

KAZAKHSTAN

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

Special 301 Recommendation: IIPA recommends that Kazakhstan be placed on the Watch List in 2009.

Executive Summary: Kazakhstan has made several notable legal reforms over the past several years, in part, to comply with its commitments under the 1992 U.S.-Kazakhstan Trade Agreement (in force, February 18, 1993). However, as a result of a “moratorium” on government anti-piracy activity in 2008, at least one copyright industry reports a noticeable decline in the number of enforcement actions – such as raids by the financial police, the regular police forces, and the Justice Ministry officials – from prior years. Additionally, several deficiencies remain in the Kazakh legal regime, including a high burden of proof in criminal cases, and an absence of proper resources – which have contributed to weak criminal enforcement.

In 2005, Kazakhstan made significant improvements in its IPR enforcement regime with the adoption of a package of IPR reforms. Additional reforms and enforcement activities are necessary to address the growing threat of Internet piracy, the on-going problems with hard copy (optical disc) piracy at street markets (in Almaty, Shymkent and Atyrau, in particular, and elsewhere across Kazakhstan), and, for the software industry, to stop the prevalent sale of pre-installed pirated software on computers. Reports persist that organized crime syndicates are responsible for the high piracy levels; enforcement against this problem can only be addressed with effective criminal measures. The 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, 2005 and 2007. 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); 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 2008, the U.S. Government and the Government of Kazakhstan held ongoing bilateral discussions on Kazakhstan’s World Trade Organization (WTO) accession including a dialog on the necessary IPR legal and enforcement reforms necessary for Kazakhstan to fully comply with the WTO TRIPS Agreement.

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 a major improvement. Other positive steps (also in 2005) were the changes made in the commercial and licensing laws to ban the sale of copyrighted material at street kiosks, requiring instead that this material be sold in retail stores. In December 2007, the Supreme Court issued a decree pertaining to the implementation of certain provisions on the existing Copyright Law.



Several needed 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 violation 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 – especially focused on improving enforcement against Internet piracy. (In fact, “digital piracy” is not defined in any of the IPR laws, which according to some industries, makes enforcement very difficult.)
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 2009.

The Customs Code was completely revised in 2003. 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, which as noted, is a critical missing element in the enforcement regime. 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.

COPYRIGHT ENFORCEMENT IN KAZAKHSTAN

The Government of Kazakhstan has made strides to improve its enforcement regime, with its noted legislative reforms and with ongoing police activities. However, in 2008, there was a decline in the number of police raids and seizures, and in prosecutorial activity as well. Thus, for another year, there were few criminal cases for IPR offenses (an on-going trend, even according to Kazakh government statistics). IIPA knows of no criminal convictions in 2008 in the music, film, or entertainment software industries; there was, in 2008, one notable criminal case commenced involving a distributor of pirated software (and pornography). There were in 2008, 8 criminal sentences – all suspended – in cases involving the infringement of business software. The copyright industries report in recent years that even though there were some additional 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. As in recent years, some of the industries report good cooperation with and enforcement activity by the financial police, the internal affairs police, and with the various public prosecutors in some cities in particular (Almaty, Karaganda and Astana).

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 have signed a Memorandum of Understanding with the Government of Kazakhstan. There have also been training programs conducted throughout the country. IIPA continues to encourage the government to act, especially against criminal operations, and to improve its overall enforcement with deterrent penalties.

The Business Software Alliance (BSA) reports that there have been, in recent years, reductions in the types of open and notorious piracy that existed five years ago, because those who sell software or computer equipment and devices now generally understand that there are criminal, administrative, and civil penalties for such activities. Piracy is now focused on end-user and Internet piracy. This migration of piracy especially to the Internet, and, a decrease in criminal enforcement efforts (especially a decline in police and prosecutorial activity last year), have kept piracy rates high. The Business Software Alliance reports (based on preliminary 2008 figures), that the piracy rate for business software in Kazakhstan was 77% and that losses were \$63 million.

In 2008, BSA reported that were 22 raids undertaken against optical disc (CD) and hard-disc software pirates, and, one against an Internet pirate, as well as the commencement of 16 civil actions. In one civil case in Popravkin, a vendor of 300 personal computers which were pre-loaded with illegal software was fined approximately \$30,000, in addition to his costs to indemnify the copyright owner (Microsoft) for its losses. The Criminal Code (Article 184(2)) has had limited impact in some instances, because it has been applied to the manufacturing and sale of illegal copies, but has not extended to contemplated but not completed sales; additionally, many cases have been dismissed or delayed unnecessarily.

In 2008, a new form of piracy surfaced pertaining to the sale of pirated stickers of the required certificates of authenticity that must be placed on some IP products, such as software. The Government of Kazakhstan needs to address this form of piracy.

While the U.S. copyright industries have been sustaining millions of dollars in losses in Kazakhstan, the country received GSP trade benefits of over \$377.7 million in 2007, and \$295.7 million in benefits in the first 11 months of 2008. 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.