Guide to Intellectual Property in Russia

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INTRODUCTION

For more than seventy years, the Soviet Union had a system for the legal protection of intellectual property rights that reflected the communist beliefs of the Soviet regime. All inventions of Russian citizens were proclaimed to be state property. Similarly, copyright works could be used for the benefit of the whole society. Various factories across the country produced consumer products under the same trade-marks. The exclusive right to trade secrets belonged to the state and institutes where this confidential information was created only exercised rights of ownership to this information within the scope of the goals and plans set out for these entities by government.

For decades, the concept of "intellectual property for the benefit of the masses" was the only approach taken with regard to intellectual property ownership, use and protection. With the collapse of the Soviet Union, one of the goals of legal reform in post-Soviet Russia was to bring its intellectual property laws into accord with Western practices.

The following is an overview of the main types of intellectual property currently protected in Russia and remedies available for their infringement.

THE RESOLUTION OF INTELLECTUAL PROPERTY DISPUTES IN RUSSIA

There are essentially four avenues through which intellectual property rights are enforced in Russia:

- Litigation
- Arbitration
- Criminal investigation
- Administrative procedures

Litigation can essentially be pursued through two sets of courts:

- The courts of general jurisdiction if at least one of the parties is a private individual
- The arbitration courts is both parties are legal entities or businessmen (essentially entrepreneurs)

These two court systems not only cater to different parties, but also have different routes of appeal.

Arbitration requires an arbitration clause either before or after the dispute arises and arbitration awards must be recognized and enforced by a regular court.

The following chapters outline the currently existing framework for the protection of trade-marks, patents, copyright and trade-secrets. It also outlines recent Russian legislative developments in the area of e-commerce.

TRADE-MARKS IN RUSSIA

First to Register System

The Russian Federation is a "first to register" country. Evidence of use of a trade-mark not properly registered with Rospatent, the Patent Office of the Russian Federation, neither provides any protection, nor establishes any priority.

Types of Trademarks

The Russian *Trade-mark Law* recognizes marks represented by words, designs, three-dimensional objects, sound, light and their combinations as potentially registrable.

Trade-mark Registrations in Latin and Cyrillic Advised

Filing for the registration of a mark in both Latin and Cyrillic is highly recommended.

Trade-mark Notification

Unregistered trademarks are recognized by the sign "TM", while registered trademarks are marked with the Latin letter "R" in a circle.

Content of Application

In order to register a trade-mark in Russia, an application must be submitted to Rospatent. The following must accompany the application:

- the full legal name and address of the applicant;
- a list of goods and/or services for which the trade-mark is to be registered, grouped in accordance with the International Classification of Goods and Services;
- a description of the mark;
- five black and white prints of the mark (size: 8 cm. x 8 cm.);
- five colour prints of the mark, if submitting an application for a colour-specific trade-mark. (A label sample may be submitted in its actual size, provided that it does not exceed 21 cm x 29 cm.)
- confirmation of the official fee payment; and
- a Power of Attorney. (A single Power of Attorney can be used even when registering numerous marks. If the applicant has a corporate seal, it should be affixed to the Power of Attorney.)

The application must be prepared in Russian. Documents submitted with the application can be in any language, however a Russian translation of the relevant documents must be provided within two months of the date of filing the application.

Two-Stage Trade-mark Examination Process

Trade-mark applications are subject to a two-step examination process.

At the formal stage, Rospatent reviews the contents of the application, and the accompanying documents, to ensure that they are in the proper format. Should Rospatent request additional documents, they must be submitted within three months. When all necessary documents are received, an Official Filing Receipt is issued. This process can be expedited upon payment of an additional fee, in which case the Official Filing Receipt is issued within ten days.

At the substantive stage of the examination process, Rospatent examines the application to determine whether the mark is registrable pursuant to the *Trade-mark Law* (distinctiveness, non-confusion with prior registrations, etc.) and determines the priority date, if this was not done at the formal stage.

In practice, substantive examination can take as long as twelve to fifteen months. Upon written request and payment of an additional fee, this time period may be reduced to four months. When the substantive examination stage is completed, the applicant will receive notice of Rospatent's decision.

Absolute Grounds for Refusing Trade-mark Registration

Trade-marks may be refused registration if they consist solely of the following:

- non-distinct marks;
- names commonly used as designations of a particular type of goods;
- generally accepted symbols or terms;
- official control, guarantee, assay marks, seals, awards, and other marks of distinction or confusingly similar signs;
- marks that indicate the type, quality, quantity, features, applications or value of goods or services, or the place or time of manufacturing or sale;
- flags or emblems of State, official designations of states, emblems and full or abbreviated names of inter-governmental organizations;
- marks misleading as to the product or its producer;

marks contrary to the public interest, principles of humanity or morality.

Appeals from Trade-mark Rejections

Should the application be rejected at either stage of examination, the applicant has three months within which to appeal the decision to the Appeal Chamber of Rospatent. The request is considered within four months. The applicant also has the right to request copies of the documents and other materials upon which the Examiner made its determination, provided the request is made within one month of the issuance of the Examiner's report. The decision of the Appeal Chamber can be further appealed to the Supreme Chamber of Rospatent within six months.

Approval and Issuance of Trade-mark

If the mark is approved for registration, a registration notice is sent to the applicant and the applicant has two months within which to pay the registration fee. The trade-mark is officially registered within one month of the payment of the fee and the Certificate of Registration will usually issue within six months of registration. Registered trade-marks must be published in the Official Bulletin within six months of their registration.

Cancellation Proceedings

Once the trade-mark is published in the Official Bulletin, cancellation proceedings can be brought against the registration by third parties.

Should the grounds for the cancellation of the registration be the existence of a confusingly similar, previously registered trade-mark, the third party must file the request within five years after publication. Cancellation proceedings brought on the grounds of lack of distinctiveness, descriptiveness, or corporate dissolution of the owner, can be brought at any time after publication of the mark.

If a trade-mark has not been in use within five years from its registration, the Supreme Patent Chamber may terminate the registration in full or in part, based on a request from any person.

The Supreme Patent Chamber may also terminate the registration in full or in part if a trade-mark that had not been in continuous use within five years before the cancellation request was submitted to the Supreme Patent Chamber.

