

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE



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March 16, 2000

Chairman of the GSP Subcommittee
of the Trade Policy Staff Committee
600 17th Street, NW, Room 518
Washington, DC 20508

Re: Pre-Hearing Brief in Support of the GSP 1999
Country Practices Review Against Ukraine
65 Fed. Reg. 7410 (Feb. 14, 2000) and 65
Fed. Reg. 11104 (Mar. 1, 2000)
Case: Ukraine 015-CP-99

To the Chairman and the Entire Subcommittee:

The International Intellectual Property Alliance (IIPA) submits this brief in support of the decision by the Trade Policy Staff Committee to accept IIPA's June 16, 1999 petition to review the status of Ukraine as a GSP beneficiary developing country in relation to its intellectual property rights practices. Under separate cover, we also submit notice of our request to present oral testimony at the GSP hearings, now scheduled for April 13 and 14, 2000. This document serves as our brief for those hearings.

IIPA AND ITS MEMBERS

The IIPA is a coalition of seven trade associations representing U.S. copyright-based industries in bilateral and multilateral efforts to open up foreign markets closed by piracy and other market access barriers. These member associations represent over 1,450 U.S. companies producing and distributing works protected by copyright laws throughout the world — all types of computer software including business software and entertainment software (such as videogame CD's and cartridges, personal computer CD's and multimedia products); motion pictures, television programs and home videocassettes; music, records, CDs, and audiocassettes; and textbooks, tradebooks, reference and professional publications and journals (in both electronic and print media).

IIPA and its seven member associations, and in turn those member companies, are interested parties to this proceeding. These companies have significant economic interests in being able to

enter the Ukrainian market; invest, sell and distribute their products; and enjoy effective legal protection against the infringement – theft – of these products.

OVERVIEW OF THE COPYRIGHT SITUATION IN UKRAINE

In the past two years, Ukraine has surpassed every other country in Central and Eastern Europe as the largest producer and exporter of illegal optical media discs. Ukraine is now the region's number one pirate CD producing country. With at least five known plants, Ukraine was capable of producing over 70 million CDs last year, which is more than Bulgaria at the height of its production capacity. Losses to the music industry alone are estimated at \$210 million for the past year. This illegal material, consisting of CDs, CD-ROMS and DVDs, is flooding other countries, completing disrupting the already vulnerable markets throughout Central and Eastern Europe (including the Confederation of Independent States, C.I.S.), as well as established markets in Western Europe. The explosive growth of optical media piracy has been fueled by serious legal reform and on-the-ground enforcement deficiencies, including the absence of optical media production controls and effective border enforcement. In addition, until February 18, 2000, foreign sound recordings were completely without protection in Ukraine; even after that date, sound recordings released prior to February 18, 2000, and works released prior to May 27, 1973 (the date of adherence to the Universal Copyright Convention) remain unprotected.

To correct these overall problems, Ukraine must start by adopting legal reform measures, most importantly protection for sound recordings released prior to this year, and works released prior to May 27, 1973; an effective criminal code; and it must immediately implement optical media production regulations.

In December 1993, Ukraine passed a new law on copyright and neighboring rights. On October 25, 1995, Ukraine adhered to the Berne Convention (Paris Act). On February 18, 2000, Ukraine adhered to the Geneva Phonograms Convention. The passage of the copyright law and accession to the Berne and Geneva Phonograms Conventions were the result, in part, of commitments Ukraine made to the United States and other countries to modernize its old Soviet copyright regime. On May 6, 1992, Ukraine signed a bilateral trade agreement with the U.S. that entered into force on June 23, 1992 (see Appendix A). That agreement included wide-ranging commitments for Ukraine to enact and enforce modern laws protecting intellectual property rights and to provide effective enforcement, in exchange for the U.S. granting Most Favored Nation (MFN) treatment to Ukraine; the Ukrainian deadline for meeting the IPR obligations was December 31, 1993.

It took Ukraine over six years to meet its obligation to join the Geneva Phonograms Convention; in the interim, it has become a "safe haven" for an increasing number of pirate manufacturers of musical recordings, as well as business and entertainment software. It must fix its significant legal framework deficiency to protect pre-2000 sound recordings and pre-1973 works; without this fix, the marketplace for legitimate sound recording and works will not get established.

Ukraine is also in breach of the agreement for failing to provide effective enforcement. Although some criminal sanctions exist for copyright violations, they are insufficient to deter commercial piracy. These provisions are not even applicable to sound recordings and other neighboring rights violations, so there are currently no criminal sanctions for the violation of the

rights of the record companies. New provisions to revise the criminal code were drafted by the Ukrainian government (Ministry of Interior) in 1998, revisited in 1999, but never adopted by the Parliament. The criminal code must include strong sanctions to deter piracy of copyright works and sound recordings. The Criminal Procedure Code must be amended to provide police the authority to act ex officio to initiate criminal intellectual property cases.

