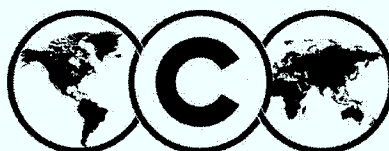


# INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE®



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December 29, 2011

William D. Jackson  
Deputy Assistant U.S. Trade Representative  
for the Generalized System of Preferences  
Chair, GSP Subcommittee  
Trade Policy Staff Committee  
Office of the United States Trade Representative  
1724 F Street N.W., Room F-214  
Washington, D.C. 20508

**Re: Generalized System of Preferences (GSP): Request for Review of the Intellectual Property Rights Practices of Ukraine in the 2011 Annual GSP Country Practices Review, 76 Fed. Reg. 67531 (November 1, 2011)**

Dear Mr. Jackson and Members of the GSP Subcommittee:

On November 1, 2011, the Office of the United States Trade Representative (USTR) published a notice in the Federal Register announcing the Generalized System of Preferences (GSP): Notice of Initiation of the 2011 Annual GSP Product and Country Practices Review. 76 FR 67531 (November 1, 2011).

In the Federal Register notice, USTR (the Trade Policy Staff Committee (TPSC)) invites interested parties to "...submit a petition to review the GSP eligibility of any beneficiary developing country with respect to any of the designation criteria listed in subsections 502(b) or 502(c) of the [1974] Trade Act (19 U.S.C. § 2462(b) and (c))." See 76 Fed. Reg. 67532. One of the bases for GSP eligibility – 19 U.S.C. § 2462(c)(5) – is "the extent to which such country is providing adequate and effective protection of intellectual property rights."

In accordance with the Federal Register notice, the International Intellectual Property Alliance (IIPA) requests that the eligibility of Ukraine as a GSP beneficiary developing country be reviewed, and that Ukraine's GSP benefits be suspended or withdrawn, in whole or in part, if requisite improvements are not made by Ukraine to remedy its intellectual property rights (IPR) protection and enforcement deficiencies (outlined below). Those deficiencies – resulting in the denial of "adequate and effective protection" for copyrighted works and recordings in Ukraine – adversely affect U.S. copyright owners, including the members of the IIPA. In addition, for the reasons stated below, Ukraine is not "provid[ing] equitable and reasonable access to [its] markets..." as required for GSP eligibility.

In 2010, Ukraine benefited from over \$39.1 million in unilateral duty free GSP benefits in the U.S. market; in 2008, that figure was over \$105 million. The 2010 benefits represented approximately 23% of total imports to the U.S., according to U.S. government statistics. On October 21, 2011, President Obama signed legislation to reauthorize the GSP program through July 13, 2013.

### **Petitioner and its Interest – the International Intellectual Property Alliance (IIPA)**

The IIPA is a private sector coalition of seven trade associations representing U.S. copyright-based industries in bilateral and multilateral efforts working to improve international protection and enforcement of copyrighted materials and open up foreign markets closed by piracy and other market access barriers. IIPA's seven member associations (listed below) represent over 1,900 U.S. companies producing and distributing materials protected by copyright laws throughout the world – all types of computer software, including business applications software and entertainment software (such as videogame discs and cartridges, personal computer CD-ROMs, and multimedia products); theatrical films, television programs, DVDs and home video and digital representations of audiovisual works; music, records, CDs, and audiocassettes; and fiction and non-fiction books, education instructional and assessment materials, and professional and scholarly journals, databases and software in all formats. The members of the IIPA are: the Association of American Publishers (AAP), the Business Software Alliance (BSA), the Entertainment Software Association (ESA), the Independent Film & Television Alliance (IFTA), the Motion Picture Association of America (MPAA), the National Music Publishers' Association (NMPA), and the Recording Industry Association of America (RIAA).

According to the recent report Copyright Industries in the U.S. Economy: The 2011 Report, prepared for IIPA by Economists, Inc., in 2010, the core copyright industries accounted for \$931.8 billion in value added to the U.S. economy, or approximately 6.36% of the Gross Domestic Product (GDP). The total copyright industries accounted in 2010 for \$1.627 trillion in value added, or approximately 11.1% of GDP. Despite the recessionary period of 2008-2009, the core copyright industries grew at an aggregate annual rate of 1.1% during the period 2007-2010, better than the remainder of the U.S. economy. Nearly 5.1 million workers were employed by the core copyright industries in 2010 which is 3.93% of the entire U.S. work force. The core copyright industries accounted for an estimated \$134 billion in foreign sales and exports in 2010. The 2011 Report has been made widely available to government officials working on IPR issues at USTR, and throughout other agencies, including the Department of State, the Commerce Department, the U.S. Patent and Trademark Office, and, the U.S. Copyright Office. The full 2011 Report, as well as a summary of the 2011 Report, are available on IIPA's website at: [http://www.iipa.com/copyright\\_us\\_economy.html](http://www.iipa.com/copyright_us_economy.html).

The U.S. creative industries represent a sector of the U.S. economy that regularly contributes to a positive balance of trade. It is essential to the continued growth and future competitiveness of these industries that U.S. trading partners provide free and open markets and high levels of protection to the copyrights on which this trade depends, both for "hard copy" goods and, for works and recordings in the digital marketplace. Worldwide, the copyright industries represented by IIPA lose billions annually due to piracy outside the United States. In addition to the worldwide problem of piracy, several foreign countries have erected market access barriers to U.S. copyright products. One of the trade "tools" used to combat these

problems in developing countries, is to enforce the IPR obligations in the GSP program; other tools include the utilization of Special 301 and Section 301 provisions, as well as other IPR dispute settlement mechanisms in regional or multilateral agreements.

Unfortunately, at present in Ukraine, both hard copy and digital copyright piracy is rampant, and this problem is getting insufficient attention from the Government of Ukraine. As a result, piracy rates are exceedingly high in Ukraine – among the highest in Europe. In addition, the use of unlicensed business software by government ministries is a long-festering problem that the Government of Ukraine has not corrected.

Weak enforcement of copyright has been a long-standing problem in Ukraine, but in the past year the situation has substantially worsened. Ukraine is a key country in the region for the enforcement of IPR because it exports piracy, especially digital piracy, into both European Union markets and other countries in the Commonwealth of Independent States (CIS). For example, there are several notorious websites hosted in Ukraine by Ukrainian ISPs that, while identified to Ukrainian enforcement officials, continue to act with impunity.

There is a long history to Ukraine's eligibility for GSP benefits tied to its IPR regime for the protection and enforcement of U.S. copyrighted works and recordings. That history is as follows: in June 1999, IIPA requested a review of Ukraine's GSP benefits as a result of its then-existing IPR enforcement practices, focused mainly on hard-copy piracy, especially the wide-scale production and distribution of illegal optical media (CDs, DVDs, etc.) by various production facilities in Ukraine, and the exporting of those illegal copies throughout Europe and elsewhere in the world. A copy of the IIPA's 1999 petition on Ukraine's GSP benefits is at: [http://www.iipa.com/gsp/1999\\_Jun16\\_cmts\\_ukraine.html](http://www.iipa.com/gsp/1999_Jun16_cmts_ukraine.html).

In 2000, the U.S. government accepted the IIPA petition and a review of Ukraine's IPR regime was commenced. On August 24, 2001, "due to Ukraine's failure to combat [optical media] piracy" Ukraine's GSP benefits were completely suspended (and other trade sanctions were later imposed as well) by the President. See 66 Fed. Reg. 42246-50. During this period there were extensive bilateral deliberations, including the development of a Joint Action Plan (2000) by the presidents of Ukraine and the United States, to address the IPR regime deficiencies. The subsequent implementation of that Action Plan, and, in 2005, the adoption of significant new optical disc laws meant to improve enforcement against optical disc piracy, resulted in the resumption of GSP eligibility, in January 2006. The IIPA supported that decision: <http://www.iipa.com/pdf/IIPA%20Ukraine%20GSP%20Press%20Announcement%20EJS%2012506%20FINAL.pdf>.

