

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE 2005 SPECIAL 301 REPORT COMMONWEALTH OF INDEPENDENT STATES (C.I.S.)

EXECUTIVE SUMMARY: TEN COUNTRIES OF THE C.I.S.¹

This report includes a brief summary of the common issues in the following ten countries of the Commonwealth of Independent States (C.I.S.): Armenia, Azerbaijan, Belarus, Georgia, Kazakhstan, Kyrgyz Republic, Republic of Moldova, Tajikistan, Turkmenistan and Uzbekistan, followed by brief individual country reports of Belarus, Kazakhstan, Tajikistan, Turkmenistan and Uzbekistan; the reports on Azerbaijan and Georgia can be found in the part of this filing entitled Countries Deserving Special Mention.² For a more complete report on the common issues of all ten countries, see <http://www.iipa.com/rbc/2003/2003SPEC301CIS.pdf>.

Special 301 Recommendation: IIPA recommends that

- **Belarus, Kazakhstan, Tajikistan, Turkmenistan and Uzbekistan** be retained on the Special 301 Watch List in 2005;
- The U.S. government should continue to monitor the post-WTO accession progress of **Azerbaijan and Georgia** for the reasons noted in the part of this filing entitled Countries Deserving Special Mention;
- In addition to the Watch List ranking, the U.S. government should suspend the duty-free trade benefits under the Generalized System of Preferences (GSP) of **Kazakhstan and Uzbekistan** for the reasons stated in the petitions filed by the IIPA concerning the shortcomings in the legal regimes of these countries and reiterated at U.S. government hearings (2003);³ and
- The U.S. government should block accession to the World Trade Organization of **Azerbaijan, Belarus, Kazakhstan, Tajikistan, Turkmenistan and Uzbekistan (as well as Russia and Ukraine for the reasons noted in those two country reports)** because the legal and enforcement regimes in each of these countries is not in compliance with the WTO TRIPS obligations.

Overview of Key Problems: IIPA's broad summary of priorities in these countries is that: (1) the legal regimes (in varying degrees in each country) are in need of critical reforms to

¹ For more details on each country's Special 301 history, see IIPA's "History" appendix to this filing at <http://www.iipa.com/pdf/2005SPEC301HISTORICALSUMMARY.pdf>. Please see previous years' reports at <http://www.iipa.com/countryreports.html>.

² IIPA filed separate Special 301 reports on the other two countries in the C.I.S., Russia and Ukraine, as a result of serious piracy problems, in particular wide-scale illegal optical media production and distribution, confronting the copyright industries in those countries.

³ As noted in the separate IIPA Special 301 reports on Russia and Ukraine, IIPA recommends that Russia lose its eligibility immediately for GSP benefits (based on the IIPA 2000 petition and our testimony at the U.S. government GSP hearing in October 2003), and that the U.S. government continue its suspension of Ukraine's GSP benefits (first suspended in August 2001). Since 2000, Belarus has had its GSP benefits suspended, but for reasons unrelated to intellectual property matters. The U.S. government terminated Armenia's GSP review on September 3, 2003.

their copyright laws, criminal codes, customs codes, civil procedure codes, and administrative codes; in some countries there is also the need for the regulation of optical media production facilities; (2) accession to key treaties is still not complete, especially for neighboring rights and the WIPO Digital Treaties (WCT and WPPT); and (3) there is virtually no on-the-ground enforcement against large-scale commercial pirates, much less against smaller scale operations. Such enforcement should include administrative remedies, effective border enforcement, and criminal prosecutions.

Actions to be Taken by the Governments of These Countries: The actions that must be taken are

- Amending the copyright laws, criminal codes, customs codes, administrative codes, and civil procedure codes (adding *ex parte* search provisions) to provide comprehensive and effective legal regime, as well as adding provisions to regulate optical media production facilities and equipment;
- Acceding to key treaties including full implementation of the Berne Convention, Geneva Phonograms Convention, WTO TRIPS, and the WIPO Digital Treaties (WCT and WPPT);
- Enacting and enforcing effective border measures to stop the export and import of illegal material;
- Commencing raids and following up with criminal prosecutions against pirates engaged in commercial distribution, as well as using administrative procedures for smaller scale operations directed at street vendors, kiosks, and retail stores.

