



March 16, 2000

Chairman of the GSP Subcommittee
of the Trade Policy Staff Committee
600 17th Street, NW, Room 518
Washington, DC 20508

Re: Pre-Hearing Brief in Support of the GSP 1999
Country Practices Review Against Armenia
65 Fed. Reg. 7410 (Feb. 14, 2000) and 65
Fed. Reg. 11104 (Mar. 1, 2000)
Case: Armenia 005-CP-99

To the Chairman and the Entire Subcommittee:

The International Intellectual Property Alliance (IIPA) submits this brief in support of the decision by the Trade Policy Staff Committee to accept IIPA's June 16, 1999 petition to review the status of Armenia as a GSP beneficiary developing country in relation to its intellectual property rights practices. Under separate cover, we also submit notice of our request to present oral testimony at the GSP hearings, now scheduled for April 13 and 14, 2000. This document serves as our brief for those hearings.

IIPA AND ITS MEMBERS

The IIPA is a coalition of seven trade associations representing U.S. copyright-based industries in bilateral and multilateral efforts to open up foreign markets closed by piracy and other market access barriers. These member associations represent over 1,450 U.S. companies producing and distributing works protected by copyright laws throughout the world — all types of computer software including business software and entertainment software (such as videogame CD's and cartridges, personal computer CD's and multimedia products); motion pictures, television programs and home videocassettes; music, records, CDs, and audiocassettes; and textbooks, tradebooks, reference and professional publications and journals (in both electronic and print media).

IIPA and its seven member associations, and in turn those member companies, are interested parties to this proceeding. These companies have significant economic interests in being able to enter an Armenian market which provides effective legal protection and enforcement mechanisms

LEGAL REFORM AND TREATY ADHERENCE

In April 1992, Armenia and the United States signed a bilateral trade agreement detailed in the C.I.S. summary (see Appendix A). This agreement entered into force on April 7, 1992. Armenia did adopt a Copyright Law on May 13, 1996; it went into force on June 6, 1996. However, the law has many substantive deficiencies. A new Law on Copyright and Neighboring Rights was adopted by the National Assembly of Armenia on December 8, 1999. It was signed by the President on January 12, 2000, and should go into force in the very near future. IIPA has not been able to obtain a copy of these amendments.

Armenia has not joined any of the relevant conventions, nor met its enforcement obligations as required by the bilateral agreement. These failures are long past the deadlines set in the agreement to take such action. Armenia is not a member of the Berne Convention. Armenia is not providing any of protection or rights to American or any other sound recordings, nor is Armenia a member of the Geneva Phonograms Convention — two obligations of the trade agreement. U.S. sound recordings are thus completely unprotected, more than six years after the bilateral trade agreement required such protection.

Armenia does not clearly provide retroactive protection for works or sound recordings as required by the clear obligation in its bilateral trade agreement, as well as by Berne (Article 18), national treatment obligations, and the TRIPS Agreement (Article 14.6 for sound recordings and Article 9 for works). Armenia must clearly provide retroactive protection for works and sound recordings to meet these obligations.

The Armenian Copyright Law does provide enumerated protection for computer programs and databases as required under the bilateral trade agreement. There are however, no criminal ex parte search procedures, to enforce end-user piracy; the availability of civil ex parte search procedures is unclear.

Article 160 of the Armenian Criminal Code provides for fines of 200 times the minimum monthly wage for copyright and neighboring rights violations, and imprisonment of up to two years. However, there have not been any convictions under this law. It is also unclear whether the Criminal Code or the Criminal Procedures Code provides police with the proper ex officio authority to commence criminal copyright cases. If it does not do so, these laws should be amended accordingly. Armenia has not amended its Customs Code to provide ex officio authority for customs officials to seize material at the border; reportedly some amendments were considered in the January 2000 copyright law package, but their disposition is unclear.

Armenia was not a signatory to either of the two new WIPO treaties. The Armenian government should be encouraged to accede to both the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT).

