing to know, that such practices were involved in the acquisition." *Id.* at n.10.

181. Anti-Monopoly Law, *supra* note 156.

182. See TRIPS, *supra* note 66, art. 39(3).

183. See *id.* art. 40(1); German Cavalier, *Control of Anti-Competitive Practices in Contractual Licenses*, in INTELLECTUAL PROPERTY & INTERNATIONAL TRADE: A GUIDE TO THE URUGUAY ROUND TRIPS AGREEMENT 62 (1996).

184. See Cavalier, *supra* note 183, at 62-63.

185. See TRIPS, *supra* note 66, art. 40.

agree that some licensing practices or conditions pertaining to intellectual property rights which restrain competition may have adverse effects on trade and may impede the transfer and dissemination of technology.”<sup>186</sup>

Instead of laying out the parameters for the protection against anti-competitive practices, TRIPS allows Members considerable latitude to determine which licensing practices abuse intellectual property and will adversely affect competition, and to adopt measures to address such practices.<sup>187</sup> While TRIPS requires Members to enter into negotiations with one another regarding alleged anti-competitive practices in contractual licenses, these negotiations are largely based on domestic law and other mutual agreements.<sup>188</sup> Therefore, it does not appear that the provisions regarding anti-competitive practices in contractual licenses will present a substantial issue for Russia during its accession negotiations.

While it seems clear that there are some problem areas for Russia in its substantive protection of intellectual property, the real stumbling block is not likely to be gaps in the actual provisions; instead, the central obstacle is Russia's problem with enforcement of intellectual property rights. Indeed, the rate of piracy of intellectual property rights in Russia remains very high.<sup>189</sup> These high rates of piracy are likely to be a barrier to successful negotiations during the WTO accession process, because while Members want an applicant's legislation to provide protection similar to that in TRIPS, they also consider effective enforcement to be a crucial matter.<sup>190</sup> It is here that Russia truly stumbles. As Russia attempts to enforce its intellectual property laws, it wrestles with a long history of lack of respect for intellectual property protection—indeed, a lack of respect for the notion of law itself.

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186. *Id.* art. 40(1).

187. *See id.* art. 40(2).

188. *See id.* art. 40(3)(4).

189. *See* Smith, *supra* note 117.

190. E-mail correspondence between Christian L. Broadbent, Editor-in-Chief Elect, *Duke Journal of Comparative & International Law*, and WTO Personnel 1 (Mar. 30, 1998) (on file with the *Duke Journal of Comparative & International Law*).

#### IV. ENFORCEMENT OF INTELLECTUAL PROPERTY RIGHTS

*[T]he problem of enforcing the laws has become the stumbling block for the implementation of the new standards of intellectual property protection in Russia.*<sup>191</sup>

While it appears that Russia may have some areas in which it must implement more extensive intellectual property protection, it does have laws in place which protect intellectual property rights to a great extent. What is missing, however, is effective enforcement. The existence of effective enforcement in Russia is critical to the effective implementation of TRIPS, and thus to WTO membership. The obligations placed on Members in TRIPS are vague but potentially far-reaching. Part III of the Agreement lays out the general obligations for enforcing intellectual property rights, and also grants member jurisdictions broad authority in the judicial resolution of intellectual property protection. Article 41 of the Agreement provides the only obligatory enforcement language in Part III.<sup>192</sup> Under Article 41(1), "Members *shall* ensure that enforcement procedures as specified in this Part are available under their law so as to permit *effective* action against *any* act of infringement of intellectual property rights covered by this Agreement, including expeditious remedies. . . ."<sup>193</sup> The provision states that the goal of the procedures to be adopted is to prevent the creation of barriers to legitimate trade.<sup>194</sup> Part III of the Agreement is explored more fully below.

Under a loose interpretive standard, Russia could possibly slip past significant problems with enforcing TRIPS. For the most part, Russia does facially provide mechanisms for judicial relief. However, will the Members of the WTO allow a poorly-operating judicial system that cannot enforce its judgments to stand in the way of Russia's membership? It is questionable whether a system that cannot enforce its laws truly acknowledges the existence of those laws in the first place. Because Russia has formally implemented laws protecting intellectual property rights, a major factor in whether it will comply with TRIPS is whether the TRIPS standards of enforcement are implemented in accordance with their letter *and* spirit.

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191. Baev, *supra* note 169, at 365.

192. The rest of Part III is only obligatory in establishing the authority of the courts, not actually in the enforcement of the courts' decisions.

193. TRIPS, *supra* note 66, art. 41(1) (emphasis added).

194. *See id.* The question here is what constitutes "effective action" and "expeditious remedies."

Under Articles 65 and 66 of TRIPS, Russia does have additional time to bring its enforcement procedures into compliance with TRIPS provisions. At this time, Russia has indicated that it will waive the transitional arrangements when its membership bid comes up for consideration.<sup>195</sup> Current WTO Members have also indicated that Russia may not be admitted as a Member unless it relinquishes its right to take advantage of the transitional arrangements. What this means, in essence, is that Russia must be in adequate compliance with TRIPS *at that time*. Russia is therefore effectively working within the grace period now to bring its intellectual property laws into compliance by the end of the century. It is uncertain whether this will be enough time for Russia to meet TRIPS standards by cultivating stronger enforcement and making concomitant changes in specific areas where substantial improvement is needed.

