



May 15, 2002

Ms. Gloria Blue
 Executive Secretary
 Trade Policy Staff Committee (TPSC)
 Office of the United States
 Trade Representative
 1724 F Street, N.W.
 Washington, D.C. 20508
 Attention: Office of WTO
 and Multilateral Affairs

Re: Request for Public Comment on Accessions to the World Trade Organization and on U.S. Participation in Negotiations for the Terms of these Accessions, 67 Fed. Reg. 13205 (Mar. 21, 2002); Specific Comments or Information Regarding Lebanon, Vietnam, Azerbaijan, Belarus, Kazakhstan, Tajikistan, Uzbekistan, Macedonia, Cambodia and Laos

Dear Ms. Blue:

This filing responds to the Request for Comments appearing in the March 21, 2002 Federal Register. The request invites comments from the public concerning U.S. commercial interests and other issues related to the accessions of various countries to the WTO, and to assist the United States Trade Representative (USTR) in participating in negotiations to determine the conditions of those accessions. Specifically, the Request for Comments notes that “[c]omments received will be considered in developing U.S. positions and objectives for the multilateral and bilateral negotiations that will determine the terms of WTO accession” for the countries listed, which include Lebanon, Vietnam, Azerbaijan, Belarus, Kazakhstan, Tajikistan, Uzbekistan, Macedonia, Cambodia and Laos. Market access issues for goods identified by the TPSC include “the protection and enforcement of intellectual property rights,” and “right of appeal in cases involving application of trade laws and other laws relating to WTO provisions, such as protection and enforcement of intellectual property rights (IPR) and services.”

The International Intellectual Property Alliance (the "IIPA" or "Alliance") submits specific and brief comments on the current situation in Lebanon and Vietnam as it affects the copyright industries, then appends to this filing reports for Lebanon, Azerbaijan, Belarus, Kazakhstan, Tajikistan, and Uzbekistan (as Appendix A), as well as excerpts regarding Macedonia, Cambodia and Laos (as Appendix B), that

were submitted to the United States Trade Representative on February 15, 2002, as part of our filing in the annual Special 301 process.

A. IIPA AND THE COPYRIGHT INDUSTRIES' INTEREST IN THIS FILING

The International Intellectual Property Alliance (IIPA) is a private sector coalition formed in 1984 to represent the U.S. copyright-based industries in bilateral and multilateral efforts to improve international protection of copyrighted materials. IIPA is comprised of six trade associations, each representing a significant segment of the U.S. copyright community. These member associations represent over 1,100 U.S. companies producing and distributing materials protected by copyright laws throughout the world – all types of computer software including business applications software and entertainment software (such as videogame CDs and cartridges, personal computer CD-ROMs and multimedia products); theatrical films, television programs, home videos and digital representations of audiovisual works; music, records, CDs, and audiocassettes; and textbooks, tradebooks, reference and professional publications and journals (in both electronic and print media).

In April 2002, the IIPA released an economic report entitled Copyright Industries in the U.S. Economy: The 2002 Report, the ninth such study written by Stephen Siwek of Economists Inc. This report details the economic impact and contributions of U.S. copyright industries to U.S. Gross Domestic Product, employment, and trade. The latest data show that in 2001, the U.S. copyright industries accounted for 5.24 percent of U.S. Gross Domestic Product (GDP), or \$535.1 billion – an increase of over \$75 billion from 1999 and exceeding 5 percent of the economy and one-half trillion dollars for the first time; Over the last 24 years (1977-2001), the U.S. copyright industries' share of the GDP grew more than twice as fast as the remainder of the U.S. economy (7 percent vs. 3 percent); Between 1977 and 2001, employment in the U.S. copyright industries more than doubled to 4.7 million workers, which is now 3.5 percent of total U.S. employment; and the U.S. copyright industries' average annual employment grew more than three times as fast as the remainder of the U.S. economy (5 percent vs. 1.5 percent); In 2001, the U.S. copyright industries achieved estimated foreign sales and exports of \$88.97 billion, again leading all major industry sectors, including: chemicals and allied products, motor vehicles, equipment and parts, aircraft and aircraft parts, and the agricultural sector. It is essential to the continued growth and future competitiveness of these industries that all our trading partners, including the WTO accession candidates which are the subject of this filing, provide not only free and open markets, but also high levels of protection to the copyrights on which this trade depends.

The TRIPS Agreement is the legal foundation for adequate and effective levels of copyright protection and enforcement that are essential the copyright industries' and individual authors/creators' ability to do business in foreign markets.

B. WTO ACCESSION AND COPYRIGHT PROTECTION

The goal of WTO accession negotiations with accession candidates, including those specifically discussed in this filing, must be to ensure that these have met in full their WTO obligations prior to accession, including that their copyright laws and enforcement systems comply with the substantive and enforcement provisions of the WTO/TRIPS Agreement. The TRIPS Agreement entered into force for the U.S. on January 1, 1996, and for all other WTO members that do not qualify for, and take advantage of, the transition periods of four and ten years.¹ Even for WTO members that did qualify for a transition period, the national treatment and MFN provisions of TRIPS applied fully as of January 1, 1996.² On January 1, 2000, all TRIPS copyright obligations, including providing effective and deterrent enforcement, entered into force for all the world's developing countries (except those classified by the U.N. as the "least" developed countries). Before 2000, many of these countries had successfully amended their statutory law to bring them into compliance (or close to compliance) with their TRIPS obligations. However, compliance with TRIPS enforcement obligations (Articles 41-61) has been disappointing and accounts for the steady high levels of piracy and the billions of dollars in losses suffered by copyright owners worldwide. It is the promise of these new enforcement obligations that is essential to returning the commercial benefits that were envisioned at the conclusion of the Uruguay Round. For accession candidates, including those discussed in this filing, it is insufficient that their statutory legal regime is in place prior to accession; they must also demonstrate that their enforcement system is, in practice, effective in deterring piracy.

As demonstrated in IIPA's 2002 Special 301 submission, a significant number of developing (and other) countries simply have not brought their enforcement regimes (civil, criminal, provisional remedies, and border measures) up to the standards required by TRIPS. Still others have not made all the statutory changes necessary to comply with their substantive obligations nor the parts of the enforcement text which can be satisfied by the mere adoption of statutory improvement. TRIPS obligations, both with respect to substantive law and to enforcement standards, in statutory law and in practice, are the worldwide "floor" for copyright and other intellectual property protection. Accordingly, in the filing below, and the appended country surveys, IIPA has paid special attention to the extent to which the countries surveyed are in compliance with these statutory and "in practice" or "performance" obligations. Where high rates of piracy persist with no evidence of immanent change, then enforcement improvements must be made as a prerequisite to WTO accession.

IIPA urges USTR and the U.S. government as a whole to use the WTO accession process as a leverage and consultation tool to move the countries affected toward TRIPS compliance. In addition to

¹ Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), Articles 65 and 66.

² TRIPS, Article 65.2 provides that "any developing country Member is entitled to delay for a further period of four years [following the expiration of the one year period after the entry into force of the WTO generally] the date of application, as defined in paragraph 1 above, of the provisions of the Agreement other than Articles 3, 4 and 5 of Part I." Articles 3 and 4 establish the national treatment and MFN obligations of the Agreement and Article 5 excludes these obligations with respect to WIPO treaties. This exception to the use of transition is also provided in all other categories of countries which may take advantage thereof. As of January 1, 2002, 144 countries were members of the WTO.

these specifics related to TRIPS compliance, IIPA notes five of six of the copyright industries' key initiatives and challenges in 2002, all of which, to a greater or lesser degree, implicate the accession candidates' TRIPS obligations, and should be borne in mind when considering an accession candidate's entry to the WTO. These initiatives include "implementation of the TRIPS enforcement text," discussed above, and also include the following:

- Electronic Commerce, Copyright Piracy on the Internet and the WIPO Internet Treaties;³
- Regulation of Optical Media Production;⁴
- Piracy by Organized Crime; and
- Use of Legal Software in Governments and Businesses.

C. COMMENTS ON SPECIFIC COUNTRIES SUBJECT TO THIS INQUIRY

IIPA is pleased to provide the following summaries of TRIPS compliance in Lebanon and Vietnam. We also provide, in Appendices, IIPA's Special 301 country reports for Lebanon, Azerbaijan, Belarus, Kazakhstan, Tajikistan, and Uzbekistan (Appendix A), as well as excerpts on problems in Macedonia, Cambodia and Laos (Appendix B).

³ Well established international norms such as the WTO TRIPS Agreement contribute valuable elements to the needed legal infrastructure to protect electronic commerce and combat Internet piracy. In particular, WTO TRIPS contains a technology neutral obligation to provide "expeditious remedies to prevent infringements and remedies which constitute a deterrent to future infringements" (Article 41). The fight against this new form of piracy must be conducted under the copyright principles contained in this Agreement, and particularly through application of the existing enforcement tools described there, accompanied by effective deterrence of this new type of illegal conduct. In addition, the two treaties adopted by the World Intellectual Property Organization (WIPO) Diplomatic Conference in Geneva in December 1996 provide an additional and more tailored framework for what is needed to protect the transmission of content in e-commerce. Effective implementation of the WIPO Copyright Treaty (WCT) and of the WIPO Performances and Phonograms Treaty (WPPT) will help raise minimum standards of copyright protection around the world, particularly with respect to network-based delivery of copyrighted materials.

⁴ Pirate CDs, VCDs, and DVDs containing protected music, sound recordings, and audiovisual works as well as pirate CD-ROMs containing tens of thousands of dollars' worth of software, games, and literary material can quickly decimate the market for legitimate U.S. products. IIPA urges the U.S. government to be particularly attentive and creative in working with U.S. industries and foreign governments to fashion effective regulatory solutions. The growing optical media problem confronting the copyright sector demands new and creative solutions. Traditional enforcement mechanisms have not been enough to prevent optical media piracy from spinning out of control and flooding national, regional, and even global markets with millions of high-quality pirate products. As part of each country's TRIPS obligation to provide deterrent enforcement against piracy on a commercial scale, every country whose optical media production facilities are producing significant pirate product must consider creating and enforcing a specialized regulatory framework for tracking the growth of optical media production capacity, including the cross-border traffic in production equipment and raw materials. This regulatory regime should also include strict licensing controls on the operation of optical media mastering and replication facilities, such as a requirement to use identification tools that flag the plant in which production occurred and that help lead the authorities to the infringer. So far such regimes have been established in China, Bulgaria, Hong Kong, Macau and Malaysia; and are under consideration in Thailand, Indonesia and the Philippines. Ukraine just recently adopted a system of regulatory controls as well, but these are flawed and we are working to address the present inadequacies.

LEBANON

Lebanon's substantive law and enforcement system remain out of compliance with TRIPS standards.⁵ The government of Lebanon must complete the following steps prior to consideration for accession to the WTO.

TRIPS Enforcement Issues

Given the extraordinarily high levels of piracy in Lebanon and the negligible actions taken by that government to date to take "effective action" to deter these infringements, Lebanon will need to take major actions to bring its enforcement system into compliance with the TRIPS requirements set out in TRIPS Articles 41-61. The Lebanese government has failed to date to make effective enforcement against copyright piracy a priority, and IIPA believes the first step toward improving this situation would be for the government at the highest levels to issue a political directive to make fighting copyright piracy (including cable piracy) a high priority for all its agencies. The following are some examples of enforcement problems that demonstrate Lebanon's failure to meet TRIPS standards in the enforcement area, and some of the actions which need to be taken in order to bring Lebanon's system closer into compliance with TRIPS:

- Rampant cable piracy continues to devastate the local theatrical, video and television markets. An estimated 1,300 cable operators serve over 50% of the Lebanese population, retransmitting domestic and foreign terrestrial and satellite programming without authorization to their subscribers (estimated to number about 460,000) for an average monthly fee of US\$10. Lebanon must take steps to close down substantially all the unlicensed "community cable" television stations operating in the country in order to provide the "deterrent to further infringements" as required by TRIPS.
- The lack of coordinated enforcement efforts in Lebanon has led to *ad hoc*, non-deterrent results. Lebanon's government must form a specialized IPR unit of the police, with dedicated resources and power to act anywhere in Lebanon, and should appoint a national network of specialized prosecutors charged with the suppression of IP infringement by *ex officio* action,⁶ in order to provide an "effective" enforcement system as required by TRIPS.

⁵ On June 13, 2001, IIPA filed a Petition (the second in three years) to the U.S. government as part of its "Country Eligibility Practices Review" of the Generalized System of Preferences (GSP) trade program. To qualify for benefits under the GSP Program, namely, duty-free imports of many important Lebanese products into the U.S., USTR must be satisfied that Lebanon meets certain discretionary criteria, including whether it provides "adequate and effective protection of intellectual property rights." IIPA's 2001 Petition notes three major deficiencies in Lebanon's protection of copyright that caused economic harm to U.S. right holders: (1) the copyright law in Lebanon contains deficiencies that render legal protection inadequate and ineffective; (2) the failure to enforce criminal remedies against pirate cable TV operators makes protection of U.S. audiovisual works inadequate and ineffective; and (3) enforcement efforts against piracy in Lebanon are totally inadequate and ineffective. During 2000, Lebanon imported \$29.5 million of products into the United States without duty, or 38.9% of its total imports into the U.S.). During the first 11 months of 2001, Lebanon imported \$34.2 million of products into the United States without duty, or 41.3% of its total imports into the U.S. Lebanon should not continue to expect such favorable treatment, since it fails to meet the discretionary criteria in this U.S. law.

