

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE
2003 SPECIAL 301 REPORT
COMMONWEALTH OF INDEPENDENT STATES
(C.I.S.)

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

This report includes an executive summary containing common issues followed by brief separate reports on the following ten countries² of the Commonwealth of Independent States (C.I.S.):

Armenia
Azerbaijan
Belarus
Georgia
Kazakhstan
Kyrgyz Republic
Republic of Moldova
Tajikistan
Turkmenistan
Uzbekistan

Special 301 recommendation: IIPA recommends that Armenia, Azerbaijan, Belarus, Kazakhstan, Tajikistan, Turkmenistan and Uzbekistan be retained on the Watch List in 2003, and that Georgia, the Kyrgyz Republic and the Republic of Moldova be placed on the Watch List in 2003. IIPA also recommends that the United States government suspend the duty-free trade benefits under the Generalized System of Preferences (“GSP”) of Armenia, Kazakhstan and Uzbekistan based on the petitions IIPA filed as a result of the major shortcomings in the legal regimes of these countries.³ IIPA recommends that the U.S. government block accession to the World Trade Organization of Azerbaijan, Belarus, Kazakhstan, Tajikistan, Turkmenistan and Uzbekistan (as well as Russia and Ukraine as outlined in separate 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 the priorities in these countries is that: (1) the legal regimes are in need of critical reforms to their copyright law, criminal code, customs code, and civil procedure code and administrative code in each country, and in some cases also need regulation of optical media production facilities; (2) accession to key treaties is

¹ For more details on each country’s Special 301 history, see IIPA’s “History” appendix to this filing.

² IIPA filed separate Special 301 reports on 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 In the separate IIPA filings on Russia and Ukraine, we recommend that Russia’s GSP benefits be suspended based on a petition IIPA filed in 2000, and that the U.S. government continue its suspension of Ukraine’s GSP benefits (first suspended in August 2001). Benefits for Belarus are also suspended (since 2000) but for reasons unrelated to intellectual property matters.

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 commercial pirates, much less against smaller-scale operations starting with the need for 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 law, criminal code, customs code, administrative code, civil procedure code (adding *ex parte* search provisions) to provide a comprehensive and effective legal regime, as well as adding provisions to regulate the production and distribution of optical media;
- 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.

Legal Reforms

The legal deficiencies of the ten (of twelve) countries of the C.I.S. covered in this report are discussed here in general terms, and later specific legal reforms are discussed in more detail for each country. (In separate reports, IIPA treats the remaining two countries of the C.I.S. not covered by this report, namely **Russia** and **Ukraine**, where very serious piracy problems confront the copyright industries.)

The legal deficiencies are, in most cases, violations of the bilateral trade agreements signed and ratified by each country, as well as shortcomings in compliance with the World Trade Organization (WTO) TRIPS Agreement, especially the enforcement obligations. Two other problems of particular note in this region need consideration: (1) the growth of optical media production and distribution, particularly in this region by organized criminal syndicates, requires the adoption of legal controls tied to criminal sanctions for violators; and (2) the rise of Internet piracy requires the accession, implementation, and enforcement of the 1996 digital treaties of WIPO—the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT).

Two key reforms—sound recordings and preexisting works/recordings: One of the most glaring legal shortcomings that exist in this region is the lack of protection for foreign sound recordings. Three countries—Tajikistan, Turkmenistan, and Uzbekistan—provide absolutely no protection; two just started in 2002 and 2003 (Belarus and Armenia) and all provide little or no enforcement even where the legal protection exists. The absence of protection (legally or in practice) is a breach of commitments made in bilateral trade agreements eight or even nine years ago. In fact, the obligation was to make “best efforts” to join the Geneva Phonograms Convention and provide adequate and effective protection in most cases by the end of 1993—an obligation that has been flaunted by the delinquency of these countries.

The other legal shortcoming common to the countries in the C.I.S. is the absence of clear protection for preexisting works (before Berne or U.C.C. accession) and sound recordings (before Geneva Phonograms or WTO TRIPS accession). At a minimum, these countries must provide protection for preexisting works and sound recordings reaching back at least 50 years, and preferably 70 years, from the date of their entry into Berne or the WTO TRIPS Agreement. The U.S. copyright law unilaterally provides automatic protection for preexisting foreign works and sound recordings from 1923 to the present for published works—so, reaching back at least 75 years, and lasting for a term of 95 years for works made for hire, or life plus 70 years for natural authors.

