

MCRUSSIA: THE WEAPONIZATION OF INTELLECTUAL PROPERTY

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ABSTRACT

Russia's invasion of Ukraine alarmed the international community in many ways. One of the causes for concern involved a series of announcements that Russia made regarding the rights of intellectual property owners from "unfriendly" countries. The first sign of jeopardy was a Russian court's decision to dismiss a trademark case brought by a British company against a Russian national. Days later, Russia enacted Decree No. 299, which provides that patentees from "unfriendly" countries will receive zero compensation for infringement. Russian lawmakers subsequently announced that they were drafting a law allowing the government to take over foreign businesses—and consequently—their intellectual property. Worries about the safety of McDonald's intellectual property in Russia emerged.

The following is an analysis of the complex way that Russia has used intellectual property in the aftermath of its invasion of Ukraine. Despite the targeting of "unfriendly" countries, Russia's use of intellectual property has not been

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a straightforward case of antagonism. Rather, Russia has walked a fine line between retaliation against sanctioning nations and observation of its obligations under international treaties. For example, while Russia suggested that it would abandon its obligations under TRIPS, it ultimately walked back that proposal. There is also an aspect of Russia’s intellectual property strategy that is aimed at self-preservation. In this vein, the recent law legalizing parallel imports is part of an effort to sustain the Russian economy at a time when it is dealing with inflation and the negative effects of various sanctions against the country as a result of its invasion of Ukraine.

This analysis contextualizes these actions by the Russian government by noting that some of the “new” policies did not arise overnight. Rather, some legal actors in Russia have advocated for legalizing parallel imports several years before the invasion of Ukraine. In that sense, Decree No. 299 may be considered an escalation of existing law and government policies rather than an entirely new development. It remains to be seen if, and how, laws like Decree No. 299 will play out.

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I. INTRODUCTION

On February 24, 2022, the Russian army invaded Ukraine, and in the following weeks the international community ratcheted up its economic pressure on Russia.¹ On the day of the invasion, the United Kingdom imposed sanctions on Russian banks and individuals, and the United States sanctioned thirteen major Russian state-owned and private entities.² Individual corporations have also taken an economic stance against Russia. Since the invasion, at least 250 companies have halted operation in Russia, and over 250 have left entirely.³ As a response to this

¹ See John Psaropoulos, *Timeline: Week two of Russia’s invasion of Ukraine*, AL JAZEERA (Mar. 9, 2022), <https://www.aljazeera.com/news/2022/3/9/timeline-week-two-of-russia-invasion-of-ukraine> [<https://perma.cc/LTT8-4T29>]. The authors interchangeably use the terms war, invasion, and conflict to describe Russia’s military aggressions. President Putin has recently described Russia’s action as war. Mary Ilyushina, *Putin declares ‘war’—aloud—forsaking his special euphemistic operation*, WASH. POST (Dec. 22, 2022, 2:55 PM EST), <https://www.washingtonpost.com/world/2022/12/22/putin-war-ukraine-special-operation/> [<https://perma.cc/L3WM-2HXT>].

² Chad P. Bown, *Russia’s war on Ukraine: A sanctions timeline*, PETERSON INST. INT’L ECON., <https://www.piie.com/blogs/real-time-economic-issues-watch/russias-war-ukraine-sanctions-timeline> [<https://perma.cc/79WW-JUQ7>] (last visited Apr. 30, 2022).

³ See Jeffrey Sonnenfeld & Steven Tian, *Opinion: Some of the Biggest Brands Are Leaving Russia. Others Just Can’t Quit Putin. Here’s a List*, N.Y. TIMES (Apr. 7, 2022), <https://www.nytimes.com/interactive/2022/04/07/opinion/companies-ukraine-boycott.html> [<https://perma.cc/6WCM-76YD>] (listing BP, eBay, and Uber as companies

economic pressure, Russia has taken several legal actions to address the intellectual property rights of holders from “unfriendly” countries.⁴ Some of these actions are enacted laws, while others remain in draft stages.

One of the earliest legal actions to garner attention was a court ruling published on March 3, 2022, in which a Russian judge expressly linked his denial of relief for infringing the Peppa Pig trademark to the economic sanctions imposed on Russia from the West.⁵ Days later, the Russian government announced Resolution No. 299, which changed Russian law to provide zero compensation for the unauthorized use of patented inventions when the patent holder is affiliated with an “unfriendly” country.⁶ Perhaps the most controversial development affecting intellectual property is a law still in its draft stages. This law would subject those companies that have departed

that have left Russia and Acer, Lenovo, and Koch as companies that have remained).

⁴ See *Russia issues list of ‘unfriendly’ countries amid Ukraine crisis*, AL JAZEERA (Mar. 8, 2022), <https://www.aljazeera.com/news/2022/3/8/russia-deals-with-unfriendly-countries-require-moscow-approval> [<https://perma.cc/3VXM-EJC3>] (“[T]he list includes Albania, Andorra, Australia, Great Britain, including Jersey, Anguilla, British Virgin Islands, Gibraltar, European Union member states, Iceland, Canada, Liechtenstein, Micronesia, Monaco, New Zealand, Norway, South Korea, San Marino, North Macedonia, Singapore, United States, Taiwan, Ukraine, Montenegro, Switzerland and Japan.”).

⁵ Dani Kass, *Russia OKs Use of Peppa Pig TM As Sanctions Retaliation*, LAW360 (Mar. 11, 2022, 6:37 PM EST), https://www.law360.com/articles/1473286?from_inh=true [<https://perma.cc/BBF9-FY3G>].

⁶ POSTANOVLENIE [Resolution] 2022, No. 299, <http://publication.pravo.gov.ru/Document/View/0001202203070005?index=0&rangeSize=1> [<https://perma.cc/D5YQ-XKYZ>] (Russ.); Hannah Knowles & Zina Pozen, *Russia says its businesses can steal patents from anyone in ‘unfriendly’ countries*, WASH. POST (Mar. 9, 2022, 8:19 PM EST), <https://www.washingtonpost.com/business/2022/03/09/russia-allows-patent-theft/> [<https://perma.cc/5TMM-JXNY>].

Russia to a system of external management, which some have characterized as nationalization.⁷

Like many issues in Russia, the purpose of this legislation is complicated. The laws are both a retaliation against “unfriendly” countries and an attempt to keep the Russian economy functioning amid sanctions. In some ways, Russia has restrained itself from adopting the most extreme intellectual property postures against its perceived antagonists. Close examination also shows that at least one *new* law on parallel imports is far from a kneejerk reaction to the most recent round of sanctions but was an action that was several years in the making.⁸ It is also important to keep in mind that some of the proposed legislation may not be enacted, and some of the enacted legislation may not be invoked. The origin story of a McDonald’s replacement illustrates this point.

II. RUSSIA

A. *Intellectual Property in Russia before the War*

Intellectual property rights in Russia were already in a precarious situation preceding the invasion of Ukraine. On one hand, intellectual property rights in Russia received

⁷ Jeanne Whalen, *Russia considers nationalizing Western businesses that have closed over Ukraine invasion*, WASH. POST (Mar. 10, 2022, 9:24 PM EST), <https://www.washingtonpost.com/business/2022/03/10/russia-nationalize-foreign-business-ukraine/> [https://perma.cc/AV5D-AY3A].

⁸ See David Aylen, *The Evolution of the Laws on Parallel Importation in Russia*, GOWLING WLG (Nov. 27, 2018), https://gowlingwlg.com/en/insights-resources/articles/2018/evolution-parallel-importation-in-russia/?utm_source=mondaq&utm_medium=syndication&utm_term=Intellectual-Property&utm_content=articleoriginal&utm_campaign=article [https://perma.cc/5Q26-3YZY] (noting that Russia’s Federal Anti-Monopoly Service (“FAS”) has advocated since at least 2014 for the legalization of parallel importation into Russia).

legal protection under both domestic law and international agreements prior to the invasion of Ukraine. Part IV of the Civil Code of the Russian Federation protects copyright, patentable inventions, utility models, industrial designs, and trademarks, among other forms of intellectual property.⁹ There is a government agency, Rospatent, that is responsible for registering intellectual property, and in 2013 Russia introduced a specialized court dedicated to resolving intellectual property disputes.¹⁰ These mechanisms for handling intellectual property are not facially dissimilar from the U.S. Constitution's intellectual property clause, the United States Patent and Trademark Office ("USPTO"), and the Federal Circuit.¹¹ Even when the Soviet Union existed, Russia had begun increasing its intellectual property protection in keeping with a 1990 bilateral agreement with the United States.¹² Russia

⁹ Anton Bankovskiy, *The Intellectual Property Review: Russia*, THE LAW REVIEWS (Apr. 24, 2022), <https://thelawreviews.co.uk/title/the-intellectual-property-review/russia> [<https://perma.cc/YJG3-RYLR>].

¹⁰ *Id.*

¹¹ *See About Us*, U.S.P.T.O., <https://www.uspto.gov/about-us> [<https://perma.cc/53ZG-QKWM>] (last visited Dec. 18, 2022) ("The United States Patent and Trademark Office (USPTO) is the federal agency for granting U.S. patents and registering trademarks. In doing this, the USPTO fulfills the mandate of Article I, Section 8, Clause 8, of the Constitution that the legislative branch 'promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.'"); *see also Court Jurisdiction*, U.S. CT. OF APPEALS FOR THE FED. CIR., <https://cafc.uscourts.gov/home/the-court/about-the-court/court-jurisdiction/> [<https://perma.cc/C2CL-MUPH>] (last visited Dec. 18, 2022) (noting that the Federal Circuit has nationwide jurisdiction over patents and trademarks and reviews agency decisions from U.S. Trademark Trial and Appeal Board and the U.S. Patent Trial and Appeal Board).

¹² Svitlana Lebedenko, *Russian Innovation in the Era of Patent Globalization*, 53 INT'L REV. INTELL. PROP. & COMPETITION L. 173, 182 (2022).

continued harmonizing its protection of intellectual property rights with the West as a requirement of its entry into the World Trade Organization (“WTO”), which requires adherence to the Trade Related Aspects of Intellectual Property (“TRIPS”) Agreement.¹³ Russia also has an obligation to respect intellectual property rights as part of its membership in the Eurasian Economic Union, the Universal Copyright Convention, the Paris Convention for the Protection of Industrial Property, and several others agreements.¹⁴

From the perspective of the United States, there has been a recent decline in the protection of intellectual property rights in Russia despite these formal commitments.¹⁵ In 2021, the Office of the United States Trade Representative (“USTR”) characterized intellectual property enforcement in Russia as weak, particularly regarding pirated online content.¹⁶ Previously, the USTR placed Russia on a watchlist of “trading partners that currently present the most significant concerns regarding IP

¹³ See *id.* at 182–83 (2022) (“Russia adopted the standards of intellectual property protection that the TRIPS Agreement required long before its formal accession to the WTO which happened only in 2012.”).

¹⁴ Bankovskiy, *supra* note 9.

¹⁵ See U.S. TRADE REPRESENTATIVE, 2021 REPORT ON THE IMPLEMENTATION AND ENFORCEMENT OF RUSSIA’S WTO COMMITMENTS 1, 49 (2021), <https://ustr.gov/sites/default/files/enforcement/WTO/2021%20Report%20on%20Russia's%20WTO%20Compliance.pdf> [<https://perma.cc/5HPZ-83GR>] (“In fact, currently available information continues to indicate that overall enforcement of IPR has decreased, rather than increased, over the past few years.”).