⁶ This is ideally accomplished through the appointment of specialized IPR prosecutors, but may, at least initially, proceed by the designation of a prosecutor who will be responsible for IPR in each of the major jurisdictions.

- Infringing materials are not being seized in the few raids that are carried out in Lebanon. Police must seize all clearly infringing materials, regardless of whether they are specifically identified in the complaint (provided, of course, that there are sufficient indicia of illegality to sustain this action), in order to bring Lebanon's system closer to compliance with TRIPS.
- Current raiding practices (virtually non-existent) do not lead to "effective legal remedies" being meted out, and fail to provide a "deterrent to further infringements," as required by TRIPS. On an annual basis, the government of Lebanon must carry out raids and initiate prosecutions against (at least 100) retail stores selling or renting out pirate discs, DVDs, videocassettes, or other copyright infringing materials, leading to final, deterrent results.
- Lebanon's border measures do not give right holders the ability to stop pirate imports at the borders. They must do so in order for Lebanon's system to be brought closer to compliance with TRIPS.

Substantive Law Reform Issues

Lebanon must revise its copyright law to:

- Delete the software exception created by Article 25 of the Copyright Law of Lebanon (violates TRIPS Article 9.1 and 13);
- Provide an express rental right for sound recordings (absence of such a right violates TRIPS Article 14.4);
- Provide a direct point of attachment for U.S. sound recordings;
- Delete or sufficiently narrow certain overly broad exceptions to protection in Articles 23, 26-30, and 32-34 (TRIPS Articles 9.1 and 13);
- Provide full retroactive protection for works and sound recordings (TRIPS Articles 9.1 and 14.6);
- Ensure that the mandatory deposit requirement, including onerous costs and documentary burdens, does not apply to foreign works or sound recordings (which would, if carried out as a condition to protection be in violation of TRIPS Article 9.1).

Lebanon now has one known optical media plant with excess optical media production capacity and therefore must work to forestall the use of that plant for purposes of piracy which would decimate the domestic market and threaten markets outside Lebanon, in part, by ensuring that adequate laws or regulations on the import, export, and operation of optical media replication and mastering equipment, and on optical grade polycarbonate, are put into place, and sufficiently well enforced, to prevent this threat from proliferating. In the context of providing TRIPS-level laws and enforcement standards, without adequate legal provisions and effective legal remedies meted out against those who produce or

distribute massive amounts of pirate optical media in Lebanon, Lebanon's system will remain TRIPS-incompatible.

VIETNAM

IIPA applauds the recent entry into force of a Bilateral Trade Agreement between the U.S. and Vietnam, and notes that, as a result, Vietnam will probably be the focus of increased attention from U.S. trade officials this year. Although creative works of U.S. copyright owners have been officially protected in Vietnam ever since the 1998 bilateral copyright agreement, in practice the market remains dominated by piracy and largely closed to legitimate distribution of U.S. works. Besides working to dismantle market access barriers for U.S. copyright industries, U.S. efforts should seek to build up Vietnam's institutional capacity to enforce its copyright laws. Thus far, Vietnam has been able to forestall any large-scale movement of pirate optical media production facilities into its territory. It must be encouraged to continue and increase its vigilance in this regard, lest it become the next destination of choice for pirate syndicates that are fleeing intensified enforcement policies in some of its ASEAN neighbors. Vietnam's substantive law and enforcement system remain out of compliance with TRIPS standards.

TRIPS Enforcement Issues

Vietnam has some of the highest levels of copyright piracy in the world, and its government will need to take major actions to bring its enforcement system into compliance with the TRIPS requirements set out in TRIPS Articles 41-61. The following are some examples of enforcement problems in Vietnam, and some of the actions which need to be taken in order to bring Vietnam's system closer into compliance with TRIPS, in advance of its accession to the WTO:

- Little enforcement is now occurring in Vietnam, against rampant retail piracy, unlicensed theatrical exhibition, unauthorized public performances of motion pictures in numerous mini-theaters that show pirated videos, use of illegal software in public and private institutions and businesses, and widespread piracy of published materials, including technical and scientific titles,⁷ etc. To move forward on providing enforcement procedures that are "effective" and act as a "deterrent to further infringements," as required by TRIPS, the Vietnamese government must enforce various edicts and directives designed to combat copyright piracy, including a March 1999 decree covering administrative enforcement.
- The lack of coordinated enforcement efforts in Vietnam leaves the enforcement system ineffective to fight piracy. In order to provide an "effective" enforcement system as required by TRIPS, the Vietnamese government must centralize copyright enforcement responsibilities, by granting one agency charge over the several authorities now assigned copyright enforcement responsibility.

⁷ U.S. titles, including novels as well as textbooks and instructional materials formed 20 percent of all books published in Vietnam; nearly all these were unauthorized translations and/or pirate editions, and many of these are published by houses controlled by the Ministry of Culture.

- An abiding problem has been the sponsorship by certain governmental or quasi-governmental organizations of video, broadcast, public performance and book piracy.⁸ In addition, the Vietnamese government still engages in the use of unauthorized software in its agencies. To be TRIPS-compliant, Vietnam must adopt procedures to ensure that proper software asset management practices, including in the Vietnamese government, are employed, and must ensure that government-sponsored piracy of copyrighted materials ceases.⁹
- Judicial enforcement is, as a practical matter, unavailable in cases in which administrative remedies are sought (e.g., copyright owners are 'steered away' from bringing cases to court once they have pursued a matter in the administrative system). The enforcement system in Vietnam must be tightened so that civil, administrative and criminal justice systems work well together, to achieve overall deterrence.

Substantive Law Issues

The 1998 Bilateral Copyright Agreement and the 2000 Bilateral Trade Agreement went a long way to establishing an adequate legal framework for the protection of copyright in Vietnam. Most significantly, the 2000 BTA hit upon one of the key issues for copyright owners to be able to succeed in Vietnam: seeking the opening up of the Vietnamese market to legitimate producers. This step is essential if Vietnam is to be successful in stamping out piracy (although the market-opening is quite limited in some aspects – for example, there are no commitments for market access of “video tapes,” and a blanket provision allows Vietnam to deny national treatment with regard to “production, publication and distribution of cultural products” – in other words, the 2001 BTA may allow improved market access for U.S. copyrighted materials; the recent decree allowing entities other than FAFILM to import films for theatrical exhibition is a step in the right direction, but just a first step toward the open and competitive marketplace that the U.S. copyright industries seek in Vietnam). While the Bilateral Copyright Agreement and the Bilateral Trade Agreement provide the basis for TRIPS-compatible laws in Vietnam, and Vietnam’s Civil Code provides the foundation upon which a modern copyright law and enforcement system can be built, so far, very little has been built on that foundation. Vietnam must adopt TRIPS-compatible laws and enforcement regulations, which resolve ambiguities in the Civil Code provisions, which explicitly designate a lead agency for copyright enforcement matters, and which set out a clear framework by which U.S. copyright owners can enforce their rights.

⁸ For example, FAFILM must enforce directives on its distributors (which include provincial and municipal bureaus of the Culture Ministry) to stop selling, renting, or otherwise exploiting all previously distributed U.S. audiovisual materials in all formats, and to recall and return pirate film prints.

⁹ Major research institutes, such as the National Centre for Science and Technology in Hanoi, have been known to engage in the unauthorized use of software and other copyrighted materials.

D. CONCLUSION

IIPA appreciates the opportunity to provide its views on the important issues that must be resolved before WTO accession of the countries discussed in this filing. IIPA urges the Administration to use the WTO Accession process as a vehicle for obtaining statutory reform and to demonstrable "on the ground" enforcement improvement prior to accession, as part of bringing these countries' regimes into TRIPS compliance. We look forward to our continued work with USTR and other U.S. agencies to bring about major improvements in copyright protection and enforcement worldwide.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Eric H. Smith", written in a cursive style.

Eric H. Smith
President
International Intellectual Property Alliance

**APPENDIX A
COUNTRY REPORTS FOR LEBANON, AZERBAIJAN,
BELARUS, KAZAKHSTAN, TAJIKISTAN, UZBEKISTAN**

FROM

**IIPA 2002 SPECIAL 301 REPORT ON GLOBAL COPYRIGHT
PROTECTION AND ENFORCEMENT SUBMITTED TO THE
UNITED STATES TRADE REPRESENTATIVE
FEBRUARY 15, 2002**

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2002 SPECIAL 301 REPORT

LEBANON

EXECUTIVE SUMMARY¹

IIPA recommends that Lebanon remain on the Priority Watch List, and recommends that an out-of-cycle review be conducted later in the year to determine whether the government of Lebanon has completed the following steps:

- formed a specialized IPR unit of the police, with dedicated resources and power to act anywhere in Lebanon;
- appointed a national network of specialized prosecutors charged with the suppression of IP infringement by *ex officio* action;²
- issued a political directive to make fighting copyright piracy (including cable piracy) a high priority for all its agencies;
- closed down substantially all the unlicensed “community cable” television stations operating in the country;
- instructed police to seize all clearly infringing materials, regardless of whether they are specifically identified in the complaint (provided, of course, that there are sufficient indicia of illegality to sustain this action);
- carried out raids and initiated prosecutions against at least 100 retail stores selling or renting out pirate discs, DVDs, videocassettes, or other copyright infringing materials; and
- instructed the customs authorities to seize pirate product entering the country.

Almost three years have gone by since passage of the Lebanese copyright law, and in that time, key Lebanese government officials have taken virtually no action against severe and overt piracy in Lebanon. While the increasingly severe piracy problem in Lebanon is exacerbated by economic malaise in the region and continued political instability, part of the answer to those problems lies in Lebanon providing a stable legal environment for businesses, including adequate protection of intellectual property rights. The answer does not lie in statements like that of the Minister of Economy and Trade in May 2001 that “[Lebanon] should wait at least two years before a serious anti-piracy campaign can take place.” Piracy levels remain unacceptably high for all sectors, notwithstanding some well-intentioned

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

² This is ideally accomplished through the appointment of specialized IPR prosecutors, but may, at least initially, proceed by the designation of a prosecutor who will be responsible for IPR in each of the major jurisdictions.

enforcement officials, who are enforcing the laws, but who are simply overwhelmed by the scope of the problem and their own governments' general unwillingness to take actions toward a solution. The lackadaisical approach of the government in Lebanon to piracy has made possible the infiltration of organized criminal elements, including pirate CD producers, into Lebanon.

In the coming months, IIPA members must see improvements in the government's approach to cable piracy, piracy cases now bogged down before the courts, CD piracy, and stopping pirated imports at the border. For example, the government could curb the long-standing cable piracy problem through a government-led campaign to shut down "community cable" TV stations showing programs illegally throughout the country. Such a move would undoubtedly lead to healthy competition and consolidation of what is now a smalltime pirate-laden network. In addition, the courts must adequately deal with straightforward piracy cases (including several now pending against cable pirates) by meting out deterrent results, including fines and, where warranted, imprisonments to serious pirates. Without proper controls against CD piracy, Lebanon might turn from a country with a domestic piracy problem into an 'export pirate' country. Customs has been ineffective in keeping pirate product out of Lebanon, and must take increased steps to fight burgeoning pirate imports

In 2001, IIPA filed a petition under the Generalized System of Preferences (GSP) program, a U.S. trade program whereby Lebanon enjoys trade benefits, subject to the requirement that it provide "adequate and effective" copyright protection. In that petition, which is still pending, IIPA spelled out the reasons why Lebanon is not meeting the statutorily-mandated standard.

Total losses to the U.S. copyright-based industries in Lebanon were U.S.\$13.3 million in 2001.

LEBANON: ESTIMATED TRADE LOSSES DUE TO PIRACY
(in millions of U.S. dollars)
and LEVELS OF PIRACY: 1996 - 2001

INDUSTRY	2001		2000		1999		1998		1997		1996	
	Loss	Level										
Motion Pictures	8.0	80%	8.0	60%	8.0	60%	8.0	80%	8.0	80%	19.0	99%
Sound Recordings / Musical Compositions ³	2.0	40%	2.0	45%	2.0	60%	2.0	40%	1.0	40%	1.0	30%
Business Software Applications ⁴	1.3	78%	1.3	83%	1.6	88%	0.9	93%	1.4	79%	1.4	76%
Entertainment Software	NA	NA	1.5	96%	0.5	70%	0.6	70%	NA	NA	NA	NA
Books	2.0	NA	2.0	NA	2.5	NA	2.5	NA	2.0	NA	2.0	NA
TOTALS⁵	13.3		14.8		14.6		14.0		12.4		23.4	

COPYRIGHT PIRACY IN LEBANON

Cable Piracy Continues to Threaten Legitimate Market for Copyright Owners

Rampant cable piracy continues to devastate the local theatrical, video and television markets. An estimated 1,300 cable operators serve over 50% of the Lebanese population, retransmitting domestic and foreign terrestrial and satellite programming without authorization to their subscribers (estimated to number about 460,000) for an average monthly fee of US\$10. Occasionally, these systems also use pirate videocassettes and DVDs to broadcast directly to their subscribers, including the broadcasting of recent popular movies and TV shows, and of movies that have yet to be released theatrically in Lebanon. Each cable operator retransmits an average of 40 to 50 different television channels. Included among those channels is a minimum of four movie channels that broadcast motion pictures 24 hours a day. Films are frequently retransmitted by these pirate cable operators prior to their legitimate broadcast by television stations in Lebanon.