In addition, Ukraine does not have an effective customs code to deter piracy at the border; the current code does not even directly stipulate IPR infringements among the many other violations and doesn't provide customs officials with ex officio authority to seize material at the border. This permits illegal material to flow freely into and out of Ukraine. The customs code must be amended to make border enforcement effective. Equally important as the copyright legal reform failures, is the failure to take the steps necessary to properly enforce its copyright laws with police, prosecutor and judicial action to deter commercial piracy. These improvements in the enforcement regime of Ukraine to the criminal, criminal procedure, civil and customs code, as well as implementing on-the-ground enforcement, are necessary for compliance with the bilateral agreement and for Ukraine's accession to the World Trade Organization.

I. Amendments to the Copyright Act and related enforcement laws are necessary to meet both bilateral and international norms.

IIPA is concerned that Ukraine has not, to date, addressed major areas of legal reform necessary for a modern and effective copyright regime. These legislative concerns are the lack of: (1) protection for sound recordings created before February 18, 2000 and for works created prior to May 27, 1973, as required by the Berne Convention (and TRIPS); (2) optical media regulations to stem the growth of the unregulated production of CDs, CD-ROMs and DVDs; (3) criminal penalties and procedures to deter commercial piracy; (4) customs code amendments to grant clear ex officio authority to customs officials to seize suspected illegal material at the border; and (5) effective civil ex parte search procedures necessary for effective end-user piracy actions (and required by TRIPS).

In addition, Ukraine should adopt provisions to implement the two 1996 WIPO digital treaties to protect against Internet and other forms of digital piracy.

The last important chapter in the history of Ukrainian adoption of copyright protection began and ended with the 1993 law. The Supreme Soviet of Ukraine passed a new Law on Copyright and Neighboring Rights on December 23, 1993, which came into force on February 23, 1994. That law was closely modeled on the Russian Federation's 1993 copyright law and the WIPO model law. Separate legislation and regulations on broadcasting were also adopted.

In 1998, a criminal penalties bill was drafted; in 1999 it was reconsidered, but it was never adopted by the Parliament. The absence of adequate criminal penalties for copyright and neighboring rights violations is a major deficiency in the current legal regime. It is reported that the draft criminal penalties bill will be considered by the Parliament in 2000. It is imperative that it be adopted quickly to stem the growth of organized criminal activity in the production of illegal material, including optical disc media. It is important to note that at present, there are no criminal sanctions for the violation of the rights of record producers.

In the 1992 bilateral agreement with the United States, Ukraine acknowledged its successor status to the Soviet Union's adherence to the Universal Copyright Convention, effective May 27, 1973. This confirmed that the point of attachment for copyright relations between the United States and Ukraine existed from this date forward (at least for works, and possibly for sound recordings). The 1992 agreement also stipulated a bilateral obligation of both countries to provide a full retroactive term of protection to each other's works on the date when both countries became members of the Berne Convention (in accordance with Article 18 of Berne). The United States unilaterally provides full retroactive protection for all Ukrainian works and sound recordings; that protection was extended from a term of 75 years to a term of 95 years in amendments adopted by the Congress in 1998.

In October 25, 1995, when Ukraine adhered to the Berne Convention, its instrument of accession included a declaration stating that it would not apply Berne's Article 18 obligations to protect pre-existing (foreign) works in Ukraine. Ukraine's decision not to grant protection to pre-existing U.S. copyrighted works (prior to May 1973) is incompatible with its bilateral trade agreement with the U.S., as well as with Ukraine's Berne (Article 18), national treatment, and any future TRIPS obligations (for works and sound recordings).

Finally, effective February 18, 2000, Ukraine did adhere to the Geneva Phonograms Convention, also an obligation of the bilateral trade agreement. By waiting so long to join the Geneva Phonograms, Ukraine has permitted the explosive growth of illegal cassette tape and optical media disc piracy of musical recordings. And by excluding pre-existing sound recordings, it will continue to be a safe haven for back-catalog pirates. There can be no adequate enforcement efforts against piracy in Ukraine until this undertaken.

As mentioned, a major legal shortcoming in Ukraine is the lack of effective criminal penalties to deter piracy. As noted above, the current Ukrainian law provides absolutely no criminal sanctions for the violation of the rights of record producers. In the Soviet era, identical criminal sanctions for copyright infringement were a part of the criminal codes in each of the republics of U.S.S.R. The codes of several of the countries of the C.I.S. including Ukraine, contain important deficiencies, that have not been corrected. These include the lack of jail terms; no protection for infringements involving producers of sound recordings or performers; and sanctions that are extremely low (only small fines and obligatory labor provisions).

Ukrainian Law (Article 136) currently provides for up to two years imprisonment and fines ranging from 50 to 120 times the minimum wage (roughly US\$1,000 to \$2,400) for copyright violations (though apparently this does not apply for sound recording infringements). In any case, these penalties, which have never been applied, are insufficient to deter commercial piracy.