¹⁶ See *id.* at 48 (“Poor enforcement in Russia has also led to a sharp increase in the distribution and availability of pirated movies. Through rampant unauthorized camcording, pirates reproduce unauthorized copies of films and then upload them onto the Internet for illegal streaming and illegal downloading (and sell them as counterfeit DVDs.”).

rights.”¹⁷ Even Russians have acknowledged “the magnitude of the problem,” as counterfeit and pirated materials are present in everything from pharmaceuticals to the automotive industry and can be found in places ranging from open-air markets to department stores.¹⁸ It is estimated that the market for counterfeit sales in Russia generates \$50 billion a year.¹⁹ The USTR has also noted issues with Russia’s enforcement of patent protection, with a major shortcoming being the failure of Russian courts to grant preliminary injunctions in pharmaceutical patent infringement cases.²⁰

Another way that Russia has undermined its commitment to enforcing intellectual property rights is through legal maneuvers that affect the role of international treaties in Russian law.²¹ Specifically, these maneuvers touch upon Article 15(4) of the Constitution of the Russian Federation and Article 7(1) of the Civil Code, provisions

¹⁷ *USTR Releases Annual Special 301 Report on Intellectual Property Protection and Review of Notorious Markets for Counterfeiting and Piracy*, OFFICE OF THE U.S. TRADE REPRESENTATIVE (Apr. 29, 2020), <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2020/april/ustr-releases-annual-special-301-report-intellectual-property-protection-and-review-notorious> [https://perma.cc/JA2X-STUF].

¹⁸ Anton Bankovskiy, *Intellectual Property*, SEAMLESS LEGAL: DOING BUSINESS IN RUSSIA, https://cms-law.ru/en/rus/publication/doing-business-in-russia/intellectual-property?redirect_from=cms.law [https://perma.cc/8MTA-MRMR] (last visited Dec. 15, 2022).

¹⁹ Rachel Smoot & Jonathan Polak, *Russia Issues Decree Affecting IP Rights for “Unfriendly Countries,”* TAFT (Apr. 8, 2022), <https://www.taftlaw.com/news-events/law-bulletins/russia-issues-decree-affecting-ip-rights-for-unfriendly-countries> [https://perma.cc/NQ8A-QABR].

²⁰ U.S. TRADE REPRESENTATIVE, *supra* note 15, at 49.

²¹ May Cheng, *How Russia laid groundwork for seizing IP rights before Ukraine invasion*, LEXOLOGY (Mar. 31, 2022), <https://www.lexology.com/library/detail.aspx?g=2763f5ca-9281-4465-b621-d9418c9166eb> [https://perma.cc/8BNY-74ZV].

which make international treaties a part of Russia's legal system.²² Russia amended its constitution in 2020 with Article 79, which gives its domestic legislation precedence over international treaties, such as TRIPS.²³

Russia had taken some positive steps to respond to the criticism of its enforcement of intellectual property rights. In 2013, Russia enacted its first law that was specifically aimed at decreasing online piracy of television and film.²⁴ That year, Russia also adjusted its method of calculating fines for trademark infringement to reflect the value of the counterfeit good being sold.²⁵ In 2014, the Duma adopted an amendment that allows courts to grant permanent injunctions as a remedy against repeat copyright infringers.²⁶ Russia also amended the Russian Civil Code

²² See KONSTITUTSIIA ROSSIĬSKOĬ FEDERATSII [KONST. RF] [CONSTITUTION] art. 15(4), art. 79 (Russ.), <http://www.constitution.ru/en/10003000-04.htm> [<https://perma.cc/A7NP-JQ67>] (“The Russian Federation may participate in interstate associations and transfer to them part of its powers according to international treaties and agreements, if this does not involve the limitation of the rights and freedoms of man and citizen and does not contradict the principles of the constitutional system of the Russian Federation.”); GRAZHDANSKIĬ KODEKS ROSSIĬSKOĬ FEDERATSII [GK RF] [Civil Code] art. 7(1) (Russ.), *translated in The Civil Code of the Russian Federation*, WORLD TRADE ORG., https://www.wto.org/english/thewto_e/acc_e/rus_e/wtaccrus58_leg_360.pdf [<https://perma.cc/LFA7-2HJB>] (last visited Dec. 28, 2022).

²³ Cheng, *supra* note 21; KONST. RF art. 79 (Russ.).

²⁴ U.S. TRADE REPRESENTATIVE, *supra* note 15, at 45.

²⁵ *Id.* at 46.

²⁶ *Id.* at 45. The State Duma is one of the chambers of the Russian parliament. It is a legislative authority composed of 450 elected members who are tasked with the adoption of federal constitutional and federal laws, among other responsibilities. The adopted laws have the highest legal force in the Russian federation. *Status and powers, composition and Regulations of the State Duma*, THE STATE DUMA: THE FED. ASSEMBLY OF THE RUSSIAN FED’N, <http://duma.gov.ru/en/duma/about/> [<https://perma.cc/6S6V-3Q9P>] (last visited Jan. 6, 2023). A common perception is that the Duma merely

to give a presumption of guilt to intellectual property infringers.²⁷ However, gaps in enforcement persisted. The USTR noted that, while the abovementioned legal changes have helped deter piracy, the laws only targeted users in Russia.²⁸ The changes that Russia has made to its intellectual property laws following the invasion of Ukraine will only add to the existing body of criticism.

B. Peppa Pig: A Signal of What's to Come?

A trademark case involving Peppa Pig was taken as an early sign that Russia was prepared to use its intellectual property laws against those countries that sanctioned it for the invasion of Ukraine.²⁹ On March 3, 2022, a Russian lower court in Kirov published a decision regarding the infringement of the “Peppa Pig” and “Daddy Pig” trademarks.³⁰ The marks at issue belong to the British company Entertainment One UK Ltd.³¹ In January of

affirms the agenda of President Putin. *See* Andrei Kolesnikov & Boris Makarenko, *Another Rubber Stamp Duma?*, CARNEGIE ENDOWMENT FOR INT’L PEACE (Sept. 6, 2016), <https://carnegieendowment.org/2016/09/06/another-rubber-stamp-duma-pub-64431> [<https://perma.cc/C8VF-J478>] (describing the Duma as part of a political model where “all elements of state- and societal-based structures must support the regime”); *see also* Washington Post (@washingtonpost), TWITTER (Oct. 3, 2022, 7:50 AM), <https://twitter.com/washingtonpost/status/1576902441899016193?lang=es> (describing the State Duma as “Russia’s rubber stamp lower house of parliament”).

²⁷ Bankovskiy, *supra* note 18.

²⁸ U.S. TRADE REPRESENTATIVE, *supra* note 15, at 46.

²⁹ *See* Nora Titus & Philip Albert, *Peppa Pig Ruling A Cautionary Tale On Sanctions And IP*, LAW360 (Apr. 20, 2022, 4:25 PM EDT), <https://www.law360.com/articles/1484416/peppa-pig-ruling-a-cautionary-tale-on-sanctions-and-ip> [<https://perma.cc/77KD-SFNZ>].

³⁰ *Id.*

³¹ Daniel Davis, *Putin v. Peppa Pig: How Russia’s War in Ukraine Threatens Intellectual Property Rights*, JD SUPRA (Mar. 21,

2022, Entertainment One sued “entrepreneur” Ivan Kozhevnikov, a Russian national, for approximately \$550 for infringing the trademark of the cartoon characters.³² Initially, Entertainment One was successful in obtaining a judgment against Kozhevnikov, but later, Judge Andrei Slavinsky threw out the case and specifically justified his decision by referring to American and British sanctions against Russia.³³ The legal basis given for that decision was Article 10, paragraph 1 of the Civil Code of the Russian Federation, which allows the abuse of rights as an independent grounds to dismiss claims.³⁴ However, the court did not explain how Entertainment One had abused its rights.³⁵

The decision alarmed outside observers, who expressed the fear that “restricting intellectual property protection in Russia is [now] considered a legitimate wartime tactic.”³⁶ Others worried that the ruling “potentially open[ed] the door to widespread format and copyright theft in the country,”³⁷ conflating the Peppa Pig decision with the complete legalization of intellectual property theft.³⁸ There was even speculation that “the

2022), https://www.jdsupra.com/legalnews/putin-v-peppa-pig-how-russia-s-war-in-2435822/#_ftn4 [<https://perma.cc/5LYG-AD4M>].

³² *Id.*

³³ Titus & Albert, *supra* note 29; Davis, *supra* note 31.

³⁴ Titus & Albert, *supra* note 29.

³⁵ *Id.*

³⁶ *Peppa Pig Loses Russian Intellectual Property Rights Over War*, MANDOUR & ASSOCIATES, <https://www.mandourlaw.com/peppa-pig-russia-intellectual-property-rights/> [<https://perma.cc/A46P-AG9X>] (last visited Dec. 15, 2022).

³⁷ *Russian Peppa Pig revenge ruling opens door to widespread copyright theft*, C21MEDIA, <https://www.c21media.net/news/russian-peppa-pig-revenge-ruling-opens-door-to-widespread-copyright-theft/> [<https://perma.cc/R9F7-M69R>] (last visited Dec. 15, 2022).

³⁸ See Peggy Keene, *Peppa Pig Verdict in Russia Worries IP Rights Holders*, LEXOLOGY (Apr. 12, 2022), <https://www.lexology.com>.

courts have probably been ordered to start to allow the piracy of, and the infringement of, IP owned by Western companies.”³⁹ In hindsight, it seems unlikely that such an order was given, as at least one other Russian court sided with the foreign intellectual property owner in a similar case around the time period as the Kirov decision.⁴⁰ Moreover, the USPTO noted in June of 2022 that “[t]he

com/library/detail.aspx?g=ee01e5c9-0d09-411b-aa75-fb5bcdc87942 [https://perma.cc/8RN9-TVBE] (“[T]hese companies worry that the goodwill associated with their famous brands may also take a hit as third parties can now use their marks without consequence.”).

³⁹ Tim Carman, *McDonald’s trademarks in Russia are under threat as Putin aims to retaliate for U.S. sanctions*, WASH. POST (Mar. 18, 2022), <https://www.washingtonpost.com/food/2022/03/18/mcdonalds-russia-trademarks-uncle-vanya/> [https://perma.cc/WJH6-C9GE].

⁴⁰ See Dani Kass, *Uncertainty Clouds Attys’ Strategies For Pursuing IP In Russia*, LAW360 (Apr. 13, 2022, 3:58 PM EDT), <https://www.law360.com/articles/1483508/uncertainty-clouds-attys-strategies-for-pursuing-ip-in-russia> [https://perma.cc/4UPU-BM9Y] (“[Victor Lisovenko] pointed to a trio of examples from March in St. Petersburg and Saratov where courts did require compensation to the U.K. trademark owner from Russians who infringed the same ‘Peppa Pig’ marks”); see also Sukanya Sarkar, *Exclusive: Russia court says enforcement by foreign ip owner isn’t “abuse,”* MANAGING IP (Mar. 30, 2022) [hereinafter Sarkar, *Exclusive*], <https://www.managingip.com/article/2a5d15ejam5bo2md9ph4w/exclusive-russia-court-says-enforcement-by-foreign-ip-owner-isnt-abuse> [https://perma.cc/B944-UPFS] (describing a Moscow court’s March 18, 2022 decision that Entertainment One’s petition to protect its intellectual property rights over ‘Gaston the Ladybird’ could not be an abuse of rights”). But see Sukanya Sarkar, *Primer: Russian IP law and practice rules post-Ukraine invasion*, MANAGING IP (May 4, 2022) [hereinafter Sarkar, *Primer*], <https://www.managingip.com/article/2a5d1aveddrlq9opduzgg/primer-russian-ip-law-and-practice-rules-post-ukraine-invasion> [https://perma.cc/7CWX-XQ2S] (“[T]he Commercial (Arbitrazh) Court of the City of Sevastopol, Crimea, recently rejected a lawsuit for trademark infringement filed by a US company for the same reason as the Kirov Court.”).

wider implications of this disturbing court decision are yet to be seen.”⁴¹

The alarm over this decision was justified, but it may not have been a harbinger of things to come. The decision was ultimately reversed on appeal, with the Second Appeal Commercial Court recognizing that the Russian national had committed an act of infringement.⁴² The court ruling also reaffirmed Russia’s commitment to protecting intellectual property rights as part of its ratification of international treaties.⁴³ The outcome of this case, in eventually upholding protection of the valuable Peppa Pig intellectual property, may somewhat ameliorate the worst fears of foreign intellectual property rights holders in Russia.