#### A. TRIPS Enforcement Requirements

Part III of TRIPS lays out the enforcement procedures that must be followed by signatory States. As stated above, Article 41 of the Agreement houses the general obligations regarding enforcement. Section Two of Part III covers civil and administrative remedies and procedures. Article 42 of the Agreement requires that Member States provide a system of civil judicial procedures to enforce the rights laid out in the Agreement. Specifically, Article 42 requires timely notice (which is sufficiently detailed), the right to representation by “independent” legal counsel, and that the court not be “overly burdensome” when requiring personal appearances. Courts must also provide a forum in which parties may present all relevant evidence and “provide a means to identify and protect confidential information,” to the extent that such confidentiality would not contravene constitutional requirements. Although much of the language in Section Two is hortatory at best, it covers many topics, such as evidence, injunctions, damages, and indemnification.

Section Three of Part III authorizes judicial authorities in Member States to adopt provisional measures whenever such measures are necessary (1) “to prevent an infringement of any intellectual property right from occurring,” and (2) “to preserve relevant evidence in regard to the alleged infringement.”<sup>196</sup> Article 50(2) does authorize

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195. See *Russia Signs Trade Deal with EU*, ITAR-TASS News Agency, July 17, 1995, available in LEXIS, News Library, Mostms File.

196. TRIPS, *supra* note 66, art. 50(1)(a)-(b).

courts to adopt provisional measures *inaudita altera parte*, but when a court does so it must give the affected parties notice of the measures and must also allow the parties a chance to be heard to decide whether the provisional measures adopted should be “modified, revoked or confirmed.”<sup>197</sup> Although Article 50(4) states that the provisional measures must be revoked if “proceeding[s] leading to a decision on the merits of the case” have not been initiated within a “reasonable” amount of time,<sup>198</sup> such wording is so broad and vague that almost any de minimis action taken could constitute some sort of “proceeding” that might eventually lead to a hearing of the merits of a case. Section Four of Part III authorizes Member States to take a number of measures specifically aimed at preventing the importation of pirated goods into a Member State.

Section Five of Part III requires Members to provide criminal sanctions for, at the very least, cases involving “wilful [sic] trademark counterfeiting or copyright piracy on a commercial scale,”<sup>199</sup> and also requires that remedies be sufficient to “provide a deterrent consistent with the level of penalties applied for crimes of a corresponding gravity.”<sup>200</sup>

What seems to be a fairly comprehensive outline of civil, administrative, and criminal remedies may be severely limited by Article 41(5).<sup>201</sup> Narrowly read, the provision merely states that Members are not required to put in place a system of judicial enforcement entirely distinct from that State’s already existing court system. However, the language that emphasizes a Member State’s autonomy in distributing resources between intellectual property enforcement and general enforcement may have a significant impact in countries like Russia where the government has limited resources to dedicate to enforcement of intellectual property laws.

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197. *Id.* art. 50(4).

198. *Id.* art. 50(6).

199. *Supra* note 104 and accompanying text.

200. *Id.*

201. Article 41 of TRIPS reads as follows:

It is understood that this Part does not create any obligation to put in place a judicial system for the enforcement of intellectual property rights distinct from that for the enforcement of laws in general, nor does it affect the capacity of Members to enforce their laws in general. Nothing in this Part creates any obligation with respect to the distribution of resources as between enforcement of intellectual property rights and the enforcement of laws in general.

TRIPS, *supra* note 66, art. 41(5).

## B. Paper Versus Practice: Enforcement of "Available" Remedies Under Russian Law

On paper at the very least, a number of remedies are available in Russian law to those whose intellectual property rights have been infringed. However, many of these remedies are left effectively unenforceable to date, which may negate the value of having the laws in the first place. Following are the major remedies available under Russian law and a few glaring examples of enforcement problems Russians (and others) have faced.

In the area of copyright protection, non-authorized use of any copyrighted work constitutes infringement.<sup>202</sup> While Russian laws allow owners of exclusive copyrights and related rights to resort to the legal, arbitration, or mediation system<sup>203</sup> and include legal remedies for the violation of copyright laws,<sup>204</sup> the application of such laws has apparently been less than admirable. In addition, some legal remedy provisions are very broad and are open to significant subjective interpretation. For example, Article 48 of Copyright Act states that the infringement of any of the provisions of the Act will entail civil, criminal, and administrative liability in conformance with the laws of Russia.<sup>205</sup> Despite such formidable wording, Article 48 does not provide further explanation as to the magnitude of such liability or what type of liability is to be incurred for which form of infringement. The only further explanation is a statement in section two of Article 48: "A natural or legal person that does not fulfill the requirements of this Law shall be a violator of copyrights and neighboring rights."

Section Five of the Copyright Act also deems that the copies of works and phonograms whose fabrication or distribution is an infringement of a copyright or related right are pirated copies.<sup>206</sup> Copies of works and phonograms that are protected under Russian law via the Copyright Act and which are imported without the owner's consent from a country that does not protect such rights, are also pirated copies under Russian law.<sup>207</sup> A court of law or of arbitration may order the confiscation or destruction of the pirated copies of a

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202. See Alexander A. Christoporoff, *Protection of Intellectual Property in Russia* (visited Nov. 10, 1997) <<http://www.ruslaw.ru/intprop1.htm>>.

203. See Copyright Act, *supra* note 137, art. 49(3).

204. See *id.* Section V.

205. See *id.* art. 48(1).

206. See *id.* art. 48(3).

207. See *id.* art. 48(4).

work or phonogram, along with the materials and equipment used in the fabrication of such works.<sup>208</sup> While there is no special procedure for customs actions,<sup>209</sup> the plaintiff who is filing or has filed a complaint may ask the court for the goods under customs control seizure order.<sup>210</sup> TRIPS does provide some specific guidance in that it mandates the adoption of procedures which allow right holders to petition for the suspension of release of goods from customs, when they are reasonably suspected to be pirated copyright goods.<sup>211</sup> However, it too provides little by means of ensuring that such procedures will actually be utilized in adjudication.