BELARUS

In May 2004, the U.S. Trade Representative criticized enforcement in Belarus as “weak and ineffective” (in his annual announcement on Special 301 designations) and noted his concerns with regard to the “migration of optical media production facilities from neighboring countries.” In 2004, there were no industry reports of either legal reforms or enforcement successes in Belarus. In recent years, Belarus has joined the relevant neighboring rights treaties—the WIPO Performances and Phonograms Treaty (WPPT) and the Geneva Phonograms Convention (2003)—the latter providing, at long last, a point of attachment for foreign sound recordings. However, the long delay (of over ten years) in providing this legal protection allowed for a large back-catalog of unprotected material to enter the marketplace, making enforcement that much more difficult.

Even more troubling is the migration, as noted by the USTR, of optical media production facilities into Belarus from neighboring countries. One plant (Armita) located in Brest, Belarus migrated from Ukraine a few years ago; in 2002, the plant closed and a criminal investigation was commenced in Belarus. However, the case was transferred to the Ukrainian General Prosecutor’s office for a criminal investigation there, because the plant operator and his deputy are Ukrainian nationals. The case was later suspended in Ukraine because the two subjects of the investigation disappeared. The manufacturing equipment was exported out of Belarus to an unknown destination and no further action was taken by the Government of Belarus—all of which further underscores the need for more effective regulation of optical media production and distribution, including criminal sanctions for violations.

The other important step that the government must take is to insist that border enforcement authorities act more effectively to prevent other plants in Russia (Ukraine or other neighboring countries) from relocating to Belarus, as well as to stop the importing and exporting of illegal optical media discs (CDs, DVDs, CD-ROMs, CD-Rs, etc.). In October 2004, the Vigmplast optical disc replication plant was opened near Minsk; it has a single line and an estimated plant capacity of 5.2 million discs a year.

In January and February 1993, Belarus and the United States exchanged letters to implement a bilateral trade agreement detailing mutual obligations to improve the protection and enforcement of intellectual property rights; that agreement entered into force on February 16, 1993. Belarus enacted a new law on copyright and neighboring rights (in force on June 18, 1996), and amendments in 1998.

Belarus is a member of the Berne Convention (1997) and Geneva Phonograms Convention (2003) as well as the two WIPO Digital Treaties, which it joined in 1998 as one of the first countries to do so. The 1998 amendments were intended to, among other things, partially implement the Digital Treaties.

Legal reform deficiencies

The 1998 Copyright Law amendments added provisions relating to anti-circumvention devices and services, and the removal or alteration of rights management information (Article 39.5). The remedies for anti-circumvention and rights management information protection include injunctive relief, monetary damages, and seizure of devices.

Criminal code provisions were adopted several years ago (in force in 2000). The provisions (Article 201) include sanctions for up to five years' imprisonment for repeat offenders of copyright and neighboring rights violations. However, the criminal sanctions only apply after there have been administrative violations, and are only triggered by a too high threshold ("large-scale damage") which is BR16,500 (US\$5,530). Also, there are no provisions for the confiscation of manufacturing equipment used to produce pirated material.

The criminal procedures code still needs revision to provide the proper *ex officio* authority for police officials to initiate copyright criminal cases. There are administrative remedies against violations of copyright and neighboring rights, including acts of illegal retail sale and distribution. However, there is no *ex officio* authority to act in administrative cases either, so even in these instances, a statement from a rightholder is required to commence a case, thus thwarting effective enforcement.

Even though customs code amendments were adopted in 1998 to include intellectual property materials, the proper *ex officio* authority was never granted to customs officials.

Under the Copyright Law (Article 40), the civil penalties for copyright or neighboring rights violations included injunctive relief, damages (including lost profits), seizure and impoundment of infringing copies, and statutory penalties of between 10 and 50,000 times the minimum wage. Belarusian officials also point to the civil code revisions (adopted in 1999) as providing additional remedies for IPR violations.

The Copyright Law (as amended through 1998) does not provide protection for pre-existing works or sound recordings (for example, only recordings fixed or released on or after April 17, 2003 enjoy protection). Belarus is required by the clear obligation in its bilateral trade agreement, as well as by Berne and the WTO TRIPS agreement to provide such protection, and should be urged to clarify its law immediately. Belarusian officials insist this protection does currently exist, at least for works. Government officials insist that since Article 42 of the 1996 law and Article 3 of the 1998 law make international treaties (such as the Berne Convention) self-executing in Belarus, absent any legislative action to the contrary, Article 18 of Berne should currently provide protection for pre-existing foreign works. While this may be a correct reading of the law, it should be clarified by statutory amendment which would avoid any confusion on the part of police, prosecutors and judges tasked with enforcement of these rights. Further, the provisions cited (Article 18 of Berne) apply only to "works" but not sound recordings; a change in the law to explicitly extend protection for sound recordings (and works) is essential. Unfortunately, draft copyright law amendments prepared by the government and submitted to the parliament in 2004 for consideration in 2005 do not address the problem of protection for pre-existing works or sound recordings.