However, since the resumption of GSP eligibility in 2006, Ukraine has failed to fully implement the now decade-old plan to provide significantly improved enforcement on the ground, or to properly reform its laws or enforcement regime to address digital piracy. For example, illicit peer-to-peer hosting and illegal websites have grown rapidly in Ukraine in the past few years, and the Government of Ukraine has done little to address this problem – either with new laws, or effective enforcement. In 2010, the governments of the U.S. and Ukraine developed an IPR "Action Plan" that was never implemented; in fact, some actions have been undertaken by Ukrainian officials that are contrary to the proposed plan, and would weaken, not strengthen enforcement. Thus, for the reasons set out below, Ukraine's eligibility as a GSP

beneficiary should be carefully reviewed, and its benefits suspended or withdrawn if it does not remedy the current situation.

### **Action Requested by Petitioner**

Pursuant to Section 501 *et seq.* of the Trade Act of 1974, as amended, 19 U.S.C. § 2461 *et seq.*, and 15 C.F.R. Part 2007, and specifically to Section 502(c)(4) and (5) of the Trade Act (19 U.S.C. § 2462(c)((4) and (5))), and 15 C.F.R. 2007.0(b), IIPA, on behalf of its seven trade association members, hereby petitions the President to review the eligibility of Ukraine as a GSP beneficiary developing country, and if requisite improvements are not made by Ukraine, then IIPA requests that the President suspend, withdraw or limit GSP benefits of Ukraine, in whole or in part, for its failure to provide “adequate and effective” copyright protection for U.S. copyright owners.

### **Legal Authority for this Petition and Discussion of the IPR Criteria in the GSP Statute**

The GSP program was instituted on January 1, 1976, and authorized under the Trade Act of 1974 (19 U.S.C. § 2461 *et seq.*) (TA 1974). Title V of the Trade and Tariff Act of 1984 (TTA 1984), known as the GSP Renewal Act of 1984, renewed the GSP Program which had been introduced in the TA 1974, and specifically required the President to consider intellectual property protection in determining whether to designate a developing country as eligible for GSP benefits. In the GSP Renewal Act of 1996, Subtitle J which revised 19 U.S.C. § 502(c)(4) to require the President to take into account “the extent to which [a country seeking to obtain or maintain GSP eligibility] has assured the United States that it will provide equitable and reasonable access to [its] markets...” Since 1996, the GSP program has been reauthorized many times – in 1997, 1998, 1999, 2002, 2006, 2008, and 2009; that last extension was through December 31, 2010 when the GSP program (temporarily) expired. On October 21, 2011, President Obama signed legislation to reauthorize the GSP program through July 31, 2013, and to provide GSP benefits retroactively during the expiration period (in 2010 to 2011). While there was a minor change in the statutory language of the GSP Renewal Act of 1996, from the GSP Renewal Act of 1984, the law with regard to IPR considerations has remained constant since 1984. As such, the legislative history of the 1984 Renewal Act is particularly instructive on the important link between GSP eligibility and benefits, and strong IPR protection.

### **The GSP Renewal Act of 1984**

In the GSP Renewal Act of 1984, Congress specified conditions that GSP beneficiary countries must meet in order to gain and maintain their preferential trading status. In particular, one of these express conditions (which Congress also delineated as one “purpose” of the GSP program) was to encourage developing countries “to provide effective means under which foreign nationals may secure, exercise, and enforce exclusive intellectual property rights.”

The legislation required the President to apply mandatory and discretionary criteria with respect to IPR protection as a condition to a country achieving “beneficiary” status under the GSP program. The mandatory criterion prohibited the designation of a country from becoming a “beneficiary developing country” if, for example, “such country has nationalized, expropriated, or otherwise seized ownership or control of property, including patents, trademarks, or

copyrights, owned by a United States citizen or by a corporation, partnership, or association which is 50 percent or more beneficially owned by United States citizens.” See Section 503(b)(4) of the GSP Renewal Act of 1984, now codified at 19 U.S.C. § 2462(b)(2)(D).

The GSP Renewal Act of 1984 added as a discretionary criterion, in determining whether to designate a developing country as eligible to receive GSP duty-free trade treatment, that:

the President shall take into account ... the extent to which [each] country is providing adequate and effective means under its laws for foreign nations **to secure, to exercise, and to enforce exclusive rights in intellectual property, including patents, trademarks, and copyrights.** [emphasis added]

Section 503(c)(5) of the GSP Renewal Act of 1984, codified at 19 U.S.C. § 2462(c)(5). The Senate Finance Committee Report explained that:

To determine whether a country provides “adequate and effective means,” the President should consider the extent of statutory protection for intellectual property (including the scope and duration of such protection), the remedies available to aggrieved parties, the willingness and ability of the government to enforce intellectual property rights on behalf of foreign nationals, the ability of foreign nationals effectively to enforce their intellectual property rights on their own behalf and whether the country’s system of law imposes formalities or similar requirements that, in practice, are an obstacle to meaningful protection.

S. Rep. No. 98-485, 98<sup>th</sup> Cong., 2d Sess. At 11 (1984). The Senate Report also noted:

In delegating this discretionary authority to the President, it is the intent of the Committee that the President will **vigorously exercise the authority to withdraw, to suspend or to limit GSP eligibility for non-complying countries...**

Where valid and reasonable complaints are raised by U.S. firms concerning a beneficiary country’s market access policy or protection of intellectual property rights, for example, it is **expected that such interests will be given prominent attention by the President in deciding whether to modify duty-free treatment for that country.** [emphases added]

*Id.* at 12-13. The House Ways and Means Committee stated that “countries wishing to reap the benefits of preferential duty-free access to the U.S. market must fulfill international responsibilities” in the intellectual property area. House Rep. No. 98-1090, 98<sup>th</sup> Cong., 2d Sess. at 12 (1984).

The IPR criteria are a condition, not only for obtaining GSP benefits in the first place, but also for retaining them. The 1984 Act authorized the President to “withdraw, suspend, or limit the application of the duty-free treatment accorded under Section 501 of this title with respect to any article or **any country**” (emphasis added) and requires the President, when taking any such action, to “consider the factors set forth in Sections 501 and 502(c).” TTA 1984 Section 505(a)(1); TA 1974 Section 504(a)(1), as amended; 19 U.S.C. § 2464(a)(1). The Act also created a system of “general reviews” to ensure that these statutory criteria are met. TTA 1984 Section 505(b); TA 1974 Section 504(c)(2)(A), as amended; 19 U.S.C. § 2464(c)(2)(A); *see also* 15 C.F.R. 2007.3.

### **The GSP Renewal Act of 1996**

When the GSP program was reauthorized in August 1996, the language of the IPR discretionary criterion for GSP eligibility in Section 502(c)(5) was simplified slightly; it requires the President to “take into account the extent to which such country is providing adequate and effective protection of intellectual property rights.” GSP Renewal Act of 1996, Subtitle J, Pub.L. 104-188, August 20, 1996, at 110 Stat. 1917 *et seq.*

As noted, the 1984 law specified that each beneficiary country provide “adequate and effective means under its laws for foreign nationals to secure, to exercise and to enforce exclusive rights in intellectual property, including patents, trademarks, and copyrights.” Otherwise, the GSP Renewal Act contains identical IPR provisions, including “mandatory” criteria denying GSP status to countries that directly or indirectly expropriate U.S. property (including intellectual property), and authorizing the President to withdraw, suspend or limit GSP privileges based on failure to meet the IPR criteria. In addition, Section 502(c)(4) provides in relevant part that the President must also take into account “the extent to which such country has assured the United States that it will provide equitable and reasonable access to [its] markets...” Since 1996, the reauthorization bills to the GSP program have not changed this language.

Thus, we request the GSP Subcommittee to follow the explicit intent of Congress, and advise the President to “vigorously exercise” his authority to withdraw, suspend or limit GSP eligibility of Ukraine for its non-compliance with the statutory criterion on IPR in the GSP program.