Additional legal reforms needed: In addition to providing full legal protection for sound recordings, and protection for preexisting works and sound recordings, the other key legal reforms include:

- Amending the criminal code and criminal procedure code to provide deterrent penalties for copyright and neighboring rights violations; and avoiding “grave harm” or other ambiguous (or high) thresholds that prevent police from commencing criminal investigations;
- Amending the criminal code (or criminal procedure code) to provide police with *ex officio* authority to commence criminal investigations;
- Amending the customs code to provide for clear *ex officio* authority to seize material and commence criminal investigations without awaiting rightholder’s registration or other ministerial delays;
- Amending the administrative code to provide clear remedies for copyright and neighboring rights violations for smaller-scale operations including revoking business licenses for street vendors, kiosks and retail stores for piracy activities;
- Amending the civil procedure code with the addition of *ex parte* search provisions—a remedy required by the WTO TRIPS Agreement for effective enforcement against end-user piracy, especially for the software industry;
- Providing optical media regulations to address (with criminal sanctions) the protection and distribution of optical discs and the equipment and machinery used to produce them.

Introducing the necessary legal infrastructure, including the regulation of optical media production and distribution, is much simpler than attempting to dismantle piratical operations once they are established. In the current environment in the region, replication facilities are easily moved from one territory to another. Today they are found mostly in Russia and Ukraine, and to a lesser degree in Kazakhstan (with one known CD plant); Belarus also has a plant that is currently closed. But at any time, the production facilities could easily move, for example to Georgia, Uzbekistan, or another country given the weak enforcement regimes prevalent in the area. Providing the necessary legal framework, including as a centerpiece effective criminal enforcement, will go a long way toward dissuading this type of movement, or to effectively confronting it when does present itself in any single country.

Civil code reform in the C.I.S.: Comprehensive civil code reform is a process underway in several countries of the C.I.S. (including the Russian Federation and Ukraine). Unfortunately, this activity threatens to seriously undermine whatever effective legal reforms have been adopted in the past ten years to protect copyright material. That’s because anti-copyright forces see the comprehensive legal reform as a way to “re-do” whatever copyright laws have been

adopted. They propose to load up civil code “reform” with crippling IPR provisions.⁴ If successful, new IPR provisions would be added on top of the existing copyright laws resulting in confusing copyright provisions inconsistent with Berne, WTO TRIPS, and the bilateral agreements, and inconsistent and weaker than the more fully developed national copyright laws. These efforts to revise the civil codes in this manner should be opposed.

In 1996, the C.I.S. Interparliamentary Assembly in St. Petersburg adopted a so-called Model Civil Code for the countries of the C.I.S. Detailed provisions on copyright and neighboring rights were included that were contradictory to existing international standards of protection for copyrights.

In Russia in 2001 and again in 2002, drafts of the Civil Code reform were circulated. These drafts included IPR provisions completely incompatible with the bilateral trade agreement, the Berne Convention, and WTO TRIPS. Fortunately, these efforts failed, but they are likely to be rekindled in 2003.

In Ukraine in December 2001, a new draft of Chapter IV of the Civil Code was proposed—reduced to 14 articles. While this proposal (not yet adopted) was an improvement over earlier drafts, even the 14 articles contained references to 90 other laws. If adopted, this civil code section on IPR would create a patchwork of protection and refer to other laws that ultimately will themselves be amended—all in all resulting in confusion and a weakening of the existing IPR regime.

IIPA continues to urge that the civil code should not be adopted in Russia, Ukraine or any of the other countries of the C.I.S. and certainly not in a manner that would in any way weaken the copyright law or its enforcement. Thus, each country of the C.I.S. should enact separate copyright, customs, and criminal provisions and procedures, rather than build on the foundation of the Soviet-era civil codes.

Copyright law reforms: The following is a chart of the passage of major revisions to copyright laws in each of the countries of the C.I.S.:

Armenia: May 13, 1996; effective June 6, 1996; amended December 8, 1999; effective February 12, 2000; amended September 25, 2002; effective November 10, 2002;

Azerbaijan: June 5, 1996; effective October 23, 1996;

Belarus: May 16, 1996; effective June 18, 1996; amended August 11, 1998; effective August 19, 1998;

Georgia: Civil Code in force on November 25, 1997; copyright law adopted June 22, 1999; effective August 16, 1999;

Kazakhstan: June 10, 1996; effective June 12, 1996;

Kyrgyz Republic: January 14, 1998; effective January 22, 1998;

⁴Prior to the breakup of the Soviet Union, the text of the law of the U.S.S.R. (1961) “Fundamentals of Civil Legislation” was the governing copyright law throughout the Union. Based on the “Fundamentals,” each of the republics adopted in their own civil code a separate chapter for copyright protection. The main features of these civil codes were: a 25-year term of protection, no protection for producers of sound recordings or performers, and broad free use provisions. The Supreme Soviet of the U.S.S.R. adopted amendments to the Fundamentals in May 1991, but they did not become effective because of the dissolution of the U.S.S.R. The 1991 amendments entered into force in the Russian Federation on August 3, 1992 by special decree. Several of the republics still treat the old civil codes as in force though it is not known if any countries explicitly treat the 1991 amendments drafted by the former U.S.S.R. as effective within their territories.

