

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2006 SPECIAL 301 REPORT

KAZAKHSTAN

IIPA recommends that Kazakhstan remain on the Watch List in 2006 for failing to provide enforcement adequate to address its IPR piracy problems. IIPA further recommends that Kazakhstan lose its eligibility to participate in the General System of Preferences (GSP) program because Kazakhstan is not providing the statutorily mandated “adequate and effective” copyright protection and enforcement.

In May 2005, the U.S. Trade Representative noted that Kazakhstan still had “additional steps” to undertake in order to meet its commitments under the 1992 U.S.-Kazakhstan Trade Agreement (in force, February 18, 1993). In particular, the U.S. Government noted several legal deficiencies and an overall enforcement regime that is weak, particularly in criminal enforcement. The USTR noted, for example, that “there are few convictions, and those who are convicted receive only minimal penalties.” Poor enforcement has been the result, in part, of a high burden of proof in criminal cases combined with a lack of adequate resources and attention to enforcement. Kazakhstan moved to address the statutory deficiency by adopting further amendments to its IPR enforcement laws in November 2005. This was a positive step. IIPA encourages Kazakhstan to properly implement this law, make any other necessary legal reforms (noted below) and to turn its attention to on-the-ground enforcement efforts, especially against organized crime syndicates. Development of a modern IPR regime in Kazakhstan will benefit local as well as foreign rights holders. In fact, the software and recording industries, as just two examples, consider Kazakhstan the most promising marketplace of the C.I.S. region, behind only Russia and Ukraine

The Copyright Law was amended in 1996, in July 2004, and again in 2005. One long-standing legal deficiency which was addressed (in the 2004 amendments) was the incorporation of explicit protection for pre-existing foreign works and sound recordings. Kazakhstan joined the Berne Convention (1999); the Geneva Phonograms Convention (2001), providing a point of attachment for foreign sound recordings; and, the two WIPO digital treaties, the WCT and WPPT, effective November 12, 2004.

Legal Reform Deficiencies

Kazakhstan revised the Copyright Law of 1996 with amendments in 2004 (effective July 9, 2004). Among other things, the amendments (Article 5(4)) fixed the long-standing problem of providing express protection for pre-existing foreign works and sound recordings. This was a major step forward. The 2004 provision provides a flat 50-year window, so pre-1954 works and sound recordings remain in the public domain. Further, the ten-year delay in adopting this provision means that a lot of (now illegal) back-catalog material remains in the marketplace, which creates further problems for effective enforcement. The 2004 amendments package also updated laws to facilitate electronic commerce and Internet technology, and at least partially, implemented the WIPO digital treaties as well as E.U. directives.

A further package of amendments, meant in particular to address IPR enforcement, was signed into law on November 22, 2005 (in force November 26, 2005). Included in this package were amendments to the Criminal Code, the Criminal Procedure Code, the Civil Code, the Copyright 2006 International Intellectual Property Alliance

Administrative Code, and the Copyright Law of 1996. Perhaps the key amendment in the package was the change to Article 184 of the Criminal Code, which repealed the 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). Further, the law repealed the requirement that there be proof of “financial gain” for criminal charges to rest—another improvement. In addition, in 2005, changes were made in commercial and licensing laws to ban the sale of copyrighted material at street kiosks, requiring instead that it be sold in retail stores. IIPA welcomes this change as well.

Several key legal reforms — notably in enforcement — remain. The Government of Kazakhstan needs to adopt the following changes:

- 1) Adoption in the Civil Code to provide the proper *ex parte* search provisions for effective enforcement against end-user pirates.
- 2) Adoption in the Customs Code of *ex officio* authority to permit customs officials to seize illegal material and to commence their own investigations and criminal cases.
- 3) Adoption of provisions in the Criminal Code (or Criminal Procedure Code) to permit the confiscation and destruction of manufacturing equipment used to produce pirated material. Currently, there are provisions permitting the destruction of goods upon a court order.
- 4) Adoption of amendments to the Administrative Code to provide *ex officio* authority to administrative authorities to commence investigations and cases. The Administrative Code (Article 129) was amended in 2005 to lower 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 violations as well.
- 5) Amendments to the Copyright Law to fully implement the WIPO digital treaties (WCT and WPPT).
- 6) Adoption of a proper regulatory scheme, including criminal penalties, for the production and distribution of optical disc material and equipment.

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 June 2004, IIPA did provide the government of Kazakhstan with “model” enforcement provisions; IIPA urges the government of Kazakhstan to use the IIPA draft and to consult with local copyright industry representatives, to adopt the proper enforcement revisions in 2006.

Effective in 2003, the Customs Code was completely revised. As noted, it did not include the necessary *ex officio* authority to seize suspected infringing material at the border as required by the TRIPS Agreement. IIPA hopes that this will be corrected in 2006. In addition, the 2003 amendments adopted a complicated registration system for copyright right holders seeking enforcement, which further weaken, not strengthen, border measures. IIPA recommends that this registration system be repealed.

Enforcement

The Government of Kazakhstan has made strides to improve its enforcement regime, both with its legislative reforms (noted above) and with stepped up police activity. However, the enforcement reports issued by the Government of Kazakhstan’s Economic Crimes agency each year indicate a relatively small number (for the size of the market) of police raids and seizures, and most troubling, almost no criminal convictions for IPR offenses. In fact, IIPA knows of no

criminal convictions with jail sentences imposed in 2005 in the music, film, or entertainment software industries. Instead, we understand that all the copyright criminal cases resulted in either no sentence or a suspended sentence.