Priority, Renewal and Term

Upon registration, priority is granted retroactively to the application date. Initially, the trade-mark is valid for ten years, and falls due for renewal during the final year of its current registration. Upon payment of the renewal fee, the registration is valid for a further ten years. Rospatent provides for a six month grace period during which renewal is still possible, subject to an additional fee.

Amendments to the Registration

Registrants must inform Rospatent of any changes to their name or address, the associated wares and services, and non-substantive changes to the mark as used. Upon payment of the appropriate fee, these amendments are recorded in the State Register of Trade-marks and on the Registration Certificate. The amendments are published in the Official Bulletin within six months after the date of amending the records. In order to register the amendments, the following documents must be submitted to Rospatent together with the official application for amendment:

- original Trade-mark Registration Certificate;
- Power of Attorney, signed by the owner of the registration; and
- confirmation of the official fee payment.

Treatment of Famous Marks

Under the *Rules of Recognition of Well-Known Status of a Trademark in the Russian Federation* (the “*Rules*”), trade-marks that may be recognized as well-known include:

- trade-marks registered in Russia;
- trade-marks protected by virtue of an international treaty to which the Russian Federation is party; and
- trade-marks that have acquired distinctiveness in association with specific goods or services through extensive use in Russia.

The *Rules* provide that a trade-mark recognized as well-known can:

- block the registration of an identical or confusingly similar mark;

- cancel the registration of an identical of confusingly similar mark; and
- prohibit the use of an identical or confusingly similar mark by a third party who is using or intending to use the mark in question in association with similar goods or services (provided that the well-known character of the trade-mark arose prior to the priority of the third party's trade-mark).

If the application for the recognition of the mark's well-known status is prompted by a trade-mark registration, the application may be filed at any time during the registration period of the mark.

It is important to note that the well-known mark status is limited to use in association with the wares and services in association with which the mark is registered.

Although practically speaking well-known status is likely to have additional persuasive value in cancellation or opposition proceedings, such status offers little more protection than a regular trade-mark registration.

Applying for Well-Known Status

The government fee for filing an application for the recognition of a mark's well-know status is US$1,100. The application must indicate the date from which the mark is considered well-known and contain factual evidence on the issue. This evidence may provide information on:

- the intensity of the mark's use, including:
  - date of first use of the mark;
  - locations where good/services under this mark have been provided;
  - volume of sales;
  - methods of using the mark;
  - average annual number of purchases; and
  - position among competitors in this sector of the economy.

The application should contain two sets of documents and five samples of the mark that forms the subject of the application, 8x8 cm in size.

The Supreme Patent Chamber of Rospatent should review the application within six months from the application date.

The intensity of mark use is not limited to use within Russia. The mark, however, must have acquired well-known status in the Russian Federation. The following may support the claim of well-known status:

- a list of countries where the mark has become known;
- advertising expenses (e.g. copies of data from the financial annual report);
- value of the mark (in accordance with the financial annual report data);
- survey evidence results on recognizing the mark as well-known gathered by an independent entity.

All documents submitted as evidence carry equal weight and there is no limit as to the type of document that may be submitted as evidence. It is recommended that surveys be conducted in at least six cities. Particular weight is given to evidence gathered in Moscow and St. Petersburg. At least 500 individuals should be surveyed.

The Supreme Patent Chamber may grant well-known status as requested, grant partial recognition of the status, or refuse it. The decision of the Supreme Patent Chamber is enforced from the date it is mailed to the applicant. The decision may be appealed in court.

Marks recognized as well-known are recorded in the Register of Well-known Marks. This Register is kept independent of the regular Trade-mark Register. The decision to grant well-known status is also published in the *Official Bulletin*.

Licensing and Assignment of Trade-marks

Licensing agreements must be drafted in accordance with the Russian legislation, which sets both mandatory terms and guidelines. Licenses are treated as civil contracts in Russia and are subject to registration with Rospatent. Unregistered licenses or assignments are deemed null and void. If an assignment was made prior to trade-mark registration, the parties thereto should inform Rospatent in writing about the assignment.

Typically, a licence includes the following basic information:

- date of the agreement;
- place of its execution;
- names of the parties to the agreement;
- number(s) of the certificate(s) for the licensed mark(s);
- list of goods and services for which the use of the mark(s) is permitted;
- whether the licensee has the right to sublicense the mark(s);
- term of the agreement;
- territory of the agreement (the licence may be issued for the whole territory of the Russian Federation or a specific region thereof);
- legal addresses of the parties (to be positioned directly above the signature lines or at the beginning of the agreement); and
- a statement that the licensee will produce goods and services of a quality not lower than that of the licensor and a mechanism for exercising quality control in relation to the use of the licensed mark(s).

When registering a trade-mark licence at Rospatent, the following documents must be submitted together with the official application:

- original licence, together with two notarized copies, and its translation into Russian;
- confirmation of the official fee payment; and
- Power of Attorney, signed by the licensor and the licensee.

It is important to remember that:

- the name and address of the licensor must be identical to the name and address of the owner of the trade-mark which is subject to the licence;
- all trade-marks subject to the licence should be listed in Exhibit A (Trade-marks), together with their Russian Federation Registration Certificate numbers;
- goods and services specified in the licence should be identical to those listed in the Trade-mark Registration Certificates.

The licence should relate the scope of transferred rights to the certificate number(s) of each trade-mark in question and identify these numbers in both the licence and any relevant attachments thereto that are intended to describe licensed marks in greater detail.

Remedies for Trade-mark Infringement

Trade-mark infringements include the following unauthorized activities:

- manufacture, application, importation, offer to sell and sale of illegally trade-marked
- goods;
- other business use of the trade-mark; or
- use of a confusingly similar mark in respect of similar goods.

Trademark disputes are resolved in courts of general jurisdiction or arbitration courts. Both courts provide permanent and preliminary injunctions and can issue orders for seizure of the goods.

Sanctions associated with trade-mark infringement include payment of either damages or lost profits, provided that the latter are not lower than the income derived by the infringer.

It is crucial that the trademark owner is clear about its goals in bringing a claim against the infringer. On the one hand, the trademark owner may seek to restrain and end the infringer's activity as quickly as possible. Additionally or alternatively, the owner may wish to obtain an award of damages for losses it has incurred because of the infringer's illegal activities. Pursuit of the latter goal places a significant burden of proof on the complainant, and, even if very strong evidence is available, the cost of amassing this evidence may outweigh any damages awarded in the trademark owner's favour.