There are no known available civil *ex parte* search procedures in Belarusian law; these are needed for effective enforcement against end-user pirates, especially in the software industry.

Neither are its anti-circumvention or copyright management information provisions fully compatible with the WIPO Digital Treaties. The provisions regarding technological protection measures need further change. In particular, the provisions must cover prohibitions on the manufacture, importation, sale, distribution, or other trafficking in devices or services that are aimed at circumventing technological protection measures, as well as outlawing acts of circumvention. In addition, rightholders need to be able to protect so-called "copyright management information" that is attached to or accompanies a work or sound recording. Such

provisions should protect against the alteration, removal or falsification of this information. The Belarusian provisions provide some, but not all, of the required protection against Internet and other digital piracy.

In general, levels of piracy remain extremely high, and enforcement remains virtually nonexistent in Belarus. There are numerous reports of material being produced in or shipped through Belarus ending up in other markets. In May 2004, Belarusian officials reported that the Council of Ministers (interministerial committee) had adopted a program for IPR protection for 2004 and 2005. However, this report focused mainly on additional legislative reforms to copyright (and patent and trademark laws), and should that it would establish a training center for IPR enforcers. While positive news, the government of Belarus needs to focus on actual enforcement activity — running raids and seizures, as well as commencing criminal cases against commercial pirates.

Belarus is in the midst of its accession process to join the World Trade Organization. To accede, Belarus must bring its law into full compliance with the WTO TRIPS obligations by improving its laws and providing effective enforcement (including criminal penalties), since the current laws and enforcement regime fall short of these obligations. According to the recording industry (International Federation of the Phonographic Industry, IFPI), Belarus has large-scale illegal musical cassette production facilities for domestic and foreign consumption—the government must take action against these facilities using the criminal law remedies.

According to the recording industry, there is one known optical media plant in Belarus—the Vigmaplast optical disc plant near Minsk, noted above (with a single operational line). However, little else is known about its operations.

The level of music piracy is estimated at about 71%; trade losses for 2004 were estimated at \$26 million. It is estimated by the recording industry that in total 9.1 million cassettes and 9.1 million CDs were sold in Belarus in 2004 and of these, 6.1 million cassettes and 6.8 million CDs were pirated copies. The industry also reported 141 raids and the seizure of US\$732,384 worth of pirate material (61,500 CDs, 7,600 DVDs, 630 cassettes) in 2004 by local enforcement agencies. In 2004, the border authorities, in a total of 50 cases, confiscated 10,000 pirate CDs and 5,800 pirate DVDs, all destined for Western Europe.

KAZAKHSTAN

The U.S. Trade Representative, in his May 2004 Special 301 announcement, noted that Kazakhstan has still not met all of its commitments under the 1992 U.S.-Kazakhstan Trade Agreement. In particular, the U.S. government cited the lack of clear protection for pre-existing works and sound recordings and noted that even though “searches and seizures increased in volume and thoroughness . . . enforcement of IPR in Kazakhstan remains weak, particularly criminal enforcement.” The USTR noted that “[v]ery few defendants are convicted, and those who are convicted receive only minimal penalties.” The enforcement problem is caused by a high burden of proof in criminal cases which needs, according to the U.S. government, legislative reform (even beyond the reforms of recent years). One legislative reform goal was accomplished in 2004 with the passage of provisions providing explicit protection for pre-existing foreign works and sound recordings. However, many other critical deficiencies remain, now more than ten years after Kazakhstan pledged to correct them, which is why IIPA recommends not only the retention of Kazakhstan on the Watch List, but also that the U.S. government block Kazakhstan’s accession in the WTO (which it is planning to join in 2006), and that it suspend all GSP benefits to Kazakhstan, until these deficiencies are corrected.

In May 1992, Kazakhstan and the United States signed a bilateral trade agreement detailing mutual obligations to improve the protection and enforcement of intellectual property rights; that agreement entered into force on February 18, 1993. The Copyright Law was amended in 1996, and again, in July 2004.

Kazakhstan joined the Berne Convention (1999) and the Geneva Phonograms Convention (2001), providing a point of attachment for foreign sound recordings. In addition, effective November 12, 2004, Kazakhstan acceded to both WIPO Digital Treaties (WCT and WPPT). This was a very positive step.