Republic of Moldova: November 23, 1994; effective May 2, 1995; amended May 28, 1998; amended July 25, 2002; effective September 19, 2002;
Russian Federation: July 9, 1993, effective August 3, 1993; amended July 19, 1995;
Tajikistan: November 13, 1998; effective December 17, 1998;
Ukraine: December 23, 1993, effective February 23, 1994; amended July 11, 2001, effective September 5, 2001;
Uzbekistan: August 30, 1996; effective September 17, 1996.

Turkmenistan has, for over ten years, been in the process of drafting new copyright legislation, so far without success. Until it is adopted, the Civil Code (Chapter IV, 1961) from the former Soviet era is still the operational law there. This is a very obsolete law that needs modernization.

Copyright Piracy and Enforcement

In almost all cases, even where legal reforms have been adopted, there is virtually no on-the-ground enforcement. That is, there are neither effective civil, administrative, criminal, nor border enforcement measures taking place. In a few countries, there are reports of sporadic police activity at the street level and minimal border activity, but little else. With the growth of organized criminal syndicates in this region, the countries must adopt effective criminal enforcement regimes to combat this piracy by going beyond raids and seizures to the imposition of criminal penalties. Also, effective border enforcement is critical to cut off and isolate the activity to particular territories.

Instead, the lack of an effective enforcement regime has resulted in the countries in this region becoming a haven for the production and distribution of pirated material, including optical media material consisting of music CDs, CD-ROMs containing business and entertainment software, and DVDs containing audiovisual material. The organized criminal enterprises operating within the region are mainly running the production and distribution apparatus. This is not only hampering the development of legal markets in the countries of the C.I.S., hurting domestic authors, musicians, publishers, producers, software developers and the like, but is spreading and thus doing significant harm to other legitimate markets in neighboring countries in Eastern and Central Europe. The combination of the failures in the legal regime, plus a total enforcement breakdown, especially poor border enforcement, acts as a bar to the entry of any legitimate copyright industries into the local markets; in addition, these are WTO TRIPS deficiencies.

As a starting point police and prosecutors must commence raids and seizures; then they have to bring criminal actions and judges must impose criminal sanctions. Second, effective border enforcement must be implemented to prevent the widespread flow of material, including the optical media production facilities and product, throughout the region or into territories beyond the region.

Compliance with Bilateral Trade Agreements

It is critical that the U.S. government insist that each of these countries cure current violations in the bilateral trade agreements that, when adopted in the early 1990s, provided the then-minimal international standards for IPR protection and enforcement, pre-TRIPS. There is no excuse why for almost ten years these countries have not been providing basic (or any)

protections for American works and sound recordings while the countries enjoy Normal Trade Relations (NTR) with the U.S.

History of trade agreements: In 1990, the United States and the Soviet Union signed a far-reaching bilateral trade agreement including extensive intellectual property rights obligations. These obligations included the enactment and enforcement of a (pre-TRIPS Agreement) modern copyright regime. As a result of the tumultuous events of August 1991, the 1990 U.S.-U.S.S.R. Trade Agreement, which required the U.S.S.R. to adopt a Berne-compatible copyright law by December 31, 1992, never entered into force because the U.S.S.R. did not implement it before it dissolved. The U.S. government determined that each country of the C.I.S. could (re)sign the 1990 U.S.-U.S.S.R. Trade Agreement with only minor technical amendments, including new deadlines to meet the agreement's obligations, and a statement from each country of the C.I.S. acknowledging its succession to the Soviet Union's Universal Copyright Convention obligation, dating from May 27, 1973. This latter obligation secured protection for pre-existing works (but not sound recordings) that were created on or after May 27, 1973.

All 12 of the former republics of the Soviet Union signed these agreements (see dates below). Once each agreement was signed, it was agreed it would enter into force upon an exchange of diplomatic notes between the U.S. and each new country. At such time that country would be eligible for "Most Favored Nation" (MFN; now known as "Normal Trade Relations") status. All of the countries have now put the agreements into force, and these agreements have been regularly renewed. Once in force, each country agreed to make its "best efforts" to enact all of the IPR components of the trade agreement, in the case of every country but the Russian Federation, by December 31, 1993. The Russian Federation agreed to complete its obligations by December 31, 1992.