COPYRIGHT ENFORCEMENT

Armenia is not currently providing “adequate and effective” enforcement with any meaningful police or prosecutorial activity, as required by the bilateral trade agreement, even if some (albeit weak) civil and administrative remedies do exist. Also, border enforcement is very weak in Armenia, allowing illegal copies that are produced in any country in the region (like Russia and Ukraine) to freely cross borders for sale in Armenia and other countries. The failure to provide an adequate legal and enforcement regime in Armenia is causing significant harm to the copyright industries.

In addition, 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, but there is at least one cassette manufacturing plant; most of the music piracy is in the form of audio cassettes. The level of music piracy is estimated at about 90%; trade losses for 1999 are estimated at \$5.0 million.

The Business Software Alliance (BSA) estimates that trade losses due to software piracy in the Commonwealth of Independent States (C.I.S.) other than Russia were \$34.1 million in 1998, the last year that these figures were available. That year, the level of piracy was estimated to be 93%.

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

CONCLUSION

In sum, we have detailed the numerous deficiencies in the Armenian copyright legal and enforcement regime to assist you in your deliberations. We would be pleased to respond to any questions or clarifications you may have concerning this information.

Respectfully Submitted,

Eric J. Schwartz
Counsel
International Intellectual Property Alliance

APPENDIX A TO IIPA PRE-GSP HEARING BRIEF

COMMONWEALTH OF INDEPENDENT STATES (CIS)

SUMMARY OF ISSUES IN THE COUNTRIES OF THE C.I.S.

As a result of numerous similarities with the problems confronted by the countries of the Commonwealth of Independent States (C.I.S.), IIPA has grouped ten of the twelve countries under this single heading for the convenience of reporting on those problems. This filing encompasses separate but similar reports on the countries of: Armenia, Azerbaijan, Belarus, Georgia, Kazakhstan, the Kyrgyz Republic, the Republic of Moldova, Tajikistan, Turkmenistan, and Uzbekistan; IIPA recommends that each of these ten countries should be placed on the Watch List in 2000.

Separately, IIPA has filed reports on Russia and Ukraine, recommending the placement of each of those countries on the Priority Watch List for 2000.

The major deficiencies of most of the ten countries of the C.I.S., further detailed in each country report below, are: (1) the failure to fully comply with the legal reforms of the bilateral trade agreement signed and ratified by each country; and (2) the failure to comply with the World Trade Organization (WTO) TRIPS Agreement, especially the enforcement obligations. A majority of these countries are not members of the Geneva Phonograms Convention and have no point of attachment for American or other foreign sound recordings, five or more years after they were obligated by the bilateral agreements to do so. Many of these ten countries are not yet members of the WTO, and are therefore not yet bound by the TRIPS Agreement obligations, but almost all of the countries are seeking WTO membership and will therefore have to comply with them on the date of adherence to the WTO.

Last, in almost all cases, even where legal reforms have been adopted, there is virtually no on-the-ground enforcement in any of these countries – neither effective civil, administrative, criminal or border enforcement is in place. In addition to being a WTO TRIPS obligation, this complete breakdown in enforcement is a total bar to the entry of any legitimate copyright industries into the local markets. It is also permitting the countries of the C.I.S. to become 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. This material, much of it produced by organized criminal enterprises, is not only hampering the development of legal markets in the countries of the C.I.S., but is spreading and thus doing significant harm to other legitimate markets in neighboring countries in Eastern and Central Europe.

Three steps are needed to curb this problem: (1) police and prosecutors must commence raids, seizures, deterrent criminal actions; (2) effective border enforcement must be implemented; (3) optical media production regulations must be implemented to shut down illegal plants.

COMPLIANCE WITH BILATERAL TRADE AGREEMENTS

In 1990, the U.S. 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.

All twelve of the former republics of the Soviet Union did sign 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. 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 the bilateral trade agreements (Article VIII of each Agreement and in the 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 making best efforts to join the Geneva Phonograms Convention; (4) Providing full retroactivity (per Article 18 of Berne); (5) Protecting computer programs and databases (as "literary works" consistent with Berne, and

now TRIPS); (6) Providing adequate and effective protection and enforcement (which is 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.