The Peppa Pig saga is representative of certain patterns that have emerged regarding Russia’s use of intellectual property laws since the invasion of Ukraine. The abrupt shift in how the Russian courts treated the Peppa Pig intellectual property is characteristic of other about-faces, such as renouncing its intention to exit the WTO and rescinding a proposal to legalize software piracy, which are discussed below. The Peppa Pig decision may also foreshadow a Russian strategy to use the threat of removing intellectual property rights to protest sanctions or deter other countries from further penalizing Russia. For example, it appears that Russia has not formally signed into law a proposed plan for the “external management” of

⁴¹ U.S.P.T.O., RECENT IP-RELATED ACTIONS BY RUSSIA CREATE CHALLENGES FOR U.S. RIGHTS HOLDERS 2 (2022), <https://www.uspto.gov/sites/default/files/documents/OPIA-Bulletin-Russia.pdf> [https://perma.cc/6Q7M-EZ22].

⁴² Sarkar, *Exclusive*, *supra* note 40.

⁴³ Palmos Riikka, *Peppa Pig won the appeal in Russia*, PAULA NEVINPAT (June 28, 2022), <https://www.papula-nevinpat.com/peppa-pig-won-the-appeal-in-russia/#:~:text=In%20early%20March%20this%20year,by%20Entertainment%20One%20UK%20Limited> [https://perma.cc/3P8K-MMK2].

companies that have departed.⁴⁴ The most valuable lesson from the Peppa Pig decision is the need to exercise caution when observing Russia's enforcement of intellectual property in a wartime context. Perhaps some Russian courts were authorized to allow the infringement of Western intellectual property at one point, but maybe this directive was rescinded. It is also possible that there is some internal division on precisely how to apply Russian law in a politically sensitive moment. Regardless of the reason for reversing the Peppa Pig decision, it shows that the Russian view, and use, of intellectual property as a tool of war is in a state of flux.

C. Enacted Laws

1. Decree No. 299 and Decree No. 322

Days after Judge Slavinsky's decision, the worst fears of foreign observers appeared to be vindicated when, on March 6, 2022, Russia instituted Decree No. 299.⁴⁵ The decree allows infringement of foreign patents.⁴⁶ Specifically, it allows Russians to infringe patents originating in "unfriendly" countries by setting the

⁴⁴ As of December 6, 2022, a Russian law firm still described external management as a draft law. *Overview of News in the Field of Intellectual Property / Russia, CIS (March to August 2022)*, GORODISSKY (Dec. 6, 2022) [hereinafter *Overview of News*], <https://www.gorodissky.com/publications/newsletters/overview-of-news-in-the-field-of-intellectual-property-russia-cis-march-to-august-2022/> [<https://perma.cc/Z29U-HPZB>]. The authors have not located an update indicating that the proposal was signed into law.

⁴⁵ Resolution No. 299 (Russ.); Knowles & Pozen, *supra* note 6.

⁴⁶ James A. Shimota & Adrian Gonzalez Cerrillo, *The Kremlin's Intellectual Property Cold War: Legalizing Patent Theft with Decree 299*, THE NAT'L L. REV. (Mar. 28, 2022), <https://www.natlawreview.com/article/kremlin-s-intellectual-property-cold-war-legalizing-patent-theft-decree-299> [<https://perma.cc/6DFM-48ED>].

damages for patent infringement at 0%.⁴⁷ Rospatent has connected the zero remuneration policy with Article 1360 of the Russian Civil Code, which allows the Russian government to use inventions without the consent of the patentee when it is in the interests of national security or the health of its citizens.⁴⁸ Theoretically, the Russian government must designate the patents that are subject to the decree rather than leaving it up to individuals to decide what patents can be infringed.⁴⁹

A decree from October 18, 2021 previously clarified that the compensation for infringement was 0.5%, so Decree No. 299 is best thought of as an escalation of existing Russian law rather than an overnight development.⁵⁰ It is believed that Article 1360 has only been invoked during the COVID-19 pandemic.⁵¹ In that context, the Russian company Pharmasintez was allowed to manufacture a generic version of Remdesivir, a

⁴⁷ *Id.*

⁴⁸ GRAZHDANSKIĬ KODEKS ROSSIĬSKOĬ FEDERATSII [GK RF] [Civil Code] art. 1360 (Russ.), *translated in The Civil Code of the Russian Federation*, WORLD TRADE ORG., https://www.wto.org/english/thewto_e/acc_e/rus_e/wtaccrus58_leg_360.pdf [<https://perma.cc/LFA7-2HJB>] (last visited Dec. 28, 2022); *Background Paper on the Zero Remuneration Rate*, ROSPATENT (Apr. 4, 2022, 9:38 AM) [hereinafter *Background Paper*], <https://rospatent.gov.ru/en/news/paper-zero-remuneration-rate> [<https://perma.cc/8994-DFEY>]; Kenneth J. Davis et al., *Russian Decree Undermines Value of Certain Patents; USPTO Cuts All Ties With Russian Patent Office*, MORGAN LEWIS (Apr. 7, 2022), <https://www.morganlewis.com/pubs/2022/04/russian-decree-undermines-value-of-certain-patents-uspto-cuts-all-ties-with-russian-patent-office> [<https://perma.cc/ZJJ5-H38Z>].

⁴⁹ See Davis et al., *supra* note 48 (“That is, in order to apply Decree No. 299, the government must designate the patents that will be subject to Decree No. 299 by issuing separate orders targeting such patents and stating the purpose of their use.”).

⁵⁰ Vladimir Biriulin, *Living in parallel reality*, LEXOLOGY (Apr. 5, 2022), <https://www.lexology.com/library/detail.aspx?g=84551177-8c34-40b1-9b08-415c2c45ef7a> [<https://perma.cc/52P9-UBW3>].

⁵¹ *Id.*

treatment for COVID-19 created and owned by Gilead.⁵² The purported limitation of Decree No. 299 to an emergency situation has not assuaged concerns of legal observers, who have noted that Article 1360 does not provide specific limitations on what goods fall under the national security umbrella.⁵³ Moreover, Decree No. 299 is still in contradiction with Article 1360, which provides for compensation for the compulsory use of patents.⁵⁴

In terms of international agreements, Rospatent has argued that Article 1360 is consistent with Article 30 of TRIPS, which provides that “[m]embers may provide limited exceptions to the exclusive rights conferred by a patent.”⁵⁵ For example, developing countries have invoked similar provisions in TRIPS to enable them to import foreign drugs and/or breach existing foreign held drug patents in their countries “to protect public health and access to medicine.”⁵⁶ In 2006 and 2007, Thailand instituted compulsory licenses for drugs related to the treatment of HIV/AIDS with a 0.5% royalty rate.⁵⁷

⁵² Ruben Dzhermakyan, *Russian Supreme Court rejects Gilead’s decree challenge*, IAM (Feb. 23, 2022), <https://www.iam-media.com/coronavirus/russian-supreme-court-rejects-gileads-decree-challenge> [<https://perma.cc/A7C8-JE48>].

⁵³ Davis et al., *supra* note 48.

⁵⁴ See Roberto A. Jacchia & Alisa Pestryakova, *Medicines for the therapy of the COVID-19 syndrome, political discretion and the bypassing of patent rights in Russia in an unprecedented legal scenario*, LEXOLOGY (Jan. 22, 2021), <https://www.lexology.com/library/detail.aspx?g=4616f1af-e652-47ad-8ff7-af39807c8b56> [<https://perma.cc/397C-9LYU>].

⁵⁵ *Background Paper*, *supra* note 48; Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154.

⁵⁶ WORLD HEALTH ORG., COUNTRY EXPERIENCES IN USING TRIPS SAFEGUARDS: PART I, at 1 (2017), <https://apps.who.int/iris/bitstream/handle/10665/272977/Country-experiences-TRIPS-Part1.pdf?sequence=1&isAllowed=y> [<https://perma.cc/T4LP-MG34>].

⁵⁷ *Id.* at 6.

Rospatent also points out that there are similar provisions in the laws of other countries.⁵⁸ Rospatent is presumably referring to examples such as 28 U.S.C. § 1498, which permits the United States government to make unauthorized use of a patent but also provides for reasonable compensation.⁵⁹ Therefore, these comparative examples still put Decree No. 299 outside of legal standards for compulsory licenses because Russia now provides zero compensation.

The full impact of Decree No. 299 is difficult to estimate, as it is unclear how broadly Russia intends to interpret national security or public health.⁶⁰ A broad interpretation of these concepts could make any patent subject to the decree.⁶¹ However, we were unable to locate orders designating specific patents as subject to Decree No. 299. This is not to say that Russian individuals or entities are not infringing patent rights as a result of the decree. It is possible that compulsory licensing under the decree is simply not being advertised. It is also possible that the mere presence of the decree could encourage the infringement of foreign patents, but the risk to patent owners is probably not distributed equally, as experts believe that U.S. companies with valuable patents are most at risk of losing their patent protections.⁶²

Russian legal commentary has fought the characterization of Decree No. 299 as permitting an open

⁵⁸ *Background Paper*, *supra* note 48.

⁵⁹ 28 U.S.C. § 1498.

⁶⁰ See Soniya Shah & Ming-Tao Yang, *Taking A Long-Term View On Russia's Patent Landscape*, LAW360 (June 6, 2022, 6:12 PM EDT), <https://www.law360.com/articles/1500141/taking-a-long-term-view-on-russia-s-patent-landscape> [<https://perma.cc/MB28-XHCL>] (“It remains to be seen how broadly the decree will be applied and whether future decrees will be issued or expanded to eliminate compensation for infringement of other IP rights, including trademarks and copyrights.”).

⁶¹ *Id.*

⁶² Knowles & Posen, *supra* note 6.

season on patent rights specifically or intellectual property generally.⁶³ Likewise, the Rospatent press release stresses that Decree No. 299 “does not imply the free use of patented objects without the rightsholder’s consent.”⁶⁴ The literal language of the decree aside, it still inspires little faith in foreign patentees in the security of their intellectual property rights in Russia and will probably have negative ramifications for Russia long into the future.⁶⁵ It may be true that Russia is considering public health and national security as it loses access to foreign goods to a certain extent, but the decree also alerts sanctioning nations as a whole to the danger of applying further economic pressure to Russia. The stakes for intellectual property rights are high, but the need for caution remains. It is not clear how Decree No. 299 has been invoked, and if the Peppa Pig decision can teach us anything, it is that nothing regarding intellectual property rights in Russia is set in stone.

Another law, Decree No. 322, could have a similar impact as Decree No. 299.⁶⁶ Issued in May of 2022,

⁶³ For example, Russian patent attorney Nikolay Bogdanov has insisted that the right to exercise Decree No. 299 will only apply to certain Russian companies which have received government authorizations. Mr. Bogdanov has argued that a patent holder may still successfully protect its rights against all other competitors that have not obtained government authorizations. Nikolay Bogdanov, *Russia Does Not Abolish Intellectual Property Rights*, GORODISSKY (Mar. 16, 2022), https://www.gorodissky.com/publications/articles/russia-does-not-abolish-intellectual-property-rights/?utm_source=mondaq&utm_medium=syndication&utm_term=Intellectual-Property&utm_content=articleoriginal&utm_campaign=article [https://perma.cc/YK52-ZYMQ].

⁶⁴ *Background Paper*, *supra* note 48.

⁶⁵ Knowles & Pozen, *supra* note 6 (“The patent decree and any further lifting of intellectual property protections could affect Western investment in Russia well beyond any de-escalation of the war in Ukraine.”).

⁶⁶ Ukaz Prezidenta Rossiyskoy Federatsii [Decree of the President of the Russian Federation] 2022, No. 322,

Decree No. 322 provides administrative hurdles for patent holders, as well as other intellectual property stake holders, who are seeking to receive compensation from Russian licensees.⁶⁷ Russians are prevented from making direct license payments to licensors from “unfriendly” countries and instead must make payments in rubles into an O-type account that is located in Russia, and Russia must specifically authorize the transfer of the payments outside of the country.⁶⁸ The Central Bank of Russia determines the exchange rate.⁶⁹ It is not difficult to imagine a situation in which a foreign patentee is effectively denied compensation from a licensee because the authorization to transfer payments is denied, or the Central Bank’s calculation of the exchange rate favors the Russian licensee. Additionally, a Russian licensee is exempt from making license payments if the foreign licensor does not formally consent to the opening of the O-type account, but the licensee is allowed to continue using the intellectual property until the consent is granted.⁷⁰ Thus, this decree

<http://publication.pravo.gov.ru/Document/View/0001202205270016?in dex=0&rangeSize=1> [https://perma.cc/Y9YZ-JM4J] (Russ.).