The bilateral trade agreements were signed and entered into force in each country on the following dates:

Armenia: Signed April 2, 1992; entry into force on April 7, 1992;
Azerbaijan: Signed April 12, 1993; entry into force on April 21, 1995;
Belarus: Exchange of letters January 6 and February 16, 1993; entry into force on February 16, 1993;
Georgia: Signed March 1, 1993; entry into force on August 13, 1993;
Kazakhstan: Signed May 19, 1992; entry into force on February 18, 1993;
Kyrgyz Republic: Signed May 8, 1992; entry into force on August 21, 1992;
Republic of Moldova: Signed June 19, 1992; entry into force on July 2, 1992;
Russian Federation: Signed June 1, 1990; entry into force on June 17, 1992;
Tajikistan: Signed July 1, 1993; entry into force on November 24, 1993;
Turkmenistan: Signed March 23, 1993; entry into force on October 25, 1993;
Ukraine: Signed May 6, 1992; entry into force on June 23, 1992;
Uzbekistan: Signed November 5, 1993; entry into force on January 13, 1994.

The obligations of these identical bilateral trade agreements (Article VIII of each agreement and an accompanying Side Letter on IPR) include:

- (1) Joining the Berne Convention (Paris Act);
- (2) Providing protection for sound recordings, including a right of reproduction, distribution (and importation), and a commercial rental right;
- (3) Providing a point of attachment for foreign (American) sound recordings and joining ("best efforts") the Geneva Phonograms Convention;

- (4) Providing full retroactivity—that is, protecting preexisting works (per Article 18 of Berne; WTO TRIPS required equivalent sound recording protection);
- (5) Protecting computer programs and databases (as “literary works” consistent with Berne, and now TRIPS);
- (6) Providing adequate and effective protection and enforcement (which was understood to include deterrent civil and criminal penalties, as well as border measures); and
- (7) Establishing a working group with each country to monitor the continuing progress of copyright and other IP protection and enforcement.

Berne Convention: Ten of twelve of the countries in the C.I.S. are members of the Berne Convention. They are: the Russian Federation (1995), Ukraine (1995), Georgia (1995), the Republic of Moldova (1995), Belarus (1997), Kazakhstan (1999), Azerbaijan (1999), the Kyrgyz Republic (1999), Tajikistan (2000), and Armenia (2000). This means that two countries, Turkmenistan and Uzbekistan, are in breach of this trade agreement obligation, and are not providing any protection for works in their countries.

Sound recording protection (Geneva Phonograms Convention, WTO TRIPS Agreement and WPPT): Nine of twelve countries in the C.I.S. provide protection for American or other foreign sound recordings by virtue of their membership in the Geneva Phonograms Convention, or by their membership in the World Trade Organization (WTO TRIPS Agreement). Seven of twelve countries are members of the Geneva Phonograms Convention: the Russian Federation (1995), Ukraine (2000), Moldova (2000), Kazakhstan (2001), Azerbaijan (2001), Kyrgyz Republic (October 2002), and Armenia (January 31, 2003).

Georgia uses its WTO membership (1999) to provide a point of attachment for foreign sound recordings since they are not Geneva Phonograms members. Kyrgyz Republic (1998), Moldova (2001), and Armenia (February 5, 2003) are also WTO members and can (and until Geneva membership did) use that as a point of attachment as well.

Belarus is a WPPT member and can use that as a point of attachment.

So, three countries still provide no protection for foreign sound recordings nine years after they obligated themselves to do so: Tajikistan, Turkmenistan, and Uzbekistan.

All the countries are encouraged to meet their bilateral trade agreement obligation and to join the Geneva Phonograms Convention. The five that have not done so—Belarus, Georgia, Tajikistan, Turkmenistan, and Uzbekistan—are encouraged to accede.

Pre-existing works and sound recordings: The Russian Federation explicitly *does not* provide protection for pre-existing works or sound recordings; as it pertains to works, this provision is in breach of the clear obligation in the bilateral agreement.⁵ This lack of protection

⁵The issue of protection for pre-existing works, at least back to 1973, was additionally required in every country in a special bilateral provision (not found in the Soviet agreement). That provision obligated each country to serve as a successor state to the Soviet Union’s obligations under the Universal Copyright Convention (U.C.C.). Thus a gap in protection for American works in each of the (non-Berne) countries of the C.I.S. was avoided, from May 27, 1973 to the present. This is because the Soviet Union became a party to the 1952 text of the Universal Copyright Convention on May 27, 1973. UNESCO (secretariat of the U.C.C.) reportedly treats all of the former republics of the U.S.S.R. as successors to the Soviet Union and confirms every republic’s adherence to the U.C.C. from that date. Only five countries—the Russian Federation, Belarus, Kazakhstan, Tajikistan and Ukraine—formally confirmed their membership in that convention, however. At the time of the signing of the bilateral agreements, the U.S. government requested that each country send such a confirmation letter to UNESCO to avoid any confusion about this status.

for pre-existing works and sound recordings is also a violation of Berne (Article 18 and the national treatment obligations) and the WTO TRIPS Agreement (Article 14.6 for sound recordings and Article 9 for works). The draft Russian copyright law amendments circulated in 2002 are intended to fix this problem, but they have yet to be enacted.