Over the years, considerations of the eligibility and retention of GSP benefits have figured prominently in the decisions of a number of countries to improve their IPR protection and enforcement. As noted, most recently, the optical media piracy problem in Ukraine was, in large measure, successfully addressed by a GSP review (and suspension). Earlier, in the 1980s, GSP reviews were used to encourage Singapore, Indonesia and Malaysia to adopt new copyright legislation. IIPA GSP petitions have been accepted by USTR for over two decades, beginning in 1989. These include petitions filed on: Indonesia, Thailand, Cyprus, Egypt, El Salvador, Turkey, Poland, Ukraine, Russia, Uzbekistan, and Lebanon. Additionally, IIPA has participated in GSP IPR reviews involving: Malta, Guatemala, the Dominican Republic, Honduras, Panama, and Paraguay (all of which were initiated by other petitioners or by the U.S. government). At present, GSP petitions, commenced by IIPA, have been accepted by the U.S. government and remain “open” in: Russia, Uzbekistan, and Lebanon.

**Ukraine is not providing “adequate and effective protection” for copyrighted works or sound recordings for U.S. rightsholders. Ukraine is also in violation of its bilateral treaty obligations and commitments to the U.S. for copyright protection (denying “adequate and effective protection and enforcement”).**

This information on Ukraine has been previously presented to members of various U.S. government interagency groups, including the Special 301 interagency group, several members of the GSP Subcommittee, as well as the Trade Policy Staff Committee, in the context of USTR’s Annual Special 301 review. On February 15, 2011, IIPA filed its annual Special 301 submission to Assistant USTR for Intellectual Property and Innovation, Stanford McCoy. This submission was widely distributed among the interagency for its internal consideration in the 2011 Special 301 Annual Review. IIPA’s entire report is available on the IIPA website, <http://www.iipa.com/special301.html>.

A full description of the deficiencies in Ukraine’s copyright legal and enforcement regime appears in Appendix A, which is the IIPA Special 301 report on Ukraine filed with USTR in February 2011.

In sum, the U.S. should suspend Ukraine’s GSP eligibility or withdraw its GSP benefits (in whole or part) because Ukraine fails to provide “adequate and effective” copyright protection, and it has failed to fully comply with its bilateral treaty obligations with the United States.

The bilateral commitments include: the 2000 Joint Action Plan; the 2010 IPR Action Plan; and the 1992 Bilateral Trade Agreement. The background of these commitments and agreements is as follows: on June 5, 2000, Ukraine formally announced an Action Plan in a joint statement issued by President Clinton and Ukrainian President Kuchma. The Action Plan consisted of several parts: including closing optical disc plants and adopting proper optical media production and distribution regulations, but also, improving significantly the copyright law and introducing other legal reforms, including criminal and administrative penalties, necessary to implement a modern copyright regime. These latter commitments remain unfulfilled. On May 6, 1992 Ukraine signed a bilateral trade agreement with the United States. This agreement entered into force on June 23, 1992 (see Article VIII of the bilateral agreement for the IPR obligations, as well as the separate IPR Side Letter). The 1992 agreement (Article VIII) requires Ukraine to provide “adequate and effective protection and enforcement” – which was and is understood to include deterrent civil and criminal penalties, as well as border measures. This bilateral trade agreement with the U.S. provided most favored nation (now known as Normal Trade Relations or “NTR”) treatment for Ukraine.

The 2010 IPR Action Plan was developed by agreement of the two governments – first, by a formal document presented by the U.S. Government in October 2010, and approved and signed by the Government of Ukraine in February 2011 (the plan is “effective” October 2010). The “plan” was actually a formal summary of obligations made by the Government of Ukraine over the past several years, especially targeting digital piracy.

In short, Ukraine is not providing the legal framework it obligated itself to provide, nor has it established an effective enforcement regime. Ukraine has established itself as a “safe haven” for copyright pirates, in particular, for digital piracy. Ukraine is now one of the few

countries in the world (along with Russia) with pay-for-download piracy of music and film, as well as the source of some of the world's top BitTorrent systems, with some sites advertising openly on billboards. As a consequence, legitimate online marketplaces cannot develop for copyrighted materials in Ukraine. Since the digital piracy is being exported to other countries, neither can markets develop in these other countries, especially in the CIS, as a result, and markets are being harmed in the European Union and elsewhere as well. Ukraine's many open air markets and street stalls remain replete with illegal copies of recorded music, films, entertainment and business software. In the case of business software, various ministries within the Government of Ukraine (especially the Ministry of Interior, the offices of State Tax Inspection, and the Prosecutor's Office) are blatantly using unlicensed software. This sets a poor example for the business sector, where illegal software use (i.e., end-user piracy) is practically the norm. Moreover, Ukraine remains a global hot spot for high-quality illegal camcords of films that are uploaded to top sites and distributed across the Internet. Irregular and insufficient criminal and border enforcement is causing pirate physical material to flow freely into and out of Ukraine.

While the law in Ukraine provides for remuneration rights for the broadcasting or other public performances of musical works and sound recordings, it is estimated that over 90% of the broadcast and public performance market places are unlicensed. This problem has been significantly worsened by the Government of Ukraine which has prevented state broadcasters from complying with the law's licensing obligations. In addition, the Government of Ukraine has not undertaken proper actions against known pirate websites and other infringers, nor against collecting societies like Oberih and Avtor which purport to grant "licenses" for which they do not have rights. Instead (and incorrectly), the Government of Ukraine has directed its investigators, and IPR enforcement resources, on the operations of legitimate rightsholder organizations.

IIPA and its members have recommended, so far without success, that the Government of Ukraine focus on: (1) criminally prosecuting the owners of the numerous pay-per-download and BitTorrent sites; (2) criminally prosecuting the principals of the rogue collecting societies that offer "licenses" to both online and physical businesses, that they do not have the authority to grant; (3) immediately taking down illegal websites; (4) systematically taking enforcement actions against open air and street market piracy occurring at large outdoor markets and in the streets (at or around underground stations, and near local shops and supermarkets); (5) taking immediate actions to prevent the sale of pirated entertainment software products bearing illegitimate holograms at retail chains. These latter recommendations included: long-term closures of illegal businesses, and follow-up raids at stores, kiosks and warehouses; and, that law enforcement authorities should – using search warrants – enter sales premises and suspected warehouses to seize illegal material, even if such premises/warehouses are closed.

Last, IIPA and its members suggested that the Government of Ukraine target: organized criminal syndicates, applying criminal prosecutions and deterrent sentences (to date the Government has relied heavily on non-deterrent administrative penalties); corporate end-user piracy with an emphasis on large-scale infringers (rather than targeting small companies and individuals); and camcording piracy. Unfortunately, the Government of Ukraine has not undertaken these steps. Other enforcement obligations that remain unfulfilled include the failure: to target enforcement against optical disc media producers, with the imposition of



criminal penalties against producers at CD burner operations, as well as optical disc plants; to move aggressively against infringing cable transmissions and retransmissions, public performances, and TV and radio broadcasting; to properly implement the Customs Code amendments, in force since February 2007, which provided customs officers with *ex officio* authority; and to improve border controls along the Russian border (especially for railroad traffic).

With regard to the use of unlicensed business software, IIPA and its members have recommended that the Government of Ukraine allocate to each Ministry dedicated funds for software legalization that are sufficient to meet each Ministry's software needs, and to perform software audits, in order to eliminate the use of unlicensed software in the public sector; and, that it should quickly develop and make public an action plan for software legalization – identifying the steps necessary, making one individual responsible for coordinating implementation (and individuals within each Ministry to carry out the plan).

There are needed key legal reforms that IIPA also recommends: (1) amending the Copyright Act and Criminal Code to make camcording illegal (by excluding camcording from any “private use” exception, and criminalizing this activity); (2) amending Article 176 of the Criminal Code (and separately, in the Civil Code) to ensure the availability of criminal remedies against online piracy of all works and sound recordings; (3) fixing or abolishing the hologram stickering system; and (4) implementing the 2003 resolution of the Cabinet of Ministers regarding legalization of software in state agencies.

In sum, Ukraine is not providing “adequate and effective” enforcement with any meaningful police or prosecutorial activity, as required by its existing multilateral or bilateral trade and treaty agreements, even if some (albeit weak) criminal, civil and administrative provisions do exist. The most significant shortcoming in the Ukraine enforcement regime has been the absence of effective criminal prosecutions and deterrent sentencing which are necessary to combat digital and hard-copy piracy. The failure to provide an adequate legal and enforcement regime in Ukraine is causing significant harm to the copyright industries.

