

# COMMONWEALTH OF INDEPENDENT STATES

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

### 2013 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

IIPA recommends that the following five Commonwealth of Independent States (CIS) countries – Belarus, Kazakhstan, Tajikistan, Turkmenistan and Uzbekistan – should be placed on the Watch List for 2013. All but Kazakhstan were on the Watch List in 2012; Kazakhstan was not listed in 2012, and we believe it should be elevated to the Watch List for 2013. All five countries are failing to comply with existing copyright treaty or trade agreement bilateral and/or multilateral obligations to provide adequate and effective protection and enforcement. In each country report we specify the details of the deficiencies.

Each of the five countries, of course, has its own copyright laws, treaty accessions and ratifications, and bilateral trade agreement obligations with the United States, and its own variances in other issues. However, IIPA has combined the reports of these five countries into a single report because the overwhelming majority of issues in each country are based upon similar bilateral trade agreements (negotiated and signed separately) with the United States in the mid-1990s, and, they have similar legal reform and enforcement scenarios. The U.S. trade agreements conferred Normal Trade Relations (then known as “Most Favored Nation”) on each country in exchange for a series of legal reforms, treaty accessions, and ratifications which have, to date, not been met.

The details of the recommended legal reforms, treaty accessions and ratifications, and enforcement obligations for each of the five countries – **Belarus, Kazakhstan, Tajikistan, Turkmenistan and Uzbekistan** – are set out below in the individual country reports.



# BELARUS

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2013 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that Belarus remain on the Watch List in 2013.

**Priority actions requested to be taken in Belarus in 2013 – Key Legal Reforms:** In 2011, Belarus completely revised its Copyright Law, and (according to an unofficial translation of the law) fixed key provisions including those pertaining to anti-circumvention and copyright management information. Still, there are a number of serious legal deficiencies that are preventing effective enforcement in Belarus. One serious problem is a provision in the 2011 law: Belarus—perhaps inadvertently, subjected the producers’ and performers’ rights of communication to a compulsory license (e.g. a right of remuneration rather than an exclusive right). While rights of remuneration are acceptable—if not favored—with respect to certain communications, such as traditional over-the-air broadcasting or performances of music in establishments, this is not the case with respect to transmissions that are effectively distributions of music to the public. Under the new Copyright Law in Belarus, the right of communication to the public includes the making available right; thus, the right of remuneration operates as a compulsory license for the distribution of music to the public. This is a violation of Belarus’ obligations under the WIPO Performances and Phonograms Treaty (WPPT) (as well as the right of reproduction under the WTO TRIPS Agreement). IIPA urges the U.S. Government to engage with the Government of Belarus to quickly remedy this problem.

The IIPA recommends the following changes to the Government of Belarus as legal reform priorities:

- Amendments to the Criminal Code to provide criminal penalties for first-time IPR violations. Currently, criminal penalties only apply to IPR violations after there has been an administrative violation and an exhaustion of administrative remedies.
- Amendments to the Criminal Code to: (a) adopt a “significant amount of use criteria” calculated on the basis of the price of legitimate product, instead of the existing too high threshold based on “large-scale damage” for IPR crimes; and, (b) lowering the actual amount of the current threshold (in Article 158) to commence liability, which is now BR12.1 million (US\$1,415).
- Amendments to the Criminal Code (or Criminal Procedure Code) to permit the confiscation and destruction of manufacturing equipment used to produce pirated material.
- Amendments to the Criminal Procedure Code to provide the proper *ex officio* authority for police officials to initiate copyright criminal cases and investigations.
- Amendments to the Administrative Code to provide *ex officio* authority to administrative officials to commence investigations and cases. At present, a statement from a rights holder is required to commence an administrative case. The administrative remedies are applicable for violations of copyright and neighboring rights, including acts of illegal retail sale and distribution.
- Amendments to the Customs Code to grant the proper *ex officio* authority to border officials to seize illegal material and to commence their own investigations and criminal cases.
- Amendments to the Civil Code to provide the proper *ex parte* search provisions for effective enforcement against end-user pirates.

- Amendments to the Copyright Law (2011): (a) to provide an exclusive right of making available to the public for performers and producers of sound recordings (currently a right of remuneration) by amending Article 41(1); (b) subjecting all of the exceptions and limitations to the three-step test of Berne Article 9(2); and (c) limiting the scope of rights (to the public performance right) for state accredited collective management organizations by amending Article 48(2).
- Amendments to the Copyright Law (2011) to provide clear protection for pre-existing works and sound recordings. Belarusian officials have insisted that this protection already exists. While this may be correct, and Article 3 of the 2011 law makes international treaty supersede the copyright and neighboring rights law, Articles 21 (works) and 31 (neighboring rights) covering “public domain” treatment, do not clearly specify how (or what) pre-existing works and recordings are protected. It would be helpful to provide statutory clarification by amendment (or decree) to avoid any confusion on the part of police, prosecutors, and judges tasked with enforcement of these rights.