Largely as a result of cable piracy, ticket sales to movie theaters dipped approximately 50% in 2000, compared with sales in 1999. Local broadcast television stations have canceled long-standing

³ Loss figures for sound recordings represent U.S. losses only. Piracy levels represent the "overall" piracy rate, whereas the international piracy rate for 2000 was 68% and for 2001 was 65%. The piracy level for 1999 represented above is the "international" piracy rate.

⁴ BSA loss numbers for 2001 are preliminary. In IIPA's February 2001 Special 301 submission, BSA's 2000 loss and level figures of \$1.5 million and 87%, respectively, were also reported as preliminary. These numbers were finalized in mid-2001, and are reflected above.

⁵ In IIPA's 2001 Special 301 submission, IIPA estimated that total losses to the U.S. copyright-based industries in Lebanon were \$15.0 million. Because of the adjustment to reflect BSA's final 2000 statistics (see footnote 4), estimated total losses to the U.S. copyright-based industries in Lebanon in 1998 are lowered to \$14.8 million.

licenses with copyright owners because they cannot compete with the pirates. The legitimate video market has been almost entirely destroyed by the various forms of piracy in Lebanon. In 2000, a study of the economic impact of cable piracy estimated that the Lebanese government is losing approximately US\$38 million a year due to cable piracy (including lost taxes, social security contributions, and the earnings of the Lebanese government if the cable industry were legitimate).⁶

Retail Piracy in Lebanon: A Pirate Haven

Piracy runs rampant in Lebanon. A sampling of the market reveals that:

- Pirate versions of virtually any business software, entertainment software, sound recording, or published interactive software (i.e., encyclopedias on CD-ROM) can readily be purchased in retail markets for US\$7 or less.
- Lebanon is a “pirate haven” for video games. Console-based videogames are 99% pirate, while personal computer videogames are 98% pirate in Lebanon (roughly 70% of each of which are imported, mainly from Asia, while 30% are domestically produced). Silver counterfeit CDs, complete with packaging and manuals, are available on the streets of Lebanon. These come in compilation-CD format and single discs. Evidence suggests that many pirated videogames are being produced in Lebanon for export, and throughout the year, several customs seizures were made of product destined for South America and elsewhere, sourced from Lebanon.
- Pirate videos and DVDs of movies not yet showing in the theaters (“pre-theatrical”) and not yet licensed for video distribution “pre-release” are widespread. Many are copied from camcorders inside theaters in other countries, and many are imported into Lebanon without authorization of the right holder. Copies of new U.S. cinema releases are on the market within days of their U.S. theatrical release. The home video market is estimated to be 80% pirate.
- Retail piracy of business software takes several forms, including the unauthorized duplication and sale of computer programs, the sale of hardware loaded with unlicensed software (hard-disk loading), and mass CD replication of pirate copies of business software.
- The parallel importation of Zone 1 DVDs (Zone 1 refers to DVDs programmed for distribution and playback in North America only) is a growing problem.
- Pirate sound recordings are sold openly at fixed location retail shops and at the airport. Pirate CDs and locally/regionally manufactured tapes are ubiquitous. Music cassette piracy harms the industry, with Syria supplying many of the pirate cassettes. Lebanon has traditionally been a very important source for repertoire that has been sold throughout the region and in Arabic populations around the globe, and U.S. record companies make significant investments in the production and distribution of Lebanese repertoire, but these investments are undermined by the current high piracy levels.

⁶ The study was carried out by Statistics Lebanon, Ltd. between April and June 2000.

- Book piracy took root during the 1980s and remains a serious problem, although the legitimate university community has recently made some efforts to have students use only legitimate textbooks. Nonetheless, pirate photocopying and pirate publications are still the norm on college campuses. Pirate scientific, technical and medical and other English-language materials continue to flow out of Lebanon into Jordan, Saudi Arabia and the United Arab Emirates, among other countries.

Optical Media Piracy Arrives in Lebanon

In addition to retail optical media piracy, IIPA has learned of one CD plant operating in Beirut unregulated, and that this plant has been producing over 150,000 discs per month.⁷ Without proper controls, this plant could transform Lebanon from a country with a small domestic piracy problem to an “export pirate” country. Given that local demand for CDs is very small (for example, it is roughly 500,000 for sound recordings), IIPA is concerned by the existence of this known plant, that reportedly has one line in operation and does not use any kind of manufacturer’s code to identify the place of production. Lebanese authorities should immediately contact any known plants to ensure that they are engaged in the production of authorized product, and if necessary, seize infringing copies and machinery, and impose civil, administrative and criminal penalties under the current laws (including the Copyright Law) to deter the organized manufacturing and distribution of pirate product. IIPA also urges the Lebanese government to move toward implementation of effective measures against “optical media” piracy. In particular, the Lebanese government should introduce effective optical media plant control measures, including the licensure of plants that produce optical media, the tracking of movement of optical media production equipment, raw materials, production parts (so-called stampers and masters), and the compulsory use of manufacturer’s codes (both mastering codes and a “Source Identification” (SID) code), in order successfully to halt the production of pirate CDs and CD-ROMs.

COPYRIGHT ENFORCEMENT IN LEBANON

The lack of coordinated enforcement efforts in Lebanon has led to *ad hoc*, non-deterrent results. While some self-help measures taken by some industries have led to raids being run or prosecutions against certain pirates, there is no systematic demonstration of government will to defeat piracy and foster legitimate business in Lebanon. The police and prosecutors (and courts of urgent matters) have indicated a willingness to help try to curb piracy, but they are effectively powerless to act in the absence of clear direction from the government. The chief Ministry responsible for copyright enforcement, the Ministry of Economy and Trade, simply has not done its job. Current Minister Fleihan has two inspectors in the Department of IP Protection who should be specifically tasked to fight piracy, but, for example, in the area of software piracy, these inspectors lack computer knowledge, only work until 2 p.m. (meaning piracy after 2 p.m. cannot be addressed), and won’t work with computer experts. Even when these inspectors have been given targets to raid, many problems in enforcement have ensued (e.g., the pirate reseller at 4 p.m. at a computer fair could not be raided, because it was “after working hours,” etc.). Even when a raid produces results, these are usually attributable to the perseverance of the copyright holder’s efforts on the scene; the inspectors of the Ministry of Economy and Trade carry out

⁷ This plant has known ties to organized crime that spread throughout Lebanon, and was connected with a network in Latin America. For example, 4,000 pirate console-based videogames were seized in Miami in August 2001 bound for Paraguay from an aircraft inbound from Beirut. Other known exports from Lebanon have been found in Europe.

their duties in the course of the raid in a half-hearted manner. Also, the courts remain slow and ineffective, and of all the test cases brought by the industries through private criminal complaints over the past year, only one sentence was handed down, on December 29, 2001, against a pirate reseller of software.⁸ Customs authorities have been wholly ineffective in stopping blatantly pirated materials, including audio CDs and DVDs, at the borders, even when they are well aware of the illegal nature of the goods upon entry.

To change the tide of piracy in Lebanon, the government, at the highest levels, must issue a political directive to make fighting copyright piracy (including rampant cable piracy) a priority for the Lebanese government. From there the establishment of a specialized IPR unit in the police or elsewhere is needed, with dedicated resources and special prosecutors assigned to deal with copyright infringements, actually carrying out raids and bringing down piracy levels for all sectors of copyright. Such sustained actions would set the stage for training for prosecutors and the IPR police unit, as well as judicial training, and government monitoring of anti-piracy cases proceeding from raids through to the courts, to ensure that piracy cases are resolved quickly and with deterrent penalties.

Self-Help Measures Bring Limited Results, But Agencies and Courts Need to Respond

Largely through self-help measures on the part of the motion picture and pay-television industries, some cable pirates have stopped retransmitting domestic and foreign terrestrial and satellite programming without authorization to their subscribers. Similarly, self-help measures of the software industry have led to raids against pirate resellers and pirate end-users in Lebanon. In December 2001, 27 copyright piracy cases, all involving pirate sound recordings (and 10 in combination with the business software industry), were filed with the Chief Prosecutor, but none of these cases has to IIPA's knowledge led to successful results.

Since November 1999, the motion picture industry has filed some 28 criminal and civil lawsuits against cable pirates. As a result, a small number of pirates have come to recognize that they may not continue retransmitting domestic and foreign terrestrial and satellite programming without authorization. As a result of both civil and private criminal actions, followed by raids largely run (and funded) by the industry, in December 2000, several cable pirates were caught in the act of illegally retransmitting cable signals. Several of those pirates eventually agreed in writing not to retransmit copyright owners' broadcasts. In addition, in 2001, some 19 cable operators were raided and either agreed to cease retransmitting certain channels or were ordered to do so by the courts.⁹ While the outcome of these cases has been somewhat promising, the Lebanese government has played no role in seeing that these cases were taken or that the cable pirates were brought to justice. These civil actions by the pay-television industry were effective, because they included claims on behalf of certain channels that were

⁸ The court fined the pirate US\$667, and awarded the plaintiffs US\$1,334, far below the value of the software seized in the raid, and hardly deterrent.

⁹ IIPA understands that out of these civil injunction actions, the courts are supposed to monitor the compliance of the cable operators with the injunctive orders, and impose fines of up to LL300,000 (approximately US\$200) per film or television program in violation of the injunction. However, no fines have ever been imposed because the cable operators concerned have not been monitored as they should have.

being retransmitted without authorization. Civil actions filed by the motion picture industry, however, have been much less effective because the injunctions obtained in those actions are limited to the specific movie titles that have already been retransmitted by the defendant cable operators.

The motion picture industry also filed seven private criminal complaints in 1999, leading to the indictment of 17 cable pirates; those cases have been referred to the appropriate trial courts (after waiting almost two years), but none has resulted in a conviction.¹⁰ IIPA understands that further cases will be brought against cable pirates by the Public Prosecutor. None of the cases brought thus far has led to a single court decision, however. Thus, while the willingness of the Public Prosecutor to take these cases is to be commended, these cases will mean little in the way of solving the long-standing cable piracy problem unless the courts follow through with deterrent results and sentences.

In June 2001, the motion picture and satellite television industries organized a press conference to launch a public education campaign (including television spots and brochures) urging cable subscribers to choose only legitimate cable companies. IIPA understands that the Minister of Information opened the press conference launching the campaign, admitting that cable piracy had reached epidemic proportions, and stating that the government had a responsibility to provide a solution. IIPA applauds the Minister for taking this stand. However, no action by the Minister (nor the government) has been taken against cable pirates. The Lebanese government has recently proposed the drafting of a law to regulate the cable television industry. IIPA looks forward to assisting the Lebanese government in this effort to regulate the industry, but such a law cannot substitute for what is sorely needed: an aggressive campaign against pirates using the existing laws.

In 2001, the business software industry filed 16 petitions with the Judges of Urgent Matters that resulted in expert's inspections of over ten different outlets. These petitions resulted in eight court settlements, and two additional defendants are negotiating similar settlements. In addition, ten criminal prosecutions were prepared, which are still under investigation. Finally, six petitions filed with the Ministry of Economy resulted in two inspections (identifying one offender).¹¹ The Court of Urgent Matters in Beirut is noteworthy as a bright spot in the Lebanese enforcement system, and the public prosecutors and police have also been cooperative. Yet there is no systematic or coordinated effort to curb piracy levels, which remain high. Cyber-cafes are also emerging as nodes of piracy in Lebanon (i.e., unauthorized use of software on computers), and it is worth noting that police raids have been conducted against many pirates in this segment.

Judicial Delays and a Non-Specialized Judiciary Harm Right Holders

The most significant impediment to enforcement in Lebanon remains a severely backlogged and inefficient court system. Postponements, even of urgent matters, are the norm, and criminal cases can

¹⁰ The court in the cases actually found, on November 15, 2001, that it did not have jurisdiction to hear 12 of the 17 cases, and remanded the cases to the Prosecutor to bring in the proper court. In the meantime, the Public Prosecutor appealed the decision regarding the 12 defendants who reside outside Beirut, and the entire court file was sent to the Appeals Court. As a result, the hearing in respect of the five Beirut residents that was scheduled for January 29 has had to be postponed again pending the outcome of the appeal brought by the Public Prosecutor. A hearing in the appeal has now been scheduled for April.

¹¹ Once again, "working hours" got in the way of these inspections, since all the suspects were selling products on a "fair ground" that opened in the late afternoon, after the Ministry of Economy's "working hours."

take years to reach judgment. *Ex officio* public criminal actions against copyright infringers remain rare in Lebanon (although the police, in conjunction with the software industry, took action in 2001). In order to facilitate effective enforcement, public prosecutors and the Ministry of Economy should initiate anti-piracy actions *ex officio*. Special prosecutors and judges should also be designated for intellectual property cases.