⁶⁷ See Alicia Carroll et al., *OFAC Authorization of Certain Transactions Related to Patents, Trademarks, and Copyrights*, JD SUPRA (June 17, 2022), <https://www.jdsupra.com/legalnews/ofac-authorization-of-certain-9374625/#:~:text=Furthermore%2C%20in%20March%202022%2C%20Russia,payment%20to%20the%20patent%20holder> [https://perma.cc/M887-HQN5] (noting that Decree No. 322 applies to intellectual property license payments generally).

⁶⁸ *Id.*

⁶⁹ Ksenia Andreeva et al., *Update: New Russian Decree Restricts Ability of Foreign Rightsholders to Collect License Payments*, MORGAN LEWIS (May 31, 2022), <https://www.morganlewis.com/pubs/2022/05/update-new-russian-decree-restricts-ability-of-foreign-rightsholders-to-collect-license-payments> [https://perma.cc/B2FH-WQU F].

⁷⁰ *The Status of Intellectual Property in Russia and Ukraine*, INT’L TRADEMARK ASS’N (Dec. 19, 2022), <https://www.inta.org/resou>

presents Russian licensees of intellectual property with loopholes for avoiding the compensation of foreign licensors. One of the long-term, negative consequences of these actions is that they may deter foreign intellectual property holders from licensing their intellectual property to Russian businesses in the future. This could deprive Russia of much needed technologies and drugs, even after the conflict in Ukraine ends.

2. Parallel Imports

On March 30, 2022, Russian Prime Minister Mikhail Mishustin announced that Russia would allow parallel imports regardless of the underlying intellectual property protection.⁷¹ The practice of parallel importing allows Russia to import goods from a third-party country without the permission of the rights holder, as long as a lawful sale has occurred first somewhere in the world.⁷² The legal framework of the parallel import practice temporarily changes the exhaustion of intellectual property rights in Russia from a national to an international framework.⁷³ The recent announcement is based on

rces/the-status-of-intellectual-property-in-russia-and-ukraine/ [https://perma.cc/84J6-7ZXQ].

⁷¹ Nicholas Gordon, *Russia is legalizing the country's bootleg economy to keep foreign goods on its shelves after Western brands exit*, FORTUNE (Mar. 31, 2022 4:37 AM EDT), <https://fortune.com/2022/03/31/russia-parallel-imports-sanctions-foreign-goods-trademark-ukraine/> [https://perma.cc/3GUK-TFER].

⁷² *Id.*; Alisa Pestryakova, *The Russian Government Legalizes Parallel Imports as a Remedy to Counter the Termination of Supplies by Foreign Producers*, LEXOLOGY (Apr. 28, 2022), <https://www.lexology.com/library/detail.aspx?g=043a3100-e23e-48cc-8206-8b01ae2d6987> [https://perma.cc/6EWC-KYDF] (“Once the relevant goods are identified by the Ministry, their importers and resellers will not be liable for the use of the inherent IP right in Russia without the consent of the right-holder upon the first lawful sale of the goods wherever occurring in the world.”).

⁷³ Andreeva et al., *supra* note 69.

Resolution No. 506, which suspends the application of Part 6 of Article 1359 and Article 1487 of the Russian Civil Code for certain goods.⁷⁴ The former affects patented goods, while the latter affects trademarks.⁷⁵ Previously, the Supreme Commercial Court of Russia had deemed such an act to be trademark infringement.⁷⁶

Legalizing parallel imports appears primarily aimed at sustaining the Russian economy during its invasion of Ukraine.⁷⁷ As previously noted, Russia's invasion of Ukraine resulted in a wave of foreign businesses announcing that they would stop doing business in Russia.⁷⁸ The effect of these exits is that many companies retained the physical presence of their retail space but stopped importing goods into the country.⁷⁹ The parallel imports law is meant to affect goods that would no longer be imported because the rights-holder has suspended importation and sale.⁸⁰ Russian authorities expressed that the goal of legalizing parallel imports will help the Russian economy.⁸¹ For example, an influx of goods into the country might lead to increased competition that will drive down prices at a time when inflation has escalated.⁸²

Compared to Decree No. 299 or external management, discussed below, a much clearer picture has

⁷⁴ Pestryakova, *supra* note 72.

⁷⁵ *Id.*

⁷⁶ Olga Yashina, *Parallel imports in Russia: same game, different rules*, *WORLD TRADEMARK REV.* (Oct. 29, 2018), <https://www.worldtrademarkreview.com/article/parallel-imports-in-russia-same-game-different-rules#:~:text=It%20recognised%20that%20parallel%20imports%20create%20a%20conflict,law%20%E2%80%93%20parallel%20imports%20in%20Russia%20are%20prohibited> [https://perma.cc/UN59-BV7B].

⁷⁷ Pestryakova, *supra* note 72.

⁷⁸ Sonnenfeld & Tian, *supra* note 3.

⁷⁹ Pestryakova, *supra* note 72.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *See* Gordon, *supra* note 71.

emerged on how Russia is using parallel imports. Effective April 19, 2022, the Ministry of Industry and Trade issued a list of goods that are allowed into Russia as parallel imports.⁸³ The list includes fifty groups of goods and over 200 brands.⁸⁴ The policy affects both classes of goods and specific brands.⁸⁵ For example, the list allows for the parallel import of industrial goods as a class and Apple watches as a brand.⁸⁶ Status on the parallel imports list is not necessarily permanent, as Industry and Trade Minister, Denis Manturov, stated that companies that have continued to supply Russia with their products have been removed from the list.⁸⁷ Moreover, membership on the list does not

⁸³ Michael Malloy, *List for Parallel Imports Issued*, DLA PIPER (Apr. 26, 2022), <https://www.dlapiper.com/en/us/insights/publications/2022/04/list-for-parallel-imports-issued/> [<https://perma.cc/52KG-6LDB>].

⁸⁴ *Brands of companies remaining in Russia will not be in parallel import list—Minister*, TASS (Apr. 25, 2022), https://tass.com/economy/1442801?utm_source=google.com&utm_medium=organic&utm_campaign=google.com&utm_referrer=google.com [<https://perma.cc/LW36-ATQY>].

⁸⁵ *Id.*

⁸⁶ Prikaz Ministerstva Promyshlennosti i Torgovli Rossiyskoy Federatsii [Order of the Ministry of Industry and Trade of the Russian Federation], Apr. 19, 2022, registered by the Ministry of Justice, May 6, 2022, No. 68421, <http://publication.pravo.gov.ru/Document/View/0001202205060001?index=0&rangeSize=1> [<https://perma.cc/9755-HCD6>] (Russ.); Alexander Osipovich, *Russia Allows Imports of Apple Watches, Bentleys and Xboxes Via Third Countries*, WALL ST. J. (May 6, 2022, 1:18 PM ET), <https://www.wsj.com/livecoverage/russia-ukraine-latest-news-2022-05-06/card/russia-allows-imports-of-apple-watches-bentleys-and-xboxes-via-third-countries-EMeU80NJEDFuAh0WINU> [<https://perma.cc/UJ2A-V3SR>].

⁸⁷ *See Russian minister says 'parallel imports' scheme is working*, REUTERS (July 4, 2022, 10:57 AM), <https://www.reuters.com/article/us-ukraine-crisis-russia-imports/russian-minister-says-parallel-imports-scheme-is-working-idUSKBN2OF0ZL> [<https://perma.cc/QP8X-VJND>] (“Companies that continue to supply Russia with their products have been removed from the list, Manturov was quoted as saying by the news agencies.”).

follow a strict rule and includes those companies that have, and have not, voluntarily left Russia.⁸⁸ It thus appears that some political considerations are at play in determining what companies are affected.⁸⁹ Regardless of how the list is determined, Russian businesses, such as the e-commerce site Ozon, have already begun selling foreign electronics through parallel imports, and brand name cosmetics and perfumes are available from other retailers.⁹⁰ The strategy seems to be successful, with analysts estimating that imports to Russia are at, or near, prewar levels.⁹¹

Industry representatives have expressed skepticism that Russia will be able to screen for counterfeit goods in the absence of involvement from foreign companies, with some estimating that counterfeit clothing and footwear could increase by fifty percent.⁹² A mixed picture has emerged on how well Russia will enforce the limitations that it has put on the temporary legalization of parallel

⁸⁸ Pestryakova, *supra* note 72.

⁸⁹ *See id.* (“Thus, it is not entirely clear what criteria will apply to the drawing up of the list, and some extent of political discretion may be expected.”).

⁹⁰ *Russian e-commerce firm Ozon starts selling goods via parallel imports mechanism*, REUTERS (June 23, 2022, 4:09 PM EDT) [hereinafter *Ozon*], <https://www.reuters.com/business/retail-consumer/russian-e-commerce-firm-ozon-starts-selling-goods-via-parallel-imports-mechanism-2022-06-23/> [<https://perma.cc/Z4N3-76PP>]; *see also* *Russia allows parallel imports of some L’Oreal brands*, INTERFAX (Aug. 5, 2022), <https://interfax.com/newsroom/top-stories/81978/> [<https://perma.cc/WP3J-YRBZ>] (“Perfume and cosmetic products from the brands Lancome, Redken, Yves Saint Laurent, Helena Rubinstein, Valentino, Giorgio Armani and Kerastase can now be imported into Russia under the mechanism of so-called parallel imports.”).

⁹¹ Ana Swanson, *Russia Sidesteps Western Punishments, With Help From Friends*, N.Y. TIMES (Jan. 31, 2023), <https://www.nytimes.com/2023/01/31/business/economy/russia-sanctions-trade-china-turkey.html> [<https://perma.cc/42QW-HCK5>].

⁹² Pestryakova, *supra* note 72.

imports.⁹³ These limitations include a requirement that the imported goods cannot be counterfeits and limiting the affected goods to the list published by the government.⁹⁴ Ozon is an example of a Russian company ostensibly trying to prevent counterfeits, as it requires proof of originality.⁹⁵ However, the information available suggests that adherence to the parallel imports list may be lacking, as at least one Russian business is treating the official list as a suggestion, rather than a requirement, on what it can import.⁹⁶ For example, the Russian importer Pivoindustria LLC sold thousands of cans of Fanta and Coca Cola despite the fact that these Coca Cola products were not on the official list of eligible parallel imports.⁹⁷

It is interesting to note that Russia began to establish the legal grounds for this decision prior to the war

⁹³ *Russia publishes list of 'parallel imports' goods*, REUTERS (May 6, 2022, 1:00 PM EDT) [hereinafter *Russia Publishes List*], <https://www.reuters.com/business/russia-publishes-list-parallel-imports-goods-2022-05-06/> [<https://perma.cc/7PUU-NHBR>]; *Parallel imports in Russia to be extended for 2023—deputy premier*, TASS (Sept. 7, 2022) [hereinafter *Parallel Imports in Russia*], <https://tass.com/economy/1503811> [<https://perma.cc/G2EB-Z2VT>].

⁹⁴ *Russia Publishes List*, *supra* note 93 (“Parallel import does not mean permission to import and circulate counterfeit goods in Russia—the products must be legally put into circulation from the country of import,” the trade ministry said in a statement.”); *Parallel Imports in Russia*, *supra* note 93 (describing the goods subject to parallel importation as those designated by Russia’s Industry and Trade Ministry).

⁹⁵ *Ozon*, *supra* note 90.

⁹⁶ Jessica DiNapoli & Alexander Marrow, *INSIGHT-Coca-Cola and Mcdonald’s left Russia. Their brands stayed behind*, REUTERS (Aug. 17, 2022, 6:01 AM), <https://www.reuters.com/article/russia-coca-cola-trademarks-idAFL1N2YI2BA> [<https://perma.cc/7XYH-HJJR>].