**Summary of U.S. – Belarus IPR Issues:** In January and February 1993, Belarus and the United States exchanged letters to implement a bilateral Trade Agreement which detailed mutual obligations to improve the protection and enforcement of intellectual property rights. That agreement entered into force on February 16, 1993. It has been nearly 20 years, and still Belarus has not adequately implemented the IPR obligations in that agreement.

In April 2012, the U.S. Trade Representative (USTR) – while retaining Belarus on the Watch List – noted that the U.S. remained “concerned about Belarus’ implementation of the IPR commitments made under the United States-Belarus Trade Relations Agreement of 1993” and that Belarus needed to “improve its copyright legal framework and to fully implement the WIPO Internet Treaties.” The statement additionally noted that although 2011 amendments to the copyright law had been adopted, they would not be put into force absent implementing regulations. The statement further urged Belarus “to provide its enforcement officials with *ex officio* authority to investigate cases, seize infringing goods, and prosecute IPR violations....[and]...provide adequate scope for *ex parte* searches.”

Belarus is a member of all of the relevant IPR treaties, including the Berne Convention (1997), the WIPO Copyright Treaty (WCT) (2002), the WPPT (2002), and the Geneva Phonograms Convention (2003). As noted, Belarus has not adopted basic digital piracy enforcement steps, such as “notice and takedown” procedures.

In the past, IIPA and USTR reported on the troubling problem of optical media production facilities migrating into (and out of) Belarus from neighboring countries; in the past few years, we have had no reports of such cases.

IIPA continues to urge the Government of Belarus to improve its border enforcement – to prevent any optical disc or other hard-copy production plant or equipment from Russia (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.). IIPA is aware of one optical disc plant (opened in 2004) in Belarus. The Vigmoplast optical disc replication plant is operating near Minsk; it has two lines and an estimated plant capacity of seven million discs a year. We understand that it was assigned a source identification (SID) code.

**Legal Reform Deficiencies:** In 1996, Belarus enacted a new law on copyright and neighboring rights; amendments were adopted in 1998. The 1998 amendments were intended to, among other things, partially implement the WIPO “digital” treaties (WCT and WPPT). In 2011, Belarus completely revised its copyright and neighboring rights law (repealing and replacing the 1996 law and the 1998 amendments). It also revised its Civil Code, including those provisions pertaining to intellectual property (copyright). The 2011 Copyright Law does further implement the digital treaties, including covering anti-circumvention devices and services, and the removal or alteration of rights management information (Article 55.2). The remedies for anti-circumvention and rights management information protection include injunctive relief, monetary damages, and seizure of devices. Related Criminal Code provisions (adopted in 2000) apply; these provisions (Article 201) include sanctions of up to five years

imprisonment for repeat offenders of copyright and neighboring rights violations. The new Article 55.2 (in an unofficial translation) does appear to 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 (“any action”), and it protects the “removal or alteration” of rights management information. Already noted are the problems with the performers’/producers’ right of communication to the public.

**Enforcement:** With the exception of some civil remedies in the Copyright Law itself, most of the IPR enforcement provisions in Belarus are found in the penal, administrative and civil codes (and other laws, such as the customs laws). Under Article 56 of the Copyright Law (2011), civil penalties for copyright or neighboring rights violations include injunctive relief, damages (including lost profits), seizure and impoundment of infringing copies, as well as statutory penalties of between 10 and 50,000 times the minimum wage; these remedies also apply, according to Article 56.2 to anti-circumvention and rights management information violations. Belarusian officials point to the Civil Code (1998, amended in 2011) as providing additional remedies for IPR violations.

In general, levels of piracy remain extremely high, and enforcement remains virtually inadequate in Belarus. For example, BSA | The Software Alliance (BSA) reports that in 2011, the software piracy rate in Belarus was 87%, representing a commercial value of unlicensed software of US\$87 million.<sup>1</sup> IIPA continues to recommend a focus on legal reforms, as well as on enforcement, including steps against digital piracy, and against hard copy piracy – running raids and seizures, commencing criminal cases against commercial pirates, and using administrative remedies to curtail street piracy.

As Belarus moves to accede to the World Trade Organization, it needs to bring its laws into full compliance with the WTO TRIPS Agreement obligations by adopting the revisions noted above and by improving on-the-ground enforcement.

There are no comprehensive enforcement statistics for 2012. In recent years, the industries reported a trend of raids by the enforcement agencies (a positive step), but these raids were aimed only at small-scale retailers of illegal material. Raids against small-scale retailers have little deterrent effect on the overall piracy problem. Furthermore, the administrative fines imposed, even against these retailers, have generally been insignificant.