Enforcement Against Retail Piracy Remains Inadequate

While some very limited progress has been made against cable piracy and software piracy, largely due to the efforts of industry, general enforcement against retail piracy is sorely lacking. Anecdotes indicate that industry complaints to the Ministry of Economy and Trade and to the police regarding retail piracy are not taken seriously at all – the police often respond that since the pirate retailers/distributors paid the relevant tax, there is “nothing [they] can do.” In other instances, raid targets are tipped off to impending raids, and in one reported case, the Ministry of Economy and Trade’s inspectors simply decided to cease a raid after the raided reseller became angry. In yet other instances, known pirate product from countries like Ukraine is regularly allowed into Lebanon, even though customs officials have been given adequate evidence of the illegality of the goods entering. Even though the recording industry has repeatedly requested written answers from the police and enforcement authorities, no explanation as to why pirated CDs from Ukraine have been allowed into Lebanon has been forthcoming.

COPYRIGHT LAW AND RELATED ISSUES

The Copyright Law of Lebanon (which entered into force on June 14, 1999) provides, on its face, a firm basis for copyright protection for U.S. works and sound recordings, including stiff penalties (on the books) for copyright infringement, stiff penalties against those who traffic in devices that receive, or those who arrange the receipt of, unauthorized transmissions of broadcasts “dedicated to a section of the public who pay a fee to receive such broadcasting” (i.e., cable pirates), confiscation of illegal products and equipment, the closure of outlets and businesses engaged in pirate activities, and a Berne-compatible evidentiary presumption of copyright ownership. The law also provides right holders with a broad communication to the public right (Article 15), and prohibits the installation and use of descrambling devices (Articles 87 and 88). Unfortunately, the law remains deficient with respect to international standards in several respects.

Article 25 Violates Berne (and TRIPS)

The software exception created by Article 25 of the new Copyright Law of Lebanon violates Article 9(2) of the Berne Convention (Paris [1971] text). It is not limited to “certain special cases,” but appears to allow unauthorized copying for any purpose; it “conflicts with a normal exploitation of the work,” especially with regard to software aimed at the educational market; and it “unreasonably prejudices the legitimate interests of right holders,” by threatening to eliminate completely a market that many copyright owners already serve on extremely generous terms. While many modern copyright laws include specific exceptions for the copying of computer programs under narrowly defined circumstances, and/or exceptions allowing the copying of certain kinds of works for “personal use” (but

almost never computer programs, except for “back-up” purposes), Article 25 sweeps far more broadly than comparable provisions of either kind, to the detriment of copyright owners.

Specifically, Article 25(1) authorizes “not-for-profit” educational institutions and public libraries to make copies of original computer programs they have acquired and to lend such copies to students for free. Such copies are made without the copyright owner's authorization and without compensation. The last sentence of Article 25(1) provides, “[t]he student shall have the right to make one copy for his personal use.” This clause does not state whether the student must first have a license to use the software before being allowed to make a copy. It is not clear if this provision is intended to allow a student to make a copy of any computer program regardless of whether he is entitled to use of such program, and regardless of whether the program in question is itself original or is already a copy. Such a provision could be interpreted to allow the making of limitless copies from a single piece of original software.

Implementing regulations for Article 25 were issued on November 25, 1999. The regulations set numerous conditions for educational institutions and public libraries to copy original software. While IIPA has not fully analyzed these regulations, it is clear that they do not cure the provision’s inconsistency with well established international legal standards. For example, Condition 8 requires educational institutions and public libraries to “program” the copy made so that it does not function if it is copied. Such “programming” could be interpreted to be an unauthorized alteration of the work, an infringement of copyright or moral rights. Moreover, we are not aware of any readily available process to limit copying in this manner, thus making the requirement unworkable as a practical matter.

Ultimately, Lebanon must delete Article 25 to comply with international treaty obligations (Berne, Paris [1971] text, TRIPS, WIPO Copyright Treaty).

Other Deficiencies

- There is no express distribution or rental right for sound recordings (which would violate TRIPS Article 14).
- Point of attachment for U.S. sound recordings can be achieved by simultaneous publication in the U.S. and any Rome Convention Member, but there is no direct point of attachment for U.S. sound recordings (Article 36).
- There are overly broad exceptions to protection, including Article 25 discussed above (Articles 23, 25-30, and 32-34).
- Works and sound recordings are not explicitly given full retroactive protection in line with international treaties (Berne and TRIPS).
- There is a mandatory deposit requirement, including onerous costs and documentary burdens; implementing regulations should clarify that this deposit requirement does not apply to foreign works or sound recordings.

Lebanon is a member of both the Berne Convention for the Protection of Literary and Artistic Works (Rome [1928] Act), as well as the International (Rome) Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations (1961). Lebanon should be urged to accede to the Paris Act of 1971 of the Berne Convention as well as the Geneva (phonograms) Convention, in order to provide clearer protection to international sound recordings.

WIPO Treaties

Several of Lebanon's lawmakers have already signaled a desire to join the necessary treaties in order to participate in and fully enjoy the emerging global information society. Copyright owners must be assured of their ability to control the security and integrity of their creations as they are disseminated through downloading or streaming on the World Wide Web, on-demand services, or other new interactive media. Without such assurances, there will be little incentive to make these valuable works available online. Thus, inadequacies in the protection of intellectual property in the networked environment will stifle the full potential of electronic commerce. Ratification and implementation of the WIPO "Internet" treaties, the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT) would bring copyright protection in Lebanon into the digital age. Specifically, the WIPO treaties require effective legal remedies against the circumvention of technical measures used by content owners to protect their works. Lebanon's representatives at international copyright seminars have made positive statements to consider swift accession to and implementation of these treaties. The WIPO national seminars in Beirut in September 1999 and the regional seminar on the treaties in November 1999 have provided Lebanon with technical know-how on the treaties.

Generalized System of Preferences

On June 13, 2001, IIPA filed a Petition (the second in three years) to the U.S. government as part of its "Country Eligibility Practices Review" of the Generalized System of Preferences (GSP) trade program. To qualify for benefits under the GSP Program, namely, duty-free imports of many important Lebanese products into the U.S., USTR must be satisfied that Lebanon meets certain discretionary criteria, including whether it provides "adequate and effective protection of intellectual property rights." IIPA's 2001 Petition notes three major deficiencies in Lebanon's protection of copyright that caused economic harm to U.S. right holders: (1) the copyright law in Lebanon contains deficiencies that render legal protection inadequate and ineffective; (2) the failure to enforce criminal remedies against pirate cable TV operators makes protection of U.S. audiovisual works inadequate and ineffective; and (3) enforcement efforts against piracy in Lebanon are totally inadequate and ineffective. During 2000, Lebanon imported \$29.5 million of products into the United States without duty, or 38.9% of its total imports into the U.S.). During the first 11 months of 2001, Lebanon imported \$34.2 million of products into the United States without duty, or 41.3% of its total imports into the U.S. Lebanon should not continue to expect such favorable treatment, since it fails to meet the discretionary criteria in this U.S. law.

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE
2002 SPECIAL 301 REPORT
COMMONWEALTH OF INDEPENDENT STATES
(C.I.S.)

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

This report encompasses separate but similar reports on the following 10 countries of the Commonwealth of Independent States (C.I.S.):

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

IIPA recommends that each of these 10 countries of the C.I.S. be individually retained, or in a few cases placed, on the Watch List in 2002.

In 2001, IIPA recommended that all ten countries of the C.I.S. be placed on the Watch List. Seven countries were named to the Watch List by USTR in 2001: Armenia, Azerbaijan, Belarus, Kazakhstan, Tajikistan, Turkmenistan and Uzbekistan. Two countries were left off the Watch List but were subjected to an out-of-cycle (OCR) review conducted late in 2001: Georgia and the Kyrgyz Republic. USTR announced the results of those OCR reviews on February 12, 2002, announcing that though it was not placing either country on any list, the U.S. government remained “concerned with the key gaps in the legal regimes of both countries” and that these gaps “must be corrected to ensure the effective enforcement of intellectual property rights.” Moldova was left off of all lists.

As in years past, IIPA has grouped these 10 (of 12) countries of the C.I.S. under a single heading (Special 301 report) only for the convenience of reporting on the problems in these countries. This is due to the numerous similarities of the issues, including the legal reform and enforcement problems, confronting the copyright industries in each of these countries.

In the remaining two countries of the C.I.S. not covered by this report, namely **Ukraine** and **Russia**, much more serious piracy problems confront the copyright industries, in particular optical media production and distribution. The problems in those two countries warrant separate attention, so IIPA has filed separate reports on Ukraine and Russia, recommending that Ukraine be retained as a Priority Foreign Country in 2002, and that Russia be retained on the Priority Watch List.

After a few issues are treated collectively in the introduction to this report, each of the 10 countries of the C.I.S. listed above is then treated separately in alphabetical order.

There are common deficiencies in the legal regimes of every one of these countries. These include: (1) the failure to fully adopt the legal reforms and enforcement required in bilateral trade agreements signed and ratified by each country; (2) the failure to comply with the World Trade Organization (WTO) TRIPS Agreement, especially the enforcement obligations; (3) the failure to adopt optical media production and distribution controls; and (4) with the rise of Internet piracy, the need to accede, implement, and enforce the 1996 digital treaties of WIPO – the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT).

Perhaps the most glaring legal shortcoming in almost half of the countries in the C.I.S. is the absence of any protection for foreign sound recordings. That is so because many of these countries are neither members of the Geneva Phonograms Convention nor the World Trade Organization TRIPS Agreement (and, the WPPT is not yet in force).

Thus, there is no point of attachment for American or other foreign sound recordings in five of the 12 countries of the C.I.S. This is so even though these countries were obligated by the bilateral trade agreements to provide this over seven, and in some cases, over eight years ago. In fact, the obligation was to make “best efforts” to join the Geneva Phonograms Convention in most cases by the end of 1993 – an obligation that has been flaunted by the delinquency of these countries.

It is very important that the U.S. government insist that each of these countries cure all of the current violations of these trade agreements. The IPR obligations in these early 1990s agreements were the then-minimal international standards for IPR protection and enforcement, pre-TRIPS. There is no excuse why for nine years these countries have not been even providing a point of attachment or national treatment for American works and sound recordings while the countries are themselves enjoying Normal Trade Relations (NTR). Without an effective legal and enforcement regime, the stakes (and obligations) have gotten even higher, especially with the growth of moveable optical media production and distribution operations, and with Internet piracy.

Introducing the necessary legal infrastructure to prevent the growth of piracy is much simpler than attempting to dismantle piratical operations once they are established. In the current environment in the region, replication facilities are easily moved from one territory to another. Today they are found mostly in Russia and Ukraine; but at any time, the production facilities could easily move, for example to Belarus, Georgia or Uzbekistan. Providing the necessary legal framework, especially an effective criminal enforcement regime, will go a long way toward dissuading this type of movement, or to effectively confronting it when does exist.

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

Instead, the lack of an effective enforcement regime has resulted in the countries in this region becoming a haven for the production and distribution of pirated material, including optical

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

Four steps are needed to curb this problem: (1) all works and sound recordings must enjoy protection consistent with the WTO TRIPS requirements – i.e., including materials released within the past 50 years (at a minimum – the U.S., for example is much more generous); (2) optical media production regulations must be implemented to shut down illegal plants and control the production and distribution of this material; (3) police and prosecutors must commence raids, seizures, and deterrent criminal actions, and judges must impose criminal sanctions; and (4) effective border enforcement must be implemented to prevent the widespread flow of material, including the optical media production facilities and product, throughout the region or into territories beyond the region.

COMPLIANCE WITH BILATERAL TRADE AGREEMENTS

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

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

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

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

The obligations of these identical bilateral trade agreements (Article VIII of each agreement and 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.

Berne Convention: Ten of 12 of the countries in the C.I.S. are members of the Berne Convention. They are: the Russian Federation (1995), Ukraine (1995), Georgia (1995), the Republic of Moldova (1995), Belarus (1997), Kazakhstan (1999), Azerbaijan (1999), the Kyrgyz Republic (1999), Tajikistan (2000), and Armenia (2000). This means that two countries, Turkmenistan and Uzbekistan, are in breach of this trade agreement obligation, and are not providing any protection for works in their countries.

Sound Recording Protection (Geneva Phonograms Convention and/or WTO TRIPS Agreement): Only seven of 12 countries in the C.I.S. provide any protection for American or other foreign sound recordings by virtue of their membership in the Geneva Phonograms Convention, or by their membership in the World Trade Organization (WTO TRIPS Agreement). The seven countries that do protect foreign sound recordings are: the Russian Federation (1995), the Kyrgyz Republic (1998), Georgia (1999), Ukraine (2000), Moldova (2000), Kazakhstan (August 2001) and Azerbaijan (September 2001).

Only five of 12 countries are members of the Geneva Phonograms Convention: the Russian Federation (1995), Ukraine (2000), Moldova (2000), Kazakhstan (August 2001) and Azerbaijan (September 2001). The Kyrgyz Republic and Georgia use their WTO membership as a point of attachment for foreign sound recordings since they are not Geneva Phonograms members (and Moldova can use either Geneva Phonograms, or its WTO membership effective July 26, 2001).

So, five of 12 countries provide no protection for foreign sound recordings over seven, or in some cases, over eight years after they obligated themselves to do so. They are: Armenia, Belarus, Tajikistan, Turkmenistan, and Uzbekistan.