**Ukraine is not providing “equitable and reasonable access to [its] markets” for copyrighted works of certain U.S. rightsholders.**

In addition to the requirement to provide “adequate and effective” copyright protection for GSP eligibility, Ukraine is required to provide “equitable and reasonable access to [its] markets...” to enjoy GSP benefits, which it is not doing. In particular, the motion picture industry is confronting three market barriers to access. These barriers are: (1) an obligation to manufacture film prints and digital encryption keys in Ukraine; (2) prohibitions on foreign ownership (and investment); and (3) customs valuation rules that assess valuation on projected royalties, rather than on the underlying carrier medium.

In more detail, these market barriers are as follows:

Compulsory Manufacturing of Film Prints: Ukrainian law requires the production of film prints locally (by statute, in effect March 18, 2010); this rule requires local film print production for the issuance of a state distribution certificate. The rules are so unclear, however, as a result

of other, conflicting laws, that movie distributors are uncertain about the rules and the State Film Agency continues to issue distribution visas irrespective of a print's place of production. The required local production rule was reiterated by the State Film Agency in March 2011; it is applicable to analog and digital prints. In addition, digital encryption keys (KDM) must be manufactured in Ukraine.

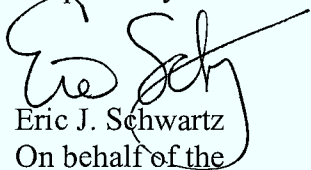
Foreign Ownership and Investment Restrictions: Ukrainian laws prohibit the direct ownership or establishment of television stations by foreign companies, and foreign investment is limited in such enterprises to 30%. There are also (apparent) domestic film broadcast quotas (no less than 30%) and requirements for Ukrainian language on television programming.

Customs Valuation: In November 2009, Ukrainian customs authorities declared new customs valuation rules. Rather than assessing duties on the underlying carrier medium, the new rules assessed valuations based on projected royalties. To further complicate matters, Ukrainian customs officials stated that the new "ruling" would be retroactive (three years), and would be enforced with serious penalties for valuations based on the carrier medium rather than royalties. However, in May 2011, the rules were apparently going to be reversed (Law No. 8130; May 5, 2011), but the precise date and nature of any such changes (i.e., proposed amendments) remain unclear.

## **Conclusion**

For the reasons stated in this submission (including the Appendix), IIPA requests that the TPSC initiate a review of the country eligibility of Ukraine for its failure to provide adequate and effective copyright protection and enforcement for U.S. copyright owners. If requisite improvements are not made in Ukraine to remedy these deficiencies, then IIPA requests that the U.S. suspend its eligibility or withdraw or limit GSP benefits of Ukraine, in whole or in part.

Respectfully submitted,



Eric J. Schwartz  
On behalf of the

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

# APPENDIX A: UKRAINE

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

### 2011 SPECIAL 301 REPORT ON COPYRIGHT ENFORCEMENT AND PROTECTION

**Special 301 Recommendation:** IIPA recommends that Ukraine be elevated to the Priority Watch List in 2011, as a result of numerous longstanding legal deficiencies and a weak overall enforcement environment.<sup>1</sup>

**Executive Summary:** Both hard copy and digital copyright piracy in Ukraine are rampant and getting insufficient attention from the Government of Ukraine. As a result, piracy rates are exceedingly high – among the highest in Europe. All of the copyright industries – music, film, book and music publishing, and entertainment and business software – report very weak enforcement, especially criminal enforcement. Ukraine Internet penetration is growing fast – it is now estimated that 33.7% of Ukraine's population, or 15.3 million people are on the Internet according to the International Telecommunications Union (a U.N. agency). Along with the growth of Internet use, there has been a sharp increase in the rate of peer-to-peer and website-based Internet piracy. Ukraine is now one of the few countries in the world (along with Russia) with pay-for-download piracy of music and film, as well as the source of some of the world's top BitTorrent systems, with some sites advertising openly on billboards. As a consequence, legitimate marketplaces cannot develop for copyright materials. Ukraine's many open air markets and street stalls remain replete with illegal copies of recorded music, films, entertainment and business software. In the case of business software, various ministries within the Government of Ukraine (especially the Ministry of Interior, the offices of State Tax Inspection, and the Prosecutor's Office) are blatantly using unlicensed software. This sets a poor example for the business sector, where illegal software use (i.e., end-user piracy) is practically the norm. Moreover, Ukraine remains a global hot spot for high-quality illegal camcords of films that are uploaded to top sites and distributed across the Internet. Irregular and insufficient criminal and border enforcement is causing pirate physical material to flow freely into and out of Ukraine. IIPA recommends that the Government of Ukraine re-double its efforts on-the-ground, that it work to fix the investigative and prosecutorial systems, and that it take steps to improve criminal enforcement against digital and hard-copy pirates. Moreover, as a member of the World Trade Organization (WTO), as of 2008, Ukraine is required to fulfill numerous legal and enforcement (TRIPs Agreement) obligations.

**IIPA Priority Recommendations in Ukraine – Key Enforcement Actions and Legal Reforms:** There are many enforcement steps and legal reforms detailed in this filing. Here is our list of priorities that we recommend to the Government of Ukraine in 2011:

**1. Significantly improve Internet enforcement:** The focus should be to: (1) criminally prosecute the owners of the numerous pay-per-download and BitTorrent sites; (2) criminally prosecute the principals of the rogue collecting societies that claim to offer "licenses" that they do not have the authority to grant; and (3) immediately take down illegal websites, including those relying, in bad faith, on the false rogue collecting society licenses. In 2010, there were many Internet-piracy training seminars held for police and prosecutors, with copyright industry participation. Using the information and skills acquired from these programs, the key enforcement agencies – including, the Ministry of Internal Affairs and General Prosecutors Office – should immediately and effectively take action against Internet piracy in Ukraine. Additionally, the Government of Ukraine should move quickly to propose and adopt amendments to the Law on Telecommunications (in cooperation with rightsholders) to promote a fair and effective response to online piracy.

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<sup>1</sup>For more details on Ukraine's Special 301 history, see IIPA's "History" appendix to this filing at <http://www.iipa.com/rbc/2011/2011SPEC301HISTORICALSUMMARY.pdf>, as well as the previous years' reports, at <http://www.iipa.com/countryreports.html>. For a summary of IIPA's 2011 global issues, see our cover letter at <http://www.iipa.com/pdf/2011SPEC301COVERLETTER.pdf>.

**2. Significantly improve criminal enforcement against other forms of piracy:** The Government should systematically focus on open air and street market piracy occurring at large outdoor markets and in the streets (at or around underground stations, and near local shops and supermarkets). Ukraine should also take immediate action to prevent the sale of pirated entertainment software products bearing illegitimate holograms at retail chains. There should be long-term closures of illegal businesses, and follow-up raids at stores, kiosks and warehouses. Law enforcement authorities should – using search warrants – enter sales premises and suspected warehouses to seize illegal material, even if such premises/warehouses are closed. Additionally, the Government should focus on: (1) organized criminal syndicates, applying criminal prosecutions and deterrent sentences (to date the Government has relied heavily on non-deterrent administrative penalties); (2) corporate end-user piracy with an emphasis on large-scale infringers (rather than targeting small companies and individuals); and (3) camcording piracy.

**3. Adopt necessary legal reforms:** Ukraine should enact legislation to fully implement its obligations under WTO TRIPs and the WIPO digital treaties (the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty – to which Ukraine acceded in 2002), as well as addressing existing legal deficiencies that impede enforcement against online piracy. A new Copyright Law draft (Bill #6523) was introduced in the Verkhovna Rada in June 2010 (it passed its first reading in February 2011). If adopted, the bill would make important changes to the Copyright Law and other laws of Ukraine, including provisions regarding temporary copies, damages, and excluding camcording from the scope of the private copy exception. IIPA supports this legislation and urges its immediate passage.