Legal reform deficiencies

Effective July 9, 2004, Copyright Law amendments were adopted in Kazakhstan further revising the Copyright Law of 1996. Among other things, the amendments (Article 5(4)) fixed the long-standing problem of providing express protection for pre-existing foreign works and sound recordings. This was a major step forward. Unfortunately, the ten-year delay in adopting this provision means that there will be a lot of (now illegal) back-catalog material in the marketplace that will take years to root out. Further, the 2004 provision only provides a flat 50 year window, so pre-1954 works and sound recordings remain in the public domain.

In addition, the 2004 amendments (which were part of a larger package) included: updating laws to facilitate electronic commerce and Internet technology by implementing the digital treaties (since Kazakhstan in 2004, also became a member of those treaties); and updating the laws for E.U. compatibility. Several key legal reforms — notably in the criminal enforcement area — remain. Development of a modern IPR regime in Kazakhstan is imperative because, for example, the software and recording industries, consider Kazakhstan the most promising marketplace of the C.I.S. members behind only Russia and Ukraine.

There are no known civil *ex parte* search procedures under Kazakh law; these are needed to provide effective enforcement against end-user pirates, especially software pirates. It is understood that the current draft copyright law amendments contain provisions to remedy this matter.

The current Criminal Code entered into force on January 1, 1998. Article 184 of the Criminal Code includes substantial fines which vary depending on the profit lost and/or “large damage” resulting from infringement. The fines run from between 100 and 800 times the statutory minimum monthly wage; detention (arrest) of up to six months; and imprisonment of up to five years for repeat offenders. But one major shortcoming still exists: the provisions are limited to actions committed for the purposes of “deriving profits” and which cause “considerable harm.” The imposition of this threshold, especially the considerable harm standard, has been a particular problem for effective enforcement in other countries, notably Russia. The threshold for criminal violations should be clear and it should be a relatively low standard (e.g., harm caused at a level equal to 50 times the minimum wage)—Kazakhstan needs to fix this provision. IIPA understands that Article 192(4) in the Criminal Code provides police with *ex officio* authority to commence criminal copyright cases, but that it is rarely used. Additional administrative and criminal law amendments have been prepared for adoption but unfortunately, not all of the copyright industries have been consulted to review the drafts. In June 2004, IIPA did provide the government of Kazakhstan with “model” enforcement provisions; IIPA urges the government of Kazakhstan to use the IIPA draft, to consult with local copyright industry representatives, and to adopt the proper enforcement revisions in 2005.

On October 28, 2004, the Government of Kazakhstan sent a package of amendments to the parliament that would revise the Criminal Code and Criminal Procedure Code. The amendments would, if adopted, revise the threshold to commence a criminal case (replacing the “considerable harm” standard with a fixed amount), and it would provide for *ex officio* authority to commence an IPR case. IIPA is cautiously optimistic about these proposals and their passage in 2005.

Under the Administrative Code (Article 129), there are IPR — copyright and neighboring rights — code violations. However, only the Ministry of Justice authorities and not the police are authorized to bring charges for such offenses. This is why the authority to bring IPR administrative cases must be broadened (to the police), and why, in general, the police need *ex officio* authority under the Criminal Code and Criminal Procedures Code.

One example of the ineffectiveness of the criminal enforcement system comes from an “enforcement report” issued by the government of Kazakhstan Economic Crimes agency, in December 2004. According to the report, 140,000 pirate audio and video tapes and CDs were seized in the first 11 months of 2004; the estimated worth of these materials is about 15 million tenge (US\$115,564). In addition, the report noted a total of 20 criminal cases in 2004 (the government reported 68 trademark criminal cases and seven copyright cases in all of 2003; no information was provided about any sentences imposed in these cases). IIPA knows of no criminal convictions with jail sentences imposed in 2004 in the music, film or entertainment industries. The business software association (BSA) reports eight pending cases and four court decisions of reseller software piracy (distributing unlicensed software) in 2004. In these cases: one infringer was ordered to undertake community service; one was fined 100 times the monthly index, a total of US\$706; another was fined (US\$270); and one was handled as an administrative fine of five times the monthly index (and material was confiscated). For a marketplace and population the size of Kazakhstan, these statistics reflect the need to do much more to deter piracy and claim effective criminal enforcement. In October 2003 and August 2004, the copyright industries signed memoranda of understanding with the government of Kazakhstan; there were also training programs in 2004 (BSA participated). In short, the government pledged to the copyright industries to undertake more and better enforcement. These memoranda are goodwill gestures and positive first steps, but nothing more without actual on-the-ground action.