In one case, Belarus, the WIPO digital treaty for neighboring rights, the WIPO Performances and Phonograms Treaty (WPPT), could provide a point of attachment for sound recordings when that treaty goes into force, hopefully sometime in 2002. In the meantime, to meet its obligations under the bilateral trade agreement and to avoid any confusion, Belarus should accede to the Geneva Phonograms Convention.

So, seven of 12 countries in the C.I.S. are in breach of the bilateral trade agreement obligation to join Geneva Phonograms. They are: Armenia, Belarus, Georgia, Kyrgyz Republic, Tajikistan, Turkmenistan, and Uzbekistan.

Pre-Existing Works and Sound Recordings: The Russian Federation explicitly *does not* provide protection for pre-existing works or sound recordings; as it pertains to works, this provision is in breach of the clear obligation in the bilateral agreement.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 WTO TRIPS Agreement (Article 14.6 for sound recordings and Article 9 for works).

This absence of protection was also an issue in Ukraine until the passage in 2001 (effective September 5, 2001) of the copyright law amendments aimed at fixing the bar on such protection for pre-existing works and sound recordings. In fact, the provision in the Ukraine law of 1993 was nearly identical to that found in the Russian law. The Ukraine drafters clearly intended to provide protection for pre-existing works and sound recordings that are less than 50 years old. Although the provisions are a bit unclear, it is likely officials and courts will properly enforce them.

Belarussian experts claim that their law probably does provide protection for pre-existing works, though they acknowledge it is less clear with respect to sound recordings. For the other nine countries of the C.I.S. it is unclear what, if any, protection they do or do not provide for pre-existing works and sound recordings. Some of the countries, like the Kyrgyz Republic, probably intended to provide such protection, though the provisions are unclear; they should be clarified by copyright law amendment, by regulation, or by some other administrative means. Other countries of the C.I.S. are probably not providing protection for pre-existing works and sound recordings. They must be urged to do so to avoid breaching the bilateral agreement, and if they wish to be members of the WTO.

¹The issue of protection for pre-existing works, at least back to 1973, was additionally required in every country in a special bilateral provision (not found in the Soviet agreement). That provision obligated each country to 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—formally confirmed their membership in that convention, however. 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.

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

Computer Programs and Databases: Some form of explicit copyright protection for computer programs and databases is provided in every country except Turkmenistan. However, almost no country in the C.I.S. provides 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.

Criminal Code: 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. In the few cases where criminal codes have been adopted, while this first step should be lauded, it must be followed with actual imposition of criminal penalties especially aimed at the organized syndicates.

Customs Code: Neither have most of these countries adopted the necessary customs code revisions to provide *ex officio* authority to properly seize material at the border. At present, border measures are probably the weakest part of enforcement in this region.

Enforcement: None of these countries is providing “adequate and effective” enforcement on the ground as required by the bilateral agreements or the WTO TRIPS Agreement. There must be real engagement by the police, prosecutors, judges and customs officials to effectively enforce copyright and neighboring rights in this region to stop commercial piracy.

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

SUMMARY OF LEGAL REFORMS AND ENFORCEMENT ACTIVITY

Of course, the most important multilateral legal reforms that came into force after the bilateral trade agreements were adopted in the early 1990s, were the World Trade Organization TRIPS Agreement in 1995, and the 1996 digital WIPO treaties, the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT).

World Trade Organization (WTO TRIPS Agreement): Only three of 12 countries in the C.I.S. are members of the World Trade Organization, and are thus bound by the TRIPS Agreement’s substantive and enforcement obligations. They are the Kyrgyz Republic (December 20, 1998), Georgia (June 14, 2000), and Moldova (July 26, 2001).

Seven other countries in the C.I.S. are in the process of acceding to the WTO. Working parties have been established for Armenia, Azerbaijan, Belarus, Kazakhstan, 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 WTO TRIPS compliance by existing and acceding WTO members. Consistent U.S. policy requires any nation newly acceding to WTO to be in full compliance with TRIPS at the time of accession. In IIPA’s view, the TRIPS obligations merely spell out in greater detail the C.I.S. countries’ *existing* bilateral obligations under the bilateral trade agreements with the U.S. to provide “adequate and effective protection and enforcement” of intellectual property rights. These obligations must also be further bolstered by accession and implementation of the WIPO digital treaties of 1996 to effectively enforce against Internet and other digital piracy.

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

Four countries are members of the WIPO Performances and Phonograms Treaty (WPPT). They are: Moldova (March 1998), Belarus (July 1998), Georgia (July 2001) and Ukraine (November 2001). Unfortunately, the Kyrgyz Republic bifurcated its membership in these important digital treaties and only joined the WIPO Copyright Treaty in 1998. It is hoped that they will accede to the neighboring rights (WPPT) treaty as well, early in 2002. The United States deposited its instrument of accession to the WCT and WPPT in September 1999. On March 6, 2002 the WCT will go into force and hopefully, soon after in 2002, the WPPT as well.

In December 2000, the Interparliamentary Assembly of the members states of the C.I.S. agreed in a resolution adopted in St. Petersburg that for those countries that have not yet done so “to recommend to the parliaments and governments”. . . to accede to the WCT and WPPT, and to modernize copyright and neighboring rights laws taking into account the two digital treaties. The assembly even adopted recommendations on the specific definitions and scope of new rights that need to be adopted by the states of the C.I.S. to properly implement the digital treaties. The resolution and recommendations were agreed to by all 12 members states of the C.I.S., working with officials from the W.I.P.O. This is an important step within the C.I.S. and one that should be encouraged by the U.S. government because of the rise of Internet and other digital piracy.

Other Multilateral Agreements: Armenia and the Russian Federation have joined the Brussels Satellite Convention. The Republic of Moldova is a member of the Rome Convention (December 1995).

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

Civil Code Reform in the C.I.S.: A dangerous development in breach of the bilateral agreement continues to unfold in several countries of the C.I.S., including the Russian Federation

and Ukraine. This is the comprehensive reform of the civil codes with the inclusion of competing copyright provisions; such reform is underway in several of these.² In most cases, the efforts to revise the civil code is likely to result in the addition to that code of new and confusing copyright provisions inconsistent with Berne, TRIPS, and the bilateral agreements, and inconsistent with the more fully developed national copyright laws. These efforts to revise the civil codes should be opposed.

In 1996, the C.I.S. Interparliamentary Assembly in St. Petersburg adopted a so-called Model Civil Code for the countries of the C.I.S. Detailed provisions on copyright and neighboring rights were included that were contradictory to existing international standards of protection for copyrights. In Russia in 2001, drafts of the Civil Code reform that were circulated continued to include IPR provisions completely incompatible with the bilateral trade agreement, the Berne Convention, and TRIPS. In Ukraine in December 2001, the latest draft of Chapter IV of the Civil Code had been reduced to 14 articles; this is certainly an improvement over earlier drafts that contained over 140 articles (and then 50 in a subsequent draft), many which would have undercut the copyright law. However, even the shorted version could, if enacted, cause confusion because it overlaps the copyright provisions. And because it makes reference to over 90 other laws, it could make the civil code provisions obsolete if and when any of the other laws referred to is amended. IIPA continues to urge that the civil code should not be adopted in Ukraine or any of the other countries of the C.I.S., certainly not in a manner that would in any way weaken the copyright law or its enforcement.

Each country of the C.I.S. should enact separate copyright, customs, and criminal provisions and procedures, rather than build on the foundation of the Soviet-era civil codes.

Copyright Law Reform: To the best of our knowledge, 11 countries have passed major revisions to their copyright laws:

- Armenia:** May 13, 1996; effective June 6, 1996; amended December 8, 1999; effective February 12, 2000;
- Azerbaijan:** June 5, 1996; effective October 23, 1996;
- Belarus:** May 16, 1996; effective June 18, 1996; amended August 11, 1998; effective August 19, 1998;
- Georgia:** Civil Code in force on November 25, 1997; copyright law adopted June 22, 1999; effective August 16, 1999;
- Kazakhstan:** June 10, 1996; effective June 12, 1996;
- Kyrgyz Republic:** January 14, 1998; effective January 22, 1998;
- Republic of Moldova:** November 23, 1994; effective May 2, 1995; amended May 28, 1998;
- Russian Federation:** July 9, 1993, effective August 3, 1993; amended July 19, 1995;
- Tajikistan:** November 13, 1998; effective December 17, 1998;

²Prior to the breakup of the Soviet Union, the text of the law of the U.S.S.R. (1961) "Fundamentals of Civil Legislation" was the governing copyright law throughout the Union. Based on the "Fundamentals," each of the republics adopted in 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 free use provisions. The Supreme Soviet of the U.S.S.R. adopted amendments to the Fundamentals in May 1991, but they did not become effective because of the dissolution of the U.S.S.R. The 1991 amendments entered into force in the Russian Federation on August 3, 1992 by special decree. Several of the republics still treat the old civil codes as in force; it is not known whether any of these republics explicitly treat the 1991 amendments drafted by the former U.S.S.R. as effective within their territories.

Ukraine: December 23,1993, effective February 23, 1994; amended July 11, 2001, effective date September 5, 2001;

Uzbekistan: August 30, 1996; effective September 17,1996.

Turkmenistan has, for almost 10 years, been in the process of drafting new copyright legislation, so far without success. Until it is adopted, the Civil Code (Chapter IV, 1961) from the former Soviet era is still the operational law there. This is a very obsolete law that needs modernization.

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

In 2000 (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	\$10,155,000 45%
Azerbaijan	\$0 0
Belarus	Suspended in 2000 --
Georgia	\$0 0
Kazakhstan	\$325,636,000 75.5%
Kyrgyz	\$133,000 6.8%
Moldova	\$257,000 0.2%
Russia	\$514,664,000 6.6%
Tajikistan	\$0 0
Turkmenistan	\$0 0
Ukraine	\$40,033,000 (suspended in 2001) 4.6%
Uzbekistan	\$166,000 0.5%

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. On May 12, 2000, the United States government held public hearings on the GSP petitions regarding these five countries; the IIPA testified, as did representatives of most of the governments of the five countries.

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

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

In 2001, the IIPA attempted to work directly with the governments of Kazakhstan and Uzbekistan to resolve the legal reform deficiencies that resulted in the filing of the IIPA's GSP petition. Unfortunately, neither country made the legal reforms necessary to fix the deficiencies detailed in this report and in the GSP proceedings that might result in the withdrawal of those petitions. It is hoped that in 2002, these countries and Armenia will adopt the necessary legal and enforcement reforms to resolve these issues. In the meantime, the United States government has not decided whether to withdraw or suspend GSP benefits in Armenia, Kazakhstan and/or Uzbekistan.

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

AZERBAIJAN

LEGAL REFORM AND TREATY ADHERENCE

In April 1993, Azerbaijan and the United States exchanged letters to implement a bilateral trade agreement detailing mutual obligations to improve the protection and enforcement of intellectual property rights (a summary of the trade agreement is provided in the introductory section, above). That agreement entered into force on April 21, 1995. Azerbaijan adopted the Copyright and Neighboring Rights Law on June 5, 1996; it went into force on October 23, 1996. IIPA has not been able to obtain a copy of this law.

Azerbaijan adhered to the Berne Convention, effective June 4, 1999. Finally, in 2001, Azerbaijan began to provide a point of attachment for foreign sound recordings when it joined the Geneva Phonograms Convention, effective September 1, 2001 (six years after the bilateral trade agreement required such protection).

Azerbaijan *does not* clearly provide protection for pre-existing works or sound recordings as required by the clear obligation in its bilateral trade agreement, Berne and the WTO/TRIPS Agreement. Azerbaijan must clearly provide protection for pre-existing works and sound recordings.

Azerbaijani law reportedly does provide copyright protection for computer programs and databases. It is unclear whether Azerbaijani law provides civil *ex parte* search provisions; these are necessary to provide for effective enforcement against end-user pirates.

Article 158 of the “new” Azerbaijani Criminal Code (in force on September 1, 2000) provides liability for copyright and patent infringements if they result in “significant damage” to the rightholder concerned. The “significant damage” standard creates an unwarranted threshold in the fight against copyright piracy because it sets a vague standard for police and prosecutors to commence action. The law should be amended to include a low and clear threshold to instigate a criminal action, for example, 50 times the minimum daily wage. Not only would this help to identify criminal infringing acts for prosecutors, but it would also provide critical guidance for the police when they are conducting initial raids and need to assess, in a particular situation, whether a case should be brought under the criminal code or the administrative code. Article 158.1 of the Criminal Code provides for fines up to 200 times the minimum monthly wage for copyright and neighboring rights violations, or corrective labor for up to two years. Article 158.2 deals with repeat violations and actions committed by a group of persons based on collusion or agreement (conspiracy). In such cases, sentences of up to five years or fines up to 5,000 times the minimum monthly wage are available. There have been no known convictions under this law.

The Azerbaijani Customs Code was amended on June 10, 1997 and does contain provisions (Article 19) relevant to the importation or export of intellectual property. However, it is not clear if the provisions adopted in the Customs Code provide *ex officio* authority for customs officials to seize material at the border as required by the WTO TRIPS Agreement.

