

BELARUS

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2009 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that Belarus remain on the Watch List in 2009.

Executive Summary: In January and February 1993, Belarus and the United States exchanged letters to implement a bilateral Trade Agreement which detailed mutual obligations to improve the protection and enforcement of intellectual property rights. That agreement entered into force on February 16, 1993. After 16 years, Belarus has not yet adequately implemented the IPR obligations in that agreement.

In 2008, the U.S. Trade Representative – while retaining Belarus on the Watch List – noted that the U.S. remained “concerned about Belarus’ delayed implementation of its intellectual property commitments under the [1993] U.S.-Belarus Trade Agreement.” Further, USTR “encourage[d] Belarus to strengthen its IPR laws, reduce piracy and counterfeiting levels, and increase its IPR enforcement efforts.” The USTR detailed in its Special 301 announcement, the numerous legal reforms necessary for Belarus to undertake in order to meet its Trade Agreement obligations as well as encouraging Belarus to “properly implement the WIPO Internet Treaties.” There were no reports of any relevant or significant legal reforms or enforcement successes in Belarus in 2008.

Belarus is a member of all of the relevant IPR treaties, including the Berne Convention (1997), the WIPO Copyright Treaty (WCT) (2002), the WIPO Performances and Phonograms Treaty (WPPT) (2002), and the Geneva Phonograms Convention (2003). The long delay (until 2002) in joining a neighboring rights treaty (Geneva and WPPT) allowed a large back-catalog of unprotected sound recordings to flourish in the marketplace, making enforcement that much more difficult, even today.

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

IIPA continues to urge the Government of Belarus to improve its border enforcement — to prevent plants or equipment from Russia (or other neighboring countries) to relocate in Belarus, as well as to stop the importing and exporting of illegal optical media discs (CDs, DVDs, CD-ROMs, CD-Rs, etc.). IIPA is aware of one optical disc plant (opened in October 2004) in Belarus. The Vigmplast optical disc replication plant is operating near Minsk; it has two lines and an estimated plant capacity of 7 million discs a year. We understand that it was assigned a source identification (SID) code.

Legal Reform Deficiencies: In 1996 (in force, June 18, 1996), Belarus enacted a new law on copyright and neighboring rights; amendments were adopted in 1998. The 1998 amendments were intended to, among other things, partially implement the WIPO “digital” treaties (WCT and WPPT). To our knowledge, no further amendments have been adopted. The 1998 amendments to the Copyright Law added provisions relating to anti-circumvention devices and services, and the removal or alteration of rights management information (Article 39.5). The remedies for anti-circumvention and rights management information protection include injunctive relief, monetary damages, and seizure of devices. Criminal Code provisions were adopted in 2000. The provisions (Article 201) include sanctions of up to five years imprisonment for repeat offenders of copyright and neighboring rights violations.



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

- 1) Amendments to the Criminal Code to provide criminal penalties for first-time IPR violations. Currently, criminal penalties only apply for IPR violations after there has been an administrative violation and an exhaustion of administrative remedies.
- 2) Amendments to the Criminal Code to: (a) adopt a "significant amount of use criteria" calculated on the basis of the price of legitimate product, instead of the existing too high threshold based on "large-scale damage" for IPR crimes; and, (b) lowering the actual amount of the current threshold (in Art. 158) to commence liability, which is now BR12.1 million (US\$4,527).
- 3) Amendments to the Criminal Code (or Criminal Procedure Code) to permit the confiscation and destruction of manufacturing equipment used to produce pirated material.
- 4) Amendments to the Criminal Procedures Code to provide the proper *ex officio* authority for police officials to initiate copyright criminal cases and investigations.
- 5) Amendments to the Administrative Code to provide *ex officio* authority to administrative authorities to commence investigations and cases. At present, a statement from a rightholder is required to commence an administrative case. The administrative remedies are applicable for violations of copyright and neighboring rights, including acts of illegal retail sale and distribution.
- 6) Amendments to the Customs Code to grant the proper *ex officio* authority to border officials to seize illegal material and to commence their own investigations and criminal cases.
- 7) Amendments to the Civil Code to provide the proper *ex parte* search provisions for effective enforcement against end-user pirates.
- 8) Amendments to the Copyright Law (1998) to provide clear protection for pre-existing works and sound recordings. Belarusian officials have insisted that this protection already exists, at least for works (Article 42 of the 1996 law and Article 3 of the 1998 law make international treaties such as the Berne Convention self-executing in Belarus). While this may be a correct reading of the law, it should be clarified by statutory amendment or decree to avoid any confusion on the part of police, prosecutors, and judges tasked with enforcement of these rights.
- 9) Amendments to the Copyright Law (1998) to fully implement the WIPO digital treaties (WCT and WPPT). The current anti-circumvention and copyright management information provisions are not fully compatible with the WIPO digital treaties because they are not "effective legal remedies" (e.g., in accordance with Art. 11 of the WCT). In particular, the law needs to cover prohibitions on the manufacture, importation, sale, distribution, or other trafficking in devices or services that are aimed at circumventing technological protection measures, as well as outlawing acts of circumvention. In addition, rightholders need to be able to protect "copyright management information" that is attached to or accompanies a work or sound recording. Such provisions should protect against the alteration, removal or falsification of this information.

ENFORCEMENT

Under the Copyright Law (Article 40), civil penalties for copyright or neighboring rights violations include injunctive relief, damages (including lost profits), seizure and impoundment of infringing copies, as well as statutory penalties of between 10 and 50,000 times the minimum wage. Belarusian officials point to the Civil Code (1999) as providing additional remedies for IPR violations.

In general, levels of piracy remain extremely high, and enforcement remains virtually nonexistent in Belarus. Several years ago, Belarusian officials reported that the Council of Ministers (an Inter-Ministerial Committee) had adopted a program for IPR protection focusing on legislative reforms (including copyright, patent and trademark laws), but there

have been no further reports of any activity by this Committee and the plan was never implemented. IIPA continues to recommend a focus on legal reforms, as well as, on enforcement: running raids and seizures, commencing criminal cases against commercial pirates, and using administrative remedies to curtail street piracy.

As Belarus moves to accede to the World Trade Organization, it needs to bring its laws into full compliance with the WTO/TRIPS obligations by adopting the revisions noted above and by improving on-the-ground enforcement. IIPA continues to recommend government action against any known production facilities (reports persist of cassette piracy facilities), and to monitor optical disc production in particular (at the one known plant), using the criminal law remedies.

There are no comprehensive enforcement statistics for 2008. In recent years, the industries have reported a trend of an increase in the total number of raids, but unfortunately, the vast majority of these raids are aimed only at small-scale retailers of illegal material. While these are helpful, they have little deterrent effect on the overall piracy problem. Furthermore, the administrative fines that are imposed, even against these retailers, are generally insignificant.