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*Via electronic submission: FR0441@ustr.gov*

Marideth J. Sandler

Executive Director of the GSP Program and Chairwoman of GSP Subcommittee

Office of the U.S. Trade Representative

1724 F Street, NW

Washington, DC 20508

Re: GSP Country Practices Review,  
015-CP-02, Kazakhstan, Pre-Hearing Brief  
and Request to Appear at the GSP Public  
Hearing

To the GSP Subcommittee:

The International Intellectual Property Alliance (IIPA) hereby submits this Request to Appear at the November 30, 2005 public hearing on the GSP country practices review of Kazakhstan. As you know, IIPA was the original petitioner of the GSP review of Kazakhstan's intellectual property rights practices in the 1999 GSP Annual Review. Attached to this letter is IIPA's Pre-Hearing Brief.

The IIPA witness will be: Eric J. Schwartz  
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Thank you.

Sincerely,

Eric J. Schwartz



**Pre-Hearing Brief**  
**International Intellectual Property Alliance**  
**GSP Review of the Intellectual Property Rights Practices of Kazakhstan**

Before the GSP Subcommittee  
 Case 015-CP-02, Kazakhstan  
 November 30, 2005

The International Intellectual Property Alliance (IIPA) appreciates the opportunity to provide the GSP Subcommittee with a summary of the serious copyright legal reform and enforcement deficiencies in Kazakhstan. In short, the government of Kazakhstan does not comply with the eligibility requirements for GSP benefits. In our view, the GSP Subcommittee should terminate the investigation with such a finding and should remove Kazakhstan's eligibility to participate until such time as it has achieved adequate and effective copyright protection and enforcement as contemplated by the GSP statute.

The U.S. Trade Representative, in his May 2004 Special 301 announcement, noted that Kazakhstan has still not met all of its commitments under the 1992 U.S.-Kazakhstan Trade Agreement to protect intellectual property rights (IPR). In particular, the U.S. government cited the lack of clear protection for pre-existing works and sound recordings and noted that even though "searches and seizures increased in volume and thoroughness . . . enforcement of IPR in Kazakhstan remains weak, particularly criminal enforcement." The USTR noted that "[v]ery few defendants are convicted, and those who are convicted receive only minimal penalties." The enforcement problem is caused by a high burden of proof in criminal cases which needs, according to the U.S. government, legislative reform (even beyond the reforms of recent years). One legislative reform goal was accomplished in 2004 with the passage of provisions providing explicit protection for pre-existing foreign works and sound recordings. However, many other critical deficiencies remain, now more than ten years after Kazakhstan pledged to correct them, which is why IIPA recommends the suspension of all GSP benefits to Kazakhstan, as well as the U.S. government moving to block Kazakhstan's accession in the WTO (which it is planning to join in 2006), until these deficiencies are corrected.

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; that agreement entered into force on February 18, 1993. The Copyright Law was amended in 1996, and again in July 2004.

Kazakhstan joined the Berne Convention (1999) and the Geneva Phonograms Convention (2001), providing a point of attachment for foreign sound recordings. In addition, effective November 12, 2004, Kazakhstan acceded to both WIPO Digital Treaties (WCT and WPPT). This was a very positive step.

## **Legal Reform Deficiencies**

Effective July 9, 2004, Copyright Law amendments were adopted in Kazakhstan further revising the Copyright Law of 1996. Among other things, the amendments (Article 5(4)) fixed the long-standing problem of providing express protection for pre-existing foreign works and sound recordings. This was a major step forward. Unfortunately, the ten-year delay in adopting this provision means that there will be a lot of (now illegal) back-catalog material in the marketplace that will take years to root out. Further, the 2004 provision only provides a flat 50 year window, so pre-1954 works and sound recordings remain in the public domain.