In 2003 (effective May 1, 2003), the Customs Code was completely revised. Unfortunately, the 2003 amendments did not include the necessary *ex officio* authority to seize suspected infringing material at the border as required by the TRIPS Agreement and as is necessary to conduct effective border enforcement. Worse, the 2003 amendments adopted a complicated registration system for copyright rightholders seeking enforcement, which further weakened, not strengthened, border measures. IIPA recommends that this registration system be repealed and that border officials be given clear *ex officio* authority to seize infringing material and to commence their own criminal investigations. The government of Kazakhstan pledged in 2004 that there would be further modernizations of the customs code in 2004, but no changes were adopted.

While the U.S. copyright industries have been sustaining millions of dollars in losses in Kazakhstan, the country received GSP trade benefits of over \$133.6 million in the first 11 months of 2004. In addition, the government of Kazakhstan enjoyed \$74.2 million in FY 2004 for other economic/social reform, law enforcement and democracy programs from the U.S. government. Also, the U.S. government and Kazakh government signed a Trade and Investment Framework Agreement (TIFA) on June 1, 2004 to enhance trade and investment between the two countries. The copyright industries have waited over ten years for effective change to the IPR regime in Kazakhstan; IIPA recommends the withdrawal of GSP benefits to help spur these necessary changes.

IIPA suggests that police and administrative activity is, if used correctly, a very positive first step and that stepped-up seizure and confiscation of illegal copyright materials should be undertaken, as well as the closure of shops and businesses conducting illegal business using the licensing law. As noted, the government reported that only 140,000 IPR copies were seized in (the first 11 months of) 2004. It is estimated that approximately 18.6 million pirate copies of sound recordings alone were sold in 2004—so much more needs to be done by enforcement authorities.

A special IPR department was recently established within the Finance Police (with national authority). In 2003, the Finance Police initiated three criminal raids, resulting in two criminal cases against illegal software resellers. According to a recent initiative, the General Prosecutor's office instructed all regional prosecutors in Kazakhstan and all regional/city departments of the Financial Police to undertake raids against IPR infringers, and to report their results by February 12, 2004. This initiative resulted in five new raids and cases against software pirates that will hopefully result in criminal proceedings. According to the business software industry (BSA), the unofficial statistics indicate 35 criminal cases were initiated in 2004 (under Article 184); an additional 29 criminal cases were initiated for trademark infringements (Article 199).

According to the recording industry (International Federation of the Phonographic Industry, IFPI), the level of music piracy is estimated at about 68%; trade losses for 2004 were estimated at \$23 million. It is estimated by the recording industry that in total 16.2 million cassettes and 10.8 million CDs were sold in Kazakhstan in 2004 and of these, 11.2 million cassettes and 7.4 million CDs were pirated copies. The industry also reported 1,135 raids and the seizure of US\$695,991 worth of pirate material (49,800 CDs, 5,672 DVDs, 105,000 cassettes and 10 recording devices) in 2004 by local enforcement agencies.

Last, there is one known optical disc production facility reported in Kazakhstan at present; it is reported that the plant, with a single operating line, is capable of producing 8.1

million discs per year. The plant does have an IFPI-issued SID code (August 2002), and does provide exemplars (examples) of CDs manufactured at the plant to be used for forensics evidence. However, there is still optical disc regulation in place. The absence of such a system, the lack of overall effective enforcement, and the infrastructure in Kazakhstan, makes it ripe for the movement of other plants into Kazakhstan from neighboring countries, such as Russia or Ukraine.

TAJIKISTAN

The U.S. Trade Representative, in his May 2004 announcement placing Tajikistan on the Watch List said, “Tajikistan’s IPR regime has numerous deficiencies, particularly with respect to copyright protection. Specifically, Tajikistan has not joined the Geneva Phonograms Convention, does not provide IPR protection to foreign sound recordings, and does not explicitly protect pre-existing works or sound recordings . . .” Further the USTR noted that Tajikistan has yet to fulfill all of its intellectual property rights commitments under the 1993 U.S.-Tajikistan Trade Agreement and its IPR enforcement “remains weak.” So, over 10 years after pledging to do so, Tajikistan does not even provide the basic rights or protection for U.S. or other foreign sound recordings, among its many other IPR deficiencies.

