

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2008 SPECIAL 301 REPORT

KAZAKHSTAN

Special 301 Recommendation: IIPA recommends that Kazakhstan be placed on the Watch List in 2008.

EXECUTIVE SUMMARY

Kazakhstan has not met all of its commitments under the 1992 U.S.-Kazakhstan Trade Agreement (in force, February 18, 1993). In particular, several deficiencies remain in its legal regime, and overall enforcement, especially criminal enforcement, is particularly weak. There have been very few convictions reported and only minimal penalties assessed according to official statistics issued by the government. Poor enforcement is the result, in part, of a high burden of proof in criminal cases, and an absence of proper resources.

In 2006, the U.S. Trade Representative noted that Kazakhstan had made “progress” by improving its enforcement regime with the adoption of several legal reforms in the preceding years. Kazakhstan did improve its IPR enforcement laws – especially in 2005 – with the adoption of a package of IPR reforms. But, it has not undertaken enough actual enforcement to date, especially against organized crime syndicates, to stem its high piracy levels, nor has it adopted all of the promised legal reforms. Development of a modern IPR regime in Kazakhstan will benefit local as well as foreign rights holders. The software and recording industries consider Kazakhstan the most promising marketplace of the C.I.S. region, behind only Russia and Ukraine.

The Copyright Law was amended in 1996, and further amended in 2004 and 2005. The 2004 amendments provided the long-sought explicit protection for pre-existing foreign works and sound recordings. Kazakhstan joined the Berne Convention (1999); the Geneva Phonograms Convention (2001) which provided a point of attachment for foreign sound recordings; and, it joined the two WIPO digital treaties, the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT), effective in 2004. In 2007, the U.S. Government and the Government of Kazakhstan held bilateral discussions on Kazakhstan’s World Trade Organization (WTO) accession. Kazakhstan’s law does not currently comply with the WTO TRIPS Agreement, and it needs to do so before Kazakhstan can be allowed to accede.

Legal Reform Deficiencies

The 2004 amendments to the Copyright Law of 1996 provide a flat 50-year window of pre-existing protection for foreign works and sound recordings. Thus, pre-1954 works and sound recordings remain in the public domain. It took over 10 years to adopt these amendments, which allowed a lot of (now illegal) back-catalog material into the marketplace. This remains a major enforcement problem that Kazakhstan has not properly addressed. Other changes made in 2004 included laws to facilitate electronic commerce and Internet technology, and to, at least partially, implement the WIPO digital treaties, as well as E.U. directives.

In 2005, (effective November 26, 2005), additional amendments to the Copyright Law of 1996 were adopted, as well as amendments to the Criminal Code, the Criminal Procedure Code, the Civil Code, and the Administrative Code. Perhaps the key amendment in 2005 was the change to Article 184 of the Criminal Code, which repealed the previously undefined “huge damage” threshold for criminal cases and replaced it with a threshold based on the harm done or value of the works or recordings exceeding 100 times the government set monthly wage (or for more serious crimes, 500 times that

amount). The 2005 amendments repealed the requirement that there be proof of “financial gain” for criminal charges to rest -- this was another major improvement. Also in 2005, changes were made in commercial and licensing laws to ban the sale of copyrighted material at street kiosks, requiring instead that this material be sold in retail stores. This was another positive step.

Several key legal reforms — notably in enforcement — remain. IIPA recommends that the Government of Kazakhstan should adopt the following changes:

- 1) In the Civil Code: provide proper *ex parte* search provisions for effective enforcement against end-user pirates.
- 2) In the Customs Code: provide *ex officio* authority for customs officials to seize illegal material and to commence their own investigations and criminal cases.
- 3) In the Criminal Code (or Criminal Procedure Code): provide for the confiscation and destruction of manufacturing equipment used to produce pirated material. Currently, there are provisions permitting the destruction of goods only upon a court order.
- 4) In the Administrative Code; provide *ex officio* authority for administrative authorities to commence investigations and cases. The Administrative Code (Article 129), as amended in 2005, lowers the threshold for bringing cases. However, only the Ministry of Justice (Copyright Office), and not the police, can bring charges for such offenses. IIPA recommends that the existing police *ex officio* authority be broadened to include administrative violations as well.
- 5) In the Copyright Law: adopt the necessary amendments to fully implement the WIPO digital treaties (WCT and WPPT). IIPA has, in the past, provided extensive comments to the government on the necessary treaty compatible amendments.
- 6) Adopt a proper regulatory scheme, including criminal penalties, for the production and distribution of optical disc material and equipment.

