

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2008 SPECIAL 301 REPORT

UZBEKISTAN

Special 301 Recommendation: IIPA recommends that Uzbekistan remain on the Watch List in 2008.

EXECUTIVE SUMMARY

In November 1993, Uzbekistan and the United States signed a bilateral Trade Agreement (in force, January 13, 1994). The agreement conferred Normal Trade Relations (then called Most Favored Nation) status on Uzbekistan, in exchange for Uzbekistan agreeing to adopt critical IPR legal reforms, and to comply with international copyright treaty norms. In a series of meetings with IIPA and the U.S. Government in 2002 and 2003, the Government of Uzbekistan pledged to finally adopt its 1994 commitments into its IPR legal regime. It never did, and now fourteen years after the 1994 Trade Agreement, some of the most basic protections are denied rightholders in Uzbekistan. For example, since Uzbekistan is still not a member of the Geneva Phonograms Convention it does not provide any protection or rights for U.S. or other foreign sound recordings; further, it does not protect pre-existing foreign works prior to 2005 as a result of a reservation it made when it joined the Berne Convention (in contravention to the Convention and the 1994 Trade Agreement).

In April 2007, the U.S. Trade Representative, in announcing Uzbekistan's retention on the Watch List noted "the lack of significant progress on IPR issues" including its Article 18 reservation pertaining to Berne Convention accession and its failure to join the Geneva Phonograms Convention. The U.S. Government noted many legal and enforcement reforms that Uzbekistan must enact to comply with the 1994 U.S.-Uzbekistan Trade Agreement. The USTR noted that "IPR enforcement in Uzbekistan remains weak." As a result, Uzbekistan should be denied trade benefits and preferences including its eligibility to participate in the Generalized System of Preferences (GSP) program, because Uzbekistan is not providing the statutorily mandated "adequate and effective" copyright protection and enforcement under its present IPR regime.

Legal Reform Deficiencies

The Copyright Law of Uzbekistan was overhauled in 1996 (in force, September 17, 1996), and two additional copyright law amendments were adopted in 2000. Separately, Uzbekistan adopted a Law on Computer Programs and Databases, which was amended in 2002. In July 2006, Uzbekistan adopted a new Law on Copyright and Related Rights (in force, July 20, 2006).¹ The 2006 Copyright Law was aimed – according to the Government of Uzbekistan – at harmonizing Uzbek law with the requirements of the Berne Convention and WTO/TRIPs, which the government hopes to accede to at some future date. The 2006 law added: a making available right; a right of communication to the public; provisions pertaining to technological protection measures and copyright management information; regulations pertaining to private copying and public performance royalties; and, extensive provisions and regulations involving collective administration (chapter 4 of the law). Unfortunately, the Copyright Law could have benefited from more input by copyright rightholders, and as a result, is either missing key provisions

¹ Note, IIPA has and bases this filing on an unofficial English translation of the 2006 Copyright Law. In 2006, Uzbekistan also adopted conforming amendments to its Civil Code on copyright and neighboring rights, as well as a decree on royalties for public performances and private copying (IIPA does not have English translations of these laws/regulations).

(protection for pre-existing works and sound recordings), or has several unclear or incomplete protections (technological protection measures).

In 2005, Uzbekistan finally adhered to the Berne Convention (effective April 19, 2005). Unfortunately, as noted, Uzbekistan made a reservation to its accession regarding Article 18 that denies protection for pre-existing works from the United States and all other Berne countries. This reservation, as noted by WIPO and other copyright experts to the Government of Uzbekistan, is in contravention to the Article 18 obligations of Berne (and the 1994 Agreement). Uzbekistan must withdraw its reservation immediately and provide clear protection for pre-existing works (and separately, for sound recordings as well).