A draft criminal code (amending Article 136) was prepared in 1998, and reconsidered in 1999, by the Ministry of Interior; but it was never considered by Parliament. The draft bill would have increased the penalties to three years imprisonment and up to 400 times the minimum wage (US\$8,000) for repeat offenders. Also, it would have been applicable against phonogram (sound recording) piracy. These would have been positive additions to Ukrainian law. However, the draft contained a provision that should have been eliminated before final adoption. As in Russia, the penalties under the draft could have only been imposed for "substantial material damage", a

standard that creates an unwarranted threshold for copyright piracy. Instead of this vague standard, the draft should have been amended to include a low and clear threshold to instigate a criminal action; this would not only help to identify criminal infringing acts for prosecutors, but would also provide critical guidance for the police when they are conducting initial raids and need to assess, in a particular situation, whether a case should be brought under the criminal code or the administrative code.

For the second straight year, the draft criminal code provisions were not adopted; they must be adopted and implemented in 2000 to stop the growing piratical activities in Ukraine. The draft law needs improvement before adoption. First, the Ukraine government should raise the penalties in the draft bill (especially the fines) to deterrent levels, and eliminate any unnecessary thresholds that will act to prevent police and prosecutors from effectively stopping commercial piracy. The availability and application of criminal penalties at levels sufficient to deter piracy are necessary ingredients to effective copyright protection, as well as TRIPS obligations. With respect to criminal procedures, police should be able to act *ex officio*, and to initiate an intellectual property criminal case for further investigation and submission to the court, including the authority to hold confiscated products and equipment for use at trial. The draft amendments, IIPA understands, would not have provided this necessary authority in Ukraine; it should be a part of any new amendments in 2000.

Ukrainian criminal procedures require right holders to file complaints to initiate actions. Prosecutors, not the police, are responsible for initiating infringement cases. Enforcement would be improved if the police were afforded *ex officio* authority to initiate cases without any formal complaint of the copyright owner; the criminal procedure code should be so amended. It is not clear if the 1999 proposed amendments to the criminal code would have made any changes to the criminal procedure codes, but these also should be part of any 2000 amendments.

As a result of its MFN status, Ukraine is now a beneficiary under the Generalized System of Preferences (GSP) program, a U.S. trade program which offers preferential trade benefits to eligible countries (duty-free tariffs on certain imports). Part of the discretionary criteria of the GSP program is that the country provide "adequate and effective means under its laws for foreign nations to secure, to exercise, and to enforce exclusive rights in intellectual property, including . . . copyrights." Ukraine is not fulfilling the statutory obligations of GSP. In 1998 (the latest full year of statistics), \$16.8 million in Ukrainian imports to the United States benefited from the GSP program, accounting for nearly 6.4% of its total imports to the United States. For the first eleven months of 1999, \$24.9 million of Ukrainian goods entered the U.S. under the GSP duty-free code. IIPA filed a petition with the U.S. government on June 16, 1999 to request the suspension or withdrawal of Ukraine's GSP benefits. That petition was accepted on February 14, 2000.

Ukraine was not a signatory to either of the two new WIPO "digital" treaties. Ukraine should be encouraged to ratify and implement both the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonogram Treaty (WPPT).

II. There has been an explosive rise of optical media piracy production in Ukraine and its export into Eastern, Central, and Western Europe.

In recent years there has been a steady rise in the production, distribution and export of illegal optical disc media (CDs containing musical works, audiovisual DVDs, and CD-ROMS containing entertainment and business software). In sum, piracy is a major feature of Ukraine's market – both in terms of a very high level of domestic piracy and in terms of the production and export of millions of pirate CDs.

The recording industry (International Federation of the Phonographic Industry, IFPI) reports that demand for legitimate CDs is less than 1 million units, but production is far exceeding this amount – an estimated 70 million units per year. The recording industry is extremely concerned that CD plants are locating to the Ukraine, and is now aware of at least five plants that are predominantly producing pirate product. Ukraine is rapidly becoming the pirate CD manufacturing capital of the world. We seek urgent action to prevent this from happening.

There are ways the government can take the necessary steps to regulate optical disc plants, and to improve border enforcement to contain the problem. In short, Ukraine must immediately set up plant monitoring procedures, like those established in Bulgaria in 1998, to regulate the production, distribution and export of optical media. Such regulations would include provisions to close plants that are caught illegally producing copyrighted material, to seize infringing product and machinery, and to monitor the importation of raw materials (optical grade polycarbonate) used in the production of CDs, DVDs and CD-ROMS (and other optical disc media). All of the plants must be required to adopt source identification (SID) codes, so that the source of illegally produced CDs can be traced and any necessary actions taken against infringing manufacturers.