Russian law also entitles the owners themselves to make further demands from the individuals whom the law deems to be violators.<sup>212</sup> In addition to any amount that a Russian court awards to a plaintiff in a copyright infringement suit, the court shall impose a fine of ten percent of the total amount it awards in favor of the plaintiff.<sup>213</sup> TRIPS introduces a two-tiered, intent-based system of damages into this scheme.<sup>214</sup>

Russian courts may also order both permanent and preliminary injunctions.<sup>215</sup> Pursuant to these injunctions, courts may order that a person reasonably assumed to be a pirate refrain from doing any act

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208. *See id.* arts. 49(4), 50(2).

209. *See* Christoporoff, *supra* note 202.

210. *See* Copyright Act, *supra* note 137, art. 49(4).

211. *See* TRIPS, *supra* note 66, art. 51.

212. *See* Copyright Act, *supra* note 137, art. 49(1). The owners of such rights may demand the following from a violator: (1) the recognition of rights; (2) the restoration to the situation in which the parties found themselves prior to the infringement and the cessation of acts infringing or threatening to infringe the owners rights; (3) the payment of damages which includes the benefits the owner has foregone as a result of the infringement; (4) the recovery of any income the pirate received due to the breach of the owner's copyrights and related rights (in lieu of a payment for damages); (5) the payment of a sum between 10,000 and 50,000 times the monthly Russian minimum wage (in lieu of a payment for damages or recovery of income) at the discretion of the court; and (6) the adoption of other statutory measures which relate to the protection of the owner's rights. *See id.*

213. *See id.* art. 49(2).

214. TRIPS allows for a somewhat open-ended payment of damages by an infringer who "knowingly, or with reasonable grounds to know, engaged in an infringing activity." Specifically, Article 45 provides for "damages adequate to compensate for the injury the right holder has suffered. . . ." TRIPS, *supra* note 66, art. 45(1). It also enables courts to require that the infringer pay attorney's fees (and possibly even lost profits and/or payment of pre-established damages) even when the infringer was doing so without knowledge or reason to know. *See id.* art. 45(2) TRIPS also provides for the disposal of pirated material outside the channels of commerce to protect the right holder, so long as such activity does not infringe on domestic constitutional arrangements. *See id.* art. 46.

215. *See* Christoporoff, *supra* note 202; *see also* TRIPS, *supra* note 66, art. 44.

specified by the Copyright Act—or transporting, storing, or possessing for the release of civil commerce—regarding copies of works and phonograms assumed to be pirated.<sup>216</sup> Courts also have the authority to require collateral security for civil suits initiated by means of search for and seizure of copies of works and phonograms which are assumed to be pirated.<sup>217</sup> This is in accordance with TRIPS provisions regarding injunctions.<sup>218</sup>

The impact of the current enforcement of the Copyright Act is slight considering the extraordinarily high piracy rate of seventy-nine percent in Russia.<sup>219</sup> In fact, Russia is reportedly the world's largest market for pirated CDs and cassettes.<sup>220</sup> Efforts to seize illegal imports are having moderate success, with Russian officials seizing or preventing from importation over 5.1 million CDs and cassettes in 1997.<sup>221</sup> Despite these efforts, and the over two hundred cases filed against music pirates last year,<sup>222</sup> enforcement efforts are having little effect. Few have been convicted due to an ineffective judiciary, and the black market is still booming, with over 500 piracy facilities in Moscow alone and the Russian government losing an estimated \$250 million in taxes to pirates each year.<sup>223</sup>

In the area of trademarks, one enforcement problem is readily apparent. The Trademarks Act states that the Supreme Chamber will hear disputes falling under Articles 13, 21, 22, 28, 29, 34, and 42 of the Act.<sup>224</sup> However, the enabling legislation that actually creates the Chamber has not been passed. Moreover, as it currently stands, an appeal on a trademark ruling to the Chamber of Patent Appeals (which currently does exist) is handled by the same individuals who originally heard the case, thus not creating an appeal that is sufficiently independent of the original action.<sup>225</sup> Finally, the Russian ju-

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216. See Copyright Act, *supra* note 137, art. 50(1).

217. See *id.* art. 50(2).

218. See TRIPS, *supra* note 66, art. 44.

219. See Smith, *supra* note 117, at 572.

220. See Tim Obojski, *Gorbushka Market, Moscow's Treasure-Trove of Audio-Video Piracy*, Deutsche Presse-Agentur, Feb. 4, 1998, available in LEXIS, News Library, Curnws File.

221. See *id.*

222. See *id.*

223. See *id.*

224. See Trademarks Act, *supra* note 147, art. 45(2).

225. See Stewart, *supra* note 47, at 14 (citing the broad language of Article 10 of the Anti-Monopoly Act, which prohibits "misleading consumers concerning the character, mode and place of manufacture, consumer properties, and quality of products.").

diciary is poorly versed in trademark litigation.<sup>226</sup> This stunts the appeals process for trademark cases and discredits the perceived ability of the courts to effectively handle such disputes.

There are both criminal and civil sanctions for trademark infringement, but they have been rendered ineffectual to date due to the government's inability to enforce decisions. The State Duma needs to enact enabling legislation officially establishing the Supreme Patent Chamber so that trademark owners have a legitimate forum for dispute resolution. The provision for damages for infringement on trademarks is also vague<sup>227</sup> and potentially subject to arbitrary enforcement by the courts. Of course, general problems with the Russian legal tradition abound,<sup>228</sup> and enforcement of the law on trademarks may take some time to secure.