Nine countries in the C.I.S. – the Russian Federation (1995), Ukraine (1995), Georgia (1995), the Republic of Moldova (1995), Belarus (1997), Kazakhstan (1999), Azerbaijan (1999), the Kyrgyz Republic (1999), and Tajikistan (2000) – are members of the Berne Convention. This means that the other three countries, Armenia, Turkmenistan and Uzbekistan, are in breach of this trade agreement obligation.

Only four countries provide sound recording protection for American sound recordings – the Russian Federation (1995), the Kyrgyz Republic (1998), Georgia (1999) Ukraine (2000). Only the Russian Federation (1995) and Ukraine (February 2000) are members of the Geneva Phonograms Convention of the twelve countries in the C.I.S. This means that ten countries in the C.I.S. are in breach of the bilateral trade agreement obligation to join Geneva Phonograms. The Kyrgyz Republic (December 20, 1998) and Georgia (October 6, 1999) are new members of the WTO, and are thus obligated under TRIPS to provide a point of attachment and a minimum level of rights for foreign (American) sound recordings. This means that in eight of the twelve countries, sound recordings are completely unprotected, six years after the bilateral trade agreements required such protection.

Two countries are members of the new WIPO Performances and Phonograms Treaty (WPPT) – Belarus and the Republic of Moldova; the Kyrgyz Republic is also a member of the WIPO Copyright Treaty, or WCT. The U.S. deposited its instrument of accession in September 1999 to the WCT and the WPPT. However, since the WPPT is not yet in force, and will not be until thirty countries ratify it, there is no point of attachment for American sound recordings at this time by accession or ratification to that treaty.

The Russian Federation and Ukraine explicitly do not provide retroactive protection for works or sound recordings in breach of the clear obligation in the bilateral agreement.¹ This lack of protection for pre-existing works and sound recordings is also a violation of Berne (Article 18 and the national treatment obligations) and the TRIPS Agreement (Article 14.6 for sound recordings and Article 9 for works). Belarussian experts claim that their law probably does provide retroactive protection, though this is less than clear with respect to sound recordings. For the other nine countries of the C.I.S. it is unclear what, if any, retroactive protection they do or do not provide for works and sound recordings. The countries of the C.I.S. that are not providing retroactive

¹The issue of retroactive protection, at least back to 1973, was additionally required in every country in a special bilateral provision (not found in the Soviet agreement) which obligated each country to act 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 — have formally confirmed their membership in that Convention. At the time of the signing of the bilateral agreements, the USG requested that each country send such a confirmation letter to UNESCO to avoid any confusion about this status.

protection for works and sound recordings must do so or they are in breach of the bilateral agreement; those countries where such protection is unclear should clarify that protection. This problem of protection for pre-existing material, especially for sound recordings, is a regional problem because such protection is not currently provided in Poland, the Czech Republic, and (possibly) Romania creating an environment for the production and wide-spread distribution of back catalog material.

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 criminal ex parte search provisions necessary for effective enforcement against end-user piracy (and as required by the WTO TRIPS Agreement); the availability of civil ex parte search provisions is unclear in virtually all of these countries.

Only a few of the countries have amended their Criminal Code to adopt any criminal provisions applicable for IPR violations; almost none of the countries have adopted deterrent penalties to stop commercial piracy, especially necessary against the organized criminal enterprises operating in this region. Neither have most of these countries adopted the necessary Customs Code revisions to provide ex officio authority to properly seize material at the border. And none of these countries are providing "adequate and effective" enforcement on-the-ground as required by the bilateral agreements or the WTO TRIPS Agreement.

Last, only the Russian Federation and Ukraine have held meetings of their working groups with United States government officials. In the other ten countries there have been no such formal meetings to follow-up on these bilateral agreement obligations, to IIPA's knowledge.

SUMMARY OF LEGAL REFORMS AND ENFORCEMENT ACTIVITY

As noted, three countries of the C.I.S. are members of the WIPO Copyright Treaty (WCT): Belarus, Kyrgyz Republic and the Republic of Moldova. Two are members of the WIPO Performances and Phonograms Treaty (WPPT): Belarus and the Republic of Moldova.