In addition, the 2004 amendments (which were part of a larger package) included: updating laws to facilitate electronic commerce and Internet technology by implementing the digital treaties (since Kazakhstan also became a member of those treaties in 2004); and updating the laws for E.U. compatibility. Several key legal reforms — notably in the criminal enforcement area — remain. Development of a modern IPR regime in Kazakhstan is imperative because, for example, the software and recording industries consider Kazakhstan the most promising marketplace of Commonwealth of Independent States (C.I.S.) members behind only Russia and Ukraine.

There are no known civil *ex parte* search procedures under Kazakh law; these are needed to provide effective enforcement against end-user pirates, especially software pirates. It is understood that the current draft copyright law amendments contain provisions to remedy this matter.

The current Criminal Code entered into force on January 1, 1998. Article 184 of the Criminal Code includes substantial fines which vary depending on the profit lost and/or “large damage” resulting from infringement. The fines run from between 100 and 800 times the statutory minimum monthly wage; detention (arrest) of up to six months; and imprisonment of up to five years for repeat offenders. But one major shortcoming still exists: the provisions are limited to actions committed for the purposes of “deriving profits” and which cause “considerable harm.” The imposition of this threshold, especially the considerable harm standard, has been a particular problem for effective enforcement in other countries, notably Russia. The threshold for criminal violations should be clear and it should be a relatively low standard (e.g., harm caused at a level equal to 50 times the minimum wage). Kazakhstan needs to fix this provision. The IIPA understands that Article 192(4) in the Criminal Code provides police with *ex officio* authority to commence criminal copyright cases, but that it is rarely used. Additional administrative and criminal law amendments have been prepared for adoption but unfortunately, not all of the copyright industries have been consulted to review the drafts. In June 2004, the IIPA did provide the government of Kazakhstan with “model” enforcement provisions. The IIPA urges the government of Kazakhstan to use the IIPA draft, to consult with local copyright industry representatives, and to adopt the proper enforcement revisions as quickly as possible.

On October 28, 2004, the Government of Kazakhstan sent a package of amendments to the parliament that would revise the Criminal Code and Criminal Procedure Code. The amendments would, if adopted, revise the threshold to commence a criminal case (replacing the “considerable harm” standard with a fixed amount), and it would provide for *ex officio* authority

to commence an IPR case. To our knowledge, this package of amendments was not adopted, as promised, in 2005.

Under the Administrative Code (Article 129), there are IPR — copyright and neighboring rights — code violations. However, only the Ministry of Justice authorities and not the police are authorized to bring charges for such offenses. This is why the authority to bring IPR administrative cases must be broadened (to the police), and why, in general, the police need *ex officio* authority under the Criminal Code and Criminal Procedures Code.

One example of the ineffectiveness of the criminal enforcement system comes from an “enforcement report” issued by the government of Kazakhstan Economic Crimes agency in December 2004. According to the report, 140,000 pirate audio and video tapes and CDs were seized in the first 11 months of 2004; the estimated worth of these materials is about 15 million tenge (US\$115,564). In addition, the report noted a total of 20 criminal cases in 2004 (the government reported 68 trademark criminal cases and seven copyright cases in all of 2003; no information was provided about any sentences imposed in these cases). The IIPA knows of no criminal convictions with jail sentences imposed in 2004 in the music, film or entertainment industries. The Business Software Association (BSA) reports eight pending cases and four court decisions of reseller software piracy (distributing unlicensed software) in 2004. In these cases, one infringer was ordered to undertake community service; one was fined 100 times the monthly index, a total of US\$706; another was fined (US\$270); and one was handled as an administrative fine of five times the monthly index (and material was confiscated). For a marketplace and population the size of Kazakhstan, these statistics reflect the need to do much more to deter piracy and claim effective criminal enforcement. In October 2003 and August 2004, the copyright industries signed memoranda of understanding with the government of Kazakhstan; there were also training programs in 2004 (in which the BSA participated). In short, the government pledged to the copyright industries to undertake more and better enforcement. These memoranda are goodwill gestures and positive first steps, but nothing more without actual on-the-ground action.