⁹⁷ *See id.* (“Importer Pivoindustria LLC has been able to sell thousands of cans of Fanta peach and pineapple and Coca-Cola Cherry—even though the government has not added sodas to the list of goods eligible for parallel imports.”).

in Ukraine. In 2018, the Russian Constitutional Court decided a parallel import case in which a Russian company imported SONY-trademarked thermal paper intended for use in ultrasound machines from Poland.⁹⁸ The Constitutional Court held that the principle of national exhaustion of rights did not apply automatically.⁹⁹ Furthermore, the court also noted that remedy for parallel importing should not be the same as that for importing counterfeit goods.¹⁰⁰ While relief for the latter can involve confiscation and destruction, relief for the former does not unless additional criteria are met.¹⁰¹ The court echoed the present situation when it noted that the economic penalties already placed on Russia merited reconsideration on the national exhaustion of rights and parallel imports.¹⁰²

D. Proposed Legislation

1. Tabled Legislation

The Russian government proposed, and subsequently renounced, legislation that would have affected copyright protection by legalizing software piracy.¹⁰³ The Ministry of Economic Development described the bill on software piracy as the “cancellation of liability for the use of software unlicensed in the Russian Federation, owned by a copyright holder from countries that have supported the sanctions.”¹⁰⁴ The piracy proposal was also suggested as a way to minimize the impact on the Russian economy of departing companies such as Apple,

⁹⁸ Yashina, *supra* note 76.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ U.S.P.T.O., *supra* note 41.

¹⁰⁴ *Id.*

Oracle, Microsoft, and SAP.¹⁰⁵ Less than two weeks later, the proposal was rescinded, with the Ministry of Digital Development, Telecommunications and Mass Media stating that it opposed the use of pirated software.¹⁰⁶ As mentioned previously, Russia's failure to effectively enforce infringement of copyrighted material is a sore point for the United States, so Russia may want to avoid formally adopting a measure that would be so antagonistic.¹⁰⁷

However, Russia has not completely abandoned the idea of legalizing copyright infringement in some form.¹⁰⁸ On August 19, 2022, the Duma introduced a draft law that would allow compulsory licensing of copyrighted and similarly protected works, such as movies and computer programs.¹⁰⁹ The most recent reported action on the bill occurred on November 15, 2022, when a working group assembled to consider the compulsory license draft.¹¹⁰ Whether or not the bill is ultimately enacted, at least one flagrant violation of copyright protection for a film occurred when a Moscow theater reportedly held a premier

¹⁰⁵ В России легализуют пиратов [*Pirates are legalized in Russia*], KOMMERSANT (Apr. 3, 2022), <https://www.kommersant.ru/doc/5240942> [<https://perma.cc/K34K-K2K2>].

¹⁰⁶ U.S.P.T.O., *supra* note 41.

¹⁰⁷ See U.S. TRADE REPRESENTATIVE, *supra* note 15, at 28 (“Similarly, Russia’s copyright levy system continues to raise national treatment concerns.”).

¹⁰⁸ *Overview of News*, *supra* note 44.

¹⁰⁹ See *id.* (describing draft law No. 184016–8 as allowing someone to file a claim in court against the right holder for granting a compulsory license to use copyrighted and similarly protected works, such as movies, computer programs, pieces of music, and literary works).

¹¹⁰ Заседание Рабочей группы по совершенствованию законодательства об интеллектуальной собственности [*Meeting of the Working Group on Improving Intellectual Property Legislation*], THE CHAMBER OF COM. AND INDUS. OF THE RUSSIAN FED’N (Nov. 15, 2022), <https://news.tpprf.ru/en/announcement/3855077/> [<https://perma.cc/JL3Y-QKH7>].

of *The Batman*, despite the fact that Warner Brothers did not supply the movie to the Russian market.¹¹¹

Similarly, Russia proposed, then walked back, a law that would have withdrawn the country from the WTO.¹¹² In March of 2022, a pro-Kremlin party in the Duma proposed the withdrawal.¹¹³ It was not the first time that such a suggestion was made.¹¹⁴ A removal from the WTO would have called into question Russia's intellectual property commitments, as intellectual property is one of the areas of trade that the WTO covers.¹¹⁵ Specifically, adhering to the TRIPS agreement is a prerequisite to joining and remaining a member of the WTO.¹¹⁶ TRIPS requires that, in most circumstances, WTO members provide national and most favored nation ("MFN") treatment to the nationals of other WTO members with regard to the protection and enforcement of intellectual property rights.¹¹⁷ National treatment means not treating

¹¹¹ See Sarkar, *Primer*, *supra* note 40; Jeremy Kay, *CinemaCon opening panels talk family films, 'The Batman' piracy in Russia*, SCREEN DAILY (Apr. 25, 2022), <https://www.screendaily.com/news/cinemacon-opening-panels-talk-family-films-the-batman-piracy-in-russia/5169825.article> [<https://perma.cc/K9TM-GQ2J>].

¹¹² U.S.P.T.O., *supra* note 41.

¹¹³ Sarah Anne Aarup & Ashleigh Furlong, *Russia takes first steps to withdraw from WTO, WHO*, POLITICO (May 18, 2022, 2:43 PM CET) [hereinafter *Russia Takes First Steps*], <https://www.politico.eu/article/russia-takes-first-steps-to-withdraw-from-wto-who/> [<https://perma.cc/7NAA-T6SX>].

¹¹⁴ *Russia Plans to Exit World Trade Organization and Other Global Bodies*, INT'L INST. FOR SUSTAINABLE DEV. (June 6, 2022), <https://www.iisd.org/articles/news/russia-plans-exit-world-trade-organization> [<https://perma.cc/C4H6-2QZ8>].

¹¹⁵ See U.S.P.T.O., *supra* note 41 (including the proposal to leave the WTO agreements in the description of Russia's recent intellectual property-related actions).

¹¹⁶ *Understanding the WTO: The Agreements*, WORLD TRADE ORG., https://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm1_e.htm [<https://perma.cc/D799-RC7L>] (last visited Jan. 5, 2023).

¹¹⁷ U.S. TRADE REPRESENTATIVE, *supra* note 15, at 44.

foreign nationals less favorably than one's own nationals, while MFN treatment refers to treating all trading partner countries of the WTO in a non-discriminatory manner.¹¹⁸ Ironically, Russia faced calls to oust it from the WTO, or to remove its MFN status, around the same time that it suggested leaving.¹¹⁹

The sponsors of the Russian bill strongly defended the proposal as a form of self-defense, but the government was not unanimous in its support of withdrawal.¹²⁰ Russia's Mission to the WTO seemed less than enthusiastic, writing to Politico in April of 2022 that "[t]he Government provides counter-arguments in support of our membership [in the WTO]."¹²¹ The conflicting statements about Russia's intentions deepened in May of 2022 when the Russian Duma's Deputy Speaker, Pyotr Tolstoy,

¹¹⁸ *Intellectual Property: Protection and Enforcement*, WORLD TRADE ORG., https://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm7_e.htm [<https://perma.cc/PN5D-YYYY>] (last visited Jan. 5, 2023).

¹¹⁹ See Alberto Nardelli & Bryce Baschuk, *EU Seeks to End Russia's Most-Favored Nation Status at WTO*, BLOOMBERG (Mar. 3, 2022, 10:24 AM EST), <https://www.bloomberg.com/news/articles/2022-03-03/eu-seeks-to-suspend-russia-s-most-favored-nation-status-at-wto?leadSource=verify%20wall> [<https://perma.cc/KLM7-PYMT>] ("The European Union is seeking to remove Russia's most-favored nation status at the World Trade Organization, a move that could further hit 95 billion euros (\$105 billion) of Moscow's exports to the bloc with tariffs."); see also David Lawder & Andrea Shalal, *Explainer: Ousting Russia from WTO, IMF would mark end of an era*, REUTERS (Mar. 9, 2022, 10:11 AM EST), <https://www.reuters.com/markets/asia/ousting-russia-wto-imf-would-mark-end-an-era-2022-03-09/> [<https://perma.cc/A9H3-67DU>] ("[S]ome Western countries are discussing strategies to oust Russia from the International Monetary Fund (IMF), the World Trade Organization (WTO), the World Bank and other development lenders as punishment for its invasion of Ukraine.").

¹²⁰ U.S.P.T.O., *supra* note 41.

¹²¹ *Russia Takes First Steps*, *supra* note 113.

announced that the country was taking steps to withdraw from the WTO.¹²²

The chairman of the State Duma ordered a study on the advisability of remaining in the WTO, but Russian Deputy Foreign Minister Alexander Pankin later claimed that such a withdrawal was not being discussed.¹²³ This abrupt turnaround suggests that there are internal divisions about the extent to which Russia should use intellectual property to retaliate against sanctions. As mentioned in Part I.A., Russia spent years increasing its protection of intellectual property to join the WTO,¹²⁴ so it is understandable that some contingency of the Russian government does not want to throw this investment away. Unlike the software infringement proposal, it does not seem that the effort to leave the WTO has been revived.

2. Prohibition on Terminating IP Agreements

The Russian government has also drafted a law that would protect Russian entities from the unilateral termination of agreements affecting intellectual property.¹²⁵ The bill, No. 92282-8, was submitted to the State Duma on March 22, 2022.¹²⁶ The legislation addresses situations in which one party is seeking to unilaterally terminate

¹²² *Id.*

¹²³ U.S.P.T.O., *supra* note 41; *Russia's withdrawal from WTO not being considered—Russian Foreign Ministry*, INTERFAX (June 16, 2022, 10:42 AM) [hereinafter *Russia's Withdrawal*], <https://interfax.com/newsroom/top-stories/80261/> [<https://perma.cc/QK6Q-XJG3>] (“This is not being discussed. We intentionally entered into the organization because of the benefits we expected and received, and we are not going to slam the door shut.”).

¹²⁴ *See* Svitlana Lebedenko, *supra* note 12.

¹²⁵ Polina Vodogreeva, *Bill on Exemption from Contractual Liability Due to Foreign Sanctions*, LIDINGS (Mar. 23, 2022), https://www.lidings.com/media/legalupdates/bill_on_exemption/ [<https://perma.cc/QYD9-LVZS>].

¹²⁶ *Id.*

agreements related to intellectual property, prohibiting the termination of such agreements unless one party has violated its obligations.¹²⁷ The bill is clearly aimed at situations in which a foreign licensor seeks to terminate a contract with a Russian licensee.¹²⁸ The bill allows Russian entities to extend the validity of any agreements involving intellectual property for the duration of the foreign sanctions with the Russian entity having the unilateral right to refuse to extend said agreements.¹²⁹ As of April 18, 2022, the bill had progressed to the stage of the first reading by the Duma.¹³⁰

3. External Management Plan

On March 7, 2022, Russian lawmakers announced that they were drafting a bill that would subject businesses that have fled Russia to external management.¹³¹ The external management would function similar to a bankruptcy and would allow the government to keep foreign companies running or to sell the assets to a Russian buyer.¹³² Intellectual property assets would be subjected to

¹²⁷ *Id.*

¹²⁸ See *Overview of News*, *supra* note 44 (“In addition, the draft law provides for the extension of agreements for the right to use results of intellectual activity and means of individualization for the period of the sanctions if the licensee (user) is a Russian resident and has not refused such an extension.”).

¹²⁹ *Id.*

¹³⁰ John Anderson et al., *Russia Moves Closer to Nationalizing Businesses Intending to Exit Russia*, JD SUPRA (Mar. 14, 2022), <https://www.jdsupra.com/legalnews/russia-moves-closer-to-nationalizing-4426644/> [<https://perma.cc/BC5T-X6NL>].