Another major potential hurdle to effective enforcement of Russian trademark laws is the provisions for remedies for trademark infringement, which are "extremely general."<sup>229</sup> Certain provisions of the trademark protection regime are so broadly worded that they create great potential for misuse.<sup>230</sup> TRIPS has been helpful in that it has provided more specific remedies for right holders, such as applying for suspension of release of counterfeit trademarked goods,<sup>231</sup> and preventing the re-exportation of counterfeit trademarked goods in an unaltered state.<sup>232</sup> The "simple removal" of a counterfeit trademark from a good is also not sufficient under TRIPS, other than in exceptional cases, to enable the pirated good to be released into the channels of commerce.<sup>233</sup>

Regarding geographical indications, the registration of title of the place of a good's origin may be declared null and void where it is

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226. *See id.* at 16.

227. The Trademarks Act merely states that illegal use of trademarks "shall entail civil and criminal liability" and outlines general remedies, such as stopping use, restoring the infringed party's reputation, and removing the goods from the channel of commerce. *See* Trademarks Act, *supra* note 147, art. 46. Article 30(1) of the Act states the following:

[T]he title of place of origin shall be the title of the country, populated locality, area or other geographic object (hereinafter "geographic object") used to denominate goods whose specific properties are exclusively or mainly determined by the natural conditions or human factors, or natural conditions and human factors simultaneously, as being characteristic of the given geographic object.

228. *See* discussion *infra* Part IV.C.

229. Newcity, *supra* note 138, at 352.

230. *See* Stewart, *supra* note 47, at 14.

231. *See* TRIPS, *supra* note 66, art. 51.

232. *See id.* art. 59.

233. *See id.* art. 46.

in violation of the requirements of the Trademarks Act.<sup>234</sup> In addition, a person may lodge an objection with the Appellate Chamber to the registration of title of place of goods origin and issue a certificate of the right to use such title for any of the reasons laid out above.<sup>235</sup> The Trademarks Act also states the following: "Use of a trademark and the title of the place of goods origin or of denomination similar to a trademark or title of the place of goods origin for similar goods, contrary to the provisions [of the Trademarks Act] shall entail civil and/or criminal liability, under RF law."<sup>236</sup> Courts may also order injunctions and allow plaintiffs to recover damages for infringements of the Trademarks Act.<sup>237</sup>

It is expected that Russian civil law and other enactments will specify the available remedies in greater detail.<sup>238</sup> In addition to Russia's need to implement certain provisions to its Trademarks Act to comply with the TRIPS Agreement,<sup>239</sup> it must more effectively enforce violations of protection of geographic indications. While the Trademarks Act does grant authority to a court to enjoin a party from acts which violate the indication and may require a party to pay damages, courts are not effectively enforcing the protection of geographical indications. Russia will also have to take measures to fall

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234. See Trademarks Act, *supra* note 147, art. 42(1). More specifically, the legal validity of the registration of title of the place of a good's origin may also be terminated upon the "disappearance of the conditions characteristic of the given geographic object, and impossibility of making goods with the properties specified in the Register." *Id.* art. 42(2). The validity of the registration of the title may also be terminated if the person who owns the title of the geographic indication loses the right to use the title of goods origin in the country of origin. See *id.* The validity of the certificate of title may also be declared null and void where it was issued in breach of the provisions of the Trademarks Act. See *id.* art. 42(3). The validity of a certificate may be terminated if any of the following provisions are met:

[U]pon loss by the goods of the specific properties shown in the Register with respect to the given title of the place of goods origin; upon cancellation of registration of the title of the place of goods origin; upon liquidation of a legal person holding the certificate; on the basis of application of the certificate holder filed with the Patents Office.

*Id.* art. 42(4).

235. See *id.* art. 42(5)-(7).

236. *Id.* art. 46(1).

237. See *id.* art. 46(2). On the demand of the public body, the procurator, or the holder of a certificate of right to the use of the title, an individual unlawfully using a registered title of the place of goods origin or a similar denomination must: (1) stop the use thereof; (2) indemnify damages caused to all aggrieved persons; (3) pay into the revenue of local budget the profit received from such actions (in excess of the indemnified damages); (4) publish a court order to restore the other party's damaged business reputation; and (5) remove from the goods or packaging the unlawfully used title or similar denomination, or destroy depictions of the title. See *id.* art. 46(3).

238. See Newcity, *supra* note 138, at 350.

239. See discussion *supra* Part III.C.2.b.

into compliance with the enforcement and arbitration procedures outlined in Articles 41-43 and 34.

Aside from the problems previously discussed,<sup>240</sup> no significant problems with industrial designs currently exist, although the Russian law might need to be clarified in order to conform with TRIPS. Under the Patents Act, an industrial design is protected if it is (1) novel, (2) original, and (3) industrially applicable.<sup>241</sup> The confusing standard of "independently created" under TRIPS may only serve to reemphasize that no imitations are to be allowed under this category, but its interpretation in the Russian context is unclear as of yet. If a patent for an industrial design was issued to the author's employer, the author has the right to receive compensation for the design on the basis of either an agreement between the employer or as provided in the U.S.S.R. Inventions Act and the U.S.S.R. Industrial Design Act.<sup>242</sup> Patents for industrial designs extend for ten years from the date of filing and may be extended for another five years,<sup>243</sup> which is consistent with TRIPS.

It is currently unclear whether the remedies provided under Russian law will prove adequate for rightholders. Authors of integrated circuit layouts (and other rightful holders under Article 1(2) of the Integrated Circuit Act) may appeal to the court system for

recognition of rights, restoration of status quo prior to infringement . . . , recovery of damages, . . . [an additional] fine amounting to 10 percent of the sum awarded by a court in favor of the plaintiff, to be entered into the revenue of the RF budget, [or] adoption of other statutory measures pertaining to protection of author's rights.<sup>244</sup>

The only specific remedies outlined, however, benefit the Russian government and not the aggrieved party, although the Act does also allow for confiscation not only of fabricated copies of illegal integrated circuits but also of all the materials and equipment used to fabricate the circuits, the proceeds of which may go to the plaintiff.<sup>245</sup>

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240. See discussion *supra* Part III.C.2.d.