At present, the criminal code provides sanctions only for criminal liability for copyright and patent rights violations; neighboring rights violations are not covered at all. The criminal provisions that do exist are minimal and do not include jail terms. Neither the criminal code nor the Criminal Procedures Code provides police with the proper *ex officio* authority to commence criminal copyright cases. These laws should be amended accordingly.

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

COPYRIGHT ENFORCEMENT

There is currently no “adequate and effective” enforcement in Azerbaijan; there is no meaningful police, customs or prosecutorial activity, as required by the bilateral trade agreement and the WTO TRIPS Agreement. There are administrative sanctions (Article 186-1) providing for fines of 20 times the minimum monthly wages for copyright infringements. However, these fines are only imposed if the infringement causes damages that equal more than 10 times the minimum monthly wages. None of the copyright industries report that these administrative sanctions, or any of the criminal penalties, have ever been levied in a copyright case.

Also, border enforcement is very weak in Azerbaijan. This is allowing illegal copies, especially of musical material produced in another country in the region, to cross borders freely for sale in Azerbaijan and other countries. The failure to provide an adequate legal and enforcement regime in Azerbaijan is causing significant harm to the copyright industries.

In addition, as in other countries in the region, the environment is ripe for illegal optical media production facilities, as well as other organized criminal production facilities. According to the recording industry (International Federation of the Phonographic Industry, IFPI), there are no optical media plants in Azerbaijan. Most music piracy is in the form of audiocassettes. The level of music piracy is estimated at about 85%; trade losses for foreign rightholders in 2001 is estimated at \$13 million, an increase from 1999, when it was \$10 million. It is estimated by the industry that in total, 8.9 million cassettes and 1.6 million CDs were sold in Azerbaijan in 2001; of these, 7.6 million cassettes and 1.3 million CDs were pirated copies.

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 \$29.7 million in 2000; the level of piracy was estimated to be 89%. The final figures for 2001 are not yet available.

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

BELARUS

LEGAL REFORM AND TREATY ADHERENCE

In January and February 1993, Belarus and the United States exchanged letters to implement a bilateral trade agreement detailing mutual obligations to improve the protection and enforcement of intellectual property rights (a summary of the trade agreement is provided in the introductory section, above). That agreement entered into force on February 16, 1993. In May 1996, Belarus enacted a new law on copyright and neighboring rights. That law entered into force on June 18, 1996.

Belarus adhered to the Berne Convention (Paris Act) on December 12, 1997, in accordance with its bilateral obligation. In December 2000, Belarus signed a cooperation agreement with the World Intellectual Property Organization (WIPO) to improve its IPR regime. However, Belarus still has not joined the Geneva Phonograms Convention and therefore is not providing any protection for U.S. or other foreign sound recordings – two obligations it pledged to make “best efforts” to conclude over eight years ago.

On August 11, 1998, amendments to the Law on Copyright and Neighboring Rights were adopted; those amendments went into force on August 19, 1998. The 1998 amendments added: (1) a rental right consistent with TRIPS for computer programs and audiovisual works (Article 16.1) and for sound recordings (Article 32.2); (2) a right of communication to the public with definitions of “communication to the public” and “broadcasting” (Article 16.1 and Article 4, respectively) – but absent a clear right of making available; (3) provisions pertaining to “rights management information” (Article 4); (4) a limited right of archival backup copying for computer programs plus a narrow exception for decompilation (Article 21); (5) a point of attachment for sound recordings – by creation, and first or simultaneous publication in Belarus (Article 30); and (6) making available rights for sound recordings (Article 32.2) (but maintaining a compulsory license for the public performance, broadcasting, communication to the public [including interactive use] of sound recordings [Article 33]).

These amendments were adopted not only for eventual WTO TRIPS compliance, but also to comply with the 1996 WIPO “digital” treaties. Belarus is not yet a member of the WTO. Belarus did deposit its instrument of ratification on July 15, 1998 for both the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT), becoming one of the first countries to do so.

However, even though Belarus ratified the WIPO Performances and Phonograms Treaty (WPPT), that treaty is not in force because 30 members have not yet ratified it. So, Belarus cannot rely on the WPPT to provide a point of attachment for American or other foreign sound recordings, which is why even with all of the other important legal reforms in place, Belarus must be urged to protect foreign sound recordings by acceding immediately to the Geneva Phonograms Convention.

The August 1998 Copyright Law added in the remedies section provisions relating to anticircumvention devices and services, and the removal or alteration of rights management

information (Article 39.5). The remedies for anticircumvention and rights management information protection include injunctive relief, monetary damages, and seizure of devices.

Criminal code provisions were adopted in 1999 and went into force on January 1, 2000. Those provisions reportedly (IIPA was never provided with a copy) provide for up to five years' imprisonment for copyright and neighboring rights violations. The criminal procedures code still needs revision to provide the proper *ex officio* authority for police officials to initiate copyright criminal cases. There are administrative remedies against violations of copyright and neighboring rights, including acts of illegal retail sale and distribution.

Even though customs code amendments were adopted in 1998 to include intellectual property materials, the proper *ex officio* authority was not granted to customs officials.

Under the Copyright Law (Article 40), the civil penalties for copyright or neighboring rights violations included injunctive relief, damages (including lost profits), seizure and impoundment of infringing copies, and statutory penalties of between 10 and 50,000 times the minimum wage. Belarussian officials also point to the civil code revisions, adopted effective July 1, 1999, as providing additional remedies for IPR violations.

The Copyright law, as amended in 1998, does not clearly provide protection for pre-existing works. The protection for pre-existing sound recordings is less clear. Belarus is 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) to provide protection for pre-existing works and sound recordings, and should be urged to clarify its law immediately.

Belarussian officials insist this protection does currently exist, at least for works. The officials insist that since 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, absent any legislative action to the contrary, Article 18 of Berne should currently provide protection for pre-existing foreign works. While this may be a correct reading of the law, it should be clarified by amendment to the law to avoid any confusion on the part of police, prosecutors and judges tasked with enforcement of these rights. Further, the provisions cited (Article 18 of Berne), apply only to "works," not sound recordings; Belarus is not a WTO member. So, even though Belarussian officials believe that protection for pre-existing sound recordings is provided in the copyright law, absent membership in the relevant treaties, there is no point of attachment. Belarus should clarify that this protection is provided for both works and sound recordings to meet its international obligations.

Belarussian copyright law does provide explicit protection for computer programs and databases as required under the bilateral trade agreement. However, there are no known available civil *ex parte* search procedures; these are needed for effective enforcement against end-user pirates.

Neither are its anticircumvention or copyright management information provisions fully compatible with the new digital treaties. In particular, implementation of the anticircumvention requirement should include a prohibition 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 so-called "copyright management information" that is attached to or accompanies a work or

sound recording, including protection against the alteration, removal or falsification of this information. The Belarussian provisions provide some, but not all, of these essential rights to protect copyright material against Internet and other digital piracy.

COPYRIGHT ENFORCEMENT

Levels of piracy remain extremely high, and enforcement remains virtually nonexistent in Belarus. This piracy and the lack of effective enforcement in Belarus is preventing entry by U.S. creative industries into the country. One additional change in the enforcement regime in 2001 was the disbandment of the Committee on Copyright and Neighboring Right and its incorporation into the State Patent Office. This does not bode well for the development of specialized enforcement entities to deal with the growing problem of piracy, especially the considerable growth in optical media production and distribution in Belarus and the region.

Belarus is in the midst of its accession process to join the World Trade Organization. To accede, Belarus must bring its law into full compliance with its TRIPS obligations by improving its laws and providing effective enforcement (including criminal penalties), since the current laws and enforcement regime fall short of these obligations.

Belarus must also act to stem the unacceptable rates of piracy by (1) enforcing its new criminal penalties provisions; (2) building an enforcement regime with effective police, prosecutorial and judicial enforcement; (3) taking action aimed at the growth of musical cassette production, and the growing threat of optical media production and distribution in Belarus – this includes implementation of optical media regulations to close illegal plants down; (4) licensing its television broadcasting stations; and (5) adopting procedures for government agencies to effectively deter commercial piracy.

According to the recording industry (International Federation of the Phonographic Industry, IFPI), Belarus has large-scale illegal musical cassette production facilities for domestic and foreign consumption. There is confirmation of the involvement of organized criminal enterprises in the music piracy business in Belarus. These criminal organizations are not only producing musical cassettes in Belarus, but are producing optical disc media in neighboring countries, and distributing CDs and CD-ROMs containing musical recordings as well as business and entertainment software in Belarus and in these other countries. In fact, one of the Ukrainian CD plants was able to migrate to Brest on the Belarus-Poland border due to the lax enforcement regime in Belarus (and Ukraine). The plant and product migration is also a result of ineffective border enforcement measures that allow materials to flow freely in the region; in particular, illegal materials flow through Belarus to Ukraine, Poland, Russia, the Czech Republic, and a number of other countries.

The environment and infrastructure is ripe for additional illegal optical media production facilities. The one plant already there could be the start of other CD plants moving some of their production facilities. These optical disc plants are capable of producing thousands of CDs, DVDs, CD-ROMs, and even VCDs. The Belarussian authorities must act quickly to close the one illegal plant and to prevent other illegal production facilities from taking root in Belarus by adopting legislation controlling optical media production and distribution (including plant licensing regulations, raw material monitoring and Source Identification [SID] coding). Illegal optical media

production is a major regional problem. Adopting measures quickly will prevent the rapid growth of this problem in Belarus.

The growth of illegal musical cassette plants for the production and distribution of musical works in Belarus and the rise of optical media production in the region are very serious developments. Belarussian authorities need to implement systems to regulate and monitor the activities of the illegal cassette tape plants, to prevent their illegal reproduction and distribution with regular copyright compliance controls.

Customs officials must be better trained and equipped to prevent any illegal product made in Belarus from being exported, and to prevent the importation of material (tapes and CDs) made elsewhere in the region from entering into Belarus. In 2000, only nine cases were reported where the shipment of CDs (about 14,100 total) were stopped by customs; obviously, much more needs to be done to stop the heavy trafficking of illegal material into and out of Belarus.

In 2001, the IFPI continued to coordinate its anti-piracy actions against retailers and illegal manufacturers, seizing over 22,000 tapes, over 36,000 CDs, and over 30 recording devices, with a total value of US\$405,000. The recording industry considers this a modest figure, taking into account the huge Belarussian markets, and notes that much more enforcement activity is needed to successfully deter the pirates.

The music industry has endemic piracy problems: The recording industry estimates total trade losses for foreign rightholders in Belarus at \$20 million in 2001 (this figure was \$25 million in 1999); the piracy rate was estimated at 75% (ranging from 65% for the Russian and "local" repertoire to over 90% for foreign repertoire). In 2001, more than 3.6 million CDs and 10.8 million cassettes were sold in Belarus, of these 2.7 million CDs and 8 million cassettes were pirated copies.

In Belarus, pirated CDs sell for one-third the legitimate price, preventing the music industry from creating a market; and as mentioned, pirate tapes are a major problem. This is coupled with the lack of protection for pre-existing works (domestic or foreign), and the lack of any protection for foreign sound recordings (because Belarus does not provide a clear point of attachment). Belarus must adhere to the Geneva Phonograms Convention, and adopt strong enforcement mechanisms to allow a legitimate music market to develop. Only in 2001 were the first criminal cases instigated (a total of three cases); charges were filed against infringers of copyright and neighboring rights, but these cases have not reached final disposition.

The Interactive Digital Software Association (IDSA) reports that the scale of piracy in Belarus of entertainment software (including videogame CDs and cartridges, personal computer CDs, and multimedia products) has grown continually worse. Piracy operations have been completely taken over by organized crime syndicates, which have ties with the Russian crime groups. Although most of the material is produced elsewhere in the region (specifically Russia, and the Ukraine), Belarus serves as a major distribution point for pirate material that is then shipped to other parts of Eastern Europe, particularly Estonia and Poland, and throughout the C.I.S. There are reports that a CD plant, formerly located in Ukraine, has now been relocated to Belarus and may be producing both entertainment software and music material. The existence, location, and production output and capacity of this plant have not yet been fully substantiated. What is quite clear is the fact that Belarus is the source of a large amount of pirate material, whether produced in or simply shipped through Belarus to neighboring countries.

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 \$29.7 million in 2000; the level of piracy was estimated to be 89%. The final figures for 2001 are not yet available.

The Motion Picture Association (MPA) reports that video and other forms of piracy remain rampant in 2001. Almost all videocassettes in Belarus' open markets are pirate Russian-language copies imported from Russia. The lack of border checkpoints between Belarus and the Russian Federation facilitates such cross-border piracy. Counterfeit packaging and tapes can also be bought separately in Russia and assembled locally. There was no enforcement activity reported by MPA, that is, the local authorities permit sales of pirate goods at open marketplaces. There is virtually no border enforcement. And pirate video dealers sell their wares at rock-bottom prices in the huge open markets; pirate cassettes are sold at retail stores at slightly higher prices.

There are no official piracy or loss figures for the motion picture, entertainment software, or book industries. The book industry reports that the primary production and distribution source of most of the pirated material in Belarus and throughout the C.I.S. is Russia and Ukraine.