¹³¹ *Id.*

¹³² Polina Sizikova et al., *Update: Draft Law on External Management Over Certain Foreign-Owned Companies Submitted to Russian Parliament*, MORGAN LEWIS (Apr. 20, 2022), <https://www.morganlewis.com/pubs/2022/04/update-draft-law-on-external-management-over-certain-foreign-owned-companies-submitted-to-russian-parliament> [<https://perma.cc/A8FR-T3N7>].

external management.¹³³ The Russian newspaper *Izvestia* reported that a list of around sixty companies that could be nationalized was sent to the Prosecutor General's Office.¹³⁴ The list included Volkswagen, Apple, IKEA, Microsoft, IBM, Shell, McDonald's, Porsche, Toyota, and H&M.¹³⁵

A recent draft of the legislation provides more details on how the law could operate if it were enacted.¹³⁶ The affected companies would be ones in which there is at least 25% ownership by individuals affiliated with "unfriendly" countries or in which the company has a materially significant impact on the economic stability of Russian citizens.¹³⁷ One of the consequences of external management is that an affected company's counterparty that owns intellectual property rights cannot terminate the right to use the intellectual property.¹³⁸ If intellectual property rights are terminated after the invasion of Ukraine, they will be reinstated without any fees due to the intellectual property owner.¹³⁹ The Commercial

¹³³ *Id.*

¹³⁴ Наталья Башлыкова [Natalya Bashlykova], Дальние по списку: в РФ создан перечень из 60 претендентов на национализацию [*Far from the List: a list of 60 applicants for nationalization has been created in the Russian Federation*], IZVESTIA (Mar. 10, 2022), <https://iz.ru/1302632/natalia-bashlykova/dalnie-pospisku-v-rf-sozdan-perechen-iz-60-pretendentov-na-natsionalizaciiu> [<https://perma.cc/HR39-DEUP>].

¹³⁵ *Id.*

¹³⁶ *Draft law on external administration submitted to the Russian Parliament*, SCHNEIDER GROUP (Apr. 13, 2022), <https://schneider-group.com/en/news/countries/draft-law-on-external-administration-submitted-to-the-russian-parliament/> [<https://perma.cc/F3VN-63HT>] ("After the decision on the external management is made, the interdepartmental commission authorizes the tax authorities to apply to the Commercial (Arbitrazh) Court of the City of Moscow (the Court) to rule on introduction of the external management.").

¹³⁷ Sizikova et al., *supra* note 132.

¹³⁸ *Id.*

¹³⁹ *Id.*

(Arbitrazh) Court of the City of Moscow would be involved in decisions such as transferring power from the affected company to an external manager and authorizing the external manager to take actions regarding the safekeeping of intellectual property.¹⁴⁰ A “Special Commission” would be in charge of approving significant decisions of the external manager, such as whether the affected company can enter into transactions.¹⁴¹ The bill has passed a first reading by the Duma.¹⁴²

As with the parallel imports law, external management has an underlying economic rationale, as several of the departing foreign companies employed large numbers of Russian citizens, and there is a need to keep these people employed.¹⁴³ The Ministry of Economic Development has stressed that the law would only apply in critical circumstances, such as when the intervention is necessary to preserve jobs that are of economic importance.¹⁴⁴ However, there is a punitive aspect to the

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Russian lawmakers give initial approval to bill allowing foreign asset takeover*, REUTERS (May 24, 2022, 3:48 PM EDT) [hereinafter *Russian Lawmakers*], <https://www.reuters.com/business/russian-lawmakers-give-initial-approval-bill-allowing-foreign-asset-takeover-2022-05-24/> [<https://perma.cc/UH3K-K3W3>] (“While the first reading approves the merits of the proposed law, the bill needs to undergo a second reading dedicated to a detailed discussion and fine tuning, before a third, usually formal reading. It then must be reviewed by the upper house, and signed by President Vladimir Putin to become law.”).

¹⁴³ Leonid Bershidsky, *Foreign Firms’ Russian Assets Are Lousy Deals for Locals*, WASH. POST (June 23, 2022, 10:44 AM EDT), https://www.washingtonpost.com/business/foreign-firms-russian-assets-are-lousy-deals-for-locals/2022/06/23/2906fdf8-f2b2-11ec-ac16-8fbf7194cd78_story.html [<https://perma.cc/4CMQ-MRBT>] (“To the Russian government, the foreign firms’ departures are a major headache, not because Russians would shed many tears for the brands but primarily because some of the companies were big employers.”).

¹⁴⁴ *Russian Lawmakers*, *supra* note 142.

bill, as those affiliated with “unfriendly” countries would be prevented from bidding on the sale of the seized assets.¹⁴⁵ The punitive aspect of this bill could be a part of an overall intent to threaten the international community against taking further economic measures against Russia rather than an intent to actually seize a company and sell its assets.¹⁴⁶ The theory that the bill will not be implemented is supported by the fact that there are downsides of external management, as such a step would only cause Russia to risk incurring further economic penalties and would adversely impact Russia’s hope for a resumption of normal business relations when the war ends.¹⁴⁷

Regardless of whether Russia will enact the law, it seems that Russia is willing to negotiate with firms that are seeking to exit the Russian market rather than unilaterally selling their property, and the government has developed some policies on how to handle the sale of those businesses.¹⁴⁸ Exiting firms that want the full market value of their assets may receive payments in rubles that may be used within Russia, but exiting firms that are willing to offer a steep discount can receive a payment offshore in a currency other than rubles.¹⁴⁹ An example of the latter arrangement seems to be the sale of the Canadian gold-mining company Kinross to the Russian firm Highland

¹⁴⁵ *Id.*

¹⁴⁶ Bershidsky, *supra* note 143 (“This law, however, is unlikely to be used much except as a threat.”).

¹⁴⁷ *Id.*; Anderson et al., *supra* note 130 (“Russia has previously been hit with arbitration awards for nationalizing foreign-owned subsidiaries, and may delay implementing the law and use the recent announcements as a warning to curb the current wave of business closures.”).

¹⁴⁸ Bershidsky, *supra* note 143.

¹⁴⁹ *See id.* (“If a foreign seller wants anything approaching the full market price for its assets, the seller should get it in rubles ‘and do whatever it wants with it in Russia.’ But if it agrees to a 50%–60% discount, the payment can be made offshore, in other currencies.”).

Gold Mining Ltd.¹⁵⁰ Originally, Kinross sought a deferred payment of \$680 million, but, in that arrangement, Kinross would have only received \$100 million upfront, with the remaining \$580 million due as annual payments through 2027.¹⁵¹ Kinross eventually settled for \$340 million, allowing it to receive \$300 million upfront.¹⁵² The advantage of this 50% discount is that it allowed Kinross to receive \$300 million in U.S dollars in its corporate account.¹⁵³ The deal was approved by Russia's Sub-commission on the Control of Foreign Investments.¹⁵⁴

Another policy that Russia is pursuing is a “caretaker” deal, in which the Russian buyer agrees to maintain the business while assuming the risk that business relations with the “unfriendly” countries will ever return to normal.¹⁵⁵ Maintaining the business entails keeping the jobs of the affected employees in Russia without the ability to rely on the departing company's trademark or global supply chain.¹⁵⁶ The potential upside for the Russian buyer is that they could recover any losses by selling the infrastructure back to the company when, or if, it resumes business in Russia.¹⁵⁷ It is likely that Russia wants its deal with the French carmaker Renault to fit into this caretaker model.¹⁵⁸ Renault recently sold its majority stake in

¹⁵⁰ *Id.*

¹⁵¹ *Kinross completes sale of Russian assets*, KINROSS (June 15, 2022), <https://www.kinross.com/news-and-investors/news-releases/press-release-details/2022/Kinross-completes-sale-of-Russian-assets/> [<https://perma.cc/33BZ-DS8B>].

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ Bershidsky, *supra* note 143.

¹⁵⁶ *See id.* (“[T]he Russian firms that have acquired, or are bidding for, the assets of big retail companies such as IKEA or OBI Group Holding SE are about to try running brand-dependent businesses without their household-name brands.”).

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

AvtoVAZ, Russia's largest carmaker, to a Moscow-based entity for the price of 1 ruble.¹⁵⁹ The Moscow city government itself has taken over Renault's Moscow factory, which alone employed over 4,000 people.¹⁶⁰ The same symbolic price of 1 ruble was allegedly paid for the factory in Moscow.¹⁶¹ Notably, Renault seems to have retained its trademark, as the Moscow location has reverted to its Soviet-era brand, Moskvich.¹⁶² In keeping with a "caretaker" model, Russia left the door open for Renault to return to doing business in the country, as the terms of this sale allows Renault to repurchase its stake in AvtoVAZ within six years.¹⁶³ Renault did not publicly reject this option.¹⁶⁴

E. *Uncle Vanya's?*

In March of 2022, threats to McDonald's intellectual property emerged when Vyacheslav Volodin, the speaker of the lower house of the Russian Parliament,

¹⁵⁹ See Liz Alderman, *Renault strikes a deal to exit Russia, for now*, N.Y. TIMES (May 16, 2022), <https://www.nytimes.com/2022/05/16/business/renault-russia-avtovaz.html> [<https://perma.cc/9LCY-Z2K> V] ("Renault will sell its 68 percent stake in AvtoVAZ, Russia's biggest carmaker, to a Moscow-based automotive research institute known as NAMI.").

¹⁶⁰ See Bershidsky, *supra* note 143 ("The Moscow city government took over the Renault Moscow factory.").

¹⁶¹ Hannah Ward-Glenton, *Russia relaunches Soviet-era Moskvich car brand using a former Renault plant*, CNBC (Nov. 23, 2022, 8:45 AM EST), <https://www.cnbc.com/2022/11/23/russia-relaunches-soviet-era-moskvich-car-brand-using-a-former-renault-plant.html> [<https://perma.cc/K63S-ETZX>].

¹⁶² Bershidsky, *supra* note 143.

¹⁶³ See Alderman, *supra* note 159 ("Russia's deal with Renault offers a window into how the Kremlin is trying to create openings for Western companies to return to doing business there whenever the dust settles from President Vladimir V. Putin's brutal invasion of Ukraine.").

¹⁶⁴ Bershidsky, *supra* note 143.

made a startling suggestion: replace McDonald's with the name "Uncle Vanya's."¹⁶⁵ The suggestion was prompted by McDonald's decision on March 8, 2022 to temporarily close its roughly 850 restaurants in Russia.¹⁶⁶ The closures of McDonalds and many other companies fueled concern that Russians would lose access to consumer products.¹⁶⁷ Volodin's credibility was bolstered by the publication of a trademark application for "Uncle Vanya."¹⁶⁸ It even listed restaurant services.¹⁶⁹ The application consisted of a logo that appeared as though the famous Golden Arches of McDonald's had been turned on their side.¹⁷⁰ The media leapt upon these developments, with the Washington Post suggesting in a headline that "there's a McDonald's

¹⁶⁵ Andrew Jeong, *There's a McDonald's replacement in Russia—with a strangely familiar logo*, WASH. POST (Mar. 18, 2022, 4:39 AM EDT), <https://www.washingtonpost.com/world/2022/03/18/uncle-vanya-russian-mcdonalds-replacement-logo/> [<https://perma.cc/5G26-3TQF>].

¹⁶⁶ Chris Kempczinski, *McDonald's To Temporarily Close Restaurants & Pause Operations in Russia*, MCDONALD'S (March 8, 2022), <https://corporate.mcdonalds.com/corpmcd/our-stories/article/Russia-update.html> [<https://perma.cc/CK3W-C7LQ>].

¹⁶⁷ See Jeong, *supra* note 165 (noting that, although McDonald's first described its closures in Russia as a temporary measure, the closures have now become permanent); see also Bill Chappell, *McDonald's is leaving Russia, after more than 30 years*, WUSF (May 16, 2022, 8:43 AM EDT), <https://wusfnews.wusf.usf.edu/2022-05-16/mcdonalds-is-leaving-russia-after-more-than-30-years> [<https://perma.cc/UFE2-6JQP>] ("McDonald's is exiting Russia over its invasion of Ukraine, pulling out of a market it's been a part of for 32 years. The fast-food giant had previously paused its operations in Russia less than two weeks into the brutal conflict being waged over Ukraine's future.").

¹⁶⁸ Jeong, *supra* note 165.

¹⁶⁹ Russ. Trademark Application No. RU 2022715219 (filed Dec. 3, 2022), https://new.fips.ru/registers-doc-view/fips_servlet?DB=RUTMAP&rn=3512&DocNumber=2022715219&TypeFile=html [<https://perma.cc/3UFJ-SAMT>].

