

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2007 SPECIAL 301 REPORT

BELARUS

Special 301 Recommendation: IIPA recommends that Belarus remain on the Watch List for its failure to adopt the legal reforms noted in this report, and for its overall lackluster enforcement of IPR crimes.

In 2006, the U.S. Trade Representative retained Belarus on the Watch List noting that “[c]oncerns continue about overdue implementation of Belarus’ intellectual property regime, including adherence to commitments under the [1993] U.S.-Belarus Trade Agreement.” Further, USTR noted that Belarus had “made no significant progress” the year before and that “IPR enforcement in Belarus remained weak...[and]...piracy levels remain high.” There were no reports of either legal reforms or enforcement successes in Belarus in 2006. Belarus is a member of all of the relevant IPR treaties, including the Berne Convention (1997), the WIPO Copyright Treaty (WCT) (2002), the WIPO Performances and Phonograms Treaty (WPPT) (2002), and the Geneva Phonograms Convention (2003). The long delay (until 2002) in joining a neighboring rights treaty (Geneva and WPPT) allowed a large back-catalog of unprotected sound recordings to flourish in the marketplace, making enforcement that much more difficult, even today.

IIPA and USTR have reported in the recent past on the troubling problem of optical media production facilities migrating into (and out of) Belarus from neighboring countries. We have no reports of any recent such cases. However, the failure of the Government of Belarus to properly police their borders, and to investigate and prosecute one such case (the Armita plant), only underscores the need for more effective regulation of optical media production and distribution, including criminal sanctions for violations.

IIPA continues to urge the Government of Belarus to improve its border enforcement — to prevent plants or equipment from Russia (or other neighboring countries) to relocate in 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 October 2004). The Vigmoplast optical disc replication plant is operating near Minsk; it has two lines and an estimated plant capacity of 7 million discs a year. We understand that it was assigned a source identification (SID) code.

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. Belarus enacted a new law on copyright and neighboring rights (in force on June 18, 1996), and amendments in 1998. The 1998 amendments were intended to, among other things partially implement the WIPO digital treaties (WCT and WPPT). No further amendments have been adopted.

Legal Reform Deficiencies

The 1998 amendments to the Copyright Law added provisions relating to anti-circumvention devices and services, and the removal or alteration of rights management information (Article 39.5). The remedies for anti-circumvention and rights management information protection include injunctive relief, monetary damages, and seizure of devices. Criminal Code provisions were in 2000. The provisions (Article 201) include sanctions for up to five years imprisonment for repeat offenders of copyright and neighboring rights violations.

There are, however, a number of serious legal deficiencies that are preventing effective enforcement in Belarus. The IIPA recommends the following changes to the Belarusian legal regime:

- 1) Amendments to the Criminal Code to provide criminal penalties for first-time IPR violations. Currently, criminal penalties only apply for IPR violations after there has been an administrative violation and an exhaustion of administrative remedies.
- 2) 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 Art. 158) to commence liability, which is now BR12.1 million (US\$5,646).
- 3) Amendments to the Criminal Code (or Criminal Procedure Code) to permit the confiscation and destruction of manufacturing equipment used to produce pirated material.
- 4) Amendments to the Criminal Procedures Code to provide the proper *ex officio* authority for police officials to initiate copyright criminal cases and investigations.
- 5) Amendments to the Administrative Code to provide *ex officio* authority to administrative authorities to commence investigations and cases. At present, a statement from a rightholder 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.
- 6) 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.
- 7) Amendments to the Civil Code to provide the proper *ex parte* search provisions for effective enforcement against end-user pirates.
- 8) Amendments to the Copyright Law (1998) to provide clear protection for pre-existing works and sound recordings. Belarusian officials insist this protection currently exists, at least for works (Article 42 of the 1996 law and Article 3 of the 1998 law make international treaties such as the Berne Convention self-executing in Belarus). While this may be a correct reading of the law, it should be clarified by statutory amendment or decree to avoid any confusion on the part of police, prosecutors, and judges tasked with enforcement of these rights.
- 9) Amendments to the Copyright Law (1998) to fully implement the WIPO digital treaties (WCT and WPPT). The current anti-circumvention and copyright management information provisions are not fully compatible with the WIPO digital treaties. In particular, the law needs 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. In addition, rightholders need to be able to protect “copyright management information” that is attached to or accompanies a work or sound

recording. Such provisions should protect against the alteration, removal or falsification of this information.

Enforcement

Under the Copyright Law (Article 40), 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. Belarusian officials also point to the Civil Code (1999) as providing additional remedies for IPR violations.

In general, levels of piracy remain extremely high, and enforcement remains virtually nonexistent in Belarus. Three years ago, Belarusian officials reported that the Council of Ministers (an Inter-Ministerial committee) had adopted a program for IPR protection for the coming years focusing on legislative reforms (including copyright, patent and trademark laws), but there have been no further reports of any activity by this committee. The government must adopt the numerous reforms recommended. In addition, the Government of Belarus needs to focus on enforcement: 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 must bring its laws into full compliance with the WTO TRIPS obligations by adopting the revisions noted above and by improving on-the-ground enforcement. IIPA continues to urge the government to take action against any known production facilities (reports persist of cassette piracy facilities) and to monitor optical disc production in particular (at the one known plant), using the criminal law remedies.

In 2005, the last year when music piracy statistics were calculated, the music industry estimated piracy levels at about 70% (and trade losses that year were estimated at over \$25 million). There are no comprehensive enforcement statistics as in recent years (for example, a reported 141 raids in 2004 according to local enforcement agencies). Rather, in 2006, the industry reported that the trend was of an increasing number of raids, but raids aimed only at small-scale retailers of illegal material. While these are helpful, they have little deterrent effect on the overall piracy problem. Plus, the administrative fines that were imposed, even against these retailers, were insignificant. In the past few years there have been reports of criminal cases initiated but the sentences imposed in those cases, if any, were almost all either conditional or suspended. This has little deterrent effect. There were no statistics provided by the government (or industry) in 2006 of the number of border seizures or investigations.