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<sup>1</sup>BSA | The Software Alliance’s 2012 Global Software Piracy Study, conducted with two leading independent research firms, IDC and Ipsos Public Affairs, measured the rate and commercial value of unlicensed PC software installed in 2011 in more than 100 markets. In 2011, the software piracy rate in Belarus was 87%, representing a commercial value of unlicensed software of US\$87 million. These statistics follow the methodology compiled in the Ninth Annual BSA and IDC Global Software Piracy Study (May 2012), <http://portal.bsa.org/globalpiracy2011/index.html>. The BSA study covers piracy of all software run on PCs, including desktops, laptops, and ultra-portables, including netbooks. It includes operating systems, systems software such as databases and security packages, business applications, and consumer applications such as games, personal finance, and reference software. It also takes into account free software, open source software, and software as a service if it is paid for. It does not cover software that runs on servers or mainframes and routine device drivers, free downloadable utilities such as screen savers, and software loaded onto tablets or smartphones. The methodology used to calculate this and other piracy numbers are described in IIPA’s 2013 Special 301 submission at <http://www.iipa.com/pdf/2013spec301methodology.pdf>.

# KAZAKHSTAN

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2013 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that Kazakhstan be placed on the Watch List in 2013.

**Priority actions requested to be taken in Kazakhstan in 2013 – Key Legal Reforms:** There are several needed legal reforms – all tied to improving enforcement – that remain in Kazakhstan. IIPA recommends that the Government of Kazakhstan should adopt the following changes:

- **In the Civil Code:** provide proper *ex parte* search provisions for effective enforcement against end-user pirates and, clarify the rules for computing damages in civil infringement cases.
- **In the Copyright Law:** adopt the necessary amendments to fully implement the WIPO digital treaties (the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT)). IIPA has, in the past, provided extensive comments to the government on the necessary treaty compatible amendments – especially focused on improving enforcement against Internet piracy. In fact, “digital piracy” is not defined in any of the IPR laws, which according to some industries, makes enforcement very difficult. At the top of the list of priorities for digital treaty implementation, IIPA recommends that Kazakhstan adopt provisions that protect the use of technical protection measures applied by rights holders to works and sound recordings.
- **In the Customs Code:** provide *ex officio* authority for customs officials to seize illegal material and to commence their own investigations and criminal cases.
- **In the Criminal Code (or Criminal Procedure Code):** provide for the confiscation and destruction of manufacturing equipment used to produce pirated material. Currently, there are provisions permitting the destruction of goods only upon a court order.
- **In the Administrative Code:** provide *ex officio* authority for administrative officials to commence investigations and cases. The Administrative Code (Article 129), as amended in 2005, lowers the threshold for bringing cases. However, only the Ministry of Justice (Copyright Office), and not the police, can bring charges for such offenses. IIPA recommends that the existing police *ex officio* authority be broadened to include administrative violation as well.
- Adopt a proper regulatory scheme, including criminal penalties, for the production and distribution of optical disc material and equipment.

**Summary of U.S. – Kazakhstan IPR Issues:** Kazakhstan has made several notable legal reforms over the past several years, in part, to comply with its commitments under the 1992 U.S.-Kazakhstan Trade Agreement (in force, February 18, 1993). However, as a result of a “moratorium” on government anti-piracy activity, at least one copyright industry reports a noticeable decline in the number of enforcement actions – such as raids by the financial police, the regular police forces, and the Justice Ministry officials – in the past several years. In sum, copyright enforcement is a low priority of prosecutors and law enforcement officials, in addition to being impeded by excessive procedural and bureaucratic delays. Several deficiencies, noted above, remain in the Kazakh legal regime, including a high burden of proof in criminal cases, and an absence of proper resources – which have contributed to weak criminal enforcement.

In 2005, Kazakhstan made significant improvements in its IPR enforcement regime with the adoption of a package of IPR reforms. Additional amendments to the IPR laws were made in 2011, effective January 12, 2012.

However, additional reforms and enforcement activities are necessary to address the growing threat of Internet piracy, the on-going problems with hard copy (optical disc) piracy at street markets (in Almaty, Shymkent and Atyrau, in particular, and elsewhere across Kazakhstan), and, for the software industry, to stop the prevalent sale of pre-installed pirated software on computers. Reports persist that organized crime syndicates are responsible for the high piracy levels; enforcement against this problem can only be addressed with effective criminal measures. The development of a modern IPR regime in Kazakhstan will benefit local as well as foreign rights holders.

The Copyright Law was amended in 1996, and further amended in 2004, 2005, 2007, and 2012. IIPA understands that further revisions to the Customs Code are being contemplated (to provide *ex officio* authority).

The 2004 amendments provided the long-sought explicit protection for pre-existing foreign works and sound recordings. Kazakhstan joined the Berne Convention (1999); the Geneva Phonograms Convention (2001); and, it joined the two WIPO “digital” treaties, the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT), effective in 2004.

**Legal Reform Deficiencies:** The 2004 amendments to the Copyright Law of 1996 provided a flat 50-year window of pre-existing protection for foreign works and sound recordings. Thus, pre-1954 works and sound recordings remain in the public domain. Other changes made in 2004 included laws to facilitate electronic commerce and Internet technology, and to, at least partially, implement the WIPO digital treaties, as well as E.U. directives.