In the case of parallel imports, the trade-mark owner is best advised to consider characterizing its claim against the infringing party as an unfair trade practice, which would come before the Russian Anti-Monopoly Committee (the “AMC”), whose decision is of great value to other Russian civil and criminal adjudicators. The AMC may choose to conduct its own investigation, enter onto the premises of the infringer, and, upon written notice, examine relevant documents. The police are under an obligation to assist AMC officers, including assisting them in entering the infringer’s premises.

Among other sanctions, the AMC may:

- grant injunctive relief;
- impose on an infringing company administrative fines of up to 100 times the minimum monthly wage per day (up to 25,000 times the minimum monthly wage) for non-compliance with injunctive order and/or on the infringer’s officers and directors, a fine of up to 200 times the minimum monthly wage;
- revoke the infringer’s licenses;
- file criminal charges.

Furthermore, the AMC proceedings do not preclude the aggrieved party from suing.

The *Criminal Code of the Russian Federation* (the “*Criminal Code*”) states that trade-mark infringement is criminally punishable only if it is committed repeatedly or causes substantial damages. The Criminal Code sets out penal provisions with respect to trade-mark infringements amounting to:

- a fine of 200-400 times the minimum monthly wage; or
- a fine equal to the infringer's income for two to four months; or
- corrective labour for 180-240 hours; or
- imprisonment for up to two years.

If the infringement is committed repeatedly or by a group of persons "involved in conspiracy", or by an organized group, it may result in:

- a fine of 400-800 times the minimum monthly wage; or
- fines equal to the income of those involved for four to eight months; or
- detention for four to six months; or
- imprisonment for up to five years.

An administrative fine is imposed for the unlawful use of another's trade-mark, service mark, name of the goods' place of origin or markings for homogeneous goods similar to them, in the amount of 15-20 times the minimum monthly wage, accompanied by confiscation of the articles bearing an unlawful reproduction of the mark or place of origin. For officials, the fine is from 30-40 times the minimum monthly wage, while for legal entities, the fine is from 300-400 times the minimum monthly wage, again accompanied by confiscation of the articles bearing an unlawful reproduction of the mark or place of origin.

PATENTS

Scope of Protection

Russia has a “first-to-file” patent system.

The *Patent Law of the Russian Federation* (the “*Patent Law*”) governs moral and economic rights arising from the development, legal protection and use of inventions, useful models and industrial designs. In accordance with international agreements on reciprocity, the *Patent Law* extends these rights to both Russian citizens and foreigners. Patent protection can only be obtained through an application to Rospatent.

An invention is generally granted patent registration if it has the following three characteristics:

- novelty;
- inventive element; and
- industrial applicability.

Patentability

Patentable things include devices, processes, substances, strains of microorganisms, cell cultures of plants and animals and the application of existing devices, processes, substances and strains for novel uses.

The *Patent Law* does not apply to:

- intellectual property deemed secret by the state;
- scientific theories and mathematical methods;
- methods of organizing and managing the economy;
- conventional symbols, timetables and regulations;
- methods of performing mental operations;
- computer algorithms and programs;
- blueprints and ideas for designing buildings and land areas;
- designs of the outer appearance of items only;
- topologies of integrated circuits; and
- inventions contrary to the public order.

Utility models are structural embodiments of means of production and consumer goods, as well as their component parts. They are patentable if novel and industrially applicable. Anything excluded from patentability as an invention is also excluded from patentability as a utility model.

Utility models differ from inventions in that:

- The scope for patenting utility models is smaller than that for patents, basically encompassing either means of production or consumer goods. An invention cannot simultaneously be patented as a utility model;

- The scope of novelty applicable to utility models is more restrictive, since objects or procedures with the same purpose are not patentable, while different processes with the same purpose are patentable;
- Utility models lack the requirement of an inventive step.

Industrial designs are artistic designs of objects that determine their external appearance. Industrial designs are patentable if they is novel, original and industrially applicable. Not patentable are those industrial designs that are determined exclusively by the technical functions of the article, as well as buildings, printed matter as such, objects with unstable forms and articles contrary to the public order.

Persons Entitled to Apply for a Patent

The right to obtain a patent is reserved by the *Patent Law* to three categories of persons:

- inventors;
- employers, if the invention was created by an employee within the scope of his or her duties; or
- other individuals or entities which are indicated by the inventor in his or her application for patent registration.

Patents can also be inherited. In addition to these categories of persons, the state may also obtain patent rights: the Federal Invention Fund of Russia may select inventions, acquire rights of patent holders and realize them in the interest of the state. If the state decides to take over an invention, a special decree will be issued and the patent-holder will be paid.

Inventors are natural persons by whose creative labour the invention, utility model or industrial design was created. If several persons participate in the creation, all are considered its inventors, and the distribution of patent rights among them must be assigned by contract. Persons who have only provided technical, organizational or monetary assistance are not recognized as inventors.

Employers are entitled to apply for a patent if an invention, utility model, or industrial design, was created by an employee, either in the course of employment or while fulfilling a specific project assigned by the employer. The employer should pay the employee an award proportionate to the profit, which has been or should have been derived from the employee's invention. This amount is determined by agreement between the employer and employee or in court, if the parties cannot agree on the issue. In the case of a contractor, patent rights belong to the creator of the work.

Employers entitled to patents must apply to Rospatent for registration or otherwise dispose of their rights within four months. If the employer fails to do so, or does not inform the inventor of its intention to keep the invention secret, the right to register the invention goes back to the inventor. Even if the rights revert to the employee, the employer will still have the right to use the patented invention in his or her business, subject to the requirement of compensating the employee.

Application Requirements

In order to be eligible for protection, an application for a patent of discovery or an industrial design, or a certificate for a utility model must be submitted to Rospatent. The application must be submitted in Russian, through a patent attorney registered with Rospatent. While the patent

application must be submitted in Russian, other documents may be in any language, with an attached translation into the Russian language.

The application should contain:

- a request for filing with information on the applicant, inventors, priority, etc.;
- a specification of the invention or utility model;
- drawings (where applicable);
- a certified copy of the priority application;
- a Power of Attorney.

Priority and Examination Procedure

The priority of an object of industrial property is determined by the filing date at Rospatent. A patent is issued after the completion of an examination procedure consisting of a formal and a substantive stage.