In fact at present, distribution — including the import, export, wholesale and retail trade of audio and audiovisual products — is regulated by Presidential Decree #491 of May 20, 1998. IIPA welcomed adoption of the 1998 decree as a positive step against piracy. Unfortunately, it has never been implemented properly; if properly enforced, it could curb the distribution and export of pirated products. Ukraine needs to implement this decree immediately by: (1) instituting plant licensing, SID code and optical media regulations and penalties for noncompliance that include the closing of offending plants; and (2) appointing the right officials, as was done in Bulgaria, with the authority to undertake this enforcement effort and responsibility for putting these regulations in place. In fact, in 1999, the Copyright Agency was effectively closed and reorganized in a weaker form. In the meantime, the authority and role of the Ukraine Copyright Agency (SCAU), in verifying the legality of the issuance of certificates for import, export, wholesale and retail trade of copyright material by other governmental bodies, should be clarified. Such an agency, in essence an author's collecting society, cannot be expected to have the proper enforcement (that is, police) authority to monitor and close down plants that are engaged in piratical activity.

In January 2000, a much weaker and potentially harmful alternative to plant licensing was proposed. The Ukraine Law on Distribution of Copies of Audiovisual Works and Phonograms (the "Hologram" law) would have created a hologram sticker scheme for the distribution of certain audio and audiovisual material as an antipiracy measure. In fact, as has occurred in other countries (such as Bulgaria) that tried to implement such a law, it is counterproductive to effective antipiracy measures. The proposed hologram sticker law would, in fact, legitimize pirated material (because the law is open to abuse and fraud). The proposed law also exempted exports, the real problem with an overproduction problem as exists in Ukraine; and it exempted manufacturers, the real

source of the problem. In fact, it would immunize plant operators from liability. Last, such a system establishes an unworkable administrative burden on legitimate businesses and keeps legal product from the market, thus permitting more pirate material to flourish in the vacuum. As of the filing of this report, this law was under final consideration; it is hoped the President will veto this law, and it will not be revisited by the RADA. To make matters worse, the January 2000 Hologram Law would have repealed Decree # 491 and all of its potential benefits (if implemented properly).

III. Enforcement against copyright piracy has been inadequate and ineffective in Ukraine, and fails to protect the rights of U.S. copyright owners.

The general failure to protect and enforce the rights of copyright owners is preventing entry by the U.S. creative industries into the country. In sum, the enforcement situation for all IIPA members can best be summarized as one of almost complete failure. There is no effective legal structure in place to stop rampant optical media production, almost no border enforcement to stop the exporting of that material, and little internal police or judicial activity to crack down on commercial pirates, much less on retail-level activity.

The Ukraine enforcement problem is twofold. First, there are extremely high levels of piracy of all copyrighted products – music, sound recordings, business applications software, interactive entertainment software (on all platforms, CDs and cartridges), motion pictures, videos, television programming, and books and journals, throughout Ukraine (and the C.I.S.). Second, levels of piracy in the entire region are expected to get worse unless the government imposes strict monitoring of the illegal optical disk media production facilities in Ukraine that are producing these disks in Ukraine for foreign distribution.

The International Federation of the Phonographic Industry (IFPI) and the Recording Industry Association of America (RIAA) report that Ukraine is now the second largest music market (after Russia) in the C.I.S.; and it is the second largest pirate music center. The recording industry reports that piracy of international repertoire is estimated at 99%. The total value of pirate sales, including exported CDs, is estimated at some \$210 million.

The estimated monthly manufacture of pirate CDs in the Ukraine for the domestic market is 500,000. As noted, the most threatening development to the music market is the rapid increase of CD plants producing pirate CDs. Prior to 1996, there was the only one CD plant in the Ukraine, in L'vov, which only had old equipment. Now, three more plants have opened up in Kiev and two other plants are operational in other regions. It is estimated the Ukraine exported 30 million CDs in 1999.

The pirate production is damaging not only the Ukrainian market, but also other markets in the region, as well as in the EU. For example, Bulgarian authorities reported significant pirate CDs entering their market from the Ukraine — an ironic twist, that clearly indicates that the Ukraine is taking the mantle from Bulgaria as one of the world's prime producers and exporters of pirate CDs. Hundreds of thousands of pirate CDs (Latin American and international repertoire) have also been transported from the Ukraine to South America. The situation gravely concerns the recording and

music publishing industries, and as noted, they must focus on legalizing and regulating the CD production plants including the implementation of IFPI Source Identification or (SID) codes.

In one instance in the summer of 1999, close to 1 million illegal CDs were seized in two separate but related raids in Russia (300,000) and Belarus (654,000); all the CDs were produced in Ukraine. In another seizure in June 35,000 musical CDs, all made in Ukraine, were seized by Italian customs officers. Other countries in which pirate CDs from Ukraine were taken in large seizures included Latvia, Lithuania, Estonia, Greece, Poland, Romania and Russia. In one brazen act, a plant offered its entire illegal catalog of recordings for sale via the Internet; it has no license from any of the music publishers, nor the sound recording producers to replicate this material.

The Business Software Alliance (BSA) estimates that trade losses due to software piracy in the Commonwealth of Independent States (C.I.S.) other than Russia was \$34.1 million in 1998, the last year that these figures were available. That year, the level of piracy was estimated to be 93%. The software industry continued to experience exceptionally high levels of software piracy in 1999 (with piracy rates estimated as remaining at or above 90%). The industry began working with Ukrainian police to accomplish the first raids of reseller pirates, but this initiative did not progress very far. Criminal and civil litigation remain nonexistent, and the absence of ex parte provisions makes it impossible for right holders to collect evidence without police assistance. Disappointingly, attempts at a government legalization decree remained bogged down throughout 1999.