In 2005, (effective November 26, 2005), additional amendments to the Copyright Law of 1996 were adopted, as well as amendments to the Criminal Code, the Criminal Procedure Code, the Civil Code, and the Administrative Code. Perhaps the key amendment in 2005 was the change to Article 184 of the Criminal Code, which repealed the previously undefined “huge damage” threshold for criminal cases and replaced it with a threshold based on the harm done or value of the works or recordings exceeding 100 times the government set monthly wage (or for more serious crimes, 500 times that amount). The 2005 amendments repealed the requirement that there be proof of “financial gain” for criminal charges to rest – this was a major improvement. Other positive steps (also in 2005) were the changes made in the commercial and licensing laws to ban the sale of copyrighted material at street kiosks, requiring instead that this material be sold in retail stores. In December 2007, the Supreme Court issued a decree pertaining to the implementation of certain provisions of the existing Copyright Law. One significant deficiency that should be addressed is the lack of clarity in the current (civil) code about the computation of damages in civil copyright infringement cases.

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. In the recent past, IIPA provided the Government of Kazakhstan with “model” enforcement provisions for its consideration as it moves toward WTO accession reforms. IIPA urges the Government of Kazakhstan to use the IIPA draft and to consult with local copyright industry representatives, to fully adopt these enforcement revisions.

The Customs Code was completely revised in 2003. However, those changes did not include the necessary *ex officio* authority to seize suspected infringing material at the border as required by the WTO TRIPS Agreement, which as noted, is a critical missing element in the enforcement regime against hard-copy piracy. The 2003 amendments also added a complicated registration system for copyright rights holders seeking enforcement at the border, which further weakens the system. IIPA continues to recommend that this registration system be repealed. Kazakhstan, Russia and Belarus joined a Customs Union (in force July 2010). As part of that Customs Union, a complicated duty valuation system based (unfairly) on royalties rather than, as in most countries, on the value of the underlying carrier media (i.e., the discs) went into force. IIPA recommends that Kazakhstan (and the Russia/Belarus Customs Union) repeal these unfair tariff rates to allow for copyright industries to invest in the local market.

**Enforcement:** The Government of Kazakhstan has made strides to improve its enforcement regime, with its noted legislative reforms and with ongoing police activities. However, for the past four years, there has been a

decline in the number of police raids and seizures, and in prosecutorial activity as well. Thus, there were few criminal cases for IPR offenses (an on-going trend, even according to Kazakh government statistics). IIPA knows of no criminal convictions in 2012 in the music, film, or entertainment software industries. The last such notable conviction was in 2008, in a criminal case involving a distributor of pirated software (and pornography). The copyright industries report in recent years that even though there were some additional cases brought to courts, the majority of pirates were not brought to justice due to administrative burdens, prosecutorial inexperience and delays, the low priority given to IPR offenses, and an overall ineffective judicial system. As in recent years, some of the industries report good cooperation with and enforcement activity by the financial police, the internal affairs police, and with the various public prosecutors in some cities in particular (Almaty, Karaganda and Astana).

Enforcement is undertaken by a variety of agencies, including the Copyright Agency within the Ministry of Culture (16 departments) and various enforcement agencies. These agencies have assisted with some raids in recent years, including against software pirates. A special IPR Department was created within the Finance Police (with national authority), but problems interpreting the law, in particular the threshold for criminal and administrative action, have hampered their enforcement activities. In recent years, the copyright industries signed a Memorandum of Understanding with the Government of Kazakhstan. There have also been training programs conducted throughout the country. IIPA continues to encourage the government to act, especially against criminal operations, and to improve its overall enforcement with deterrent penalties.

BSA | The Software Alliance (BSA) reports that there have been, in recent years, reductions in the types of open and notorious piracy that existed about five years ago, because those who sell software or computer equipment and devices now generally understand that there are criminal, administrative, and civil penalties for such activities. However, piracy is now focused on enterprise end-user and Internet piracy. This migration of piracy, especially to the Internet, and, a decrease in criminal enforcement efforts (especially a decline in police and prosecutorial activity last year), have kept piracy rates high. BSA reports that in 2011, the software piracy rate in Kazakhstan was 76%, representing a commercial value of unlicensed software of US\$123 million.<sup>2</sup>

In the past, BSA has reported on some raids undertaken against optical disc (CD) and hard-disc software pirates, and, even one against an Internet pirate, as well as the commencement of civil actions. The Criminal Code (Article 184(2)) has had limited impact in some instances, because it has been applied to the manufacturing and sale of illegal copies, but has not extended to contemplated but not completed sales; additionally, many cases have been dismissed or delayed unnecessarily.

In the past several years, a new form of piracy surfaced pertaining to the sale of pirated stickers of the required certificates of authenticity that must be placed on some IP products, such as software. The Government of Kazakhstan needs to address this form of piracy.