At the formal examination stage, patent examiners check for conformity of documents in the application, patentability of the subject matter, and conformity with the single invention requirement.

The substantive examination is undertaken at the applicant's request within three years after receipt of the request to respond, unless an extension is requested.

Rospatent publishes in its *Official Bulletin* particulars about the patent granted and enters the patent into the *State Register of Inventions of the Russian Federation*. The inventor may request to remain anonymous. Upon publication, anybody can inspect the application as amended and trace the inventor's name, even if it has not been previously revealed.

Term of Protection

Protection under the *Patent Law* is based on the filing date of the application, not the date of invention, unless the terms of the *Paris Convention* set the priority earlier, due to a filing in a member state. Patents and certificates are valid for the following terms:

- inventions (patents) - 20 years;
- industrial designs (patents) - 10 years, with a possible renewal for the additional five years;
- utility models (certificates) - 5 years, with a possible renewal for the additional three years.

Patent Invalidation

Patents may be invalidated for three reasons:

- failure to meet substantive requirements for patentability, availability in the patent of features different from those in the specification, or incorrectly identified names of the author or patentee;
- request filed by the patentee to formally renounce the patent; and
- non-payment of patent fees.

Protecting Russian Inventions Abroad

An application to obtain a patent outside of Russia cannot be filed until three months after the corresponding patent application is filed with Rospatent. This waiting period allows special procedures associated with national security and secrecy to be put into effect. Rospatent may shorten the three month waiting period. Failure to follow this rule entails the imposition of an administrative fine in the amount of 10-20 times the minimum monthly wage, and on legal entities, in the amount from 500-800 times the minimum monthly wage.

Non-Infringing Use

The *Patent Law* identifies activities that do not constitute infringement of the patent holder's exclusive rights, namely:

- temporary use, in the territory of Russia, of means incorporating patented industrial property in the process of designing transport vehicles of other countries;
- use, in the case of exceptional circumstances, with subsequent payment of compensation to the patentee;
- use for personal not-for-profit purposes;
- at pharmacies, one-time reproduction of drugs in accordance with a physician's prescription;
- use of means involving patent-protected inventions which have been “legally introduced into economic circulation”; and
- certain *bona fide* uses of industrial property by third parties before the item's prior use date.

Licences and Assignments

Contracts for the transfer, assignment or license of property rights to inventions must be in writing. The agreement must be registered with Rospatent. The *Patent Law* defines three types of agreements subject to registration:

- patent assignments;
- exclusive patent licences; and
- non-exclusive patent licences.

While patent assignments and licences are registered with Rospatent (even if they are part of a mixed agreement), transfers of know-how are nowhere recorded.

It is important to note that in Russia, even under a so-called exclusive licence, if certain rights are not included in the licence, the patent or certificate owner can license them to third parties. In addition, only an exclusive licensee can bring infringement proceedings, unless the licence specifies otherwise.

The *Patent Law* provides no details on how licences are to be drafted, but in Russia, they usually address the following issues:

- scope of rights transferred;
- names of the parties to the agreement;
- patents held by the licensor;
- definitions of terms used;

- object of the agreement, which details the rights licensed and retained, territorial restrictions, terms of the agreement and sublicensing rights;
- procedure for transferring technical documents, confirming their receipt and presenting formal grievances;
- warranties and liabilities;
- a technical assistance agreement, under which the licensor may be obliged to assist the licensee in realizing the patent, including defraying legal costs, and the licensee may be obliged to allow the licensor to inspect the production process and pay the cost;
- payment arrangements;
- charges and taxes;
- information and accounting procedures;
- a confidentiality agreement, which typically lists persons allowed access to technical information, as well as the period of confidentiality;
- an agreement on legal protection of the licensed rights, under which the licensee acknowledges the patent rights of the licensor and pledges to protect the patent and inform the licensor about threats to the patentee's statutory monopoly;
- an advertising agreement, under which the licensee may be obliged to advertise the licensed products and indicate the patent holder;
- a dispute resolution procedure; and
- the term of the agreement and actions that may lead to its premature termination.

Additional Issues to Consider

Prior to entering into a licence agreement with a Russian partner, the following issues should be addressed:

- Check whether any of the inventions the Russian partner offers for the transfer agreement or for the funding capital have been developed with the involvement of state funds. State involvement might limit ownership rights and mobility of the intellectual property;
- Insist that the Russian partner exchange investors' certificates obtained during Soviet times for patents under the *Patent Law*, if this has not yet been done;
- If the Russian partner has been previously privatized, check that the privatization process was duly executed. Intellectual property belonging to a company not properly privatized can be contested on the ground of intellectual property infringement;
- If the Russian partner was privatized by way of a lease with the right to purchase by a sale at auction or by a competitive bid, ask to see the contract of purchase regarding the intellectual property obtained as a result of the privatization;
- Check balance sheets of the Russian partner to ensure that the intellectual property in question is recorded as an asset;
- In case such information has not been previously kept, request that the Russian partner disclose in the agreement its legal rights and obligations regarding the intellectual property in question, including information on its right of conveyance and prior obligations;

- Technology transfer or cooperation agreements should contain a clause stipulating that the Russian partner will remedy all possible legal defects and disputes arising in the matter. A special clause dealing with liquidated damages arising in the case of future cancellation of rights may also be included in the agreement;
- Ensure that the agreement contains a clause referring to third party intellectual property rights. It may be advisable to reach an agreement on future intellectual property rights before establishing a joint venture or to include such agreement in the Articles of Incorporation or By-laws;
- Ensure that the Russian partner's outstanding obligations to individual inventors are fully satisfied. The license or assignment of a patent belonging to a group of inventors is impossible without their mutual consent;
- Pay attention to the Recommendations on Handling IP in Arrangements on Scientific and Technical Cooperation and Contractual Agreements Between Russian and Foreign Organizations ("Recommendations"), published by the Russian Ministry of Science and Technology Policy. The Recommendations draw distinctions between Russian and foreign parties in relation to rights arising from the creation of intellectual property under technology transfer agreements;
- Consider including in the agreement a clause referring not only to intellectual property rights held by the Russian party to the contract, but also to those held by its subsidiaries, so that there is no chance for patent registration through a related entity.