The Business Software Alliance (BSA) reports some improvements in enforcement in Kazakhstan in 2005. The BSA reports that “open and notorious” piracy has been reduced because those who sell software or computer equipment and devices now generally understand that there are criminal, administrative, and civil penalties for such activities. For example, where unlicensed discs of BSA-member products were easily found in the marketplace in 2003 and 2004, in 2005, it was more difficult to find such discs. In addition, the sale of hard-disc loaded computers with unlicensed software has been reduced. Generally, companies that sell computers sell them without any loaded software, or only with licensed software. There has also been some progress made against end-user companies, in part because of warning letters sent by BSA, and some raiding activity in 2005 as well.

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, including against software pirates. A special IPR Department was created a few years ago within the Finance Police (with national authority). Problems of interpreting the law, in particular the threshold for criminal and administrative action have hampered enforcement. For a marketplace and population the size of Kazakhstan, the statistics reflect the need to do much more to deter piracy and claim effective criminal enforcement. In 2003 and 2004, the copyright industries signed memoranda of understanding with the Government of Kazakhstan; there were also training programs conducted in 16 regions of the country throughout 2005 (and 2004). The software (BSA) and recording (IFPI) industries participated in these and other training programs in 2005. In short, the government pledged to the copyright industries to undertake more and better enforcement. IIPA encourages the government to act, especially against criminal operations, and to improve its overall enforcement with deterrent penalties.

The software industry reported some actions undertaken against hard-disc loaders. In Almaty, in the spring of 2005, officers of the Finance Police assisted with several cases. In one instance, an individual was caught selling unlicensed pre-installed software and a criminal case commenced (under Article 184.2; Article 223.2 of the Criminal Code). The court assessed damages caused by this reseller at \$5,190. He was given a 2-year suspended sentence and barred from continuing this activity (although his property was not confiscated). In other similar instances, however, cases were not taken to court. For example, test purchases were made, in other instances confirming the sale of computers preloaded with unlicensed software and two criminal cases were initiated against companies. In one instance, a criminal case was dismissed (per Article 184) because the “significant harm” threshold was not met and there was no profit motive proven. This was an incorrect result even under the old law. In another matter, a criminal case against the director of Unicomp LLP was dropped because of the “threshold” problem (and a miscalculation of the harm done). Because of the delays in concluding (albeit unsuccessfully) that case, it was too late to bring an administrative action. Overall, BSA reported that though there were some cases brought to court, the majority were not brought to justice due to administrative burdens, prosecutorial inexperience and delays, and an overall ineffective judicial system.

There is no consistency in the sanctions that do result for the few criminal cases that go to trial. As noted, in a software case in 2005, a reseller got a 2-year suspended sentence for piracy that resulted in damages worth about \$5,190. In a music piracy case last year, where

damages were estimated at \$83,000 and which was treated under the “serious crime” proceedings, the defendant also received a 2-year suspended sentence.

BSA reported administrative cases undertaken against two companies (Middle Ural LLP and Lainer LLP) for installed software. Administrative sanctions and a settled civil suit resulted. There have been three other settlements against pirates where sanctions included public apologies. The total enforcement statistics reported in 2005 by the software industry included: 32 raids; 26 criminal cases initiated; 11 cases resolved; 10 administrative cases initiated with 8 resolutions of administrative violations; and, 3 civil suits initiated in 2005.

While the U.S. copyright industries have been sustaining millions of dollars in losses in Kazakhstan, the country received GSP trade benefits of over \$158 million in 2004, and \$185.8 million in the first 11 months of 2005 (a 39.6% increase from 2004). To help spur the necessary enforcement improvements, IIPA recommends the withdrawal of GSP benefits. IIPA testified on this point at the latest U.S. government hearing on outstanding GSP petitions in November 2005.

IIPA suggests that police and administrative activity is, if used correctly, a very positive first step and that stepped-up seizure and confiscation of illegal copyright materials should be undertaken, as well as the closure of shops and businesses conducting illegal business using the licensing law. In the last year (2004) in which IIPA was presented with enforcement statistics by the Government of Kazakhstan, only about 140,000 copies of illegal copyrighted material were seized (during the first 11 months of 2004).

There are two known optical disc production facilities reported in Kazakhstan at present. One plant has a single operating line, capable of producing 8.1 million discs per year; the second plant opened in July 2005. Both plants now have IFPI-issued SID codes (August 2002; August 2005) and have provided exemplars (examples) of discs manufactured at the plants to be used for forensics evidence. At least to date, there is no forensic evidence of illegal production at either optical disc plant. Still, IIPA recommends the adoption of optical disc regulations to properly monitor the production and distribution of material and equipment at these and any future plants, including tying illegal commercial production to criminal penalties. The absence of such a system, the lack of overall strong enforcement, and the infrastructure in Kazakhstan, makes it ripe for the movement of other plants into Kazakhstan from neighboring countries, such as Russia.

According to the recording industry (International Federation of the Phonographic Industry, IFPI), the level of music piracy is estimated at about 66%; trade losses for 2005 were estimated at over \$20 million. In 2004, the last year in which a market survey was undertaken, the recording industry estimated that in total 16.2 million cassettes and 10.8 million CDs were sold in Kazakhstan and of these, 11.2 million cassettes and 7.4 million CDs were pirated copies.

In 2005, the recording industry reported that 427 raids were conducted, and that \$267,616 worth of pirate material (39,706 CDs, 7,323 DVDs, 19,981 music cassettes) were seized by local enforcement agencies. Although this number (at least, what is known by the copyright industries) reflects a drop from previous years, there were more criminal proceedings — 18 such cases initiated — and more court sentences, that is, 8 convictions, in 2005 than in prior years. Also, the industries reported that there were 362 administrative actions undertaken in 2005 pertaining to “minor” violations. Of these, 281 legal entities were fined (for a total amount of \$339,735 in fines in 2005). The average fine, however, was under \$100.