Other key reforms include: (1) amending the Copyright Act and Criminal Code to make camcording illegal (by excluding camcording from any “private use” exception, and criminalizing this activity); (2) amending Article 176 of the Criminal Code to ensure the availability of criminal remedies against online piracy of all works; (3) fixing or abolishing the hologram sticker system; and (4) implementing the 2003 resolution of the Cabinet of Ministers regarding legalization of software in state agencies.

**4. Undertake other enforcement measures:** (1) Continue enforcement targeted against optical disc media producers, with the imposition of criminal penalties against producers at CD burner operations, as well as optical disc plants. (2) Move more aggressively against infringing cable retransmissions, public performances and broadcasting. (3) Properly implement the Customs Code amendments, in force since February 2007, which provided customs officers with *ex officio* authority. (4) Increase and improve border controls along the Russian border (especially for railroad traffic).

## **COPYRIGHT ENFORCEMENT IN UKRAINE**

**Internet piracy in Ukraine in 2010:** The last few years have seen a rapid growth of illicit peer-to-peer hosting and illegal websites, including BitTorrent sites (some of the world’s largest), located in Ukraine, for target audiences primarily in the countries of Western Europe and the United States. This is causing significant harm to U.S. copyright industries. There are numerous open and notorious sites including, for example, extratorrent.com, upload.com.ua, fileshare.in.ua, and torrents.net.ua. Ukraine has many free and pay-per-download music and video websites, as well as streaming services, some aimed at an international audience. One particularly severe case of blatant and open piracy is the filesharing site EX.ua, which in 2010 attracted at least 50% of all the users who upload and download illegally in Ukraine, and whose popularity is growing. In many cities and towns outside Kiev – especially where internet bandwidth is relatively slow – a problem exists with so-called “LAN” (Local Area Networks) sites. These are high speed FTP sites that store massive amounts of content, most of it consisting of infringing movies, music and videogames. Local users can get access to these LAN networks by paying a fee and can then download as much content as they wish; there are no constraints on bandwidth limitations (as they might encounter when visiting infringing sites abroad). It is encouraging that the police have taken an interest in these cases. Some investigations have commenced against LAN sites, including prosecutions (with convictions). But, the problems persist and need additional enforcement attention.

The recording industry reports that paid download sites like mp3fiesta.com remain a major source of piracy in Ukraine (some selling whole albums for \$1). These sites use the same business model as the original Russian allofmp3.com site, with professional looking interfaces capable of deceiving unfamiliar users into believing they are legal sites. Some of these websites offer incentives such as free give-aways in return for users making monetary “deposits” onto the sites.

In addition to infringing hosted content available for download, another common type of Internet piracy is via mail order – with orders placed on-line and delivered by mail, according to the Business Software Alliance (BSA). One common example involves the reselling of software in violation of licensing agreements, for example, software obtained using privileged licenses for a finite set of users which is then resold to the public on the Internet.

The primary hindrance to effective enforcement against Internet piracy is the Law on Telecommunications (Article 40, paragraph 4 on the “responsibility of operators”) which blankly states that Internet Service Providers (ISPs) “do not bear responsibility for the content of the information transmitted through their networks.” Additionally, Article 38 states that ISPs can disable end-users from the Internet, or block access to (i.e., take-down) infringing websites only with a court order. In the past, the ISPs association (IAU) – citing this statutory language – have taken the position that rightsholders need to go after illegal websites directly, without ISP assistance or cooperation. Many of the websites offering pirated material of films, music, videogames and business software, are thriving in part because of the support of local ISPs (there are over 400 ISPs in Ukraine and over 150 sites offering pirated CDs and DVDs). The copyright industries have, for years, been seeking private agreements (with governmental assistance) with ISPs to work cooperatively to take-down illegal websites and slow illegal peer-to-peer traffic. While some ISPs will delete links upon request (MPAA reported over 250 takedown letters in 2010 that were responded to by ISPs), most refuse rightsholders request and will demand court orders. Some ISPs – Ukretelcom and Data Xata – have cooperated with rightsholders, but the majority do not. In December 2008, the IAU agreed to work more forcefully with right holders to reach mutually acceptable solutions to help stem Internet piracy. Unfortunately, these efforts, and others between the Government of Ukraine and various copyright industries, have stalled (despite the memoranda of understanding), which is why IIPA recommends Government involvement to broker a private agreement, or, if that effort fails, the adoption of legal reforms.

Despite claims from the Government of Ukraine that adequate *ex officio* authority exists under current law, police continue to claim they are unable to instigate criminal operations against online piracy unless a rights holder first files a claim for damages. When criminal investigations are undertaken, police efforts are often stymied by a lack of cooperation from ISPs, which often refuse to provide available information on their infringing users. In December 2009, amendments to the Law on Telecommunications (draft # 3271) were proposed but ultimately defeated; they were intended to assist the police in conducting Internet crime investigations by providing subscriber information. The business software industry, for example, reports that legislative deficiencies and lack of cooperation with the ISPs thwart any attempts to focus on enforcement against Internet piracy. Thus, in general, the copyright industries report that the lack of clear prosecutorial and court procedures for Internet-related cases is a block on effective enforcement and that existing procedures are too difficult to be used effectively. Another impediment: procedures require that prosecutors identify the exact name of a website owner and the local network user(s) prior to commencing a case. IIPA recommends the adoption of guidelines and more effective procedures for police, prosecutors and judges for these crimes.

**Hard copy piracy:** The widespread availability of illegal material in open-air markets persists, in such places as: Petrovka and Radiolubitel (in Kiev), Mayak (in Donetsk), and in Odessa, Lviv and other major cities. There has been little change in this problem in the past few years. The hard goods piracy problem is also prevalent in some retail chains, many of which openly sell pirate product alongside legitimate product. Often times these pirated goods bear wrongly issued holograms which legitimizes the product and makes enforcement challenging.

In 2010, the Motion Picture Association (MPA) described hard-copy piracy of films as consisting of 90% pressed DVDs and 10% burned DVD-Rs (mostly, made in Ukraine), with new movie releases available at markets (especially in Kiev, Donetsk, Kharkiv, Odessa, Dnipropetrovsk and Lugansk), and at kiosks and vendors – often,

within three to five days of theatrical release. The DVD materials are mostly Russia-sourced (camcorded) discs with Russian audio, and contain as many as eight to fourteen titles on each disc. The points of sale – the markets and street vendors – are occasionally raided, but local corruption ensures that these sites are rarely permanently shut-down, and operators rarely criminally prosecuted. One local anti-piracy organization (UAPA) notes that organized criminal groups in Odessa, Donetsk, Zytomir and Kiev have been identified, with stalls/kiosks regularly (weekly) restocked, and supplied with prerelease CDs and DVDs.

For the Entertainment Software Association (ESA), piracy at Internet and cyber cafés or “game clubs” continues unabated, with pirated and/or unlicensed versions of videogame software in wide use. Most of the hard copy piracy is produced in plants for PCs on discs and is manufactured in Ukraine, without licenses and absent any royalty payments to rightful owners. The problems persist despite efforts by police to initiate actions and raids, including seizures at retail outlets, warehouses, and Internet cafes. The significant problem is post-raid investigations (which are unduly lengthy, costly, and non-transparent) and prosecutions – very few cases get to trial. Instead, it is common for cases to be simply dismissed or terminated without explanation, even when high volume seizures are involved.

The camcording of motion pictures, and the quick transference of these illegal copies on the Internet, is a major problem for the motion picture industry. There is a strong relationship between Russian and Ukrainian “release groups” and, hence, the camcording problem in this hot spot region shifts quickly between the two countries. In 2010, there were three camcords sourced from Ukrainian theaters; two were of video material, the other was audio. All were of high quality. The camcord (and Internet release) problem is strongly linked to organized criminal networks operating in Ukraine and Russia. Passage of Bill #6523 is needed to fix the Copyright Law (and Criminal Code) to provide for effective camcording enforcement, particularly with regard to effective enforcement against the “source content” stolen by organized criminal syndicates.