241. Patents Act, *supra* note 168, art. 6(1); see also Baev, *supra* note 169, at 365. For regulations regarding the licensing of industrial designs, see Rules for Consideration and Registration of Agreements on Cession of Patent and License Agreements on Granting the Rights to Use Invention, Utility Model or Industrial Design (Rospatent Order), Registered with the RF Ministry of Justice under No. 853 on May 12, 1995, Apr. 21, 1995.

242. See Application on RF Territory of some Provisions of ex-U.S.S.R. Legislation on Inventions and Industrial Design, RF Government Decree No. 822, Aug. 14, 1993, art. 3.

243. See Patents Act, *supra* note 168, art. 3(3).

244. Integrated Circuit Act, *supra* note 175, art. 11(1).

245. See *id.* art. 11(3).

With patents there is the recurring problem of judicial enforcement, as Article 32 of TRIPS provides that judicial review *must* be available to anyone whose patent has been revoked or forfeited.<sup>246</sup> As the Russian government has not yet actually instituted the Supreme Patent Chamber, an individual's right to judicial review, much less his or her right to judicial enforcement of a decision, lies in uncertain territory. In terms of compliance with TRIPS, aside from the aforementioned general problems, there is no major conflict between the Russian law on integrated circuits and TRIPS, as they mirror each other.<sup>247</sup>

Regarding the protection of undisclosed information, the information constituting an employment or commercial secret is protected by the Russian Civil Code, the general protection of the trademark laws, and other laws. The Civil Code requires individuals who have received any information which constitutes an employment or commercial secret by illegal methods to compensate the owner for losses caused by the receipt of such information.<sup>248</sup> In addition, the Civil Code also provides the following: "[t]he same duty shall be placed on workers who, contrary to the labour contract, have divulged an employment or commercial secret, including a kontrakt, or contracting parties who have done so despite a civil-law contract."<sup>249</sup>

Articles 8 through 16 of the Civil Code also provide more broadly-structured remedial provisions. Article 8(1) specifically notes that civil rights shall arise "as a result of the creation of works of science, literature, art, inventions, and other results of intellectual activity."<sup>250</sup> If a right to property must be registered with the State, the civil right shall arise at the moment that the property is registered, unless established otherwise by law.<sup>251</sup>

Articles 9 and 10 provide for the effectuation and limitations of civil rights. Article 9 states that citizens and juridical persons may effectuate the civil rights (that belong to them) at their discretion,<sup>252</sup> and that, except for instances provided for by a law, these rights may not be terminated if citizens and juridical persons refuse to effectuate

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246. See TRIPS, *supra* note 66, art. 32.

247. See discussion *supra* Part III.C.2.f.

248. See Civil Code of the Russian Federation, art. 139(2).

249. *Id.*

250. *Id.*

251. See *id.* art. 8(2).

252. See *id.* art. 9(1).

their civil rights.<sup>253</sup> Article 10, however, provides for limitations on the civil rights granted by the Civil Code in situations where the rights are used to harm others or to limit competition.<sup>254</sup>

Articles 11 and 12 contain the provisions for the defense of civil rights. Article 11 provides that a "court, arbitrazh court, or arbitration court . . . shall effectuate the defence of violated or contested civil rights in accordance with the jurisdiction of cases established by procedural legislation."<sup>255</sup> Article 11 also provides for the defense of civil rights in an administrative procedure, but states that a defense may be effectuated in this procedure only in the instances provided for by law.<sup>256</sup> Article 12 provides for the means of a defense of civil rights, stating that such rights shall be defended in the following ways:

[R]ecognition of the right; restoration of the situation which existed before the violation of the right and suppressing actions violating a right or creating a threat to violate it; recognition of a contested transaction to be invalid and the application of the consequences of the invalidity thereof, and the application of the consequences of the invalidity of a null transaction; recognition of an act of a State agency or agency of local self-government to be invalid; self-defence of right; awarding performance of a duty in kind; compensation of losses; recovery of a penalty; contributory compensation for moral harm; termination or change of legal relation; non-application by count of act of a State agency or agency of local self-government which is contrary to a law; [and] other means provided for by a law.

Article 13 provides a defense of civil rights when they are violated by a government act, while Article 14 allows the self-defense of civil rights. Article 13 allows a court to declare invalid both normative and non-normative acts of a State agency or an agency of local self-government that violate the civil interests of a citizen or a juridical person protected under the law. If a court does invalidate the act of a State agency or agency of a local self-government, the violated right is subject to restoration or to Article 12 defenses.<sup>257</sup> Article 14 permits the self-defense of civil rights, but limits such defense to means that are commensurate to the violation, and may not exceed the limits of actions necessary to it.

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253. *See id.* art. 9(2).

254. *See id.* art. 10(1)-(3).

255. *Id.* art. 11(1).

256. *See id.* art. 11(2).

257. *See id.* art. 13.

Articles 15 and 16 address the compensation of losses. Article 15(1) states the following: “A person whose right has been violated may demand full compensation of losses caused to him unless compensation of losses in a lesser amount has been provided for by a law or contract.” Article 15(2) further elaborates upon the provisions in paragraph one, by defining “losses” as the following:

[E]xpenses which the person whose rights have been violated made or must make in order to restore the violated right, loss or damage of his property (real damage), and also revenues not received which this person would have received under ordinary conditions of civil turnover if his right had not been violated (lost advantage).