The entertainment software industry reports that material has been confiscated throughout the region that was made illegally in Ukraine, and that production levels are up several hundred percent from recent years in Ukraine. As in the music industry, this is a regional problem of production, distribution and export throughout Ukraine, the Czech Republic, Poland, Hungary and Russia (and most likely by organized operations region-wide).

The Motion Picture Association (MPA) reports that for the fifth straight year, the video piracy rate is at 99% and broadcast piracy remains at 95% (cable and satellite rates are unavailable). In 1999, as in prior years, the main audiovisual piracy problem in Ukraine continues to be rampant video piracy in shops and street kiosks. Pirate videos of MPA member company films regularly appear in Ukrainian kiosks within weeks of their U.S. theatrical release. Most are back-to-back copies of videos recorded from U.S. cinema screens. Police lack legislative enforcement tools, and organized criminal groups are heavily involved in video piracy.

A broadcast television piracy problem is also widespread in Ukraine. There are three national television stations, two of which are run by Ukrainian State Television and which broadcast original Ukrainian programming and retransmitted Russian signals. There are also many regional channels that almost exclusively broadcast pirated films. Some of these stations use legitimate U.S. videos to make pirate broadcasts, often broadcasting the U.S. "FBI" antipiracy warning at the beginning of those videotapes.

The Ukrainian Copyright Agency and the National Council for Television and Radio, which has licensing authority over Ukrainian television, have not been effective. The Ukrainian government should require compliance by broadcasters with copyright laws to obtain and maintain their licenses.

MPA estimates that trade losses in 1999 due to audiovisual piracy in Ukraine remained at \$40 million (the same as it has been since 1995).

The book industry continues to experience piracy as well, with most of the problem being books illegally printed in the Ukraine for sale in Russia.

In sum, copyright piracy threatens not only foreign investment but also the development of local copyright industries in Ukraine (and in the other countries of the C.I.S.). This threat must be met by a coordinated legal and enforcement response. All enforcement agencies (police, prosecutors, customs, and ministries such as Justice, Interior, and Internal Revenue) should treat commercial copyright infringement as a serious crime. Each agency should have authority to act ex officio against commercial piracy. Clear government strategies and lines of authority should be developed. Training of judges, prosecutors, magistrates, customs officials, and police should be part of regular, ongoing enforcement efforts.

The Ukraine government promised in 1998 to establish an interministerial committee on intellectual property enforcement. There have been no reports that such a Committee was actually formed; if it was, there are no signs of its effectiveness in combating the spread of pirated material (and production of optical disk media). This includes not only domestic (internal) enforcement, but the need to provide customs officials with the proper authority to seize illegal material at the border without a court order. Without clear authority internally and at the border, the piracy problem will continue to worsen.

CONCLUSION

In sum, we have detailed the numerous deficiencies in the Ukrainian copyright legal and enforcement regime to assist you in your deliberations. We look forward to answering any questions the Subcommittee may have at the GSP Public Hearings next month.

Respectfully submitted,

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International Intellectual Property Alliance

APPENDIX A IIPA PRE-GSP HEARING BRIEF

COMMONWEALTH OF INDEPENDENT STATES (CIS)

SUMMARY OF ISSUES IN THE COUNTRIES OF THE C.I.S.

As a result of numerous similarities with the problems confronted by the countries of the Commonwealth of Independent States (C.I.S.), IIPA has grouped ten of the twelve countries under this single heading for the convenience of reporting on those problems. This filing encompasses separate but similar reports on the countries of: Armenia, Azerbaijan, Belarus, Georgia, Kazakhstan, the Kyrgyz Republic, the Republic of Moldova, Tajikistan, Turkmenistan, and Uzbekistan; IIPA recommends that each of these ten countries should be placed on the Watch List in 2000.

Separately, IIPA has filed reports on Russia and Ukraine, recommending the placement of each of those countries on the Priority Watch List for 2000.

The major deficiencies of most of the ten countries of the C.I.S., further detailed in each country report below, are: (1) the failure to fully comply with the legal reforms of the bilateral trade agreement signed and ratified by each country; and (2) the failure to comply with the World Trade Organization (WTO) TRIPS Agreement, especially the enforcement obligations. A majority of these countries are not members of the Geneva Phonograms Convention and have no point of attachment for American or other foreign sound recordings, five or more years after they were obligated by the bilateral agreements to do so. Many of these ten countries are not yet members of the WTO, and are therefore not yet bound by the TRIPS Agreement obligations, but almost all of the countries are seeking WTO membership and will therefore have to comply with them on the date of adherence to the WTO.