Legal reform deficiencies

In July 1993, Tajikistan and the United States signed a bilateral trade agreement detailing mutual obligations to improve the protection and enforcement of intellectual property rights; that agreement entered into force on November 24, 1993. The Tajik Copyright Law was last amended in 1998 (in force on December 17, 1998). Among its deficiencies, the law over-regulates the terms and conditions of authors’ contracts. And, it provides a right of remuneration only for producers of sound recordings for the public performance, broadcasting, or communication of a phonogram to the public by cable. The law should be further amended to provide producers with an exclusive public performance (or making available) right, at a minimum, for digital transmissions. Tajikistan should be encouraged to ratify and then fully implement both the WIPO digital treaties.

Tajikistan is a member of the Berne Convention (2000). As noted, it fails to provide any protection or rights to U.S. or any other sound recordings, and is not a member of the Geneva Phonograms Convention—two obligations of the trade agreement. Nor does the Tajik law clearly provide protection for pre-existing works or sound recordings in its copyright law. There are no known civil *ex parte* search procedures in existence in the Tajik law; these provisions must be adopted and implemented for effective enforcement against end-user pirates, especially software pirates.

Tajikistan needs to amend its criminal code to adopt criminal provisions for IPR violations. The failure to provide this essential remedy is a breach of the bilateral agreement’s obligation to provide “adequate and effective” protection and enforcement. In addition, there is nothing in the criminal code or the criminal procedures code to provide police with the proper *ex officio* authority to commence criminal copyright cases. Also, the customs code must be amended to provide customs officials with *ex officio* authority to seize suspected infringing material at the border as required by the TRIPS Agreement and as is necessary to conduct effective border enforcement. The customs code (last revised in 1995) does make one liable for the transfer of illegal goods, including intellectual property material, through the border. A 2002 resolution (No. 185 of the Cabinet of Ministers) established border control rules for goods, including IPR works, and it implemented a customs registry for IPR works requiring a rightholder to file a statement and set of documents for border enforcement, a cumbersome and ineffective tool.

In short, the Tajik copyright regime does not provide “adequate and effective” enforcement as required by the bilateral trade agreement. The Criminal Code (Article 156) does provide for copyright and neighboring rights sanctions (where there is “significant harm” to the

rightholder). However, there has not been a single criminal IPR case reported. Nor has there been a single case reported under the administrative code; this code, revised in 1999 (Article 158-2) provides levies, fines, and seizure of illegal copyright and neighboring rights material.

On December 10, 2002, the U.S. and Tajik presidents signed a joint statement reaffirming the relationship between the two countries and “recognizing the importance of . . . the rule of law,” as well as pledging to work together on economic and political reforms. IIPA observes that the government of Tajikistan should, in this spirit of cooperation, and as required by its now ten-plus-year-old obligations under the Bilateral Trade Agreement, amend the relevant IPR laws and engage in effective enforcement. The U.S. government and Tajik government signed a Trade and Investment Framework Agreement (TIFA) on June 1, 2004 to enhance trade and investment between the two countries.

According to the recording industry (International Federation of the Phonographic Industry, IFPI), there are currently no known optical media plants in Tajikistan. The level of music piracy is estimated at about 81%; trade losses for 2004 were estimated at \$5 million. It is estimated by the recording industry that in total 7.2 million cassettes and 1.3 million CDs were sold in Tajikistan in 2004 and of these, 5.8 million cassettes and 1.1 million CDs were pirated copies.

TURKMENISTAN

The U.S. Trade Representative, in his May 2004 announcement placing Turkmenistan on the Watch List, noted the many steps that Turkmenistan must take in order to “satisfy all of its IPR obligations under the 1993 U.S.-Turkmenistan Trade Agreement.” In fact, Turkmenistan is not providing any protection or rights to U.S. or other foreign works or sound recordings—over ten years after it agreed to make basic changes in its legal and enforcement regimes and join the relevant treaties.

Legal reform deficiencies

In March 1993, Turkmenistan and the United States signed a bilateral trade agreement detailing mutual obligations to improve the protection and enforcement of intellectual property rights; that agreement entered into force on October 25, 1993. For almost ten years since that time, however, Turkmenistan has done little to modernize its copyright regime or to join any of the relevant treaties as it obligated itself to do in the bilateral agreement. Turkmenistan never adopted a comprehensive and separate copyright and neighboring rights law. In October 1993, Turkmenistan formally incorporated the Soviet-era Civil Code (Chapter IV) into its legal structure. On March 1, 1999, the Civil Code was revised, with extensive amendments pertaining to copyright. As a result, the operational copyright law is the 1961 Civil Code as amended in 1999. The rights and provisions necessary to comply with basic international norms are lacking. A draft Law on Copyright and Neighboring Rights was under consideration several years ago, but was never adopted by the Parliament.