Remedies for Patent Infringement

Patent infringements is defined as:

> "[the] unauthorized manufacture, application, import, offer for sale, sale or other introduction into economic circulation or storage for this purpose, of product containing the patented invention, utility model, industrial design and also the application of a process protected by a patent for an invention, or the introduction into economic circulation or storage for this purpose of a product manufactured directly by applying a process protected by a patent for an invention."

Claims of infringement of patent-holders' rights are reviewed in courts of general jurisdiction or in arbitration courts. Both courts may order permanent or preliminary injunctions or seizure of goods.

Protection under the *Patent Law* includes the right to demand cessation of infringing activities, monetary damages and criminal sanctions.

The *Criminal Code* stipulates that unlawful exploitation of patent rights or making their essence known to the public prior to their official publication, as well as misappropriation of inventorship or coercion to co-inventorship, if such acts result in substantial harm, are punishable by:

- a fine of 200-400 times the minimum monthly wage; or
- a fine equal to the infringer's income for two to four months; or
- corrective labour for 180-240 hours; or
- imprisonment for up to two years.

If the infringement is committed repeatedly or by a group of persons "involved in conspiracy", or by an organized group, it may be punishable by:

- a fine of 400-800 times the minimum monthly wage; or
- fines equal to the income of those involved for four to eight months; or
- detention for four to six months; or
- imprisonment for up to five years.

An administrative fine is imposed for the infringement of invention and patent rights in the amount of 15-20 times the minimum monthly wage, accompanied by confiscation of the infringing articles. For officials, the fine is from 30-40 times the minimum monthly wage, while for legal entities, the fine is from 300-400 times the minimum monthly wage, again accompanied by confiscation of the infringing articles.

In the case of a breach of foreign patenting procedure, an administrative file is imposed in the amount of 10-20 times the minimum monthly ware, for private individuals, and 500-800 times the minimum monthly wage, for legal entities.

COPYRIGHT

Scope of Copyright Protection

The *Copyright Law of the Russian Federation* (“the *Copyright Law*”) deals with the creation and use of works, or any part thereof, of science, literature and arts, stage production, phonogram, radio or cable TV broadcasting, regardless of the purpose or merits of the work, or the method and form of expression, including:

- written (manuscripts, typewritten works, musical notations, computer programs);
- oral (public pronouncements and performances);
- audio/visual (mechanical, magnetic tapes, digital and optical recordings, musical works with or without text);
- image (drawings, comics, design works, graphic stories, maps, sketches, paintings, plans, diagrams, movie-, TV-, video- or photo episodes, various forms of theatre production);
- three-dimensional (sculptures, models, mock-ups, structures).

The *Copyright Law* also protects derivative works, such as:

- translations;
- theses;
- annotations;
- resumes;
- adaptations of literary, scientific and art works; and
- collections (encyclopaedias, anthologies, databases, etc.).

Protection is extended to derivative works regardless of whether the original works on which they are based have copyright protection.

Copyright arises automatically and there is no need to register it. Although copyright does not have to be registered with state authorities, it should be claimed (a process which will be described further below.) A copyrightable work possesses the following characteristics:

- it is a work of science, literature or art;
- it comes about as a result of the author's creative activities; and
- it exists in a substantive form.

Through the use of the word “including” the Copyright Law makes it clear that it does not list all possible forms of copyrightable matter, and so covers virtually every form that creative work may take, except for those explicitly excluded.

Copyright is not connected to the right of ownership in a physical object expressing the subject of copyright. Furthermore, a work does not need to be publicly disclosed to be protected.

Works Excluded from Copyright Protection

Copyright does not apply to:

- ideas, methods, processes, systems, concepts, principles, discoveries and facts;

- official documents and their translations;
- state symbols or signs;
- folk art; and
- news reports.

Items Subject to Double Protection

Some items protected by the *Copyright Law* are also protected by other Russian intellectual property laws. Designs, for example, are protected under both the *Copyright Law* and the *Patent Law* and sound recordings are subject to both copyright and neighbouring right protection. These forms of intellectual property are provided double protection, but they are also subject to two sets of legislative provisions and obligations.

Copyright Notification

A proper claim is made when the author affixes to his or her work a copyright notice of a Latin letter “C” in a circle, accompanied by the author's name and the year in which the work was produced, or the producer of a phonogram/performer affixes on each copy of his or her product a neighbouring right sign which consists of the Latin letter “P” in a circle, the name of the exclusive neighbouring rights’ holder, and the year of the first publication/performance of the work.

Author’s Rights

Under the *Copyright Law*, the author’s moral rights include the right:

- to be recognized as the author of the work;
- to authorize uses of the work;
- to publish the work; and
- to protect the work.

The author's property rights include the right to:

- reproduce the work;
- distribute the work;
- publicly demonstrate and perform the work; and
- translate, adapt and re-arrange the work.

Co-authors of a work are protected by joint copyright, regardless of whether the parts contributed by the co-authors stand out as independent parts of the work. Each co-author may freely use the part he or she created unless the agreement between them provides otherwise.

Publishers of encyclopaedias, dictionaries, collections of scientific works, newspapers, magazines and other periodicals are entitled to the exclusive use of the compilations produced by them while the individual authors retain their copyright.

Generally, copyright in a work created on the job belongs to the author of the work. Where there is an employment agreement, property right to the work belong to the author's employer. Moral rights, however, remain with the author.

Term of Protection

Copyrighted works are protected during the author's lifetime and for 50 years after his or her death, subject to additional periods of copyright protection arising in certain circumstances. For example, in the case of joint authorship, the death of the longest surviving author is taken as the starting point of the 50-year term. Anonymous works, posthumous works, and works made public under a pseudonym, are protected for 50 years calculated from January 1 of the year following the year of publication.

Neighbouring rights are valid for 50 years after the work's performance or transmission, calculated from January 1 of the year following the performance or transmission.

Moral rights are protection indefinitely.

"Free Use": an Exception to Copyright Protection

The doctrine of "free use" limits copyright protection in Russia. Under the *Copyright Law*, a copyrighted work may be used without obtaining the copyright holder's consent or paying royalties for certain purposes, namely:

- use of short excerpts in reviews of current events;
- use of the work exclusively for educational or scientific purposes;
- citation of short excerpts for informational purposes, provided that if a broadcasting or a cable company uses a copy of a phonogram produced for commercial purposes, royalties are paid;
- reproduction of works for the reproducer's personal use, or
- reproduction of works for use in public places;
- reproduction of works for judicial purposes; and
- reproduction for purposes justified by the nature of the applicable ceremony (e.g., wedding, funeral).