Last, in almost all cases, even where legal reforms have been adopted, there is virtually no on-the-ground enforcement in any of these countries – neither effective civil, administrative, criminal or border enforcement is in place. In addition to being a WTO TRIPS obligation, this complete breakdown in enforcement is a total bar to the entry of any legitimate copyright industries into the local markets. It is also permitting the countries of the C.I.S. to become a haven for the production and distribution of pirated material, including optical media material consisting of music CDs, CD-ROMs containing business and entertainment software, and DVDs containing audiovisual material. This material, much of it produced by organized criminal enterprises, is not only hampering the development of legal markets in the countries of the C.I.S., but is spreading and thus doing significant harm to other legitimate markets in neighboring countries in Eastern and Central Europe.

Three steps are needed to curb this problem: (1) police and prosecutors must commence raids, seizures, deterrent criminal actions; (2) effective border enforcement must be implemented; (3) optical media production regulations must be implemented to shut down illegal plants.

COMPLIANCE WITH BILATERAL TRADE AGREEMENTS

In 1990, the U.S. and the Soviet Union signed a far reaching bilateral trade agreement including extensive intellectual property rights obligations. These obligations included the enactment and enforcement of a (pre-TRIPS Agreement) modern copyright regime. As a result of the tumultuous events of August 1991, the 1990 U.S.-U.S.S.R. Trade Agreement, which required the U.S.S.R. to adopt a Berne-compatible copyright law by December 31, 1992, never entered into force because the U.S.S.R. did not implement it before it dissolved. The U.S. government determined that each country of the C.I.S. could (re)sign the 1990 U.S.-U.S.S.R. Trade Agreement with only minor technical amendments, including new deadlines to meet the Agreement's obligations, and a statement from each country of the C.I.S. acknowledging its succession to the Soviet Union's Universal Copyright Convention obligation, dating from May 27, 1973.

All twelve of the former republics of the Soviet Union did sign these agreements (see dates below). Once each agreement was signed, it was agreed it would enter into force upon an exchange of diplomatic notes between the U.S. and each new country. At such time that country would be eligible for "Most Favored Nation" (MFN; now known as "Normal Trade Relations") status. All of the countries have now put the agreements into force. Once in force, each country agreed to make its "best efforts" to enact all of the IPR components of the trade agreement, in the case of every country but the Russian Federation, by December 31, 1993. The Russian Federation agreed to complete its obligations by December 31, 1992.

The bilateral trade agreements were signed and entered into force in each country on the following dates:

Armenia (Signed April 2, 1992; entry into force on April 7, 1992);
Azerbaijan (Signed April 12, 1993; entry into force on April 21, 1995);
Belarus (Exchange of letters January 6 and February 16, 1993; entry into force on February 16, 1993);
Georgia (Signed March 1, 1993; entry into force on August 13, 1993);
Kazakhstan (Signed May 19, 1992; entry into force on February 18, 1993);
Kyrgyz Republic (Signed May 8, 1992; entry into force on August 21, 1992);
Republic of Moldova (Signed June 19, 1992; entry into force on July 2, 1992);
Russian Federation (Signed June 1, 1990; entry into force on June 17, 1992);
Tajikistan (Signed July 1, 1993; entry into force on November 24, 1993);
Turkmenistan (Signed March 23, 1993; entry into force on October 25, 1993);
Ukraine (Signed May 6, 1992; entry into force on June 23, 1992);
Uzbekistan (Signed November 5, 1993; entry into force on January 13, 1994).

The obligations of the bilateral trade agreements (Article VIII of each Agreement and in the accompanying Side Letter on IPR) include:

(1) Joining the Berne Convention (Paris Act); (2) Providing protection for sound recordings, including a right of reproduction, distribution (and importation), and a commercial rental right; (3) Providing a point of attachment for foreign (American) sound recordings and making best efforts to join the Geneva Phonograms Convention; (4) Providing full retroactivity (per Article 18 of Berne); (5) Protecting computer programs and databases (as "literary works" consistent with Berne, and

now TRIPS); (6) Providing adequate and effective protection and enforcement (which is understood to include deterrent civil and criminal penalties, as well as border measures); and, (7) Establishing a working group with each country to monitor the continuing progress of copyright and other IP protection and enforcement.

Nine countries in the C.I.S. – the Russian Federation (1995), Ukraine (1995), Georgia (1995), the Republic of Moldova (1995), Belarus (1997), Kazakhstan (1999), Azerbaijan (1999), the Kyrgyz Republic (1999), and Tajikistan (2000) – are members of the Berne Convention. This means that the other three countries, Armenia, Turkmenistan and Uzbekistan, are in breach of this trade agreement obligation.

Only four countries provide sound recording protection for American sound recordings – the Russian Federation (1995), the Kyrgyz Republic (1998), Georgia (1999) Ukraine (2000). Only the Russian Federation (1995) and Ukraine (February 2000) are members of the Geneva Phonograms Convention of the twelve countries in the C.I.S. This means that ten countries in the C.I.S. are in breach of the bilateral trade agreement obligation to join Geneva Phonograms. The Kyrgyz Republic (December 20, 1998) and Georgia (October 6, 1999) are new members of the WTO, and are thus obligated under TRIPS to provide a point of attachment and a minimum level of rights for foreign (American) sound recordings. This means that in eight of the twelve countries, sound recordings are completely unprotected, six years after the bilateral trade agreements required such protection.