This absence of protection was also an issue in Ukraine until the passage in 2001 of copyright law amendments aimed at fixing the bar on such protection for pre-existing works and sound recordings. In fact, the provision in the Ukraine law of 1993 was nearly identical to that found in the Russian law. The Ukraine drafters clearly intended to provide protection for pre-existing works and sound recordings that are less than 50 years old. Although the provisions are a bit unclear it is likely officials and courts will properly enforce them.

Belarussian experts claim that their law probably does provide protection for pre-existing works, though they acknowledge it is less clear with respect to sound recordings. For the other nine countries of the C.I.S. it is unclear what, if any, protection they do or do not provide for pre-existing works and sound recordings. Some of the countries (Kyrgyz Republic) probably did intend to provide such protection but the provisions in their law are unclear. But, many of the countries of the C.I.S. are likely not providing protection for pre-existing works and sound recordings. Given the lack of judicial expertise on IPR matters, IIPA encourages all of the countries in this region to clarify by copyright law amendment, by regulation, or by some other administrative means, the full nature and extent of protection for pre-existing works and sound recordings so that they all meet their bilateral agreement and WTO TRIPS obligations on this matter.

This problem of protection for pre-existing material, especially for sound recordings, is a serious regional problem because such protection has only in the past few years been provided in neighboring countries such as Ukraine, Poland and the Czech Republic, thereby creating a regional haven for the production and widespread distribution of back-catalog material. That back-catalog material competes with any new product and prevents the development of legitimate markets for musical recordings.

Computer programs and databases: Some form of explicit copyright protection for computer programs and databases is provided in every country except Turkmenistan. However, almost no country in the C.I.S. provides civil *ex officio* authority to the police to commence raids necessary for effective enforcement against end-user piracy. And, although required by the WTO TRIPS Agreement, the availability of civil *ex parte* search provisions is unclear in virtually all of these countries.

Criminal code: Only a few of the countries have amended their criminal code to incorporate criminal provisions for IPR violations. In the cases where criminal codes have been adopted, the next step must be the actual imposition of criminal penalties especially aimed at the organized syndicates. This latter step has not been taken in any of these countries.

Customs code: Most of these countries have not adopted the necessary customs code revisions to provide *ex officio* authority to properly seize material at the border. At present, border measures are probably the weakest part of enforcement in this region. This is the step that is the most needed to limit the scope of the problem from a regional to a country-specific problem.

Enforcement: None of the countries is providing “adequate and effective” enforcement on the ground as required by the bilateral agreements or the WTO TRIPS Agreement. There

must be real engagement by the police, prosecutors, judges, and customs officials to effectively enforce copyright and neighboring rights in this region to stop commercial piracy.

Working groups: Last, working groups consisting of representatives of the governments of United States and each of these countries should meet periodically to exchange information on the progress of IPR reforms and to trade specific information on enforcement. This is especially important because many of the countries of the C.I.S. do not have politically strong agencies for the adoption and implementation of IPR laws; perhaps such working group meetings could help spur the governments of the C.I.S. into better IPR protection and enforcement activity.

WTO TRIPS Compliance and WCT and WPPT Accession

The critical multilateral legal reforms that entered into force after the bilateral trade agreements (adopted in the early 1990s) was the World Trade Organization TRIPS Agreement and the 1996 digital WIPO treaties—the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT).

World Trade Organization TRIPS Agreement: Only four of twelve countries in the C.I.S. are members of the World Trade Organization, and are thus bound by the WTO TRIPS Agreement's substantive and enforcement obligations. They are the Kyrgyz Republic (December 20, 1998), Georgia (June 14, 2000), Moldova (July 26, 2001) and Armenia (February 5, 2003).

Seven other countries in the C.I.S. are in the process of acceding to the WTO. Working parties have been established for Azerbaijan, Belarus, Kazakhstan, the Russian Federation, Tajikistan, Ukraine, and Uzbekistan.