In the case of a permitted free use of a copyrighted work, the name of the author and work from which the excerpt is borrowed must be indicated.

Assignment and Licence of Copyright

Copyright holders may transfer their rights to third parties by contract. Generally, the contract must specify in writing:

- scope of the rights being transferred;
- ways in which the work may be used;
- term and territory for which the rights are transferred; and
- the amount of royalties payable and/or the method of their calculation.

If the author's agreement does not cover all these points, the *Copyright Law* establishes default positions. The *Copyright Law* is not clear on whether the entire copyright or only separate uses of the work are transferable, but it appears that only separate rights associated with a work may be transferred.

It is important to note that moral rights belong to the author, regardless of his or her possession of property rights for the work and are retained by the author even upon assignment of the exclusive right to use the work.

Enforcement of Copyright: Collectives

Authors may, through a voluntary written agreement, form a collective to enforce their rights. The *Copyright Law* directs these collectives to:

- negotiate the amount of remuneration due to authors;
- issue licences to the licensees of property rights;
- collect and distribute royalties;
- report to authors on the volume of use of their work; and
- take whatever legal action may be necessary to defend the authors' rights.

In Russia, these services are provided by the Russian Society of Authors (RSA), functioning under the protection of the President of the Russian Federation.

Copyright Under *Software Law*

The *Software Law* attempts to grant software creators protection similar to that afforded to authors of literary works (with respect to software) and collections of works (with respect to databases), by providing that any software program shall enjoy legal protection afforded to literary works. Yet, protection granted under the *Software Law* to software and databases is more limited than copyright protection. Protection granted by the *Software Law* applies equally to software programs and databases, yet each copyrightable database element is protected independently of the database itself.

Protection under the *Software Law* does not apply to:

- ideas and principles underlying computer programs and databases;
- ideas and principles of organizing interfaces and algorithms; and
- programming languages.

Under the *Software Law*, protection arises simply by virtue of the fact that a computer program or database is created. The *Software Law* protects software created in any language, being at any stage of completion, disclosed or not disclosed, and expressed in any form, including source code and object code. It also protects databases not created but simply compiled, regardless of their material carrier, designation and merits.

Copyrights in software are valid for the author's lifetime and 50 years after his or her death, beginning on January 1 of the year following his or her death, subject to certain specific exceptions. Authors' moral rights to their computer programs or databases are protected indefinitely within and outside of the Russian Federation.

Under the *Software Law*, the copyright owner is either the author of a computer program, his or her heirs, or any "natural or legal person who enjoys exclusive property rights secured by virtue of law of contract" An employer holds all rights to software copyright if it was created in the course of the employee's activities, unless these rights were explicitly waived in a contract with the employee. Like other forms of copyright, moral rights are not transferable.

Software authors have the following exclusive property right to:

- issue,
- reproduce,
- distribute (by selling, hiring, leasing, lending, or any other means),
- to modify,
- publicly demonstrate,
- import, and
- translate,

the software.

Software authors have several moral rights, including the right to:

- be recognized as author,
- determine presentation of their name as that of recognized author, and
- protect their software or themselves against distortions, which may damage the author's reputation or dignity.

Copyright holders may elect, but are not obligated to, register their copyright in computer programs and databases with the Agency for Legal Protection of Computer Programs, Databases and Topologies of Integrated Circuits (the "Agency"). Registration strengthens copyright owners' position in the case of dispute, by creating a rebuttable presumption of authorship. Registration, however, may not be advisable due to the possibility that secret information could leak through corrupt government officials. If software is registered, a contract that assigns all property rights to this software must also be registered with the Agency. Parties to a contract assigning property rights to unregistered software may also choose to register the document.

Software Licences

Anyone who wants to use software must obtain a licence to do so. The *Software Law* provides that those in lawful possession of software or databases may copy them for their personal use or archives, adapt, decompose, or resell them without obtaining the author's consent. Consent of the author must be obtained for import or export.

Software licences must stipulate in writing:

- the extent and methods of software use,
- payment procedures; and
- duration of the contract.

If the software has been registered, a contract that assigns all property rights to it must also be registered with the Agency. Parties to a contract assigning property rights to unregistered software may also choose to register their contract.

The *Copyright Law* allows "shrink-wrap" licenses and stipulates that they are valid only if their terms are visible to buyers prior to the purchase.

Remedies for Copyright Infringement

Copyright infringement cases may be heard both in courts of general jurisdiction and in arbitration courts. Copyright and neighbouring right violations can lead to civil, criminal or administrative sanctions, which, at the author's election, may take the form of:

- an injunction order;
- a confiscation order;
- recognition of the author's rights;
- restoration of the author to a situation similar to the one preceding infringement;
- compensation for losses associated with the infringement; and
- delivery up of the profits accumulated by the infringer.

The *Copyright Law* does not distinguish between moral and property rights infringement. Monetary compensation is granted in either case. A court of general jurisdiction or arbitration may order the forfeiture of accumulated profits or compensating losses of 10-50,000 times the minimum monthly wage. In addition, the infringer can be forced to pay into federal coffers another 10% of the amount awarded to the plaintiffs.

Courts of general jurisdiction and arbitration grant both preliminary and permanent injunctions. Counterfeit copies of copyrighted works are subject to obligatory confiscation, after which they are destroyed or turned over to the copyright holder (at his or her request.)

The *Criminal Code* specifies that copyright or neighbouring right infringements are punishable by:

- a fine of 200-400 times the minimum monthly wage; or
- a fine equal to the infringer's income for two to four months; or
- corrective labour for 180-240 hours; or
- imprisonment for up to two years.

If the infringement is committed repeatedly or by a group of persons "involved in conspiracy", or by an organized group, it may result in:

- a fine of 400-800 times the minimum monthly wage; or
- fines equal to the income of those involved for four to eight months; or
- detention for four to six months; or
- imprisonment for up to five years.

An administrative fine is imposed for the infringement of copyright in the amount of 15-20 times the minimum monthly wage, accompanied by confiscation of the infringing articles. For officials, the fine is from 30-40 times the minimum monthly wage, while for legal entities, the fine is from 300-400 times the minimum monthly wage, again accompanied by confiscation of the infringing articles.