On November 30, 2005, IIPA testified at the GSP country practice hearing regarding Uzbekistan's legal deficiencies. After that hearing, the U.S. Government asked IIPA for a list of "steps that the Government of Uzbekistan should take with respect to protecting IPR in order to retain GSP eligibility." IIPA provided the U.S. Government with eight recommendations for improving IPR in Uzbekistan, in a written response on December 14, 2005. Those steps were:

1) Notifying the WIPO that the Government of Uzbekistan removes its reservation to Article 18 of the Berne Convention so that Uzbekistan can properly provide protection – as required by Berne and the U.S. Bilateral – for pre-existing works.

2) Joining the Geneva Phonograms Convention.

3) Clarifying in the Uzbek Copyright Law that pre-existing works and sound recordings are protected in Uzbekistan for a minimum of 50 and preferably for 70 years (the U.S. provides over 70 years of such protection to foreign works and sound recordings).

4) Ratifying and fully implementing the WIPO Copyright Treaty ("WCT"), and the WIPO Performances and Phonograms Treaty ("WPPT").

5) Fixing the deficiencies in the Copyright Law including: (1) the absence of an exclusive public performance (or making available) right for producers of sound recordings, at a minimum for digital transmissions (in lieu the current law provides only a right of remuneration for the public communication of the recording, broadcasting, or communication to the public by cable); and (2) delete the onerous provisions that over-regulate the terms and conditions of authors' contracts.

6) Adopting clear civil *ex parte* search procedures into the Uzbek law.

7) Amending the Customs Code to provide customs officials with the proper *ex officio* authority. (Including not adopting a proposed registration system for customs enforcement which will weaken, not strengthen, enforcement at the border).

8) Amending the Criminal Code (and/or Criminal Procedure Code) as follows:

i. To provide for liability for infringement of neighboring rights violations (i.e., crimes involving the pirating of sound recordings);

ii. To toughen the existing penalties which are too weak because: (1) there are currently no criminal penalties applied "until one year after administrative penalties are assessed" — providing pirates with a chance to pirate without penalty the first time; and (2) the levels — set at 50 to 100 times the minimum wage — were much too low to be deterrent penalties as needed. The IIPA recommends that the first provision be deleted; and the second (50 to 100 times) be raised considerably to at least 500 times the minimum wage.

iii. To add the proper *ex officio* authority for police and prosecutors to commence criminal copyright cases.

IIPA again testified at the U.S. Government's GSP country practice hearing regarding Uzbekistan's legal deficiencies on October 4, 2007. Over two years after we created the list above, and after two rounds of hearings on this matter, to the best of our knowledge, Uzbekistan has failed to undertake at least seven of these eight steps. It did adopt a copyright law (step #5), which as noted, still has deficiencies.

Recommended Legal Reforms

IIPA recommends the adoption of the following legal reforms and treaty accessions in Uzbekistan in order to provide for effective copyright protection and enforcement:

- 1) Adherence to the Geneva Phonograms Convention.
- 2) Amending the Copyright Law to provide protection for pre-existing works and sound recordings for a minimum of 50 years (and preferably, 70 years).
- 3) Amending the Criminal Code to include "neighboring rights" violations (the current code only applies to infringements of "works").
- 4) Amending the Criminal Code to raise the penalties for IPR violations to deterrent levels (for example, to 500 times the minimum wage).
- 5) Amending the Criminal Code to adopt a threshold for a criminal violation calculated on the basis of the price of legitimate product, instead of a threshold based on an undefined "large-scale damage" for IPR crimes; and, set that threshold at a low actual level.
- 6) Amending the Criminal Code (or Criminal Procedure Code) to permit the confiscation and destruction of manufacturing equipment used to produce pirated material.
- 7) Amending the Criminal Procedures Code to provide the proper *ex officio* authority for police officials to initiate copyright criminal cases and investigations.
- 8) Amending the Administrative Code to provide *ex officio* authority to administrative authorities to commence investigations and cases.
- 9) Amending 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.
- 10) Amending the Civil Code to provide the proper *ex parte* search provisions for effective enforcement against end-user pirates.
- 11) Adherence to the WIPO digital treaties: the WIPO Copyright Treaty ("WCT") and the WIPO Performances and Phonograms Treaty ("WPPT"), plus enacting all of the appropriate implementing legislation in the Copyright Law.
- 12) Correct deficiencies (and some uncertainties) in the Copyright Law of 2006, including:
 - i. Providing protection for pre-existing works and sound recordings;
 - ii. Adopting an exclusive right of public communication for sound recording producers for the recording, broadcasting, or communication to the public by cable (which appears to be limited to a right of remuneration in Article 51);