The U.S. Congress has made it clear in the legislation implementing the Uruguay Round that the administration should work to encourage “acceleration” of WTO TRIPS compliance by existing and acceding WTO members. Consistent U.S. policy requires any nation newly acceding to WTO to be in full compliance with TRIPS at the time of accession. In IIPA's view, the TRIPS obligations merely spell out in greater detail the C.I.S. countries' *existing* bilateral obligations under the bilateral trade agreements with the U.S. to provide “adequate and effective protection and enforcement” of intellectual property rights. These obligations would be further bolstered by accession and implementation of the WIPO digital treaties to effectively combat Internet and other digital piracy.

WCT and WPPT: Five countries are members of the new WIPO Copyright Treaty (WCT). They are: Moldova (March 1998), Belarus (July 1998), the Kyrgyz Republic (September 1998), Georgia (July 2001), and Ukraine (November 2001).

The same five countries are also members of the WIPO Performances and Phonograms Treaty (WPPT). They are: Moldova (March 1998), Belarus (July 1998), Georgia (July 2001), Ukraine (November 2001) and the Kyrgyz Republic (August 15, 2002). The United States deposited its instrument of accession to the WCT and WPPT in September 1999. On March 6, 2002 the WCT entered into force, and on May 20, 2002 the WPPT entered into force.

In December 2000, the Interparliamentary Assembly of the member states of the C.I.S. agreed in a resolution adopted in St. Petersburg that for those countries that have not yet done

so “to recommend to the parliaments and governments “...to accede to the WCT and WPPT, and to modernize copyright and neighboring rights laws taking into account the two digital treaties.” The assembly even adopted recommendations on the specific definitions and scope of new rights that need to be adopted by the states of the C.I.S. to properly implement the digital treaties. The resolution and recommendations were agreed to by all twelve member states of the C.I.S., working with officials from the W.I.P.O. This was an important step within the C.I.S. and one that should be encouraged by the U.S. government because of the rise of Internet and other digital piracy.

Other multilateral agreements: Armenia and the Russian Federation are members of the Brussels Satellite Convention. The Republic of Moldova (1995), Ukraine (June 12, 2002) and Armenia (January 31, 2003) are members of the Rome Convention.

In September 1993, the C.I.S. Treaty on Cooperation in Copyright and Neighboring Rights was signed. This obligated member states to confirm their membership in the Universal Copyright Convention (U.C.C., 1952 text); to mutually protect their works on this basis; and to develop national legislation at the level of the Berne, Geneva Phonograms, and Rome conventions. This treaty does not provide for the creation of any intergovernmental executive body.

Generalized System of Preferences (GSP)

As a result of their MFN/NTR status, all of the countries are eligible to be beneficiaries under the Generalized System of Preferences (GSP) program, a U.S. trade program that offers preferential trade benefits to eligible countries (duty-free tariffs on certain imports). Part of the discretionary criteria of the GSP program is that the country provide “adequate and effective protection of intellectual property rights...” which includes copyright protection and enforcement. Georgia was added to the list of countries eligible for GSP benefits only in 2001.

In 2001 (the latest full year of statistics), the countries of the C.I.S. received the following preferential trade benefits under GSP:

	<u>\$ Amt. GSP duty-free</u>	<u>% of U.S. imports from GSP</u>
Armenia	\$14,893,000	45%
Azerbaijan	\$0	0
Belarus	Suspended in 2000	—
Georgia	\$2,080,000	6%
Kazakhstan	\$214,083,000	61%
Kyrgyz	\$263,000	8%
Moldova	\$145,000	Less than 1%
Russia	\$378,007,000	6%
Tajikistan	\$0	0
Turkmenistan	\$0	0
Ukraine	\$37,849,000 (before suspended)	6%
Uzbekistan	\$2,529,000	4.7%

On June 16, 1999, IIPA submitted a request to the United States government in accordance with U.S. law that the eligibility of Armenia, Belarus, Kazakhstan, the Kyrgyz Republic, the Republic of Moldova, Ukraine, and Uzbekistan as a GSP beneficiary developing

country be reviewed, and that GSP benefits be suspended or withdrawn, in whole or in part, if requisite improvements were not made by each of these countries to remedy the deficiencies which adversely affect U.S. copyright owners.

On February 14, 2000 the United States government accepted the IIPA petitions for: Armenia, Kazakhstan, the Republic of Moldova, Ukraine, and Uzbekistan. On May 12, 2000, the United States government held public hearings on the GSP petitions regarding these five countries; the IIPA testified, as did representatives of most of the governments of the five countries.

As a result of cooperation with the government of Moldova on legal reforms following the filing of the IIPA petition, on October 23, 2000, the IIPA requested that its petition be withdrawn. On January 10, 2001, the United States government accepted that action and the GSP review of the Republic of Moldova was formally ended.