Furthermore, if the individual or entity that has violated the civil rights has received revenues as a consequence thereof, the individual whose rights were violated may demand compensation—in addition to the other losses—for lost advantage in an amount equal to or greater than the revenues.<sup>258</sup> Article 16 deals with the compensation for losses caused by State agencies and agencies of local self-government. Article 16 states the following:

Losses caused to a citizen or juridical person as a result of the illegal actions (or failure to act) of State agencies, agencies of local self-government, or officials of these agencies, including the publication of the act of a State agency or agency of local self-government which does not correspond to a law or other legal act, shall be subject to compensation by the Russian Federation, respective subject of the Russian Federation, or municipal formation.<sup>259</sup>

In addition to the remedies provided by the Civil Code in defense of undisclosed information, the Anti-Monopoly Law contains provisions regarding the liability incurred by breaching anti-monopoly legislation.<sup>260</sup> Articles 22 and 22-1 of the Anti-Monopoly Law delineate these remedial provisions.

Article 22 provides that if commercial and noncommercial organizations, federal organs of executive power, organs or executive power of Russian subjects, organs of local self-government, or citizens breach antimonopoly legislation, they are bound by directive guidelines of the Federal Antimonopoly Agency.<sup>261</sup> According to Agency directives, if the listed entities or individuals breach the antimonopoly legislation, they are bound to do the following:

[T]o discontinue the breach, to restore the status quo, to rescind the

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258. *See id.* art. 15(2).

259. *Id.* art. 16.

260. *See* Anti-Monopoly Law, *supra* note 156, § 5.

261. *See id.* art. 22(1).

contract or make amendments thereto, to conclude a contract with another business subject, to revoke the act not in conformity with legislation, to remit into the federal budget the profits received as a result of the breach, to effect reorganization in the form of division or divestiture, with observance of the established conditions and time periods, and to perform other actions specified in the directive.<sup>262</sup>

In addition, in the event of a breach, the Federal Antimonopoly Agency may impose fines and issue warnings in administrative procedure.<sup>263</sup>

Article 22-1 outlines the types of liability for a breach of antimonopoly legislation. Article 22-1 provides that government officials, commercial and noncommercial organizations and their senior executives, and citizens shall bear civil, administrative, or criminal liability for willful illegal acts in breach of antimonopoly legislation.

Russia does not have an enforcement problem with control of anti-competitive practices in contract licensing because they are allowed to use domestic law to deal with it. The only thing they have to do to comply with TRIPS is provide a consultation procedure, which apparently does not involve any enforcement issues.

Despite the existence of these remedies on paper, many factors render such options effectively unavailable. Some specific provisions of enforcement may be lacking. However, this is not the central problem. While Russia has adopted many laws regarding enforcement, the problem lies in the long tradition of piracy and lack of knowledge in the judiciary, *not* in the lack of available remedies. A major difficulty individuals face when they wish to file a court action against someone is that "the role, status and organization of courts remains as uncertain as the substance of the laws that they adjudicate."<sup>264</sup> Numerous problems still exist with judicial selection, judicial independence, and public perception of the validity of the judicial system as a whole.<sup>265</sup> Individuals will not pay the potentially high court costs involved in litigating an intellectual property dispute if the judgment to be rendered is possibly arbitrary or corrupt, and probably ultimately unenforceable. A corrupt Duma is also helping little

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262. *Id.* art. 22(1).

263. *See id.* art. 22(2).

264. Peter H. Solomon, *The Limits of Legal Order in Post-Soviet Russia*, 11 POST-SOVIET AFFAIRS 89, 94 (1995).

265. As many as sixty percent of the Russian population have voiced their distrust in the courts. *See id.* at 106-07.

to create a sense of legitimacy in the Russian legal system.<sup>266</sup> The proliferation of organized crime since the fall of the Soviet Union<sup>267</sup> has also hampered efforts to enforce intellectual property rights.

### C. The Russian Legal Tradition

*[T]he law is no more than a dwarf on the shoulders of a giant—a society with its culture, religion, traditions, ideology . . . [t]he dwarf is helpless outside or beside society. . . .*<sup>268</sup>

The problems attendant to enforcing laws are not confined to the area of intellectual property rights. Crucial to a legitimate analysis of Russian intellectual property law is an exploration of the underlying legal traditions on which Russian law is built. The Russian legal tradition has created a legal culture (or lack thereof) that is distrustful of the law and in which law is not taken seriously at best and, at worst, is flagrantly disregarded. This “apparent failure of Russian society to attach any opprobrium to . . . breaches of the law”<sup>269</sup> stems from a number of factors, including cynicism about the capability of legal institutions to regulate various spheres of activity, poorly-drafted and often vague or inconsistent legislation, corrupt political officials, and decades of a communist rule that subordinated legal institutions for political gains.<sup>270</sup>

How did this attitude develop? Alexander Yakovlev, a leading Russian legal scholar who has played an important role in legal reforms in post-Soviet Russia,<sup>271</sup> cites three underlying influences central to the development of Russian legal culture: (1) Russia’s cultural

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266. *See id.*

267. *See id.* at 108.

268. ALEXANDER M. YAKOVLEV, *STRIVING FOR LAW IN A LAWLESS LAND* 7 (1996).

269. Michael Newcity, *Russian Legal Tradition and the Rule of Law*, in JEFFREY D. SACHS AND KATHARINA PISTOR, *THE RULE OF LAW AND ECONOMIC REFORM IN RUSSIA* 41, 42 (1997). Newcity cites four general reasons why the Russian legal tradition has been historically different than the Western legal tradition in its disrespect for the law: (1) “[t]he influence of Russian Orthodoxy on the development of Russian legal consciousness”; (2) “[a] tradition of absolutism that has been virtually uninterrupted since the sixteenth century”; (3) “[d]elayed economic development in Russia, with the persistence of a traditional peasant culture that emphasized the communal ownership of land well into the twentieth century”; and (4) “75 years of a communist regime that emphasized as a matter of theory that law was superstructure, that as a matter of constitutional principle raised the CPSU above constitutional limitations, and that practiced a highly politicized and increasingly corrupt brand of law.” *Id.* at 46; *see also* Thomas C. Owen, *Autocracy and the Rule of Law in Russian Economic History*, in JEFFREY D. SACHS AND KATHARINA PISTOR, *THE RULE OF LAW AND ECONOMIC REFORM IN RUSSIA* 23-39 (1997).