**Rogue collecting societies:** The proliferation of rogue collecting rights societies – such as Oberih and VAASP – which falsely claim “licenses” to repertoire, and the inability for legal societies to properly operate in Ukraine, remains a major problem for the recording industry. In 2009, the Ministry of Education and Science (with approval from the Ministry of Justice) issued an executive order (Order #1175) for the accreditation of collecting societies, but providing that there could be no more than one authorized collecting society for each copyright sector – thus, one for broadcasting rights, one for public performances, etc. The executive order delegated the authority to implement the accreditation of organizations to the State Department of Intellectual Property (SDIP); the executive order also noted that the authorization of any particular organization would be based on the majority of the national and international repertoire represented. Two legitimate organizations – the Ukrainian Music Alliance (UMA) – broadcasting – and the Ukrainian Music Rights League (UMRL) – public performances – legitimately represent over 80% of the domestic and international repertoire for music. They were both properly accredited by SDIP. Despite various attempts by non-representative organizations to cancel the results of accreditation (now for over two years), IIPA supports this accreditation and the reform brought on by Order #1175. Furthermore, in order for authorized collecting societies to function efficiently, we recommend that the regulatory framework increase their authority, including the possibility of inspections, representation in court, and cooperation with law-enforcement agencies.

One positive step was the launch, by prosecutors, of a criminal investigation into the activities of Oberih, the rogue collecting society. Unfortunately, it has taken far too long to conclude an investigation in this case of clear-cut piracy. IIPA calls upon the enforcement officials to quickly conclude their investigation and to properly prosecute those responsible for Oberih’s illegal operations (in addition to taking action against other rogue collecting societies, such as UPO AVTOR, which license pirate websites).

**Software legalization:** In 2003, the Cabinet of Ministers of the Ukrainian Government passed a regulation establishing procedures for the use of software in government agencies. It provided for government institutions to use properly licensed and legally held software, and prohibited public servants from installing, using, or copying software without prior consultation with a responsible system administrator. In 2004, the government issued a new regulation to implement legalization – assigning all procurement authority for software products to one entity, SDIP, in order to

try to eliminate the use of pirated software products in the public sector. However, since then, implementation of the program by the government, the largest consumer of illegal software in Ukraine, has been slow. The software piracy rate in state agencies ranges from 54% to 78% based on the government's own estimates. Illegal software usage by government agencies (including IPR enforcement entities) sends the wrong signal to the business community and Ukrainian citizens about the value and protection of intellectual property. It also diminishes the efforts by right holders to enforce and publicly educate Ukrainian society about intellectual property rights. Overall, the BSA reports (based on its preliminary figures) that piracy rates for PC software are at 84% – one of the highest in Europe – with a commercial value for pirated U.S.-vendor software of \$189.3 million.<sup>2</sup> The Government of Ukraine should (1) allocate to each Ministry dedicated funds for software legalization that are sufficient to meet each Ministry's software needs, and to perform software audits, in order to eliminate the use of unlicensed software in the public sector; (2) within three months, develop and make public an action plan for software legalization – identifying the steps necessary, making one individual responsible for coordinating implementation (and individuals within each Ministry to carry out the plan).

**Hologram Stickers:** All of the copyright industries – music, film, entertainment and business software companies – report persistent problems with the administration of the current hologram sticker system which was adopted in 2000. In short, the system has failed as an enforcement tool, and should either be abolished or completely revised. As a result of ineffective oversight by Intelzakhist, the body responsible for administration of the hologram system, holograms are often issued on the basis of false contracts and licenses. Here are four examples from 2010 of the problem: Intelzakhist delivered 12,500 holograms to an unauthorized distributor of a videogame (and not only was the government unaware of the circumstances, but it never commenced a criminal investigation). In another, a Ukrainian “distributor” represented itself as an authorized distributor of a videogame by producing falsified power of attorney documents from a Hong Kong entity; it was able both to obtain false holograms and to prevent the issuance of legitimate holograms to the proper rights holder. Unauthorized music compilations of 100+ tracks in mp3 format on each CD (featuring “the best hits” of well-known artists) are widely available with holograms. Last is the example of the widespread sale of discs with Xbox games bearing holograms in many retail outlets throughout the country, in spite of the fact that the right holders do not distribute these titles in Ukraine. In sum, the system has done considerably more harm than good to the interests of legitimate copyright owners while it has permitted suspect companies (based on false contracts and unverified licenses) to receive thousands of holograms for foreign releases (music, film, entertainment and business software) for which they have no licenses, despite objections from the legitimate licensees. This makes the pirate product “de facto authorized” by the state for distribution which means it cannot be (or is not) seized by law enforcement officials.

For some industries, one out of every two products seized is labeled with a false hologram, and for others (for example, the motion picture industry), all illegal copies seized had false holograms. Were the hologram requirement effectively administered it could potentially benefit rights holders. However, in practice, the hologram requirement actually benefits those engaged in the distribution of pirated product. Consequently, IIPA recommends an immediate moratorium on the hologram regime. While IIPA favors abolishing the system entirely, in the alternative, IIPA recommends a complete revision of the law to bring transparency to the hologram sticker administration procedures (along with proper enforcement). One “fix” would require SDIP to publish on its official website information about all current applications for stickers, and to indicate both the names of the applicants as well as the names of all works (CDs and DVDs) seeking labels – this would assist right holders in tracking applications. In

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<sup>2</sup>BSA's 2010 statistics are preliminary, representing U.S. software publishers' share of commercial value of pirated software in Ukraine. They follow the methodology compiled in the Seventh Annual BSA and IDC Global Software Piracy Study (May 2010), <http://portal.bsa.org/globalpiracy2009/index.html>. These figures cover packaged PC software, including operating systems, business applications, and consumer applications such as PC gaming, personal finance, and reference software – including freeware and open source software. They do not cover software that runs on servers or mainframes, or routine device drivers and free downloadable utilities such as screen savers. The methodology used to calculate this and other piracy numbers are described in IIPA's 2011 Special 301 submission at [www.iipa.com/pdf/2011spec301methodology.pdf](http://www.iipa.com/pdf/2011spec301methodology.pdf). BSA's final piracy figures will be released in mid-May, and the updated US software publishers' share of commercial value of pirated software will be available at [www.iipa.com](http://www.iipa.com).

2003, the Ukrainian Ministry of Education and Science passed an “order” requiring the SDIP to organize a voluntary registry for software manufacturers and distributors in Ukraine. This registry was intended to contain the names of software manufacturers and distributors, data about their registration, location, and contact details as well as information about their management, type of business activity and a short description of all software products manufactured and/or distributed. However, the registry was never properly set up.

**Broadcast and public performance piracy:** Broadcast television piracy is a major problem for the motion picture, music publishing and recording industries – both with regard to regional and nationwide broadcasts. Broadcasting, cable retransmission, and public performance piracy is estimated to be over 90%. Despite the fact that the Ukrainian Copyright Act provides for broadcasting and public performance rights, and collecting societies are in place, the overwhelming majority of users in Ukraine – cable operators and TV stations (including the largest state-owned broadcaster), restaurants, bars, shopping malls, sports clubs, etc. – refuse to pay royalties to the relevant authorized collecting societies. IIPA continues to recommend that the Government of Ukraine create a database, inspect commercial users, set a goal to bring these 90+% piracy levels down below 50% in one year (by relying on regional police economic crime units and state IP inspectors), and subject unauthorized users to administrative and criminal prosecutions. The law should also be clear that such wholesale blatant copyright and related rights infringements could lead to station broadcast license suspensions or cancellations from the state.

**Criminal enforcement:** The most significant shortcoming in the Ukraine enforcement regime has been the absence of effective criminal prosecutions and deterrent sentencing which are necessary to combat digital and hard-copy piracy. Despite 2006 amendments to the Criminal Code (Article 176) to significantly lower the previously too-high threshold for criminal prosecution, the current threshold is still high. The threshold is now 9410 UAH or \$1184 USD (as of January 2011, including inflationary adjustments). This high threshold serves as a bar to effective criminal enforcement and results in less effective administrative actions in lieu. This is particularly true for online piracy matters where the valuation of damages (by law enforcement agents, prosecutors and the courts) is too difficult to calculate absent an official methodology, thus preventing the initiation of criminal investigations and prosecutions. Additionally, enforcement officials have applied the threshold on a per-rightsholder basis, which means that when illegal material is seized, if the material for each rightsholder does not exceed the threshold, the criminal case does not proceed. This and other procedural problems hampers needed criminal enforcement. Other procedural problems include: (a) the use of expert evidence; (b) treatment of repeat offenders; (c) needed changes in the Criminal Code or Criminal Procedure Code to avoid delays and case dismissals; and (d) Supreme Court guidelines for judges on sentencing and to develop expertise on IPR cases. Provisions do exist in the Ukrainian Criminal Code (e.g., Article 28) for prosecuting organized groups or criminal organizations, including those engaged in IPR offenses, but the provisions have been under-utilized by prosecutors.