Remedies for Infringement of Copyright in Software

Courts of general jurisdiction, arbitration and commercial courts review database and software infringement cases. Besides criminal charges, sanctions for software infringement may include:

- recognition of the author's rights;

- reconstruction of the author's status which existed prior to the infringement;
- cessation of the infringing activities;
- payment of profits gained or compensation for damages suffered;
- confiscation of the counterfeit programs, materials and equipment used, and their transfer to the state or the plaintiff;
- at court's discretion, payment of damages amounting to 5000-50,000 times the minimum monthly wage; and
- an order that the infringer pay into federal coffers an additional fine in the amount of 10% of damages awarded.

TOPOLOGIES

Scope of Protection

The *Topology Law*, which protects integrated circuit topologies, combines elements of both the *Patent Law* and *Copyright Law*. Protection under this law does not cover ideas, methods, systems, technology or encoded information implemented in a topology.

Owner's Rights

Topology owners have the exclusive right to use them at their discretion and, in particular, to produce and distribute integrated circuits with the topologies and to forbid the use of topologies by others without obtaining proper authorization from them.

Property rights in a topology created in the process of fulfilling official duties or at the employer's request belong to the employer provided that a contract between the parties does not provide otherwise.

Term of Protection

The term of exclusive right for the use of topologies is ten years.

Non-Infringing Activities

The following acts do not infringe the exclusive right to a topology:

- Use of legally obtained integrated circuits, or articles containing these integrated circuits, if the person using them did not know and was not supposed to know that these integrated circuits or articles were produced and distributed in infringement of the exclusive right to use the topology. After receipt of an appropriate notification from the holder of the right to the topology, this person must pay appropriate compensation for each integrated circuit or article containing the integrated circuit;
- Use for personal non-profit purposes and for the evaluation, analysis, research or teaching;
- Commercial distribution of integrated circuits with the protected topology.

Transfer of Rights to a Topology

Rights to a topology may be transferred completely or partially on the basis of a written contract, which stipulates

- the scope and methods of using the topology;
- remuneration amounts; and
- payment procedures.

A contract assigning complete rights must be registered with the Agency. An agreement assigning partial rights may be registered, if the parties so desire.

Remedies for Infringement of Topologies

A topology is infringed if any of the following acts are performed without the owner's authorization:

- copying the topology in whole or in part by including it in an integrated circuit or in another manner, with the exception of copying only that part of the topology that is not original;
- using, importing, offering for sale, selling and otherwise marketing the topology or an integrated circuit with that topology.

In the case of infringement, a topology owner has the right to

- have his or her rights acknowledged;
- to be restored to his or her status prior to the infringement;
- have the activities infringing the right or creating a threat of infringement terminated;
- be compensated for the damages sustained, the amount of which includes profits illegally obtained by the infringer;
- In addition to compensation for damages sustained, at court's discretion, a fine of 10% of the sum awarded to the plaintiff, to be paid into federal coffers;
- The court may also issue an order to confiscate illegally produced integrated circuits and articles including such integrated circuits, as well as materials and equipment used for their production, and to destroy them or to transfer them into federal coffers or to the plaintiff at his request as part of the compensation for damages.

TRADE SECRETS

General Overview

In the Soviet Union there existed two standards for trade secret transfers:

- in trade secret transfers between Soviet parties no ownership right was recognized or transferred, but
- if a transfer involved a foreign party, ownership rights of the Soviet scientific institution were recognized and registered by the respective ministry in the licence documentation covering the transaction.

While in the Soviet Union there existed scattered statutory provisions dealing with trade secrets, a true legislative framework for the protection of trade secrets in the country was only set up in 1990 when the USSR *Law on Enterprises* established the rights of trade secret holders.

The USSR *Law on Enterprises* defined trade secrets as non-state secret information, related to the production, technological information, management, finances and other activities of an enterprise, disclosure of which may cause harm to the interests of the enterprise.

When the Russian Federation *Law on Enterprises and Entrepreneurial Activities* was adopted in December 25, 1990 and so replaced the USSR *Law on Enterprises*, it did not contain a definition of trade secrets, but confirmed that enterprises had the right to the protection of this type of intellectual property. The 1991 Russian Federation *Law on Competition and Anti-Monopoly Activities* established that receipt, use, and disclosure of scientific-technological, production and trade information, including trade secrets without consent from its owner would constitute a form of unfair competition.

Circumstances under which a holder of technical, organizational or commercial information, forming a company's trade secrets could protect this information from unfair use by third parties, were defined for the first time in the *Fundamental Principles of Civil Legislation*, in force since August 1992, which states that:

> "The holder of technical, organizational or commercial information that contains the enterprise's know-how, has the right to protect it from illegal use by third parties if
>
> - this information has real or potential commercial value as being unknown by third parties;
> - this information is not freely accessible legally; and
> - the owner of the information takes all necessary steps for the preservation of confidential character of the information."

This approach to the definition of trade secrets was adopted in the *Civil Code of the Russian Federation* (the "*Civil Code*"), which further states that persons, who obtain secret information by illegal means, must compensate the trade secret owner for damages sustained as a result of this disclosure.

Today, trade secrets are touched upon cursorily in at least 100 statutes. Current treatment of trade secrets created in the Soviet-era is dictated by Resolution No. 1132. (*On Extra-ordinary Measures for Legal Protection of State Interests in the Process of Economic and Civil Use of the Results of Scientific-Research, Test, Design and Technological Works of Military, Special and Dual Purpose*) (the "*Resolution*") issued in September 1998. According to the *Resolution*, if the

results of research and development activities in a military, special or dual purpose industry have not entered the exclusive property of physical or legal persons prior to the enactment of the *Resolution*, and if information about these results was not generally accessible, rights to the results of this intellectual activity belong to the Russian Federation.

Information That Cannot Constitute Trade Secrets

The following information cannot constitute trade secrets:

- founding documents and by-laws;
- certificates of registration, licences and patents;
- data on the economic activities and financial status of an enterprise;
- documents pertaining to its solvency and strength;
- composition of the work force, payroll, working conditions and vacancies, tax returns and mandatory deductions;
- data on the environmental protection undertakings of an enterprise, instances of breach of anti-monopoly regulations and work safety rules;
- information on the sale of products detrimental to human health;
- information on the amount of damages obtained by infringers;
- information about employees' involvement in business activities of cooperatives, small businesses, joint stock companies and other business entities.