¹⁷⁰ *Id.*

replacement in Russia—with a strangely familiar logo.”¹⁷¹ It seemed plausible that Rospatent might register this mark, as the filer’s company “has well-established business relations with Russian and Eurasian Patent Offices.”¹⁷² The filing also appeared to lay the groundwork for a Russian takeover of the McDonald’s restaurants.¹⁷³ Subsequent events have lessened the threat to the Golden Arches.



Figure 1. Logo from “Uncle Vanya’s” Trademark Application¹⁷⁴

Although the application for knockoff arches generated considerable outrage,¹⁷⁵ little attention has focused on the fact that the application was withdrawn.¹⁷⁶

¹⁷¹ *Id.*

¹⁷² Carman, *supra* note 39.

¹⁷³ Aaron Gregg et al., *McDonald’s Seeks to sell Russian business that is ‘no longer tenable,’* WASH. POST (May 16, 2022 at 6:50 AM EDT), <https://www.washingtonpost.com/business/2022/05/16/mcdonalds-exit-business-russia-ukraine-renault/> [https://perma.cc/M83K-EL7N].

¹⁷⁴ Dani Kass, *McDonald’s, Starbucks Already Facing Russian TM Copycats*, LAW360 (Mar. 16, 2022, 4:51 PM EDT), <https://www.law360.com/articles/1474611/mcdonald-s-starbucks-area-dy-facing-russian-tm-copycats> [https://perma.cc/NV2Y-EHAK].

¹⁷⁵ See Josh Gerben (@JoshGerben), TWITTER (Mar. 16, 2022, 9:08 AM), <https://twitter.com/JoshGerben/status/1504082125968007174> [https://perma.cc/X233-T7U7] (“Trademark squatting has begun in Russia.”).

¹⁷⁶ Позиция Роспатента касательно рассмотрения заявок на обозначения сходные до степени смешения с товарными знаками иностранных заявителей [*Explanatory Note of Rospatent*

Rospatent sought to distance itself from this controversial application by noting that a trademark application's acceptance and assignment of a serial number does not automatically confer legal protection.¹⁷⁷ Even in the United States, nothing prevents any individual from merely filing trademark applications that pose obvious legal issues.¹⁷⁸ Filings in the United States for marks such as "Covfefe" and "Boston Strong" were ultimately unsuccessful.¹⁷⁹ These doomed filings include individuals seeking to ride the coattails of a well-known brands, such as the application of Robert Victor Marcon, an individual unaffiliated with L'Oreal, who filed an application with the USPTO to register the mark "L'OREAL PARIS" for aloe vera drinks, although the mark was not granted registration.¹⁸⁰

The possibility of the Uncle Vanya logo becoming a reality has all but disappeared. Perhaps because of the threat of nationalization, McDonald's sold its restaurants in Russia to Alexander Govor, a previous licensee, for a

Concerning the Examination of Recent Trademark Applications Confusingly Similar to Foreign Trademarks Registered in Russia, ROSPATENT (Apr. 1, 2022, 7:12 PM) [hereinafter *Explanatory Note*], <https://rospatent.gov.ru/en/news/poziciya-rospatenta-01042022> [<https://perma.cc/78JM-37YZ>] ("[The Uncle] Vanya application was withdrawn by the applicant two weeks after the filing.").

¹⁷⁷ *Id.*

¹⁷⁸ Bill Donahue, *No, Seriously, Don't Try To 'Trademark' Coronavirus*, LAW360 (Mar. 18, 2020, 5:43 PM EDT), <https://www.law360.com/articles/1254641> [<https://perma.cc/8EPE-E493>] (describing the efforts of some individuals in the United States to file marks on terms like "covid," which, by their very nature, are "incapable of functioning as trademarks in the first place").

¹⁷⁹ *See id.* ("Back in 2017, when President Donald Trump accidentally tweeted the word 'Covfefe,' it was followed by 42 separate attempts to register it as a trademark.").

¹⁸⁰ *L'Oreal S.A. v. Marcon*, 102 U.S.P.Q.2d 1434, 1444-45 (T.T.A.B. 2012).

“symbolic” sum.¹⁸¹ As part of the deal, McDonald’s has retained control of its trademarks in Russia, and the new restaurants must remove the Golden Arches under a “de-arching” effort.¹⁸² Govor has made clear that Vkusno-i tochka does not have the right to trade off McDonald’s name or trademarks, announcing that “[they] don’t have the right to use some colours, [they] don’t have the right to use the golden arches, [they] don’t have the right to use any mention of McDonald’s.”¹⁸³ The name McDonald’s has been replaced by Vkusno-i tochka, which translates to “Tasty and that’s it.”¹⁸⁴ Vkusno-i tochka has unveiled a logo that does not include the golden arches but is rather meant to represent two fries and a hamburger.¹⁸⁵

¹⁸¹ Praveen Paramasivam, *McDonald’s to sell Russia restaurants to local operator, rebrand*, REUTERS (May 19, 2022, 4:02 PM EDT), <https://www.reuters.com/markets/deals/mcdonalds-sell-russia-business-current-licensee-2022-05-19/> [<https://perma.cc/5YXM-KWN2>]; see also *Tasty Name but No Big Mac: Russia opens rebranded McDonald’s restaurants*, REUTERS (June 13, 2022, 4:13 AM EDT) [hereinafter *Tasty Name*], <https://www.reuters.com/world/europe/mcdonalds-russia-reopens-under-new-ownership-renamed-vkusno-tochka-2022-06-12/> [<https://perma.cc/k594-dr2y>] (“[Govor] said on Sunday that he paid a ‘symbolic’ figure ‘far lower than market price’ for McDonald’s Russia.”).

¹⁸² *De-Arching: McDonald’s to Sell Russia Business, Exit Country*, VOICE OF AM. (May 16, 2022 5:01 PM), <https://www.voanews.com/a/de-arching-mcdonald-s-to-sell-russia-business-exit-country-/6575892.html> [<https://perma.cc/Y68X-78AU>].

¹⁸³ *Tasty Name*, *supra* note 181.

¹⁸⁴ *What’s in a Name? Russia rebrands McDonald’s restaurant chain*, AL JAZEERA (June 12, 2022), <https://www.aljazeera.com/news/2022/6/12/whats-in-a-name-russia-rebrands-mcdonalds-restaurant-chain#:~:text=On%20Sunday%2C%20McDonald%27s%20restaurants%20reopened,%E2%80%9CTasty%20and%20that%27s%20it%E2%80%9D> [<https://perma.cc/7BPA-ZQ9T>].

¹⁸⁵ *Id.*



Figure 2. Logo of Vkusno-i tochka¹⁸⁶

Concerns over McDonald's intellectual property rightfully persist. Some people think that the new chain still makes an association with the old one, opining that the new logo evokes the letter "M," but the biggest concern is the actual use of McDonald's trademarks.¹⁸⁷ Govor may have prevented his restaurants from using the McDonald's family of marks, but there were about 100 locations in Russia that he did not own.¹⁸⁸ Some of those locations were, and perhaps still are, using McDonald's branding, although the CEO of Vkusno-i tochka hopes that these

¹⁸⁶ Zahra Ullah et al., *Rebranded McDonald's restaurants unveiled in Russia*, CNN (June 13, 2022, 3:27 AM EDT), <https://www.cnn.com/2022/06/12/business-food/mcdonalds-restaurant-replacement-russia-ukraine-intl/index.html#:~:text=The%20golden%20arches%20and%20Big,%E2%80%9CTasty%20and%20that's%20it.%E2%80%9D> [https://perma.cc/P3TF-FKC8].

¹⁸⁷ *Id.*; see also Mark Wilson, *See the new 'de-arched' McDonald's logo in Russia*, FAST COMPANY (June 9, 2022), https://www.fastcompany.com/90759860/see-the-new-de-arched-mcdonalds-logo-in-russia?partner=rss&utm_source=twitter.com&utm_medium=social&utm_campaign=rss+fastcompany&utm_content=rss [https://perma.cc/36ZT-HAWD]; see *Big Macs still sold in Russia despite McDonald's exit*, REUTERS (June 16, 2022, 1:22 PM EDT) [hereinafter *Big Macs Still Sold*], <https://www.reuters.com/business/retail-consumer/big-macs-still-sale-russia-despite-mcdonalds-exit-2022-06-16/> [https://perma.cc/UKK5-L8LM].

¹⁸⁸ *Big Macs Still Sold*, *supra* note 187.

rogue operators will join the new brand, which would presumably force them to abandon their infringement.¹⁸⁹ *Vkusno-i tochka* has already been successful in adding another former McDonald's franchise to its brand.¹⁹⁰

In hindsight, it seems unlikely that the Russian authorities would have allowed a Russian company to simply appropriate the McDonald's family of trademarks on its own volition, as the Renault factory changed its name back to Moskvitch.¹⁹¹ While a Russian takeover of McDonald's locations did occur, the terms of the exit protected the McDonald's intellectual property.¹⁹² The new brand's commitment to upholding its side of the deal is such that Govor still engages in conversations with McDonald's about how it is sticking to the terms of the deal, which include an agreement not to use certain branding and color schemes.¹⁹³ As discussed above, Russia

¹⁸⁹ Grace Dean, *The CEO of the rebranded Russian McDonald's isn't happy that some old franchisees are still using McDonald's branding and selling Big Macs*, INSIDER (June 22, 2022, 8:23 AM), <https://www.businessinsider.com/russia-mcdonalds-vkusno-tochka-franchisees-branding-big-mac-restaurant-paroev-2022-6> [<https://perma.cc/D2YK-HY87>] (“[The CEO] said that *Vkusno & tochka* had suggested that the former franchisees join the new brand, and that one had already agreed.”).

¹⁹⁰ *Russian McDonald's successor solves franchise problem as more outlets join*, REUTERS (Nov. 28, 2022, 9:07 AM EST), <https://www.reuters.com/business/retail-consumer/russian-mcdonalds-successor-solves-franchise-problem-more-outlets-join-2022-11-28/> [<https://perma.cc/H7V5-82C4>] (“[A] former franchisee of the global hamburger chain agreed to join the new brand, resolving a conundrum for the new owners.”).

¹⁹¹ Bershidsky, *supra* note 143.

¹⁹² *Tasty Name*, *supra* note 181.

¹⁹³ See Alexander Marrow & Hilary Russ, *McDonald's retains contact with Russian Restaurants—new owner*, REUTERS (Dec. 16, 2022, 6:14 AM EST), <https://www.reuters.com/markets/europe/mcdonalds-retains-contact-with-russian-restaurants-new-owner-2022-12-16/> [<https://perma.cc/V4LD-HUHM>] (“McDonald's Corp regularly engages with its successor brand in Russia following its exit from the

holds out hope that some of these exiting businesses will one day return, so it would seem counterproductive for Russia to antagonize McDonald's unnecessarily by simply rotating the golden arches or selling the business without McDonald's permission.¹⁹⁴ Its deal with McDonald's reflects Russia's desire for foreign companies, like McDonald's, to return, as it includes an option for McDonald's to buy back its restaurants in fifteen years.¹⁹⁵ However, McDonald's has stated that it will not buy back its former franchises in Russia.¹⁹⁶

The Uncle Vanya/McDonald's saga illustrates that it is unnecessary to take every suggestion floated by the Russian government at face value. As with the Peppa Pig decision, it is important to keep in mind that Russian officials do not all sing from the same hymn sheet. While almost all Russian officials face pressure to publicly support the war in Ukraine, the same pressure to take a hardline stance does not seem to exist when it comes to hammering out the technical details of how to adjust Russia's intellectual property laws to a wartime scenario.¹⁹⁷

market earlier this year, communications that are needed to ensure terms of the sale are fulfilled, its new owner told Reuters.”).

¹⁹⁴ Alderman, *supra* note 159.

¹⁹⁵ *Tasty Name*, *supra* note 181.

¹⁹⁶ *Id.* (“They made it clear to me that they would not buy back,” Interfax quoted [Govor] as saying.”).