Enforcement efforts are further hampered by a lack of resources. The Government established a specialized unit for intellectual property rights crimes within the Economic Crime Division in the Ministry of the Interior with exclusive authority to deal with intellectual property rights crimes. This was a positive step, but the current number of 100 officers (down from 133 in 2010) serving in that division for the entire country is simply insufficient for conducting effective and systematic actions to deter piracy. This number should be increased to at least 260 officers. Out of this number, there should be a team of officers dedicated exclusively to copyright and related rights violations, and these officers should be provided with effective training (including IT skills), equipment, high-speed broadband connection, etc.. Similarly, the current number of state IP inspectors in SDIP empowered to combat various IPR infringements throughout the 25 regions of Ukraine is inadequate (at the end of 2010, there were only 15 inspectors for a country of 46 million). That number should be increased to 25 at a minimum, so that each region has at least one dedicated inspector. In populated cities such as Kiev (2.5 million people), Kharkyv (1.5 million), and Dnypropetrovsk, Odessa and Donetsk (with a combined 1+ million), to be effective, we recommend a team of at least 3 inspectors as the minimum number available. (In 2009, a Cyber Crime Unit was created within the Ministry of the Interior; the MOI is currently being reorganized and it is not clear if it will address copyright piracy issues in the future.) Other agencies – Tax Administration and the Security Service – are not actively engaged in IPR enforcement.



**Raids, Seizures and Other Enforcement Actions in 2010:** The Motion Picture Association of America (MPAA) reports seizures in 2010 totaling about 2.6 million optical discs, with a total of 960 criminal investigations commenced, and administrative measures applied in about 4,700 cases. The administrative actions were mostly undertaken against stores, kiosks and other street piracy, as in recent years; unfortunately, these actions were not coupled with severe enough penalties to deter these crimes. As in years past, almost all of the actions were directed against small-scale sellers and distributors.

The business software industry (BSA) reported 315 *ex officio* raids – 78 relating to CD sellers, 218 to end-users, 22 to hard disc loaders and only two to Internet piracy. These raids resulted in 208 criminal cases commencing; of these, 62 cases were sent to the courts for their consideration. These numbers were almost identical in number to the 2009 figures. Almost every request for assistance by rights holders for raids against suspected targets was denied by law enforcement agencies.

ESA, like other copyright industries, reports continued frustration with the pace at which investigations are undertaken and the rarity with which cases reach trial. Officers often refuse to proceed with investigations or to transfer cases in a timely manner to prosecutors, even when high volume seizures are involved. In some instances, ESA member companies did agree to support cases (as complainant), at the request of prosecutors, only to incur great expenses, and were provided with little or no information about progress of the case. In rare instances in which cases do make it to court, there is a high likelihood that judges will dismiss the case. In one 2007-initiated matter, the case was transferred to the court in 2010 (after three and half years), and was then dismissed by the judge because of the three-year delay (reasoning that it could not find criminal liability). In another case re-classified by a judge from an administrative to a criminal case, the investigator in charge refused (two times) to open the criminal case, and the case was closed. These give clear examples of the enforcement hurdles that the copyright industries face in Ukraine – ineffective investigations and prosecutions and non-deterrent sentencing for the few cases that do reach trial (BSA reports that only 10% to 15% of filed criminal cases end up in court and of those, only 15% result in sentences). Ukrainian tax authorities will exercise enforcement authority, and initiate cases, usually against retail pirates (as administrative actions).

Also in 2010, the MPAA reported six criminal cases commenced against the owners of FTP servers in several cities; also, criminal cases were commenced against the owners of local networks (for example, “Deeptown” in Sevastopol and “EmiliaNet” in Odessa), but they ended in suspended sentences. In May 2010, in Odessa, the first ever criminal case against a torrent server/service was launched; the server contained over 16,000 unauthorized works. However, a lower court ruling against the owner was reversed on appeal and the case was closed without any sentence. A case was commenced in April 2010 involving camcording in Batefly Petrivka Cinema – the investigation is ongoing; it is related to an earlier case in 2010 involving numerous illegal camcordings and the distribution of films made from those camcordings, all by one organized enterprise.

One positive note: in December 2010, in Lugansk, the owner of streaming movie sites (novoaydar.com.ua and cinemaxx.net.ua) was sentenced to three years imprisonment with an additional year of probation. This was the first ever verdict against the owner of a streaming site (and was based on a complaint filed in May 2010 by UAPA).

A few examples of raids, seizures and criminal investigations undertaken in 2010 include:

- A January 22, 2010 raid in Lugansk against a network of shops that seized 1 million optical discs, including newly released movies. The raid was carried out with the assistance of UAPA, and revealed not only shops, but warehouses and printing plants as well. The investigation revealed that as many as 50 people were engaged in the business – making it the largest operation ever revealed. The criminal cases – using the organized crime provisions of the law – are proceeding (that is, an investigation at the pre-trial stage).
- Other major raids in: January 30, 2010 in Kiev – seizing 70,000 DVDs and PCs; December 2010 in Donetsk seizing 160,000 DVDs, printers, 170,000 inlays, and including a warehouse raid in Kramatorsk; October 2010 in Kiev seizing 50,000 optical discs (mostly, videogames plus movies); December 2010 a warehouse

raid in Kiev seizing 25,000 DVDs with hologram stickers, 36,000 inlays and boxes. There were also major raids reported in these cities: Krivoy Rog (Dnepropetrovsk region), Kharkov, Kirovograd and Melitopol (Zaporizhyya).

**Optical Disc Piracy and Enforcement:** There is currently no evidence of large-scale industrial production of pirated optical discs in Ukraine – at least not of music and film material; however, other forms of optical disc piracy involving CD-R and DVD material, in particular, have increased. The June 2000 Joint Action Plan not only detailed plant licensing and inspection requirements, but also the adoption and implementation of criminal and administrative penalties, which could and should be used effectively against all forms of pirated product. A multi-agency order signed into law in November 2009 (with the approval of the Police, Customs, Tax, the Ministry of Culture, the Security Service, the Ministry of Education, as well as representatives of Microsoft-Ukraine, the BSA, the Music Association and UAPA) to improve IPR protection, has been wholly ineffective.

Regulation and control of the plants that does exist is still not effective, especially for industry sectors not present or unable to provide sufficient resources in Ukraine, and thereby unable to assist the authorities with inspections. There are, at present, eight optical media disc plants (producing CDs, DVDs or both) in operation in Ukraine.

**Ineffective Border Enforcement:** Customs officials were granted *ex officio* authority to properly conduct enforcement investigations (in amendments to the Customs Code in 2004 and 2006). For example, under Article 203-1 of the Criminal Code, with this *ex officio* authority customs officials can seize illegal material at the border without a court order (the police and other enforcement officials also have equivalent *ex officio* authority). Unfortunately, Customs authorities are not sufficiently engaged in enforcement measures. There have been some minor seizures by customs authorities of illegally produced CDs and other pirated materials over the past several years, but cooperation with right holders is still not ideal and activity has not been nearly enough to address the problem. The State Customs Service of Ukraine (SCSU) has the authority to stop importations in violation of the law. Thus, although *ex officio* authority was a positive step, it is under-utilized. The Government should expand the specialized intellectual property rights unit within the Customs Service (and not rely on a centralized bureaucracy), and provide it with sufficient resources to effectively stop illegal material at the border.