While the U.S. copyright industries have been sustaining millions of dollars in losses in Kazakhstan, more than US\$96.8 million in imports to the U.S. from Kazakhstan enjoyed duty-free treatment under the Generalized System of Preferences (GSP) program during the first eleven months of 2012 (and more than US\$93.3 million in 2011). In April 2006, as a result of improvements in Kazakhstan's IPR legal regime, the U.S. Government concluded

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<sup>2</sup>BSA | The Software Alliance's 2012 Global Software Piracy Study, conducted with two leading independent research firms, IDC and Ipsos Public Affairs, measured the rate and commercial value of unlicensed PC software installed in 2011 in more than 100 markets. In 2011, the software piracy rate in Kazakhstan was 76%, representing a commercial value of unlicensed software of US\$123 million. These statistics follow the methodology compiled in the Ninth Annual BSA and IDC Global Software Piracy Study (May 2012), <http://portal.bsa.org/globalpiracy2011/index.html>. The BSA study covers piracy of all software run on PCs, including desktops, laptops, and ultra-portables, including netbooks. It includes operating systems, systems software such as databases and security packages, business applications, and consumer applications such as games, personal finance, and reference software. It also takes into account free software, open source software, and software as a service if it is paid for. It does not cover software that runs on servers or mainframes and routine device drivers, free downloadable utilities such as screen savers, and software loaded onto tablets or smartphones. The methodology used to calculate this and other piracy numbers are described in IIPA's 2013 Special 301 submission at <http://www.iipa.com/pdf/2013spec301methodology.pdf>.

its GSP review of IIPA's petition of Kazakhstan. IIPA asks the U.S. Government to continue to closely monitor Kazakhstan's GSP obligations vis-à-vis its IPR legal and enforcement regime.

IIPA suggests that police and administrative activity can, if used correctly, be a very positive first step. IIPA recommends 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.

# TAJIKISTAN

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

### 2013 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that Tajikistan remain on the Watch List in 2013.

**Priority actions requested to be taken in Tajikistan in 2013 – Key Legal Reforms:** There are a number of serious legal deficiencies in Tajikistan that make the IPR regime in Tajikistan inconsistent with international obligations, including the need for full implementation of the WIPO digital treaties. Recent positive steps have included accession to the WIPO Copyright Treaty (WCT) in 2009, the WIPO Performances and Phonograms Treaty (WPPT) in 2011, the Geneva Phonograms Convention (effective, February 26, 2013), and most notably, final approval in December 2012, for membership in the World Trade Organization (WTO) in March 2013, subject to domestic ratification procedures which are expected in 2013.

IIPA recommends the following legal reforms to improve the IPR regime in Tajikistan, and to comply with these treaty obligations:

- Amending the Copyright Law to: (a) comply with the WCT and the WPPT – including basic protections for copyrighted materials on the Internet – an exclusive right of making available to the public for authors (i.e., a communication to the public right consistent with the WCT, Article 8), and for phonogram producers (i.e., consistent with the WPPT, Article 14); protection for the use of technical protection measures applied by rights holders to works and sound recordings; effective legal remedies against those who engage in acts of circumvention or distribute circumvention devices; (b) provide clear protection for pre-existing works and sound recordings for a minimum of 50 years (and preferably, 70 years); and (c) delete the onerous contract regulations.
- Amending the Civil Code to provide the proper *ex parte* search provisions for effective enforcement against end-user pirates.
- Amending the Criminal Code to cover all IPR violations of “works” and “neighboring rights.”
- Amending the Criminal Code to adopt a threshold for a criminal violation calculated on the basis of the price of legitimate product, instead of a threshold based on an undefined “large-scale damage” for IPR crimes, and set that threshold at a low actual level. The current Criminal Code (Article 156) provides for copyright and neighboring rights sanctions, but only where there is “significant harm” to the right holder.
- Amending the Criminal Code to set the penalties for IPR violations to deterrent levels (for example, to 500 times the minimum wage).
- Amending the Criminal Code (or Criminal Procedure Code) to permit the confiscation and destruction of manufacturing equipment used to produce pirated material.
- Amending the Criminal Procedure Code to provide the proper *ex officio* authority for police officials to initiate copyright criminal cases and investigations.
- Amending the Administrative Code to provide *ex officio* authority to administrative officials to commence investigations and cases.
- Amending the Customs Code to grant the proper *ex officio* authority to border officials to seize illegal material and to commence their own investigations and criminal cases.

**Summary of U.S. – Tajikistan IPR Issues:** In 1993, Tajikistan and the United States concluded a Bilateral Trade Agreement which detailed mutual obligations to improve the protection and enforcement of intellectual property rights. That agreement entered into force on November 24, 1993. Tajikistan has never fully implemented the IPR obligations in that agreement.

In April 2012, the U.S. Trade Representative – in retaining Tajikistan on the Watch List – noted the positive step of accession to the WPPT resolving “a longstanding concern for U.S. rights holders” and “steps to implement the Berne Convention...” But as the statement further noted: “Tajikistan should implement its commitments under the 1993 United States-Tajikistan Trade Agreement. Additional concerns remain, including with respect to the lack of *ex officio* authority for border and criminal enforcement officials, and regarding the need for more prosecutions of criminal IPR infringement.”