Copyright piracy not only threatens foreign investment, but the development of local copyright industries in Belarus, as it does in the other countries in the C.I.S. This threat must be met by a coordinated legal and enforcement response. All enforcement agencies (police, prosecutors, customs, ministries such as Justice, Interior, and Internal Revenue) should treat commercial copyright infringement as a serious crime and, as noted above, have the proper *ex officio* authority to act against it. Clear government strategies and lines of authority should be developed. Training of judges, prosecutors, magistrates, and police should be part of regular ongoing enforcement efforts.

KAZAKHSTAN

LEGAL REFORM AND TREATY ADHERENCE

In May 1992, Kazakhstan and the United States signed a bilateral trade agreement detailing mutual obligations to improve the protection and enforcement of intellectual property rights (a summary of the trade agreement is provided in the introductory section, above). That agreement entered into force on February 18, 1993.

On June 10, 1996, Kazakhstan passed the Law on Copyright and Neighboring Rights. That law entered into force on June 12, 1996. Among its many features, the 1996 law for the first time protected computer programs and sound recordings. The 1996 law provided copyright owners with the exclusive rights of: (1) reproduction; (2) distribution including importation, rental, and public lending; (3) public display and public performance; (4) communication to the public; (5) broadcasting; and (6) a right of translation as well as adaptation. The law enacted a Berne-compatible term of life-plus-50 years.

Kazakhstan joined the Berne Convention, effective April 12, 1999. Effective on August 3, 2001, Kazakhstan became a member of the Geneva Phonograms Convention, providing a point of attachment for foreign sound recordings, albeit more than seven years after the bilateral trade agreement required such protection.

Kazakhstan was a signatory to both of the WIPO digital treaties. The Kazakh government should be encouraged to ratify both the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT), early in 2002, and to adopt the appropriate legislation to fully implement these treaties to effectively fight against Internet and other forms of digital piracy, and to create an environment for the future growth of e-commerce.

In 2001, IIPA met several times with officials from the government of Kazakhstan to try to resolve the legal reform and enforcement issues that have persisted in Kazakhstan detailed in this report. It was hoped that if these revisions, including accession to the digital copyright treaties, were undertaken, Kazakhstan could develop into a successful marketplace for the copyright industries as a result of its transformation into an effective copyright enforcement regime; in exchange, it was hoped that the threatened suspension or withdrawal of GSP benefits instigated by the IIPA would be lifted. Those GSP benefits in 2000 (the last full year of available statistics) resulted in over \$325 million in trade benefits to Kazakhstan. But unfortunately, the needed legal reforms including treaty accessions and the adoption of a stronger, more effective, and enforced copyright, customs (regulations), criminal, and criminal procedure codes, did not materialize in 2001. On September 26, 2001, the government of Kazakhstan issued a resolution (#1249) instructing the appropriate government ministries to draft laws and regulations that would fix the acknowledged deficiencies in the Kazakh enforcement regime. Perhaps these revisions can be completed early in 2002.

The Kazakh Copyright Law even after the 1996 “modernization” contains several deficiencies. Perhaps most fundamentally, the copyright law does not contain a provision that

clearly provides protection for pre-existing works and sound recordings as required by the obligation in the bilateral trade agreement as well as by Berne (Article 18), under national treatment obligations, and under the TRIPS Agreement (Article 14.6 for sound recordings and Article 9 for works). Kazakhstan's Copyright Law (Article 4) states where there is a conflict between the Kazakh Law and an international treaty obligation (i.e., Berne Article 18), the latter shall govern and be self-executing in Kazakhstan. However, when Kazakhstan adhered to Berne in April 1999, it did not make clear in a directive or decree how or if it was complying with its obligations under Article 18 (for works) and would thereby provide full protection for older works. And, there is no equivalent treaty provision for the protection of pre-existing sound recordings (that is, it is not found in the Geneva Phonograms Convention). That is why the Kazakh law must be amended to clearly provide such protection for pre-existing works and sound recordings (at a minimum of 50 years) to meet its international obligations. Proposals to amend the Copyright Law in 2002 are reportedly being prepared; they should include these changes for pre-existing works and sound recordings, as well as full and proper implementation of the digital treaties.

The Kazakh Copyright Law does provide explicit copyright protection for computer programs and databases as required under the bilateral trade agreement.

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

On July 16, 1997, Kazakhstan adopted criminal code amendments; these amendments went into force on January 1, 1998. Pursuant to the bilateral agreement obligations, the criminal code revisions in 1997 included important sanctions for copyright and neighboring violations. Article 184 of the Criminal Code includes substantial fines of between 100 and 800 times the statutory minimum monthly wage; detention (arrest) of up to six months; and imprisonment up to five years for repeat offenders.

There is one major shortcoming in these provisions: They are limited to actions committed for the purposes of "deriving profits" and which cause "considerable harm." The imposition of unclear thresholds, especially the considerable harm standard, has been a particular problem for effective enforcement in other countries, notably Russia. The considerable harm standard is a vague one that shifts the burden of proof away from the pirates onto copyright owners. In other countries, this threshold has resulted in otherwise clear piracy cases being dismissed because the burden could not be met to move forward – either the prosecutors refuse to press charges, or judges dismiss cases. The threshold is not only a burden for identifying infringing acts under the criminal law, it also provides critical guidance for the police when they are conducting the initial raids, and must determine whether the cases should be brought under the criminal code or the administrative code.

The threshold for criminal violations should be clear and it should be a relatively low standard applied against those in commercial activities. Proposed amendments to fix the considerable harm threshold at 500 times the minimum monthly wage were considered but not adopted in 2001. The IIPA recommends that such a threshold is too high for copyright piracy, and should be much lower to commence a criminal case. A low threshold is important not only for identifying infringing acts under the criminal law but also for providing critical guidance for the police when they are conducting the initial raids, and they must assess the situation and determine whether the case should be brought under the criminal code or the administrative code. IIPA

would recommend (as it has been considered in other countries) that the threshold be lowered to 50 times the daily minimum wage.

In addition, there is nothing in the criminal code or the criminal procedures code to provide police with the proper *ex officio* authority to commence criminal copyright cases.

The Law on Customs was amended on June 16, 1999. It contained five articles on IP border control (Articles 218-1 to 5). Effective February 15, 2001, the customs code was further revised. According to Kazakh officials, the 2001 customs code revisions did, for the first time, provide customs officials with the proper *ex officio* authority to seize suspected infringing material at the border as required by the TRIPS Agreement and as is necessary to conduct effective border enforcement. Reportedly, new customs code regulations will implement these changes some time in 2002, so they have not yet been put to use. IIPA urges the Kazakh government to quickly adopt these regulations to provide Customs officials with the proper authority to effectively enforce against IPR violations at the border, at present, a very serious problem for the copyright industries.

Copyright authors and owners (individuals or legal entities) have the right to commence civil actions under Article 125 of the civil code as amended effective December 27, 1997. The copyright law provides civil remedies that include compensation for losses, including lost profits, and statutory damages ranging between 20 and 50,000 times the minimum salary, as determined by the court (Article 49).

COPYRIGHT ENFORCEMENT

As in past years, there are reports that piracy of all copyrighted products – music, sound recordings, business applications software, interactive entertainment software (on all platforms, CDs and cartridges), motion pictures, videos, television programming, books and journals – is widespread throughout Kazakhstan. Levels of piracy are extremely high and enforcement is very weak, especially at the border.

Kazakh government officials reported significant improvements in 2001 in the amount of pirated product that was seized and destroyed by the police (over 112,600 copies valued at 20.6 million tenge (US\$135,000)). Further, Kazakh officials pointed to a newly adopted licensing law (Article 22) for businesses that, it is hoped, will be used as an effective administrative tool against copyright pirates. IIPA suggests that such police and administrative activity would be 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. The next step should be imposition of the criminal penalties against large commercial pirates, especially those involved in the criminal syndicates working with the region.

In 2000, the Kazakh government employed a structural change to enhance IPR enforcement when the Copyright Agency was moved into and under the direction of the Ministry of Justice. So far, that has not proven to be as successful as was hoped, in the stepping up of enforcement operations, especially against criminal piracy operations.

To date, none of the copyright industries report any cases that have moved forward and utilized the “new” (1997) criminal penalties, now four years after their adoption. IIPA again urges

the government of Kazakhstan to direct prosecutors to utilize these new penalties scaled to multiples of the monthly salary or income of individuals convicted, so that they can be imposed in a way that they actually deter piracy. The availability and application of criminal penalties at levels sufficient to deter piracy are necessary for effective copyright protection, and are required under the bilateral agreement, as well as the WTO TRIPS Agreement.

In addition, as already noted, the customs law must be fully implemented with the necessary regulations and then put to use to stop the flow of materials across the region, a particular problem region-wide to stem the flow of material being imported from or exported to Russia, Ukraine, Belarus, the Czech Republic and Poland.

According to the music industry, because of the lack of any effective border enforcement, illegal sound recordings (especially CDs) continue to be imported, particularly from Russia and China. The music industry (International Federation of the Phonographic Industry, IFPI) reported good cooperation with the Kazakh copyright officials with ongoing legal reforms to improve the levels of protection and enforcement for sound recordings and copyrighted works. However, the lack of a clear point of attachment for foreign sound recordings is of course a major obstacle to effective protection.

The recording industry reports trade losses for foreign rights holders in Kazakhstan were \$25 million in 2000 (up from \$20 million for all rightsholders in 1999). The piracy rate was estimated at 78% (but considerably higher for the international repertoire segment of the music market). It is estimated that in 2001, more than 2.87 million CDs and 12.4 million pirated cassettes were sold in Kazakhstan. The recording industry reports that more than 190 raids were run in 2001, but only about 13,600 CDs, 13,600 cassettes and 8 recording devices were seized. So, obviously most of the "raids" were taken against very small operations, and only minimal administrative sanctions were levied against infringers.

At present, there are still no illegal optical disc production facilities reported in Kazakhstan. However, the lack of effective enforcement and the infrastructure there makes this country ripe for movement of plants into Kazakhstan from the neighboring countries, such as Ukraine. For example, there are fears that several former military facilities in Kazakhstan could easily be converted to optical disc plants; there are no confirmed reports that this has already occurred. In any case, illegal optical media production is now a major regional problem including facilities in Ukraine, Poland, Russia, and the Czech Republic, which manufacture and distribute throughout the region. Optical disc plants, like the ones operating in Ukraine and other neighboring countries, are capable of producing thousands of musical recordings, entertainment and business software, and audiovisual works on CDs, DVDs, CD-ROMs, and even VCDs.

The Kazakh authorities should act now to prevent illegal production facilities from taking root in Kazakhstan by adopting legislation controlling optical media production and distribution (including plant licensing regulations, raw material monitoring, and the use of IFPI Source Identification [SID] codes). Adopting measures now will prevent the spread of this problem to Kazakhstan.

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 \$29.7 million in 2000; the level of piracy was estimated to be 89%. The final figures for 2001 are not yet available.

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

Copyright piracy continues to threaten not only foreign investment but also the development of local copyright industries in Kazakhstan. This threat must be met by a coordinated legal and enforcement response. All enforcement agencies – the police, prosecutors, customs, in addition to ministries such as Justice, Interior, and Internal Revenue – should treat commercial copyright infringement as a serious crime, and should have and use the proper authority (*ex officio*) to act against commercial piracy. Clear government strategies and lines of authority should be developed. Training of judges, prosecutors, magistrates, customs officials, and police should be part of regular ongoing enforcement efforts.

TAJIKISTAN

LEGAL REFORM AND TREATY ADHERENCE

In July 1993, Tajikistan and the United States signed a bilateral trade agreement detailing mutual obligations to improve the protection and enforcement of intellectual property rights (a summary of the trade agreement is provided in the introductory section, above). That agreement entered into force on November 24, 1993.

On November 13, 1998, the Republic of Tajikistan adopted the Law on Copyright and Neighboring Rights, providing a comprehensive revision of the copyright law in Tajikistan; the law went into force on December 17, 1998.

According to the Minister of Culture B.A. Makhmadov in an official statement that accompanied the passage of the Tajik Copyright Law of 1998, the law was intended to modernize the legal regime in Tajikistan by: (1) protecting sound recordings (and other neighboring rights) for the first time; (2) removing the Soviet-era “maximum rates of author’s remuneration”; (3) permitting authors and users freely to contract (eliminating the “standard authors’ contract”); (4) adding a term of life-plus-50 years (from life-plus-25); (5) expanding authors’ economic rights and moral rights, including the possibility of assignment of economic rights to third parties; (6) limiting the scope of “free use” and adding more exact terms of such use; (7) adding numerous definitions to clarify the scope of the act. The law also includes numerous provisions regulating the terms and conditions of authors’ contracts.

The exclusive economic rights provided to authors include: reproduction; distribution, including rental for computer programs and sound recordings; importation; public presentation and public performance; communication of the work to the public (but without an explicit right of making available) including broadcasting, cablecasting or by other wire or comparable means; translation; and adaptation. The producers of phonograms are afforded the exclusive rights of reproduction, adaptation, distribution (including rental), and importation. However, the law provides a right of remuneration only for producers of sound recordings for the public performance, broadcasting, or communication of a phonogram to the public by cable. The law should be further amended to provide producers with a broader public performance (or making available) right, at a minimum, for digital transmissions.