Turkmenistan is neither a member of the Berne Convention nor the Geneva Phonograms Convention, which means that U.S. (and other foreign) works and sound recordings remain completely unprotected. When it does join these treaties, it must also obligate itself to provide protection for pre-existing works and sound recordings. Further, the civil procedure code must be amended to include provisions for civil *ex parte* search procedures; these are necessary to provide effective enforcement against end-user pirates, especially software pirates.

In addition to the necessity to adopt a copyright and neighboring rights law, Turkmenistan must also adopt deterrent sanctions into its copyright regime. Article 153 of the Criminal Code does provide sanctions for copyright and neighboring rights violations, but only in cases of “significant harm” — a threshold that is too high. IIPA knows of no cases to date where the Criminal Code (Article 153) was used against a copyright pirate.

Provisions must also be added into the criminal code to provide police with the proper *ex officio* authority to commence criminal copyright cases. Further, the customs code must be amended to provide customs officials with *ex officio* authority to seize suspected infringing material at the border as required by the WTO TRIPS Agreement, and to conduct effective border enforcement. Last, the Turkmen government should be encouraged to ratify and then fully implement both the WIPO digital treaties.

Turkmenistan, in the absence of these essential provisions and the lack of any police, prosecutorial, judicial or border activity, is clearly not providing “adequate and effective” enforcement as required by the bilateral trade agreement. After adopting the legal reforms, the Turkmen authorities must, at a minimum, commence police raids and seizures, and must act to stop the retail distribution of illegal material through the use of administrative and criminal

sanctions. The music industry reports that illegal musical cassettes produced in neighboring countries, in particular from Uzbekistan, enter Turkmenistan as the result of the very poor border enforcement regime (on both sides of the border). The IFPI reports that there are still no known optical media plants in Turkmenistan.

The U.S. government and Turkmen government signed a Trade and Investment Framework Agreement (TIFA) on June 1, 2004 to enhance trade and investment between the two countries.

According to the recording industry (International Federation of the Phonographic Industry, IFPI), the level of music piracy is estimated at about 85%; trade losses for 2004 were estimated at \$7 million. It is estimated by the recording industry that in total 6.9 million cassettes and 1.7 million CDs were sold in Turkmenistan in 2004 and of these, 5.7 million cassettes and 1.5 million CDs were pirated copies.

UZBEKISTAN

The U.S. Trade Representative, in his May 2004 announcement placing Uzbekistan on the Watch List, noted that Uzbekistan is “out of compliance with its intellectual property commitments under the 1994 U.S.-Uzbekistan Trade Agreement, particularly with respect to copyright protection and enforcement.” In fact, Uzbekistan is neither a member of the Berne Convention nor the Geneva Phonograms Convention and thus does not provide any protection or rights to U.S. or other foreign works or sound recordings—over ten years after it agreed to make basic changes in its law and enforcement regime. The USTR noted that “IPR enforcement remains very weak” in Uzbekistan; IIPA agrees.

Legal reform deficiencies

In November 1993, Uzbekistan and the United States signed a bilateral trade agreement detailing mutual obligations to improve the protection and enforcement of intellectual property rights; that agreement entered into force on January 13, 1994. The Copyright Law of Uzbekistan was overhauled in 1996 (in force, September 17, 1996), and two additional amendments were adopted in 2000. However, with the exception of the two relatively minor changes in 2000, there have not been the thorough revisions to the copyright act or to the relevant enforcement laws that Uzbekistan obligated itself to undertake in the bilateral agreement over ten years ago. The December 2000 amendments, while valuable, did not fix the major deficiencies. In January 2004 new amendments were prepared, and the IIPA and Uzbek government held constructive discussions about needed legal reforms and treaty accessions. Unfortunately, the January 2004 drafts were missing key provisions; for example, the draft did not provide protection for preexisting works and sound recordings. In any case, the January 2004 amendments were never adopted.

Uzbekistan has not acceded to any of the relevant copyright or neighboring rights treaties even after it twice obligated itself to do so. The first instance was in the 1993 bilateral; the second time was in its testimony to the U.S. government during the 2000 GSP hearings, when it said it would join both treaties by no later than the end of 2003. As a result of these ongoing delays (especially with treaty accessions), IIPA recommends the immediate withdrawal of Uzbekistan’s GSP benefits (Uzbekistan enjoyed about \$3 million in GSP benefits in the first 11 months of 2004). To enjoy GSP benefits Uzbekistan must: join the Berne Convention and the Geneva Phonograms Convention; and amend its copyright law to provide protection for preexisting works and sound recordings for a minimum of 50 years (and preferably, 70 years). Uzbekistan was not a signatory to either of the two new WIPO treaties. The Uzbek government should also ratify and fully implement both the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT).