270. *See* Newcity, *supra* note 269, at 42-44.

271. *See* YAKOVLEV, *supra* note 268, at xiii.

traditions, (2) Marx's theory of state and law, and (3) the Russian version of absolute monarchy.<sup>272</sup>

First, Russia's cultural traditions have weighed heavily on the legitimacy given to legal institutions in modern-day Russia. A dialectic between "moral" truth (*pravda*) and "objective" truth (*istina*) exists in Russian culture: "*Istina* necessarily *is*, while *pravda* is something that *ought to be*. . . . In the Russian people's consciousness, the law has never been associated with moral truth."<sup>273</sup> This is distinguished from the Western legal tradition, where moral and objective truth arguably meld together into an organic, independent Rule of Law that can be used "not only as a sword available exclusively to the regime, but also as a shield with which [the non-powerful] can protect and advance their own interests against other citizens and even against the state."<sup>274</sup> In Russia, by contrast, the law was seen as a tool of political elites that was to be wielded against the weak:

The Soviet legal culture was the antithesis of a legal culture grounded in the rule of law. While the trappings of a legal system were present in the form of the courts, as well as an extensive body of positive law, something vital was missing. Soviet law lacked the legitimacy that exists when law reflects the values of the community at large. Law was a force imposed from above by the state; legal institutions were avoided at all costs.<sup>275</sup>

Given that the law was perceived as what *was*, as opposed to an ideal of what *should be*, it is no surprise that "moral" truth was legitimized by placing it above the law ("objective" truth) when conscience dictated.<sup>276</sup>

Second, Marx's theory of law and the state left an equally indelible mark on Russian legal culture. In short, Marx's theory on law and the state sanctified the following principles:

(1) Law is separate from society and tied up in the state. It is primarily a *projection of the will of the dominant class* and is not a set

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272. See *id.* at 7-25.

273. *Id.* at 9-10.

274. Kathryn Hendley, *The Spillover Effects of Privatization on Russian Legal Culture*, 5 TRANSNAT'L L. & CONTEMP. PROBS. 39, 41 (1995).

275. *Id.*

276. Yakovlev summarizes the dualistic existence of truth as follows:

In a situation where the law is equated only with the power of a tyrannical state, where the law is not respected but only feared, the idea of fairness is contrasted to existing laws. There the ways of morals and conscience are considered to be the only ways possible for a moral and fair people, while the law is considered to be of limited significance, a body of merely "external" norms. "Internal," spiritual, moral freedom is pictured as the highest value, the only one worth achieving.

YAKOVLEV, *supra* note 268, at 13.

of objectively existing, orderly structured social relations. . . .

(2) In a society supposedly split into irreconcilable, antagonistic classes, the state and law are nothing but *tools for oppression*, a projection of the interests of the dominant social class.

(3) The oppressed class, the *proletariat*, is the bearer of absolute truth, the *liberator of humankind*, and the creator of an ideal world of the highest justice, without state or law.

(4) To create this perfect world the proletariat *must destroy the state and law* and negate them as tools of oppression.

(5) Any product of liberal thinking in the theory of the state and law, such as the rule of law . . . is to be treated contemptuously as the *product of false consciousness*, as an ideological cover-up serving the interests of the dominant class.

(6) A "*dictatorship of the proletariat*" is the ideal tool to build a utopian society with absolute justice. Toward this end any means [including violence] is justified.<sup>277</sup>

Obviously, the existence of these ideas in Russian culture for decades was not kind to the development of a legal system in which the law was respected or perceived as an objective shield and sword for the oppressed as well as the privileged to use.

Third, the uniquely Russian construct of absolute monarchy that existed in pre-revolutionary Russia placed all conceivable political power in the hands of a single absolute monarch (*samoderzhavnyi*), who had total control over the entire legal system and enshrined a wholesale rejection of the contractual nature of the state.<sup>278</sup>

These three factors have had what some argue is an intractable effect on the development of a Russian legal culture—an influence that may be almost impossible to overcome in the quest to establish a respected rule of law in the post-Soviet regime. In sum, "[i]n the absence of either effective coercive power by the state, a strongly held moral norm that motivates compliance, or a pervasive sense of legitimacy, Russians often see no particular reason why they ought to obey the law."<sup>279</sup> Even if the political and economic environment in Russia stabilizes, it is possible that a stable legal system may not be a byproduct of that process.<sup>280</sup>

This is not to say that *no* positive legal developments have oc-

277. *Id.* at 19.

278. *See id.* at 20-24.