¹⁹⁷ Pyotr Kozlov, *Seven Months On, Russia's Only Diplomat to Publicly Quit Over the Ukraine War Has Time on His Hands*, MOSCOW TIMES (Jan. 6, 2023), <https://www.themoscowtimes.com/2023/01/05/seven-months-on-russias-only-diplomat-to-publicly-quit-over-the-ukraine-war-has-time-on-his-hands-a79845> [https://perma.cc/K4FN-FT9B] (“Bondarev, 42, was briefly thrust into the media spotlight when he quit his mid-level job in the Foreign Ministry, making him one of just a handful of Russian officials to resign as a result of the invasion of Ukraine in February.”); Elaine Godfrey, *Sudden Russian Death Syndrome*, THE ATLANTIC (Dec. 29, 2022), <https://www.theatlantic.com/ideas/archive/2022/12/russian-tycoon-pavel-antov-dies-putin-ukraine/672601/> [https://perma.cc/Q8WT-VUC7] (“Over the weekend,

The Uncle Vanya situation may resemble the proposal to legalize piracy, in which the Ministry of Economic Development supported the endeavor while the Ministry of Digital Development, Telecommunications and Mass Media opposed it.¹⁹⁸ Cooler heads may have prevailed in the decision to withdraw the application for the clearly infringing Uncle Vanya logo. It is too early to know if the same will be said of Russia's willingness to invoke Decree No. 299 or whether it will ultimately adopt the legislation on external management.

III. INTERNATIONAL RESPONSE TO RUSSIA

In early March 2022, Ukraine utilized intellectual property amid the backdrop of war when it disseminated Russian trade secrets, apparently with the help of volunteer hackers.¹⁹⁹ The trade secrets in question were obtained by hacking the computer systems of the Russian Beloyarsk Nuclear Power Station, which is run by Rosenergoatom, the Russian state nuclear utility.²⁰⁰ They are likely valuable trade secrets, as Russia has invested billions of dollars in

Pavel Antov, the aforementioned sausage executive, a man who had reportedly expressed a dangerous lack of enthusiasm for Vladimir Putin's war against Ukraine, was found dead at a hotel in India, just two days after one of his Russian travel companions died at the same hotel. Antov was reported to have fallen to his death from a hotel window.”).

¹⁹⁸ U.S.P.T.O., *supra* note 41, at 1.

¹⁹⁹ Joe Uchill, *In a first, Ukraine leaks Russian intellectual property as act of war*, SCMEDIA (Mar. 11, 2022), <https://www.scmagazine.com/analysis/breach/in-a-first-ukraine-leaks-russian-intellectual-property-as-act-of-war> [https://perma.cc/MNB2-3SLV]; James Pooley, *Government-Forced Technology Transfer Is Almost Always Wrong*, 199 IPWATCHDOG (Mar. 29, 2022, 1:15 PM), <https://ipwatchdog.com/2022/03/29/government-forced-technology-transfer-is-almost-always-wrong/id=147968/> [https://perma.cc/7F55-99WB].

²⁰⁰ Uchill, *supra* note 199.

the project, and the nuclear power station contains the only two fast-breed nuclear reactors in commercial operation.²⁰¹ The effect of this leak probably has long-term implications, potentially jeopardizing future sales for the facility.²⁰² Moreover, Ukraine's attack on Beloyarsk may be the first time that a hack and release of technical secrets took place during a state of active warfare.²⁰³ The incident took place on the heels of Russia's bombing of Ukraine's Zaporizhzhia Nuclear Power Plant.²⁰⁴ The intent of the hack was not "to topple the infrastructure of Russia, but rather to demonstrate to Russia that they have a collective ability to perform overt acts of cyber resistance concerning Russian-affiliated companies' intellectual property."²⁰⁵

Several countries have moved to isolate Russia from gaining access to intellectual property protection in their countries.²⁰⁶ On March 11, 2022, the USPTO

²⁰¹ See *id.* ("It's taking a multi-billion dollar project that Russia has been building and made it open-source," said Eric Byres, chief technology officer at the industrial control systems cyberdefense firm Dolus Technology.)

²⁰² Uchill, *supra* note 199.

²⁰³ April Barnard & Brad Lane, *A New Battlefield: Ukraine Resistance Includes Leaks of Russian Trade Secrets*, CROWELL (Apr. 7, 2022), <https://www.crowelltradesecretstrends.com/2022/04/a-new-battlefront-ukraine-resistance-includes-leaks-of-russian-trade-secrets/> [http://perma.cc/P8NV-Q5MC].

²⁰⁴ Jeffrey Carr, *Russia's Beloyarsk Nuclear Power Plant has been breached by a GURMO Cyber unit*, INSIDE CYBER WARFARE (Mar. 7, 2022, 4:26 PM), <https://jeffreycarr.substack.com/p/russias-beloyarsk-nuclear-power-plant?s=r> [https://perma.cc/U65A-5UDJ].

²⁰⁵ Barnard & Lane, *supra* note 203.

²⁰⁶ See *EUIPO Statement on Ukraine*, E.U.I.P.O. (Mar. 9, 2022), https://euiipo.europa.eu/ohimportal/en/web/guest/-/the-euiipo-has-adopted-a-number-of-measures-in-coordination-with-the-eu-institution-s?inheritRedirect=true&redirect=https%3A%2F%2Feuiipo.europa.eu%2Fohimportal%2Fen%2Fweb%2Fguest%2Fsearch%3Fp_p_id%3Dcom_liferay_portal_search_web_portlet_SearchPortlet%26p_p_lifecycle%3D0%26p_p_state%3Dnormal%26p_p_mode%3Dview%26_com_liferay_portal_search_web_portlet_SearchPortlet_keywords%3D9237969

suspended its coordination with Rospatent over the Global Patent Prosecution Highway (GPPH) program.²⁰⁷ The GPPH is an avenue that allows participating companies to rely on a prior examination that occurred in another participating country.²⁰⁸ On March 22, 2022, the USPTO formally ended cooperation with Rospatent, the Eurasian Patent Organization, and the Belarus national patent office.²⁰⁹ In severing ties with Russia, the USPTO connected the decision to Russia's invasion of Ukraine, expressing "hope for the restoration of peace and human dignity."²¹⁰

IV. CONCLUSION

In its conflict with Ukraine, Russia has used intellectual property both as a shield and as a sword. Some of Russia's legislation regarding intellectual property seems

[<https://perma.cc/E3BG-WM9W>] (announcing the decision to "halt[] all cooperation actions with Rospatent, the Russian Federal Service for Intellectual Property, and the Eurasian Patent Organisation (EAPO)"); see also *IPO Statement On Ukraine*, U.K.I.P.O. (Mar. 2, 2022), <https://www.gov.uk/government/news/ipo-statement-on-ukraine> [<https://perma.cc/63QB-QKH6>] ("The UK's economic sanctions against Russia include intellectual property, and we are enforcing these sanctions robustly. We will not be providing services to those on the sanctions list, either directly or through their agents.").

²⁰⁷ *USPTO statement on engagement with Russia, the Eurasian Patent Organization, and Belarus*, U.S.P.T.O. (Mar. 22, 2022) [hereinafter *USPTO Statement*], <https://www.uspto.gov/about-us/news-updates/uspto-statement-engagement-russia-and-eurasian-patent-organization> [<https://perma.cc/C7MQ-CMNS>].

²⁰⁸ *Id.*

²⁰⁹ See Becky Sullivan, *Why Belarus is so involved in Russia's invasion of Ukraine*, NPR (Mar. 11, 2022, 5:01 AM EDT), <https://www.npr.org/2022/03/11/1085548867/belarus-ukraine-russia-invasion-lukashenko-putin> [<https://perma.cc/9UKB-AJSB>] (noting that the White House has previously criticized Belarus for "enabling Putin's invasion of Ukraine.").

²¹⁰ *USPTO Statement*, *supra* note 207.

geared at propping up its economy in the face of the economic challenges that have mounted during its invasion of Ukraine, with intellectual property rights a casualty of those efforts. The legislation regarding parallel imports fits into a defensive posture meant to bolster economic security, as one goal of the law seems to be to satisfy the demand for goods and to provide more competition in the Russian marketplace as imports decline.²¹¹ If legal commentary from Russia regarding Decree No. 299 can be believed, the intent of that decree is to protect national security rather than to abandon patent protection for patentees from “unfriendly” countries.²¹² However, it is indisputable that the decree has succeeded in alarming countries whose intellectual property rights would be at stake.

In other ways, Russia has used intellectual property more as a sword. The initial decision dismissing the infringement of Entertainment One’s Peppa Pig trademark falls into the category of an offensive posture. It was antagonistic behavior meant to punish a foreign rights holder, although hindsight suggests that it is possible for foreign rights holders to ultimately prevail in Russian courts. Russia has also used intellectual property legislation to pressure companies to resume business in Russia. The draft bill temporarily nationalizing foreign businesses also falls into the category. It sends a message to “unfriendly” countries that they can either resume operations in Russia or risk losing their assets.²¹³ The parallel import law falls into the category of both shield and sword, as the Russian Prime Minister has connected membership on the list with whether companies resume business in Russia.²¹⁴

²¹¹ Pestryakova, *supra* note 72.

²¹² See *Overview of News*, *supra* note 44.

²¹³ Sizikova et al., *supra* note 132.

²¹⁴ Pestryakova, *supra* note 72.

Another takeaway is a strange dichotomy between Russia's attitude towards the traditional aspects of war and its attitude towards intellectual property as an aspect of the war. News reports have shown Russia's willingness to violate international norms regarding human rights when it comes to its war in Ukraine.²¹⁵ When it comes to the traditional aspects of war, it does not appear that the opinions of international observers sway Russia's behavior on the battlefield.²¹⁶ Perhaps for selfish reasons, Russia has exhibited a relative amount of concern for how outside observers will view Russia's treatment of assets, especially assets that relate to intellectual property.²¹⁷ The willingness of Govor to engage in ongoing communications with McDonald's regarding issues like branding speaks to this concern.²¹⁸ Another indication of this concern is the way that Russian authorities have reiterated a commitment to the international agreements in which it still holds membership.²¹⁹ This commitment is seen in the appellate court's decision to uphold Entertainment One's rights in the Peppa Pig trademark, in which the judge overruled the Kirov court in part because of Russia's commitment to

²¹⁵ *War crimes have been committed in Ukraine conflict, top UN human rights inquiry reveals*, UNITED NATIONS (Sept. 23, 2022), <https://news.un.org/en/story/2022/09/1127691> [<https://perma.cc/Z6KQ-AYVN>] (“Based on the evidence gathered so far during the Commission’s existence, we found out after having carried out the investigations in these four areas just mentioned, we found that war crimes have been committed in Ukraine,” [Commission chairperson Erik Møse] told journalists in Geneva.”).

²¹⁶ Jack Guy, *Russian forces have committed ‘a litany of violations’ in Ukraine, says rights group*, CNN (Jan. 11, 2023, 10:00 PM EST), <https://www.cnn.com/2023/01/11/europe/human-rights-watch-2023-report-intl/index.html> [<https://perma.cc/ZU6X-SFX5>] (“Evidence of war crimes in Bucha, a suburb of Kyiv, are part of a pattern that ‘has been repeated countless times.’”).

²¹⁷ Bershidsky, *supra* note 143.

²¹⁸ Marrow & Russ, *supra* note 193.

²¹⁹ *Russia’s Withdrawal*, *supra* note 123.

international agreements.²²⁰ The same commitment to international agreements was seen in the decision to walk back the proposal to leave the WTO.²²¹

Russia's treatment of intellectual property demonstrates the role of intellectual property as a global currency. The fact that intellectual property remains a concern at all—in the midst of a war—demonstrates this importance. Russian authorities seem to gamble on intellectual property being so valuable that departing companies will eventually return to the country in order to monetize this asset. Inherent in this gamble is the assumption that Russia's relative regard for intellectual property rights will outweigh Russia's treatment of human lives.

²²⁰ Riikka, *supra* note 43.

²²¹ *Russia's Withdrawal*, *supra* note 123.