In 2003 (effective May 1, 2003), the Customs Code was completely revised. Unfortunately, the 2003 amendments did not include the necessary *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. Worse, the 2003 amendments adopted a complicated registration system for copyright holders seeking enforcement, which further weaken, not strengthen, border measures. The IIPA recommends that this registration system be repealed and that border officials be given clear *ex officio* authority to seize infringing material and to commence their own criminal investigations. The government of Kazakhstan pledged in 2004 that there would be further modernizations of the customs code in 2004, but no changes were adopted.

While the U.S. copyright industries have been sustaining millions of dollars in losses in Kazakhstan, that country received GSP trade benefits of over \$133.6 million in the first 11 months of 2004. In addition, the government of Kazakhstan enjoyed \$74.2 million in FY 2004 for other economic/social reform, law enforcement and democracy programs from the U.S. government. Also, the U.S. government and Kazakh government signed a Trade and Investment Framework Agreement (TIFA) on June 1, 2004 to enhance trade and investment between the two

countries. The copyright industries have waited over ten years for effective change to the IPR regime in Kazakhstan. The IIPA recommends the withdrawal of GSP benefits to help spur these necessary changes.

The IIPA suggests that police and administrative activity is, if used correctly, a very positive first step and that stepped-up seizure and confiscation of illegal copyright materials should be undertaken, as well as the closure of shops and businesses conducting illegal business using the licensing law. As noted, the government reported that only 140,000 IPR copies were seized in (the first 11 months of) 2004. It is estimated that approximately 18.6 million pirate copies of sound recordings alone were sold in 2004. Much more needs to be done by enforcement authorities.

A special IPR department was recently established within the Finance Police, which has national authority. In 2003, the Finance Police initiated three criminal raids, resulting in two criminal cases against illegal software resellers. According to a 2004 initiative, the General Prosecutor's office instructed all regional prosecutors in Kazakhstan and all regional/city departments of the Financial Police to undertake raids against IPR infringers, and to report their results by February 2004. The initiative resulted in five raids and cases against software pirates that, it was hoped, would result in criminal proceedings. According to the business software industry (BSA), the unofficial statistics indicate 35 criminal cases were initiated in 2004 (under Article 184), and an additional 29 criminal cases were initiated for trademark infringements (Article 199).

According to the recording industry (the International Federation of the Phonographic Industry, IFPI), the level of music piracy is estimated at about 68% and trade losses for 2004 were estimated at \$23 million. It is estimated by the recording industry that in total 16.2 million cassettes and 10.8 million CDs were sold in Kazakhstan in 2004. Of these, 11.2 million cassettes and 7.4 million CDs were pirated copies. The industry also reported 1,135 raids and the seizure of US\$695,991 worth of pirate material (49,800 CDs, 5,672 DVDs, 105,000 cassettes and 10 recording devices) in 2004 by local enforcement agencies.

Last, there are now two known optical disc production facilities reported in Kazakhstan at present. One plant is reported to have a single operating line and is capable of producing 8.2 million discs per year; the other has a capacity of producing 6 million discs a year. The total production capacity of the two plants is 14.2 million discs per year. One plant does have IFPI-issued source identification (SID) codes (August 2002), and does provide exemplars (examples) of CDs manufactured at the plant to be used for forensics evidence; the other plant (just opened in 2005) does not have SID codes. There is thus a need for optical disc regulation in Kazakhstan. The absence of such a system, the lack of overall effective enforcement, and the infrastructure in Kazakhstan makes it ripe for the movement of other plants into Kazakhstan from neighboring countries, such as Russia or Ukraine.

In sum, Kazakhstan is not meeting the GSP requirements and should be denied eligibility for these benefits until it complies with the GSP obligations in U.S. law and the commitments it made to the U.S. government to improve its copyright protection and enforcement regime.

Respectfully submitted,

International Intellectual Property Alliance