Ukrainian law provides for the payment of a levy on blank media (e.g. CD-Rs) to compensate for private copying; the levies are to be paid to UMA, a collecting society of right holders. Unfortunately, the SCSU is not, in practice, stopping imports for non-payment of the levy. Moreover, SCSU has no legal obligation to collect and share data on its collection of imported blank media. Under the Copyright Law, the non-payment of private copying levies does not constitute an infringement of copyright and related rights. There is, therefore, no viable mechanism for enforcement of the law, and widespread violation thereof, undermining the rule of law.

## **LEGAL REFORMS**

A history of the key legal reforms made by Ukraine in the past few years is available on the IIPA website at <http://www.iipa.com/rbc/2010/2010SPEC301UKRAINE.pdf>.

In sum, the six most important missing elements for effective enforcement and full TRIPs compliance (now that Ukraine is a member of the World Trade Organization) are: (1) amendments to the Criminal Procedure Code to give the police proper authority to commence investigations *ex officio*; (2) amendments to the Customs Code (which was revised in November 2006 to give clear *ex officio* authority) to repeal the restrictive “commercial purpose” threshold and the onerous registration and fee requirements for IP-related materials; (3) the adoption of an ISP responsibility framework that lays out the role and responsibilities of ISPs with respect to cooperative efforts with rightsholders in addressing Internet piracy; (4) the addition of key administrative remedies; (5) a major overhaul or abolition of the hologram sticker program; and (6) clear criteria for the operation of collecting rights societies (so that only organizations with a majority of relevant repertoire of material can be authorized).

The law of 2003 included in the Civil Procedure and Commercial Procedure Codes *ex parte* search provisions necessary for effective end-user (software) piracy actions. In 2004, the Highest Commercial Court of Ukraine adopted recommendations to implement these procedures. However, practical difficulties remain, most critically, the inability of the authorized enforcement agency (the state executive service) to actually undertake *ex parte* searches in spite of the revised Civil Procedure Code (since the Civil Code does not apply to administrative remedies).

**Copyright Law:** The Copyright Law of 2003 fixed several major deficiencies, but a number of problems remain, especially in the sphere of the collective management of rights. A major shortcoming is the accreditation of non-representative collecting societies which have been allowed to carry out collections on behalf of all music rightsholders (including foreign rightsholders) when they do not control any "volume of rights" by legitimate negotiated direct agreement with rightsholders. One order of the Ministry of Education and Science (Order #1175) was intended to address this problem, but this administrative reform is not a substitute for the needed Copyright Law amendments so that the law itself is clarified. The other amendments – noted above – need to be adopted to improve digital enforcement rights and fully implement the digital treaties.

One positive note: in June 2010, the Supreme Court – in a resolution – declared that the storage of illegal copies of software in a computer memory could be a copyright infringement.

Neither the Copyright Law of Ukraine nor the Criminal Code clearly provide that the use of illegal copies of software is an infringement – this should be corrected. According to the current wording of Article 1 of the Copyright law, the installation, duplication and sale of unauthorized software is a violation of the copyright law, but the use or storage of such copies is not.

Moreover, three other important changes to the Copyright Law should be adopting with amendments to: (1) Article 52 to allow licensees of foreign music companies to be treated equally to local right holders; (2) constitute as an infringement of copyright and/or related rights either the non-payment of music rights royalties or of private copying levies; and (3) add statutory damages and/or a system of enhanced damages in order to adequately compensate right holders and deter further infringement.

**Anti-Camcord Legislation (Copyright Law amendments):** The illicit recording of a movie in a theater remains the single most prolific source of movie piracy in Ukraine which is why an amendment is needed. Draft bill #6523, currently under consideration by the Verkhovna Rada, includes an anti-camcording amendment that would specifically exclude camcording from the scope of the Copyright Law's private copy exception. The law, if enacted, would prohibit the reproduction of audiovisual works during their exhibition in theatres and at other premises intended for public consumption. The motion picture industry (MPAA) appreciates the Government of Ukraine's attention to this matter and urges expedited passage of this important legislation.

**Criminal Code and Criminal Procedure Code:** The Criminal Code was completely revised in the past several years, including amendments in 2007 (May 31, 2007); as noted, the threshold for criminal responsibility under Article 176 remains high.

Amendments we recommend include: fixing Article 176 of the Criminal Code to clearly apply to all forms of piracy (i.e., on the Internet), not only (as it clearly does now) to hard-copy piracy. In addition, any amendment to the Criminal Code should ensure that repeat copyright infringement (within 12 months) would automatically lead to a criminal, and not solely an administrative, prosecution. In addition, relevant criminal sanctions should be included in the code for intentional infringements related to the obligation to pay music rights royalties.

The Criminal Procedure Code must also be fixed in law and practice so that police can act *ex officio* to initiate criminal intellectual property cases. Ukrainian criminal procedures in practice (although not required by the code) currently require right holders to file complaints to initiate actions which acts as a bottleneck to successful enforcement. The Criminal Procedure Code should be changed so that police initiate intellectual property criminal

cases and investigations for submission to the court; it must also be clear that the police (as they sometimes do in software cases) have the authority to hold confiscated products and equipment for use at trial.

**WIPO Digital Treaties:** In 2001, Ukraine acceded to the two "digital" treaties – the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonogram Treaty (WPPT), in force in March and May 2002, respectively. The Copyright Law of 2001 included amendments intended to implement these treaties. Unfortunately, the amendments fell short of complete and effective implementation, especially with regard to technological protection measures (requiring proof of "intentional" circumvention, which could prove a major impediment to protection). Ukraine needs to fully implement the treaties with amendments to its copyright law, as well as ensuring that the law is correctly applied. One area of concern includes recent attempts to reverse one (proper) implementation measure (Resolution No. 71 – January 18, 2003) which ensures the proper enforcement of cable retransmission rights.

**Administrative Remedies:** As part of the Joint Action Plan in 2000, Ukraine agreed to adopt and implement appropriate administrative remedies to deter piracy as well as to enact criminal penalties. The proper remedies do now exist, but they are not being used effectively to remove the business licenses of infringing retail stores, kiosks, and other smaller scale pirates. Further amendments have been proposed, but never adopted, to increase the maximum fines, which IIPA recommends. Administrative courts should be able to hear infringement cases even in the absence of the infringer – such delays, and the deadlines, lead to many unnecessary case dismissals. One of the biggest hurdles to overcome in the Administrative Code of Ukraine (Article 51.2) is the requirement to prove intent of the infringer. Intent is certainly relevant in criminal proceedings, but it has no relevance in administrative sanctions, and should be deleted from the code.

**Customs Code:** The Customs Code of Ukraine (amended in 2006; effective March 2, 2007) provides clear *ex officio* authority (Article 257) to customs officials. But, for suspected illegal material, a monetary threshold remains. Also, for optical discs, a maximum of 20 discs can be imported or exported for personal use under the Optical Disc Law. The 2004 Customs Code narrowed the applicable sanctions to acts meeting a "commercial purpose" threshold; this limits the effectiveness of the 2004 code. The 2006 amendments introduced new criteria replacing the "commercial purpose" criteria; the sanctions now apply to "goods destined for manufacturing or other business activity." In addition, the notification and registration requirements, and the fees, were not repealed by the 2006 amendments. While some administrative improvements have been made in recent years, IIPA recommends the abolishment of the registration system altogether; it is an unnecessary maze of regulations which interferes with effective border enforcement.

**Market Access:** There are three market access issues that the motion picture industry is confronting: (1) a March 18, 2010 statute requiring all film prints to be produced locally (which has created uncertainty for distributors because of conflicting information from the government); (2) a January 2008 law requiring all foreign films to be dubbed, voice-over translated, or subtitled in Ukrainian; and (3) changes in the Customs Code valuations (beginning in November 2009) based on projected royalties, rather than the underlying media (and confusion resulting from proposed retroactive implementation of these rules).

**Generalized System of Preferences:** In 2010, Ukraine benefited from over \$39.1 million in unilateral duty free Generalized System of Preferences ("GSP") benefits in the U.S. market; in 2008, that figure was over \$105 million. The U.S. Government should continue to consider Ukraine's compliance with the "adequate and effective protection" obligations of GSP, as part of its review under the GSP program (assuming the program is re-authorized), as well as in the Special 301 context.