At the other end of the spectrum, Ukraine completely failed to comply with the Joint Action Plan signed by President Kuchma and then-President Clinton in June 2000 to address the optical media piracy problems in Ukraine, and to adopt an effective regime of copyright protection and enforcement. As a result of this failure, the U.S. government announced the complete suspension of trade benefits to Ukraine under the General System of Preferences program; that decision was announced on August 10, 2001, effective August 24, 2001. In addition, trade sanctions were imposed against Ukraine by the U.S. government, effective January 23, 2002. These sanctions and the withdrawal of GSP benefits remain in effect.

In 2002 the IIPA sought to work directly with the governments of Kazakhstan and Uzbekistan to resolve the legal reform deficiencies that resulted in the filing of the IIPA's GSP petition. Unfortunately, neither country made the legal reforms necessary to fix the deficiencies detailed in this report and in the GSP proceedings that might result in the withdrawal of those petitions. It is hoped that in 2003 these countries will adopt the necessary legal and enforcement reforms to resolve these issues. In the meantime, the United States government has not decided whether to withdraw or suspend GSP benefits in Armenia (now, effective February 5, 2003, a WTO TRIPS member), Kazakhstan and/or Uzbekistan.

In 2000 the United States government withdrew GSP benefits from Belarus, but for reasons unrelated to intellectual property matters.

GEORGIA

Legal Reforms and Treaty Adherence

Georgia is a member of the World Trade Organization and the WIPO digital treaties. While it has made a number of important legal reforms in the past several years, it is still not providing the type of effective enforcement necessary to stem the copyright piracy there, or to be in compliance with the enforcement obligations of the WTO TRIPS Agreement. As the U.S. Trade Representative noted after an out-of-cycle review (completed in February 2002), “the U.S. government is concerned with key gaps in the legal regime...” and noted in particular “the lack of *ex officio* authority (the authority to undertake action without a rightholder’s complaint) for customs and criminal authorities, as well as the lack of civil *ex parte* search and seizure procedures conducted without notice to the alleged infringers.” One year after this report by the U.S. government, Georgia has still not corrected these deficiencies and thus has not improved its enforcement regime.

History of legal reforms: In March 1993, Georgia and the United States signed a bilateral trade agreement detailing mutual obligations to improve the protection and enforcement of intellectual property rights (details of the 1993 Trade Agreement are provided in the C.I.S. introductory section, above). That agreement entered into force on August 13, 1993. Until adoption of a separate (specialized) copyright law in 1999, the operating law in Georgia was the Civil Code of Georgia (Chapter IV), which entered into force on November 25, 1997. On June 22, 1999, Georgia adopted the Law on Copyright and Neighboring Rights; it came into force on August 16, 1999.

Georgia adhered to the Berne Convention, effective May 16, 1995. However, Georgia is not a member of the Geneva Phonograms Convention, eight years after it pledged to make “best efforts” to accede to that treaty in the trade agreement.

Georgia is a member of the World Trade Organization (WTO) effective June 14, 2000. It is therefore obligated to be in full compliance with the WTO TRIPS Agreement, including substantive provisions as well as the important enforcement obligations. On June 14, 2000, by its adherence to the WTO, Georgia finally provided a point of attachment for American and other foreign sound recordings. Georgia is also a member of the two WIPO digital treaties, the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT), having deposited its instrument of ratification on July 4, 2001.

In 2001 Georgia was added to the list of beneficiary countries under the Generalized System of Preferences (GSP) program by the U.S. government. One key component of the discretionary criteria of the GSP program under U.S. law is that the country provide “adequate and effective protection of intellectual property rights...” which includes copyright protection and enforcement. Georgia must improve its levels of protection and enforcement of copyright and neighboring rights in order to enjoy these GSP benefits.

Legal reform deficiencies: The Georgian Copyright Law of 1999 does not provide protection for pre-existing works as required by the clear obligation in its bilateral trade agreement, nor does it provide such protection for pre-existing sound recordings. However, as required by the WTO TRIPS Agreement (Article 14.6 for sound recordings, and Article 9 for

works), Georgia is obligated to provide protection for pre-existing works and sound recordings that are less than 50 years old. It is presumed that since international treaties are granted supremacy under Georgian law that the WTO TRIPS obligations are self-executing, and therefore this protection is afforded works and sound recordings. The Georgian copyright law should be amended to clearly provide for protection for pre-existing works and sound recordings for a minimum of 50 years (and preferably 70 years—the U.S. provides it for at least 75 years for Georgian works and recordings) to meet Georgia's bilateral and multilateral obligations, and in order to create an environment for the development of the copyright industries there.

Georgia does provide explicit copyright protection for computer programs and databases as required under the bilateral trade agreement.