iii. A clarification about the scope and application of the rental right for audiovisual works and computer programs (Article 21);

iv. Improvements, consistent with the digital treaties (WCT and WPPT), to the provisions pertaining to technological protection measures (Article 63) and rights management information (Article 64); and

v. Deleting the onerous provisions (found in Articles 38 through 42) that over-regulate the terms and conditions of author's contracts.

Other Legal Reforms

Although Uzbekistan has proposed and/or made changes in some of these areas previously, these proposed changes were not always adequate to fix the deficiencies. The 2000 Copyright Law amendments did two things: (1) added "copying of a record" to the enumerated rights of producers to fix a glaring deficiency; and (2) 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 — this latter problem appears (in the unofficial translation) to have been corrected by Article 4 of the 2006 law.

IIPA is unaware of any recent amendments to the Criminal Code following passage of the 2006 Copyright Act to adopt deterrent penalties for intellectual property violations. Drafts to amend the Criminal Code were circulated in 2004, but, to our knowledge, never adopted. In fact, the 2004 draft would have weakened, not strengthened, criminal penalties because: (1) no criminal penalties are applied "until one year after administrative penalties are assessed" — providing pirates with a chance to pirate without penalty the first time; and (2) the levels — set at 50 to 100 times the minimum wage — are much too low to be deterrent penalties as needed. If a similar draft is proposed, IIPA would recommend that the first provision be deleted, and the second provision (regarding the minimum wage), be raised considerably to at least 500 times the minimum wage, as has been done in other countries.

Another 2004 draft to amend the Customs Code would have established a complicated registration system for IPR enforcement at the border. IIPA strongly recommends that Uzbekistan not adopt a border registration plan because it will prove counterproductive to effective enforcement at the border.

A 2001 resolution (No. 285 of the Cabinet of Ministers) established a licensing system for the production, reproduction and sale of records, cassettes and CDs, according to which only licensed entities could carry out such activities. Industry experience shows that such licensing systems are not effective against the pirate production enterprises, which are common in this region. IIPA recommends that this plan be repealed.

Enforcement Progress and (GSP) Trade Benefits

The U.S. Government and Uzbek Government signed a Trade and Investment Framework Agreement (TIFA) on June 1, 2004 to enhance trade and investment between the two countries.

In 2005, Uzbekistan benefited from \$11.4 million worth of GSP benefits, although in 2006, that number decreased to \$2.8 million. In the first 11 months of 2007, Uzbekistan received \$2.7 million in such benefits. Thus, even as the U.S. Government is promising to enhance trade and investment with Uzbekistan and providing GSP benefits and other aid, the Uzbek copyright regime is, at present, among the weakest of all of the countries in the C.I.S. Uzbekistan is not complying with the IPR eligibility requirements for GSP benefits and should be immediately removed from eligibility to participate until such time as it has achieved "adequate and effective" copyright protection and enforcement as contemplated by the GSP statute. Further, Uzbekistan is not in compliance with its bilateral and multilateral obligations, and is woefully inadequate in its IPR regime as a potential WTO member.

After the Uzbek Government adopts the necessary legal reforms, including accession to the relevant treaties to protect foreign works and sound recordings, and pre-April 2005 works (i.e., books, films, music, software) it needs to commence enforcement actions. Such actions should begin with police raids and seizures at a minimum, and it must act to stop the retail distribution of illegal material through the use of administrative and criminal sanctions.

According to the recording industry (International Federation of the Phonographic Industry, IFPI), illegal musical CDs produced in neighboring countries 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 operations due to the poor enforcement regime.