Two countries are members of the new WIPO Performances and Phonograms Treaty (WPPT) – Belarus and the Republic of Moldova; the Kyrgyz Republic is also a member of the WIPO Copyright Treaty, or WCT. The U.S. deposited its instrument of accession in September 1999 to the WCT and the WPPT. However, since the WPPT is not yet in force, and will not be until thirty countries ratify it, there is no point of attachment for American sound recordings at this time by accession or ratification to that treaty.

The Russian Federation and Ukraine explicitly do not provide retroactive protection for works or sound recordings in breach of the clear obligation in the bilateral agreement.¹ This lack of protection for pre-existing works and sound recordings is also a violation of Berne (Article 18 and the national treatment obligations) and the TRIPS Agreement (Article 14.6 for sound recordings and Article 9 for works). Belarussian experts claim that their law probably does provide retroactive protection, though this is less than clear with respect to sound recordings. For the other nine countries of the C.I.S. it is unclear what, if any, retroactive protection they do or do not provide for works and sound recordings. The countries of the C.I.S. that are not providing retroactive

¹The issue of retroactive protection, at least back to 1973, was additionally required in every country in a special bilateral provision (not found in the Soviet agreement) which obligated each country to act as a successor state to the Soviet Union's obligations under the Universal Copyright Convention (U.C.C.). Thus a "gap" in protection for American works in each of the (non-Berne) countries of the C.I.S. was avoided, from May 27, 1973 to the present. This is because the Soviet Union became a party to the 1952 text of the Universal Copyright Convention on May 27, 1973. UNESCO (secretariat of the U.C.C.) reportedly treats all of the former republics of the U.S.S.R. as successors to the Soviet Union and confirms every republic's adherence to the U.C.C. from that date. Only five countries — the Russian Federation, Belarus, Kazakhstan, Tajikistan and Ukraine — have formally confirmed their membership in that Convention. At the time of the signing of the bilateral agreements, the USG requested that each country send such a confirmation letter to UNESCO to avoid any confusion about this status.

protection for works and sound recordings must do so or they are in breach of the bilateral agreement; those countries where such protection is unclear should clarify that protection. This problem of protection for pre-existing material, especially for sound recordings, is a regional problem because such protection is not currently provided in Poland, the Czech Republic, and (possibly) Romania creating an environment for the production and wide-spread distribution of back catalog material.

Some form of explicit copyright protection for computer programs and databases is provided in every country except Turkmenistan. However, almost no country in the C.I.S. provides criminal ex parte search provisions necessary for effective enforcement against end-user piracy (and as required by the WTO TRIPS Agreement); the availability of civil ex parte search provisions is unclear in virtually all of these countries.

Only a few of the countries have amended their Criminal Code to adopt any criminal provisions applicable for IPR violations; almost none of the countries have adopted deterrent penalties to stop commercial piracy, especially necessary against the organized criminal enterprises operating in this region. Neither have most of these countries adopted the necessary Customs Code revisions to provide ex officio authority to properly seize material at the border. And none of these countries are providing "adequate and effective" enforcement on-the-ground as required by the bilateral agreements or the WTO TRIPS Agreement.

Last, only the Russian Federation and Ukraine have held meetings of their working groups with United States government officials. In the other ten countries there have been no such formal meetings to follow-up on these bilateral agreement obligations, to IIPA's knowledge.

SUMMARY OF LEGAL REFORMS AND ENFORCEMENT ACTIVITY

As noted, three countries of the C.I.S. are members of the WIPO Copyright Treaty (WCT): Belarus, Kyrgyz Republic and the Republic of Moldova. Two are members of the WIPO Performances and Phonograms Treaty (WPPT): Belarus and the Republic of Moldova.

Armenia and the Russian Federation have joined the Brussels Satellite Convention. The Republic of Moldova is a member of the Rome Convention. In September 1993, the C.I.S. Treaty on Cooperation in Copyright and Neighboring Rights was signed. This obligated member states to confirm their membership in the U.C.C. (1952 text); to mutually protect their works on this basis; and, to develop national legislation at the level of the Berne, Geneva Phonograms, and Rome Conventions. This Treaty does not provide for the creation of any inter-governmental executive body.

On December 20, 1998, the Kyrgyz Republic joined the World Trade Organization (WTO); it was the first country in the C.I.S. to join the WTO. On October 6, 1999, Georgia became the second C.I.S. member to join the WTO. Eight other C.I.S. nations are in the process of acceding to the WTO. Working Parties have been established for Armenia, Azerbaijan, Belarus, Kazakhstan, the Republic of Moldova, the Russian Federation, Ukraine and Uzbekistan. The U.S. Congress has made it clear, in the legislation implementing the Uruguay Round, that the Administration should work to encourage "acceleration" of TRIPS compliance by existing and acceding WTO members.