Armenia and the Russian Federation have joined the Brussels Satellite Convention. The Republic of Moldova is a member 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 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 inter-governmental executive body.

On December 20, 1998, the Kyrgyz Republic joined the World Trade Organization (WTO); it was the first country in the C.I.S. to join the WTO. On October 6, 1999, Georgia became the second C.I.S. member to join the WTO. Eight other C.I.S. nations are in the process of acceding to the WTO. Working Parties have been established for Armenia, Azerbaijan, Belarus, Kazakhstan, the Republic of Moldova, the Russian Federation, 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 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 trade agreements with the U.S. to provide "adequate and effective protection and enforcement" of intellectual property rights.

A dangerous development in breach of the bilateral agreement continues to unfold in several countries of the C.I.S., including the Russian Federation. That is the comprehensive reform of the civil codes of these nations that is underway.² In most cases, the efforts to revise the civil code will (or have) result(ed) in the addition in that code of new copyright provisions inconsistent with Berne, TRIPS, and the bilateral agreements. These efforts to revise the civil codes should be opposed. For example, in the case of Russia, drafts of the civil code reform (as recent as 1999) included IPR provisions completely incompatible with the bilateral trade agreement, the Berne Convention, and TRIPS. In 1996 a so-called Model Civil Code for the countries of the C.I.S. was reportedly adopted by the C.I.S. Inter-parliamentary Assembly in St. Petersburg. Detailed provisions on copyright and neighboring rights were included that were contradictory to existing international standards of protection for copyrights.

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.

To the best of our knowledge, eleven countries have passed major revisions to their copyright laws:

Armenia (May 13, 1996; effective June 6, 1996; amended January 12, 2000)

Azerbaijan (June 4, 1996; effective October 23, 1996)

Belarus (May 16, 1996; effective July 18, 1996; amended August 11, 1998; effective August 19, 1998)

Georgia (Civil Code in force on November 25, 1997; amended June 22, 1999; effective July 8, 1999)

Kazakhstan (February 9, 1996; effective June 10, 1996)

Kyrgyz Republic (December 16, 1997; effective January 23, 1998)

Republic of Moldova (November 23, 1994; effective March 2, 1995; amended May 28, 1998)

Russian Federation (July 9, 1993, effective August 3, 1993)

Tajikistan (November 13, 1998; effective December 17, 1998)

Ukraine (December 23, 1993, effective February 23, 1994)

Uzbekistan (August 30, 1996; effective September 17, 1996)

²Prior to the break-up of the Soviet Union, the text of the U.S.S.R.'s 1961 "Fundamentals of Civil Legislation" was the governing copyright law throughout the Union. Based on the "Fundamentals," each of the republics adopted in its 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 exceptions to protection. 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; it is not known whether any of these include the 1991 amendments drafted by the former U.S.S.R.

Turkmenistan is reportedly in the process of drafting new copyright legislation; until it is adopted, the Civil Code (Chapter IV, 1961) from the former Soviet era is still the operational law.

As a result of their MFN/NTR status, all of these countries are now beneficiaries under the Generalized System of Preferences (GSP) program, a U.S. trade program which 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 means under its laws for foreign nations to secure, to exercise, and to enforce exclusive rights in intellectual property, including...copyrights." In 1998 (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>Percent.of U.S. imports that benefit from GSP</u>
Armenia	\$510,247	50.4%
Azerbaijan	\$0	0%
Belarus	\$6,761,685	47.6%
Georgia	\$0	0%
Kazakhstan	\$90,205,615	66.32%
Kyrgyz	\$29,863	56.29%
Moldova	\$512,659	< 1.0%
Russian	\$423,561,309	24.78%
Tajikistan	\$0	0%
Turkmenistan	\$0	0%
Ukraine	\$16,775,064	6.4%
Uzbekistan	\$2,258,837	68.19%

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 its GSP benefits be suspended or withdrawn, in whole or in part, if requisite improvements are 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. The United States government is withdrawing GSP benefits from Belarus (for reasons unrelated to intellectual property matters).