279. Newcity, *supra* note 269, at 44.

280. *See, e.g.,* Hendley, *supra* note 274, at 63 (arguing that managers in the commercial contracts context "desperately want stability—they want to be able to plan for the future, but they do not see law as a means to that end.").

curred since the fall of the Soviet empire. The Russian government has taken positive steps in at least getting the law "on the books," an important first step in establishing a legitimate legal system. A positive political initiative also existed between U.S. Vice President Al Gore and former Prime Minister Viktor Chernomyrdin which created one avenue through which some enforcement issues may have been worked out. The two leaders had been meeting on a regular basis for the last five years, and a number of agreements were reached through this initiative, including a special unit that Chernomyrdin established in the Interior Department to focus on piracy, as well as other agreements.<sup>281</sup> Some concerned U.S. industry leaders, such as Jack Valenti, president of the Motion Picture Association of America, have also met with Chernomyrdin in efforts to improve the enforcement of intellectual property rights in Russia.<sup>282</sup>

Many hoped that the Gore-Chernomyrdin initiative would be the starting point for development of a positivist legal culture. However, these developments may have been effectively destroyed when Yeltsin dismissed his entire cabinet in March of this year.<sup>283</sup> In the aftermath of Chernomyrdin's dismissal and uncertainty about who will fill the empty Prime Minister post, the value of this dialogue now becomes questionable.<sup>284</sup>

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281. See Christopher Stern, *The Minsk C'right Menace*, VARIETY (daily ed.), Oct. 8, 1997, at 1; see also Elizabeth Shogren, *Gore Leads Russian Premier on a Silicon Valley Stroll*, L.A. TIMES, Mar. 13, 1998, at A12; *Al, Viktor and the Mosowrena*, ECONOMIST, Feb. 8, 1997, at 34.

282. Such meetings were apparently producing positive results. See Olga Svistunova and Igor Veksler, *Jack Valenti satisfied with his meeting with Chernomyrdin*, ITAR-TASS News Agency, July 12, 1997, available in LEXIS, News Library, Curnws File; Stern, *supra* note 281. According to Valenti, pirates control almost one hundred percent of the home video market in Russia. *Id.*

283. See William Safire, *You're All Fired!*, N.Y. TIMES, Mar. 26, 1998, at A27 (quoting Alexander Lebed as saying, "take Prime Minister from Chernomyrdin, and he's nothing."); Philip Shenon, *U.S. Ties Unaffected, Russian Tells Albright*, N.Y. TIMES, Mar. 25, 1998, at A8; Michael Specter, *Shake-up in Russia: The Overview; Yeltsin Dismisses His Entire Cabinet in Show of Power*, N.Y. TIMES, Mar. 24, 1998, at A1; Tim Wiener, *Shake-up in Russia: The Reaction; Washington Listened, but Moscow Didn't Call*, N.Y. TIMES, Mar. 24, 1998, at A8.

284. One factor to consider, however, is the fact that both Gore and Chernomyrdin will be running for president in their respective countries in the next presidential elections. Unfortunately for Chernomyrdin, however, according to recent polls less than ten percent of the Russian public would vote for him. See Michael R. Gordon, *Ex-Premier of Russia Plans to Run for President*, N.Y. TIMES, Mar. 29, 1998, at § 1, p. 9 (reporting that in an *Izvestia* poll "only 5.4 percent of those surveyed supported Mr. Chernomyrdin for President"); *Al, Viktor and the Mosowrena*, *supra* note 281 (stating that Chernomyrdin's support in the polls had sunk to ten percent). President Yeltsin will not be running for re-election in 2000. See Michael R. Gordon, *Yeltsin Says He Won't Run For Another Term in 2000*, N.Y. TIMES, Mar. 31, 1998, at A6.

## V. CONCLUSION

Russia most certainly would not have been accepted to full WTO membership at the signing of the WTO agreements in 1995. Fortunately, the agreements provide for a transitional period of five years for developing countries and for countries, like Russia, who are making the transition from a centrally-planned to a market economy.<sup>285</sup> This transition period, however, is not automatic. Three factors must be fulfilled before the WTO will grant such a transition period: (1) the country must be in the process of transforming from a centrally-planned to a market economy, (2) the country must be undertaking structural reform of its intellectual property system, and (3) the country must demonstrate that it faces special problems in the preparation and implementation of intellectual property laws and regulations.<sup>286</sup> Article 65 of TRIPS does grant an additional five-year grace period for patents in pharmaceuticals or agricultural products that are not currently protected under Russian law.<sup>287</sup> However, during this period Russia may not allow its domestic legal regime to become more inconsistent with TRIPS (the “non-backsliding” clause).<sup>288</sup> The transition period does not give a country a “way out” of international obligations (such as the Paris and Berne Conventions) to which it has already committed itself.

Russia is effectively in this grace period now, and must be in full compliance with the WTO agreements by the time its bid for membership comes up in 2000. Moreover, the TRIPS text, after it was signed into force, acquired the status of a “de facto set of international norms,”<sup>289</sup> which creates an informal body of international law on which nations may rely in international litigation of intellectual property disputes. In sum, “the general rule is that obligations in the agreement apply to intellectual property rights that exist at the end of a country’s transition period, as well as to new ones.”<sup>290</sup> Although many view the Russian legal regime as “a moving target” that hampers Russia’s chances of becoming a full WTO Member,<sup>291</sup> Russia has

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285. See TRIPS, *supra* note 66, art. 65(2)-(3).

286. See *id.*

287. See *id.* art. 65(4). This provision involves a system whereby a patent that is filed after the WTO agreements were signed is held until such patents are granted and/or protected, but when examined will be examined as it was at the time of the filing. See *id.*

288. *Id.* art. 65(5).

289. Otten and Wager, *supra* note 1, at 408.

290. *Transition Arrangements: 1, 5 or 11 Years to Fall into Line* (visited Nov. 10, 1997) <<http://www.wto.org/wto/about/agmnts6.htm>>.

291. Stephanie Baker-Said, *WTO Says Russia Must Stabilize Laws*, NAT’L L.J., Aug. 18,

made much progress in aligning its intellectual property regime with international standards. The most formidable obstacle in Russia's path to the WTO is the Russian government's current inability to enforce the laws that already exist. The difficulty in surmounting such a challenge is particularly acute in Russia, given its cultural penchant for distrusting the government and its institutions. However, Russia's best chance for acceding to the WTO will come as the Russian economic and legal systems slowly stabilize and provide an opportunity for its intellectual property regime to root and flourish.

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