One remaining issue, even after WCT and WPPT treaty accessions, is that Tajikistan has not clearly indicated its intention to provide protection for pre-existing works and sound recordings, as those treaties, the Berne Convention, and the Bilateral Trade Agreement, require. It is hoped that the Government of Tajikistan will either clearly identify this protection (in existing law), or quickly amend its law to provide such protection for works and sound recordings.

**Legal Reform Deficiencies:** In 2000, Tajikistan adhered to the Berne Convention. However, the Tajik Copyright Law (in force, December 17, 1998) falls short of full compliance with the Berne Convention and other international norms; the Tajik Government has indicated it would reform its copyright law to fully comply with Berne, but it has not, to our knowledge, done so. There are many deficiencies in the Copyright Law, noted above, including: (1) the over-regulation of the terms and conditions of authors’ contracts; and (2) provisions that provide only for a right of remuneration for producers of sound recordings for the public performance, broadcasting, or communication of a phonogram to the public by cable.

The Customs Code (last revised in 1995) does provide liability 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 rights holder to file a statement and set of documents for border enforcement. These regulations are cumbersome and an ineffective tool that IIPA recommends should be repealed.

There has not been a single criminal IPR case reported under the existing laws. Nor has there been a single case reported under the Administrative Code. The Administrative Code, last revised in 1999 (Article 158-2), provides levies, fines, and seizure of illegal copyright and neighboring rights material. The copyright industries have no reports concerning enforcement activity in Tajikistan.

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 recommends that the Government of Tajikistan affirm this statement by meeting its obligations and amending its relevant IPR laws and engaging 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, and have since held talks in the context of the TIFA, to further improve trade relations.

# TURKMENISTAN

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2013 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that Turkmenistan remain on the Watch List in 2013.

**Priority actions requested to be taken in Turkmenistan in 2013 – Key Legal Reforms:** A positive step undertaken in 2012, was the enactment in January 2012 of a revised Civil Code, Part IV outlining basic provisions for copyright (and patent and trademarks), and the companion adoption of the first-ever Copyright Law (in force, January 20, 2012) providing basic comprehensive copyright and neighboring rights law. However, still missing from the IPR legal regime are enforcement provisions, and basic treaty accessions – to provide protections for American (and other foreign) works and recordings. As a result, the IIPA recommends the following IPR legal reforms in Turkmenistan:

- Adherence to the Berne Convention.
- Adherence to Geneva Phonograms Convention.
- Adherence to the WIPO digital treaties – the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT).
- Amendments to the law to fully comply with Berne, the WTO TRIPS Agreement and the WIPO digital treaties (WCT/WPPT), including basic provisions to protect works in the digital era – such as the use of technical protection measures applied by rights holders to works and sound recordings. The law should also clearly protect pre-existing works and sound recordings for a minimum of 50 years (and preferably, 70 years).
- Amending the Civil Code to provide the proper *ex parte* search provisions for effective enforcement against end-user infringers.
- Amending the Criminal Code to raise the penalties for IPR violations to deterrent levels (for example, to 500 times the minimum wage).
- Amending the Criminal Code to adopt a threshold for a criminal violation calculated on the basis of the price of legitimate product, instead of a threshold based on an undefined “large-scale damage” for IPR crimes, and, to set that threshold at a low actual level. Article 153 of the current Criminal Code does provide sanctions for copyright and neighboring rights violations, but only in cases of “significant harm” — a threshold that is too vague, and likely too high in practice to provide any effective enforcement.
- Amending the Criminal Code (or Criminal Procedure Code) to permit the confiscation and destruction of manufacturing equipment used to produce pirated material.
- Amending the Criminal Procedures Code to provide the proper *ex officio* authority for police officials to initiate copyright criminal cases and investigations.
- Amending the Administrative Code to provide *ex officio* authority to administrative officials to commence investigations and cases.
- Amending the Customs Code to grant the proper *ex officio* authority to border officials to seize illegal material and to commence their own investigations and criminal cases.

**Summary of U.S. – Turkmenistan IPR Issues:** In 1993, Turkmenistan and the United States concluded a Bilateral Trade Agreement which detailed mutual obligations to improve the protection and enforcement of intellectual property rights. That agreement entered into force on October 25, 1993. Almost twenty years later, Turkmenistan has not adequately implemented the IPR obligations in that agreement.

In April 2012, the U.S. Trade Representative – in retaining Turkmenistan on the Watch List – noted its progress in adopting a Copyright Law and “by amending its Civil Code to enhance IPR protection.” But, the statement noted: “Turkmenistan should implement its commitments under the 1993 United States-Turkmenistan Trade Agreement, and there continues to be a need for more comprehensive administrative, civil, and criminal procedures for adjudicating IPR cases.” Also, the statement noted the need to provide *ex officio* authority to customs officials, and to join the Berne Convention and the Geneva Phonograms Convention.