There are no known civil *ex parte* search procedures under Georgian law; these are needed to provide for effective enforcement against end-user pirates, especially software pirates.

The Georgian copyright law needs to be amended to fully implement the two WIPO digital treaties to fight against Internet and other forms of digital piracy, and to create an environment for the future growth of e-commerce.

In 1999, Georgia adopted Criminal Code amendments; these amendments came into force on July 1, 2000. Article 189 applies to copyright and neighboring rights violations. The penalties range from fines of between 300 to 500 times the minimum wage, or obligatory social labor for up to two years, for illegal reproduction, importation or export. They increase up to 1,000 times the minimum wage and the same temporary limitation on freedom, for the unauthorized "use" or "release" (including first publication, i.e., moral rights violations) of copyright and neighboring rights material. For repeat offenders, the temporary limitation of freedom increases up to three years; there is a jail sentence of up to one year.

There are no known provisions in the criminal code or the criminal procedures code to provide police with the proper *ex officio* authority to commence criminal copyright cases. This is an essential tool for copyright enforcement and an obligation to meet the WTO TRIPS standards of adequate and effective enforcement.

Customs code amendments were adopted in 1999. IIPA has never been provided with a copy of those amendments, but they reportedly did not 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. The 1999 amendments explicitly provided for border enforcement measures relevant to intellectual property violations. Customs officials are authorized to seize suspected IP materials and hold them until a court renders a decision; however, one provision that significantly weakens the effectiveness of these provisions requires that an application be submitted by the rightholder before such action can commence.

Georgia has, for years, been considering major revisions to its civil code. One such proposal, offered a few years ago, would have incorporated an extensively reworked copyright law into the civil code, inconsistent with its international treaty obligations including Berne and the WTO TRIPS Agreement. That effort, opposed by the European Union, the U.S. government, the WIPO, and the IIPA, seems now to have been abandoned, which is fortunate.

Copyright Enforcement

On April 30, 2001, U.S. Trade Representative Zoellick announced that although not listed on the Watch or Priority Watch Lists, Georgia would be the subject of an out-of-cycle review in 2001 by the U.S. government for enforcement and legal reform deficiencies. In the completion of that review on February 12, 2002, the U.S. government voiced its ongoing concerns about the lack of effective enforcement in Georgia, and laid out the details of these concerns. The government of Georgia did not correct these deficiencies in 2002. As a result, the IIPA strongly encourages placement of Georgia on the Watch List.

Thus, Georgia is currently not providing “adequate and effective” enforcement as required by the WTO TRIPS Agreement obligations found in Articles 41 through 61, and as required by the bilateral trade agreement.

The copyright industries report that there is still no meaningful police, prosecutorial, judicial or customs activity to stop retail distribution, much less organized criminal enterprises producing and distributing material in Georgia and trafficking that material in neighboring countries. The copyright industries did not report a single case in Georgia in 2002 in which criminal penalties were levied.

The administrative sanctions provide penalties only for the reproduction (replication) of illegal products, but not for the distribution of these products. IIPA understands that these provisions do cover violations of both copyright and neighboring rights. However, because the administrative sanctions are limited to reproduction only, they are, in effect, never used. There was not a single reported case in 2002. The administrative codes should be revised and used so that administrative remedies are utilized to close retail (including kiosk) establishments by removing business licenses from pirate shops.

As in other countries in the region, border enforcement is very weak in Georgia. This is allowing illegal copies, especially of musical material produced in neighboring countries, to freely cross the borders for sale in Georgia and other countries. The lack of any effective border enforcement, in particular, is causing significant harm to the copyright industries.

In addition, as in other countries in the region, the environment is ripe for illegal optical media production facilities as well as other organized criminal production facilities. According to the recording industry (International Federation of the Phonographic Industry, IFPI), there are no known optical media plants yet in Georgia. The reports that in the near future some of the illegal Ukraine CD plants may move their operations to Georgia are very troubling. Most of the music piracy in Georgia is currently in the form of audiocassettes. The recording industry estimates that trade losses for foreign rightholders in Georgia in 2002 were \$8 million; the piracy rate was estimated at 86%. In 2002, about 900,000 CDs and 5.2 million cassettes were sold in Georgia; of these, 800,000 CDs and 4.6 million cassettes were pirated copies.

The Business Software Alliance (BSA) estimates that foreign trade losses due to software piracy in the Commonwealth of Independent States (C.I.S.) other than Russia were \$58.4 million in 2001 (up from \$29.7 million in 2000); the level of piracy was estimated to be 87% that year. The final figures for 2002 are not yet available.

There are no official piracy or loss figures for the motion picture, entertainment software, or book industries.