Tajikistan deposited its instrument of accession to the Berne Convention on December 9, 1999 and became a member of Berne effective March 9, 2000. However, Tajikistan is not providing any protection or rights to U.S. or any other sound recordings, nor is Tajikistan a member of the Geneva Phonograms Convention—two obligations of the trade agreements it pledged to make “best efforts” to conclude over eight years ago. So U.S. (and other foreign) sound recordings remain completely unprotected in Tajikistan.

Tajikistan *does not* clearly provide protection for pre-existing works or sound recordings in its copyright law as required by the clear obligation in its bilateral trade agreement and the Berne Convention. Tajikistan must amend its law to clearly state its protection for pre-existing works and

sound recordings that are (at a minimum) less than 50 years old in order to comply with its bilateral trade agreement obligations and international norms.

The Tajik Copyright Law does provide explicit copyright protection for computer programs and databases as required under the bilateral trade agreement.

There are no known civil *ex parte* search procedures in existence in the Tajik law; these provisions must be adopted and implemented for effective enforcement against end-user pirates.

Tajikistan has not amended its criminal code, following passage of the November 1998 copyright law, to adopt criminal provisions for IPR violations, in breach of the bilateral agreement's obligation to provide "adequate and effective" protection and enforcement. The criminal code must provide deterrent penalties. In addition, there is nothing in the criminal code or the criminal procedures code to provide police with the proper *ex officio* authority to commence criminal copyright cases.

The customs code must be amended to provide customs officials with *ex officio* authority to seize suspected infringing material at the border as required by the TRIPS Agreement and as is necessary to conduct effective border enforcement. The customs code, last revised in November 1995, does make one liable for the transfer of illegal goods, including intellectual property material, through the border. This is, however, an ineffective tool that must be revised.

Tajikistan was not a signatory to either of the two new WIPO treaties. The Tajik government should be encouraged to ratify and then fully implement both the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT).

COPYRIGHT ENFORCEMENT

The Tajik copyright regime is currently not providing "adequate and effective" enforcement as required by the bilateral trade agreement. In addition to the many deficiencies in the enforcement legal regime (civil, administrative, criminal and customs provisions), there is no meaningful on-the-ground police, prosecutorial, judicial or customs activity to stop retail distribution, much less the organized criminal enterprises who produce and distribute material in Tajikistan and throughout the neighboring countries.

The Criminal Code (Article 156) does sanction copyright and neighboring rights infringements with penalties of between two and five years. However, none of the copyright industries report that these criminal penalties, much less any of the administrative sanctions, have ever been levied in a copyright case. The Administrative Code was amended on December 10, 1999 (Article 158-2; IIPA does not have a copy of this new law). Reportedly, this provision levies fines and seizure of illegal copyright and neighboring rights material.

Border enforcement, as in other countries in the region, is very weak in Tajikistan. This is allowing illegal copies, especially of musical material produced in neighboring countries such as Russia, to freely cross borders for sale in Tajikistan and other countries. This is causing significant harm to the copyright industries.

According to the recording industry (International Federation of the Phonographic Industry, IFPI), there are no known optical media plants in Tajikistan. Most of the music piracy is in the form of audio cassettes, some produced in Tajikistan. The recording industry estimates trade losses for foreign rights holders in Tajikistan were \$3 million in 2001 (up from \$500,000 in 1999); music piracy levels were estimated to be at about 83%. Of 4 million cassettes, 3.36 million were pirated copies; for CDs the figures were 450,000 total sales, of which 393,000 were pirated copies.

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 \$29.7 million in 2000; the level of piracy was estimated to be 89%. The final figures for 2001 are not yet available.

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

UZBEKISTAN

LEGAL REFORM AND TREATY ADHERENCE

In November 1993, Uzbekistan and the United States signed a bilateral trade agreement detailing mutual obligations to improve the protection and enforcement of intellectual property rights (a summary of the trade agreement is provided in the introductory section, above). That agreement entered into force on January 13, 1994.

On August 30, 1996, the Uzbek Parliament adopted the Law on Copyright and Neighboring Rights providing a comprehensive revision of the copyright law in Uzbekistan; the law went into force on September 17, 1996. Since that time, there have not been any thorough revisions to the copyright act, or to the relevant enforcement laws, even though Uzbekistan obligated itself to undertake important changes in the bilateral agreement over eight years ago. The exception was in December 2000, when two amendments to the copyright law were adopted; however, as noted herein, major deficiencies remain.

Uzbekistan has not acceded to any of the relevant copyright or neighboring rights treaties, as it obligated itself to do in the bilateral agreement over eight years ago. In fact, in discussions with the IIPA and the United States government in 2000, Uzbek government officials stated that they did not expect to join the Berne Convention or the Geneva Phonograms Convention before the end of 2003. As a result of Uzbek reluctance to meet its bilateral obligations, IIPA filed a petition to withdraw the GSP benefits of Uzbekistan in 1999; the U.S. government accepted that petition. IIPA continues to press for the withdrawal or suspension of GSP benefits as the result of the Uzbek government's total failure to adopt the necessary legal reforms, treaty accessions, and enforcement obligations.

The Uzbek Law on Copyright and Neighboring Rights of 1996 established protection for the first time of computer programs, databases, and sound recordings (further amended by the December 2000 provisions). The exclusive economic rights provided to authors (Article 22) include "the right to exploit the work in all forms and by all means" such as by reproduction and dissemination; public presentation; rental; public performance; broadcasting, including cable distribution or satellite transmission; recording of a work by technical means, and communication of a technical recording (including by radio or television); and translation or transformation. There are numerous provisions that remain that regulate the terms and conditions of authors' contracts. The producers of phonograms are afforded the exclusive rights of public presentation, adaptation or other transformation, distribution (including commercial rental), and importation.

Until 2001, the neighboring rights section of the law did not provide for a basic right of reproduction for producers of sound recordings; one of the two December 2000 amendments added "copying of a record" to the enumerated rights of producers to fix that glaring deficiency. The copyright law provides a right of remuneration only for producers of sound recordings for the public communication of the recording, the broadcasting, or the communication to the public by cable. The law should be further amended to provide producers with a broader public performance (or making available) right, at a minimum, for digital transmissions.

Uzbekistan is not a member of the Berne Convention. Uzbekistan is currently not providing any rights to U.S. or other foreign sound recordings. Nor is Uzbekistan a member of the Geneva Phonograms Convention, so U.S. (and other foreign) sound recordings are completely unprotected. Joining Berne and Geneva Phonograms and providing protection for U.S. sound recordings are all obligations of the bilateral trade agreement that Uzbekistan promised to fulfill over eight years ago. Uzbek officials suggested in meetings with IIPA members that a point of attachment could be available for works and sound recordings under the Foreign Investment Law. Since it pledged to join the international copyright and neighboring rights treaties (eight years ago), the Uzbek government should, instead, be urged to clearly provide copyright and neighboring rights protection under these relevant treaties (Berne and Geneva Phonograms) and via its copyright law. The second December 2000 amendment 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.

Uzbek law does not clearly provide protection for pre-existing works (or sound recordings, since it provides no protection for new or old foreign recordings). When Uzbekistan extends protection for foreign sound recordings, it must clearly protect pre-existing works, and sound recordings that are at least 50 years old, to comply with the bilateral treaty obligations and international norms.

The Uzbek Copyright Law does provide explicit copyright protection for computer programs and databases as required under the bilateral trade agreement.

There are no known civil *ex parte* search procedures in the Uzbek law; these must be adopted into the civil procedure code in order to commence actions against end-user pirates. These are important enforcement tools that the Uzbek government must be encouraged to implement.

Uzbekistan did not amend its criminal code following passage of the 1996 Copyright Act to adopt deterrent penalties for intellectual property violations, in breach of the bilateral agreement's obligation to provide "adequate and effective" protection and enforcement. The Criminal Code (Article 149) does provide for liability for infringement of copyright and patent violations, but does not include neighboring rights violations. In any case, the existing penalties are too weak and must be amended to strengthen and broaden the provisions for all copyright and neighboring rights violations. Uzbek officials reported that Article 149 would be revised in 2001, but that never transpired. IIPA has not seen any drafts currently under consideration.

IIPA recommends that the draft criminal reform also include revisions to the criminal code and criminal procedures code to provide police with the proper *ex officio* authority to commence criminal copyright cases. Further, the customs code must be amended to provide customs officials with *ex officio* authority to seize suspected infringing material at the border, as required by the TRIPS Agreement and as is necessary to conduct effective border enforcement.

Resolution 215 of the Cabinet of Ministers (April 19, 1994) established a licensing system for the production, reproduction and sale of records, cassettes and CDs. However, IIPA still has no reports on how (or if) these provisions were implemented, and their effectiveness against pirate production enterprises that are so common in this region.

Uzbekistan was not a signatory to either of the two new WIPO treaties. The Uzbek government should be encouraged to ratify and fully implement both the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT).

COPYRIGHT ENFORCEMENT

The Uzbek copyright regime is, at present, among the weakest of all of the countries in the C.I.S. It is not in compliance with the bilateral obligations it made to the United States eight years ago, and woefully is insufficient for any future WTO membership. The legal regime in Uzbekistan must be overhauled to provide basic civil, administrative, criminal and customs remedies to bring the enforcement regime up to international norms. Currently, Uzbekistan is not providing “adequate and effective” protection and enforcement as it is obligated to do under the bilateral agreement. There are significant legal reform deficiencies and there is no effective police, prosecutorial, judicial or border activity underway. The Uzbek government must adopt the necessary legal reforms, including accession to the relevant treaties to protect foreign works and sound recordings. Then the authorities must commence police raids and seizures at a minimum, and must act to stop the retail distribution of illegal material through the use of administrative and criminal sanctions.

The criminal code currently does not provide deterrent penalties and must be amended. The administrative code does not provide any sanctions for violations of copyright or neighboring rights infringements and must be amended to provide for fines and the forfeiture of business licenses for retail establishments that are operating pirate operations.

Border enforcement, as in other countries in the region, is very weak in Uzbekistan. This is allowing illegal copies freely to cross borders for sale in Uzbekistan and other countries. This in turn is causing significant harm to the copyright industries, in particular the music industry.

The recording industry (International Federation of the Phonographic Industry, IFPI) reports that, as in Turkmenistan, in the absence of substantive legislation granting protection to foreign works and phonograms, it is impossible to distinguish the “pirated” product from the “legitimate” copies. That is why the music industry will not provide piracy rates in Uzbekistan. Rights holders remain very concerned that almost all of the material produced and/or distributed in Uzbekistan is done so without authorization. The recording industry reports that illegal musical cassettes produced in neighboring countries, particularly Russia, are entering Uzbekistan as a result of poor border enforcement (on both sides of the border). The IFPI reports there are no known optical media plants in Uzbekistan, although the opportunity is there for the startup of pirate CD and cassette operations due to the climate and infrastructure. The recording industry preliminary estimates trade losses for foreign rightsholders in Uzbekistan (by calculating the size of the potential legal market) were \$35 million in 2001 (up from \$30 million in 2000). In total, 24 million cassettes and 6 million CDs were sold in Uzbekistan in 2001.

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 \$29.7 million in 2000; the level of piracy was estimated to be 89%. The final figures for 2001 are not yet available.

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

APPENDIX B: EXCERPTS FROM IIPA 2002 SPECIAL 301 REPORT ON MACEDONIA, CAMBODIA AND LAOS

Macedonia: Copyright enforcement is particularly weak in Macedonia according to all of the copyright industries active there. This should be considered for serious discussion by the U.S. government as Macedonia moves toward WTO accession (possibly in 2002). High levels of piracy, for example, in the business software sector are reported including widespread use of unlicensed software within government agencies. The police, prosecutors, and the customs officials lack the necessary equipment and expertise to conduct raids, investigations, and to commence cases against copyright infringers. Nevertheless, the police recently started to take action, for example, against software pirates. In 2001, the Business Software Alliance (BSA) reported the first three raids undertaken by the police. In contrast, the Copyright Inspectorate (which can only take administrative enforcement actions) has failed to refer cases that merit criminal investigation to the police and prosecutors. In addition, the State Market Inspectorate does not even have the authority to enforce the copyright law, thus burdening the already scarce police resources. Customs authorities do not take the necessary actions to prevent transshipment of pirated products across the borders, in particular along the borders with Kosovo and Bulgaria. The software industry reports that it is very rare for courts to issue injunctions in criminal cases, even though provisions providing for such action are found in the Copyright Law. Severe delays, and the issuance of only minimal fines rather than deterrent prison sentences in IPR cases, continue to plague the Macedonian court system.

Cambodia. Reportedly one pirate optical disc plant containing two production lines has relocated to Cambodia, which is not a member of the WTO, the Berne Convention, or the WIPO digital treaties. Currently Cambodia has neither an adequate copyright law nor enforcement mechanisms (or other regulatory schemes) in place to control the production, distribution, and importation of pirate optical media product or the raw materials for producing pirate product.

Laos. Reportedly two pirate optical disc plants containing two production lines have relocated to Laos from other Asian territories, such as Hong Kong. At the same time, Laos is not a member of the WTO, Berne Convention, and WIPO digital treaties and currently has no copyright law to even begin to combat the problem. As a result, because there is no protection or enforcement for US works, the market for legitimate US copyrighted works in Laos is nonexistent.