**Legal Reform Deficiencies:** Until 2012, Turkmenistan did not have a comprehensive basic copyright and neighboring rights law, instead relying on the Soviet-era Civil Code (Chapter IV). The 2012 revision of that Civil Code (Chapter IV), and of a separate Copyright Law remedied this major IPR legal regime deficiency, but other key reforms, as noted, are still necessary for a digital-era basic IPR regime, especially, for effective enforcement.

IIPA knows of no cases to date where the Criminal Code (Article 153) was used against a copyright pirate. Turkmenistan, by failing to provide a proper legal regime, and lacking any police, prosecutorial, judicial, or border activity, is clearly not providing “adequate and effective” enforcement as required by the 1993 Bilateral Trade Agreement.

After adopting the necessary legal reforms, the Turkmen authorities must, at a minimum, commence police raids and seizures and act to stop the retail distribution of illegal material through the use of administrative and criminal sanctions.

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 and have subsequently held talks in the context of the TIFA, to further improve trade relations.

# UZBEKISTAN

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

### 2013 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that Uzbekistan remain on the Watch List in 2013.

**Priority actions requested to be taken in Uzbekistan in 2013 – Key Legal Reforms:** IIPA recommends the adoption of the following legal reforms and treaty accessions in Uzbekistan in order to provide for effective copyright protection and enforcement:

- Revoking the reservation to Article 18 of the Berne Convention by a formal notification from the Government of Uzbekistan to the WIPO, in order to properly provide protection for pre-existing works compliant with Berne and the U.S. bilateral agreement.
- Adherence to the Geneva Phonograms Convention.
- Adherence to the WIPO digital treaties – the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT).
- Correcting deficiencies (and some uncertainties) in the Copyright Law of 2006, including:
  - i. Providing protection for pre-existing works and sound recordings for a minimum of 50 years (and preferably, 70 years).
  - ii. Adopting an exclusive right of public communication for sound recording producers for the recording, broadcasting, or communication to the public by cable (which appears to be limited to a right of remuneration in Article 51).
  - iii. Clarifying the scope and application of the rental right for audiovisual works and computer programs (Article 21).
  - iv. Complying with the digital treaties (WCT and WPPT) – by improving the provisions pertaining to technical protection measures (Article 63, which currently provides for no civil or criminal remedies) and rights management information (Article 64).
  - v. Deleting the onerous provisions (found in Articles 38 through 42) that over-regulate the terms and conditions of authors' contracts.
- Amending the Civil Code to provide the proper *ex parte* search provisions for effective enforcement against end-user pirates.
- Amending the Criminal Code to include “neighboring rights” violations (the current code only applies to infringements of “works”).
- Amending the Criminal Code to raise the penalties for IPR violations to deterrent levels (for example, to 500 times the minimum wage).

- Amending the Criminal Code to adopt a threshold for a criminal violation calculated on the basis of the price of legitimate product, instead of a threshold based on an undefined “large-scale damage” for IPR crimes; and, set that threshold at a low actual level.
- Amending the Criminal Code (or Criminal Procedure Code) to permit the confiscation and destruction of manufacturing equipment used to produce pirated material.
- Amending the Criminal Procedures Code to provide the proper *ex officio* authority for police officials to initiate copyright criminal cases and investigations.
- Amending the Administrative Code to provide *ex officio* authority to administrative officials to commence investigations and cases.
- Amending the Customs Code to grant the proper *ex officio* authority to border officials to seize illegal material and to commence their own investigations and criminal cases.

**Summary of U.S. – Uzbekistan IPR Issues:** In November 1993, Uzbekistan and the United States signed a Bilateral Trade Agreement (in force, January 13, 1994). The agreement conferred Normal Trade Relations (then known as “Most Favored Nation”) status on Uzbekistan, in exchange for Uzbekistan agreeing to adopt critical IPR legal reforms, and to comply with international copyright treaty norms. Unfortunately, over nineteen years after the 1994 Trade Agreement, some of the most basic protections continue to be denied rights holders in Uzbekistan. For example, since Uzbekistan is still not a member of the Geneva Phonograms Convention or the WPPT, it does not provide any protection or rights for U.S. or other foreign sound recordings. Further, it does not protect pre-existing foreign works prior to 2005 as a result of a reservation it made when it joined the Berne Convention (in contravention to that Convention and the 1994 Trade Agreement).

In April 2012, the U.S. Trade Representative, in announcing Uzbekistan’s retention on the Watch List, noted ongoing concerns “regarding the lack of copyright protection for pre-existing works and for U.S. and foreign sound recordings” and the need to join the Berne Convention, the Geneva Phonograms Convention (both obligations of the 1994 United States-Uzbekistan Trade Agreement), and the WIPO Internet Treaties. “Uzbekistan should also increase penalties for IPR violations and ensure that its law enforcement authorities have *ex officio* authority to initiate investigations and enforcement actions.” The statement did also note (with optimism) the establishment of a new Agency for Intellectual Property intended to “improve the enforcement of IPR laws.”

As a result of its ongoing failures to improve its IPR regime, IIPA continues to recommend that the U.S. Government should deny Uzbekistan trade benefits and preferences including its eligibility to participate in the Generalized System of Preferences (GSP) program, because Uzbekistan is not providing the statutorily mandated “adequate and effective” copyright protection and enforcement under its present IPR regime.