IIPA understands that Article 192(4) in the Criminal Code provides police with *ex officio* authority to commence criminal copyright cases, but that it is rarely used. For the past several years, IIPA has provided the government of Kazakhstan with “model” enforcement provisions. IIPA urges the Government of Kazakhstan to use the IIPA draft and to consult with local copyright industry representatives, to adopt these enforcement revisions in 2008.

Effective in 2003, the Customs Code was completely revised. However, those changes did not include the necessary *ex officio* authority to seize suspected infringing material at the border as required by the TRIPS Agreement. This needs to be corrected. The 2003 amendments also added a complicated registration system for copyright right holders seeking enforcement at the border, which further weakens the system. IIPA continues to recommend that this registration system be repealed.

Enforcement

The Government of Kazakhstan has made strides to improve its enforcement regime, both with its legislative reforms (noted above) and with stepped up police activity. However, the enforcement reports issued by the Government of Kazakhstan’s Economic Crimes agency in recent years indicate a relatively small number (for the size of the market) of police raids and seizures, and most troubling, almost no criminal convictions for IPR offenses. In fact, IIPA knows of no criminal convictions with jail sentences imposed in 2007 in the music, film, or entertainment software industries. Instead, we understand that all the copyright criminal cases resulted in either no sentence or a suspended sentence.

The Business Software Alliance (BSA) reports that in recent years “open and notorious” piracy has been reduced because those who sell software or computer equipment and devices now generally

understand that there are criminal, administrative, and civil penalties for such activities. For example, unlicensed discs of BSA member products, which used to be easily found in the marketplace, are now more difficult to find. In addition, the sale of hard-disc loaded computers with unlicensed software has been reduced. Generally, companies that sell computers sell them without any loaded software, or only with licensed software. In recent years, piracy levels for software have remained very high. Overall, the BSA reports in 2007 (based on its preliminary figures) piracy rates are at 79% and losses at \$54 million.

Enforcement is undertaken by a variety of agencies, including the Copyright Agency within the Ministry of Culture (16 departments) and various enforcement agencies. These agencies have assisted with some raids, in recent years, including against software pirates. A special IPR Department was created within the Finance Police (with national authority), but problems interpreting the law, in particular the threshold for criminal and administrative action have hampered their enforcement activities. In recent years, the copyright industries signed Memoranda of Understanding with the Government of Kazakhstan; there have also been training programs conducted throughout the country. The government has pledged to the copyright industries that it would undertake more and better enforcement. IIPA encourages the government to act, especially against criminal operations, and to improve its overall enforcement with deterrent penalties.

The copyright industries report in recent years that even though there were some cases brought to courts, the majority of pirates were not brought to justice due to administrative burdens, prosecutorial inexperience and delays, and an overall ineffective judicial system. Further they report, that even when cases do go to trial, there is no consistency in the sanctions that result (especially in the few criminal cases).

While the U.S. copyright industries have been sustaining millions of dollars in losses in Kazakhstan, the country received GSP trade benefits of over \$483.1 million in 2006, and \$377.7 million in benefits in the first 11 months of 2007. In April 2006, as a result of improvements in Kazakhstan's IPR legal regime, the U.S. Government concluded its GSP review of IIPA's petition of Kazakhstan. IIPA asks the U.S. Government to continue to closely monitor Kazakhstan's GSP obligations vis-à-vis its IPR legal and enforcement regime.

IIPA suggests that police and administrative activity can, if used correctly, be a very positive first step. IIPA recommends 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.

There are two known optical disc production facilities reported in Kazakhstan at present (the latter opened in August 2005). Each of the two plants has a single production line; the total plant capacity of the two plants is 11.6 million discs per year. Both plants now have IFPI-issued SID (source identification) codes (August 2002; August 2005) and have provided exemplars (examples) of discs manufactured at the plants to be used for forensics evidence. To date, there is no forensic evidence of illegal production at either optical disc plant. Still, IIPA recommends the adoption of optical disc regulations to properly monitor the production and distribution of material and equipment at these and any future plants, including tying illegal commercial production to criminal penalties. The absence of such a system, the lack of overall strong enforcement, and the infrastructure in Kazakhstan, are an invitation for plants and organized crime syndicates to move their operations into Kazakhstan from neighboring countries, such as Russia.