There are other deficiencies in the Copyright Law including: (1) no exclusive public performance (or making available) right for producers of sound recordings, at a minimum for digital transmissions; in lieu the current law provides only a right of remuneration (for the public communication of the recording, broadcasting, or communication to the public by cable); and (2) onerous provisions that over-regulate the terms and conditions of authors’ contracts. The December 2000 amendments did two things: (1) added “copying of a record” to the enumerated rights of producers to fix a glaring deficiency; and (2) added a broad national treatment obligation into the law (Article 56.3), but not a clear point of attachment for all works and sound recordings.

There are no known civil *ex parte* search procedures in the Uzbek law; these must be adopted into the civil procedure code in order to commence actions against end-user pirates, especially software pirates. These are important enforcement tools that the Uzbek government must be encouraged to implement.

Uzbekistan did not amend its criminal code following passage of the 1996 Copyright Act to adopt deterrent penalties for intellectual property violations, in breach of the bilateral agreement's obligation to provide "adequate and effective" protection and enforcement. The Criminal Code (Article 149) does provide for liability for infringement of copyright and patent violations, but does not include neighboring rights violations (i.e., crimes involving the pirating of sound recordings). In any case, the existing penalties are too weak and must be amended to strengthen and broaden the provisions for all copyright and neighboring rights violations. Drafts to amend the criminal code were also circulated in January 2004, but never adopted. The January 2004 draft would have weakened, not strengthened, criminal penalties because: (1) no criminal penalties applied "until one year after administrative penalties are assessed"—providing pirates with a chance to pirate without penalty the first time, and (2) the levels—set at 50 to 100 times the minimum wage—were much too low to be deterrent penalties as needed. IIPA recommends that if this draft is still viable, the first provision be deleted; and the second (50 to 100 times) be raised considerably to at least 500 times the minimum wage.

IIPA recommends that the draft criminal reform also include revisions to the criminal code and criminal procedures code to provide police with the proper *ex officio* authority to commence criminal copyright cases. Further, the customs code must be amended to provide customs officials with *ex officio* authority to seize suspected infringing material at the border, as required by the WTO TRIPS Agreement and as is necessary to conduct effective border enforcement. In January 2004, an Uzbek government proposal was circulated to IIPA for the establishment of a complicated registration system for IPR enforcement at the border; IIPA strongly recommends that this plan be dropped because it will prove counterproductive to effective enforcement.

A 2001 resolution (No. 285 of the Cabinet of Ministers) established a licensing system for the production, reproduction and sale of records, cassettes and CDs, according to which only licensed entities could carry out such activities. However, experience shows that such licensing systems are not effective against the pirate production enterprises, which are common in this region.

The U.S. government and Uzbek government signed a Trade and Investment Framework Agreement (TIFA) on June 1, 2004 to enhance trade and investment between the two countries. In addition, the government of Uzbekistan enjoyed \$50.6 million in FY 2004 for other economic/social reform, law enforcement and democracy programs from the U.S. government.

Yet, even as the U.S. government is promising to enhance trade and investment with Uzbekistan and providing other aid, the Uzbek copyright regime is, at present, among the weakest of all of the countries in the C.I.S. It is not in compliance with the bilateral obligations it made to the United States over ten years ago, and is woefully inadequate as a potential WTO member. After the Uzbek government adopts the necessary legal reforms, including accession to the relevant treaties to protect foreign works and sound recordings, it must then commence police raids and seizures at a minimum, and must act to stop the retail distribution of illegal material through the use of administrative and criminal sanctions.

According to the recording industry (International Federation of the Phonographic Industry, IFPI), the level of music piracy is estimated at about 81%; trade losses for 2004 were estimated at \$31 million. It is estimated by the recording industry that in total 32 million cassettes and 8 million CDs were sold in Uzbekistan in 2004 and of these, 25 million cassettes and 7 million CDs were pirated copies. The recording industry reports that illegal musical cassettes are produced mainly in Uzbekistan, but that illegal CDs are produced in neighboring countries, particularly Russia, and are entering Uzbekistan as a result of poor border enforcement (on both sides of the border). The IFPI reports there are no known optical media plants in Uzbekistan, although the opportunity is there for the startup of pirate CD operations due to the poor enforcement regime.