**Legal Reform Deficiencies:** The Copyright Law of Uzbekistan was overhauled in 1996 (in force, September 17, 1996), and two additional copyright law amendments were adopted in 2000. Separately, Uzbekistan adopted a Law on Computer Programs and Databases, which was amended in 2002.

In July 2006, Uzbekistan adopted a new Law on Copyright and Related Rights (in force, July 20, 2006).<sup>3</sup> The 2006 Copyright Law was aimed – according to the Government of Uzbekistan – at harmonizing Uzbek law with the requirements of the Berne Convention and WTO TRIPS Agreement, which the government hopes to accede to at

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<sup>3</sup>Note, IIPA bases this filing on an unofficial English translation of the 2006 Copyright Law. In 2006, Uzbekistan also adopted conforming amendments to its Civil Code on copyright and neighboring rights, as well as a decree on royalties for public performances and private copying (IIPA does not have official English translations of these laws/regulations).

some future date. The 2006 law added: a making available right; a right of communication to the public; provisions pertaining to technical protection measures and copyright management information; regulations pertaining to private copying and public performance royalties; and, extensive provisions and regulations involving collective administration (Chapter Four of the law). The Copyright Law could have benefited from more input by copyright rights holders, and as a result, is either missing key provisions (protection for pre-existing works and sound recordings), or has several unclear or incomplete protections, such as, those pertaining to technical protection measures.

In 2005, Uzbekistan adhered to the Berne Convention (effective April 19, 2005). Unfortunately, Uzbekistan made a reservation to its accession regarding Article 18 that denies protection for pre-existing works from the United States and all other Berne countries. This reservation, as noted by WIPO and other copyright experts to the Government of Uzbekistan, is in contravention to the Article 18 obligations of Berne (and the 1994 Agreement). Uzbekistan must withdraw its reservation immediately and provide clear protection for pre-existing works (and separately, for sound recordings as well).

On November 30, 2005, IIPA testified at the GSP country practice hearing regarding Uzbekistan's legal deficiencies. After that hearing, the U.S. Government asked IIPA for a list of "steps that the Government of Uzbekistan should take with respect to protecting IPR in order to retain GSP eligibility." IIPA provided the U.S. Government with eight recommendations for improving IPR in Uzbekistan, in a written response on December 14, 2005. We testified again on October 4, 2007, and on April 24, 2009 at GSP hearings. Now, more than seven years later, and after three rounds of hearings, the Government of Uzbekistan has failed to adopt seven of the eight recommendations (which, for the most part, track the 1994 trade agreement obligations). The same set of recommendations is set out above – with some additional detail.

Although Uzbekistan has proposed and/or made changes in some of these areas previously, these proposed changes were not always adequate to fix the deficiencies. The 2000 Copyright Law 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 — this latter problem appears (in the unofficial translation) to have been corrected by Article 4 of the 2006 law.

IIPA is unaware of any recent amendments to the Criminal Code following passage of the 2006 Copyright Act to adopt deterrent penalties for intellectual property violations. Drafts to amend the Criminal Code were circulated several years ago, but, to our knowledge, never adopted. In fact, one draft (2004) would have weakened, not strengthened, criminal penalties because: (1) no criminal penalties are 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 – are much too low to be deterrent penalties. If a similar draft is proposed, IIPA would recommend that the first provision be deleted, and the second provision (regarding the minimum wage), be raised considerably to at least 500 times the minimum wage, as has been done in other countries.

A draft bill several years ago to amend the Customs Code would have established a complicated registration system for IPR enforcement at the border. IIPA strongly recommends that Uzbekistan not adopt a border registration plan because it will prove counterproductive to effective enforcement at the border.

**Enforcement:** 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. The governments have since held talks, in the context of the TIFA, to further improve trade relations.

During the first eleven months of 2012, US\$595,000 in imports from Uzbekistan enjoyed duty-free treatment under the GSP program (in 2011, the figure was US\$727,000). Thus, even as the U.S. Government is promising to enhance trade and investment with Uzbekistan and providing GSP benefits and other aid, the Uzbek copyright regime is, at present, among the weakest of all of the countries in the C.I.S. The IIPA recommends that the U.S.

Government should remove Uzbekistan from eligibility to receive GSP benefits because Uzbekistan is not complying with the IPR eligibility requirements for GSP benefits, namely the requirement to provide “adequate and effective” copyright protection and enforcement. Further, Uzbekistan is not in compliance with its bilateral and multilateral obligations, and is woefully inadequate in its IPR regime as a potential WTO member.

After the Uzbek Government adopts the necessary legal reform and treaty accessions, it also needs to commence enforcement actions. Such actions should begin with police raids and seizures at a minimum, and it must act to stop the retail distribution of illegal material through the use of administrative and criminal sanctions. There have been reports of some actions against retail shops that sell pirated product, which if true, are a positive step.