E-COMMERCE

Privacy protection

At present, the Russian legislation recognizes both the right of citizens to access and distribute information, and the right of the state and commercial organizations to protect secrets, so that the right of access to personal data can be subordinated to security.

Two major laws define how personal data is treated in Russia: the Russian Federation *Law on Information, Information Technologies and Protection of Information* ("*Law on Information*") and the Russian Federation *Law on Participation in the International Information Exchange* ("*Information Exchange Law*"). Together with the *Constitution*, they establish the following framework for the protection of personal data in the country:

- Personal data in Russia is treated as confidential information and is subject to limited access.
- Currently, Russian law does not establish a central regulatory body responsible for data protection. The responsibility for data protection therefore lies with data collectors.
- Entities and individuals involved in the business of collecting, processing and provision for use of personal data are subject to mandatory licensing in Russia.
- Any transfer of information from data collectors to third parties, located in Russia or abroad, is subject to mandatory licensing, and formal authorization of the government to export this confidential information is required, irrespective of whether the information is transferred in the form of hard copy documents, or if it is accessed through computer networks.
- The *Constitution* recognizes the basic human right of privacy existing in one's communication and personal data, and the applicable standards established by the international conventions signed by Russia.
- The rights guaranteed by the *Constitution* are not absolute. The Russian Federation *Law on Operational-Search Activities* allows the government to monitor telephone conversations and other types of communications of persons suspected or accused of specific crimes, as well as those aware of these crimes.
- Through systems for investigative activities in Russia, commonly referred to as SORM, the Federal Security Service and seven other federal agencies, including the tax police, customs and the ministry of interior affairs, have the right to directly access all communications and watch all activities conducted over the Internet. In fact, the SORM directives require that Russian Internet service providers install, at their own expense, a re-routing device to link these agencies directly to the service providers.
- Entities that gather personal data are not permitted to collect this data from a member of the Russian public without first soliciting their explicit consent, which may be either limited or retracted at any time.
- Russians are permitted to access records containing their personal data to correct it and to determine who uses this information and for what purposes.
- The *Information Exchange Law* governs relations arising from the exchange over the borders of the Russian Federation of information available in print form, as well as information available through mass media, audio and visual communication channels,

located in information libraries, systems, archives, funds, databases and other types of information systems.

- The *Law on Information* does not specifically refer to foreign persons, yet from the more general rules of the *Civil Code* it can be inferred that foreigners enjoy the same treatment as Russians when it comes to information ownership, except where laws indicate otherwise. Furthermore, the *Information Exchange Law*, brought into force after the *Law on Information*, indicates that in Russia, foreigners are allowed to participate in the international information exchange.
- Disregard of any of the above-listed laws may lead to civil, criminal or administrative liability.

E-Contracting

The issue of electronic contracts received initial attention from Russian legislators in the early 1990s, starting with a few scattered provisions in the *Civil Code*. The *Civil Code* provides that agreements between two parties can be in written or oral form, if no particular form is specified in the governing law, and contemplates the possibility of entering into an agreement electronically. It provides that a written agreement is considered to be binding on two or more parties when they sign a single document, or exchange documents outlining the transaction by mail, facsimile, telephone, electronically or through other means of communication.

In 1994, the Supreme Arbitration Court of the Russian Federation (the "SAC") issued Letter No. C1-7/OP-07 *On Certain Recommendations Passed at the Council on Arbitration Court Practices*, in which the SAC provides that a valid electronic contract would contain:

- electronic digital signatures;
- a clear indication of the fact that the parties are entering into an electronic contract;
- definitions of the terms "electronic document", "digital signature", etc.;
- the location where passwords to electronic documents are stored;
- a dispute resolution clause outlining procedures for the amendment of contractual terms;
- an indication of the party bearing the responsibility for the authentication of digital signatures;
- a list of documents and types of correspondence to be used in the electronic format;
- a description of the procedure used for the creation of electronic documents; and
- the identification of the software used, as well as its producer.

It appears that in order to be considered a valid and binding written agreement, a contract in the electronic format must fulfill all formal requirements set out for written documents, and be signed by the parties, whose identities can be verified.

In addition to the already established standard for electronic documents, the *draft Law on Electronic Commerce* and *Law on Electronic-Digital Signatures* establish specific requirements for electronically executed documents, irrespective of whether these documents can be considered contracts, namely:

- A contract cannot be deemed invalid merely because it is executed electronically. At the same time, if the governing law requires that transaction documents be notarized or registered, these documents cannot be electronically executed.
- Electronically executed contracts must provide the following information:

  - steps necessary to execute the contract;
  - technology and procedures for checking the equivalence of handwritten signatures;
  - means and timing of acceptance;
  - means and timing of revoking erroneous acceptances;
  - means and timing of amendments;
  - contract terms that are included by reference to another electronic document and means of technical access to referenced documents;
  - procedures for storing and disclosing electronic documents, and access to the electronically executed document; and
  - conditions for the provision of hard copies of electronic documents.
- The *Law on Electronic-Digital Signatures* contemplates recognition in Russia of e-commerce related documents executed abroad. Yet, foreign parties involved in e-commerce deals with Russian parties should note that the *Law on Electronic Commerce* requires that electronically executed contracts be drafted in simple Russian language.

Digital Signatures

Until recently, Russian legislation contained few direct or indirect provisions dealing with digital signatures, despite the fact that the government first considered the issue in 1993 when the Russian Federation *Law on Federal Authorities on Government Communications and Information* vested the Federal Agency on Government Communications and Information with the power to carry out licensing and certification of software and hardware systems and activities in the area of encrypted information.

In 1994, the State Committee on Standards introduced the first federal standard applicable to digital signatures. That same year, the Russian Federation Supreme Arbitration Court indicated that Russian courts would accept electronically generated documents and digital signatures as evidence.

In 1995, the concept of “digital signature” appeared in Russian legislation for the first time. The *Civil Code* stated that “use in transactions of...digital signatures or other analogous reproductions of actual handwritten signatures is permitted in cases and in accordance with procedure provided by federal laws or other legislative instruments, or an agreement between the parties to the contract.”