Consistent U.S. policy requires any nation newly acceding to WTO to be in full compliance with TRIPS at the time of accession. In IIPA's view, the TRIPS obligations merely spell out in greater detail the C.I.S. countries' existing bilateral obligations under the trade agreements with the U.S. to provide "adequate and effective protection and enforcement" of intellectual property rights.

A dangerous development in breach of the bilateral agreement continues to unfold in several countries of the C.I.S., including the Russian Federation. That is the comprehensive reform of the civil codes of these nations that is underway.² In most cases, the efforts to revise the civil code will (or have) result(ed) in the addition in that code of new copyright provisions inconsistent with Berne, TRIPS, and the bilateral agreements. These efforts to revise the civil codes should be opposed. For example, in the case of Russia, drafts of the civil code reform (as recent as 1999) included IPR provisions completely incompatible with the bilateral trade agreement, the Berne Convention, and TRIPS. In 1996 a so-called Model Civil Code for the countries of the C.I.S. was reportedly adopted by the C.I.S. Inter-parliamentary Assembly in St. Petersburg. Detailed provisions on copyright and neighboring rights were included that were contradictory to existing international standards of protection for copyrights.

Each country of the C.I.S. should enact separate copyright, customs, and criminal provisions and procedures, rather than build on the foundation of the Soviet-era civil codes.

To the best of our knowledge, eleven countries have passed major revisions to their copyright laws:

Armenia (May 13, 1996; effective June 6, 1996; amended January 12, 2000)

Azerbaijan (June 4, 1996; effective October 23, 1996)

Belarus (May 16, 1996; effective July 18, 1996; amended August 11, 1998; effective August 19, 1998)

Georgia (Civil Code in force on November 25, 1997; amended June 22, 1999; effective July 8, 1999)

Kazakhstan (February 9, 1996; effective June 10, 1996)

Kyrgyz Republic (December 16, 1997; effective January 23, 1998)

Republic of Moldova (November 23, 1994; effective March 2, 1995; amended May 28, 1998)

Russian Federation (July 9, 1993, effective August 3, 1993)

Tajikistan (November 13, 1998; effective December 17, 1998)

Ukraine (December 23, 1993, effective February 23, 1994)

Uzbekistan (August 30, 1996; effective September 17, 1996)

²Prior to the break-up of the Soviet Union, the text of the U.S.S.R.'s 1961 "Fundamentals of Civil Legislation" was the governing copyright law throughout the Union. Based on the "Fundamentals," each of the republics adopted in its civil code a separate chapter for copyright protection. The main features of these civil codes were: a 25-year term of protection, no protection for producers of sound recordings or performers, and broad exceptions to protection. The Supreme Soviet of the U.S.S.R. adopted amendments to the Fundamentals in May 1991, but they did not become effective because of the dissolution of the U.S.S.R. The 1991 amendments entered into force in the Russian Federation on August 3, 1992 by special decree. Several of the republics still treat the old civil codes as in force; it is not known whether any of these include the 1991 amendments drafted by the former U.S.S.R.

Turkmenistan is reportedly in the process of drafting new copyright legislation; until it is adopted, the Civil Code (Chapter IV, 1961) from the former Soviet era is still the operational law.

As a result of their MFN/NTR status, all of these countries are now beneficiaries under the Generalized System of Preferences (GSP) program, a U.S. trade program which offers preferential trade benefits to eligible countries (duty-free tariffs on certain imports). Part of the discretionary criteria of the GSP program is that the country provide "adequate and effective means under its laws for foreign nations to secure, to exercise, and to enforce exclusive rights in intellectual property, including...copyrights." In 1998 (the latest full year of statistics), the countries of the C.I.S. received the following preferential trade benefits under GSP:

	<u>Amt. GSP Duty-Free</u>	<u>Percent.of U.S. imports that benefit from GSP</u>
Armenia	\$510,247	50.4%
Azerbaijan	\$0	0%
Belarus	\$6,761,685	47.6%
Georgia	\$0	0%
Kazakhstan	\$90,205,615	66.32%
Kyrgyz	\$29,863	56.29%
Moldova	\$512,659	< 1.0%
Russian	\$423,561,309	24.78%
Tajikistan	\$0	0%
Turkmenistan	\$0	0%
Ukraine	\$16,775,064	6.4%
Uzbekistan	\$2,258,837	68.19%

On June 16, 1999, IIPA submitted a request to the United States government in accordance with U.S. law, that the eligibility of Armenia, Belarus, Kazakhstan, the Kyrgyz Republic, the Republic of Moldova, Ukraine and Uzbekistan as a GSP beneficiary developing country be reviewed, and that its GSP benefits be suspended or withdrawn, in whole or in part, if requisite improvements are not made by each of these countries to remedy the deficiencies which adversely affect U.S. copyright owners. On February 14, 2000 the United States government accepted the IIPA petitions for: Armenia, Kazakhstan, the Republic of Moldova, Ukraine and Uzbekistan. The United States government is withdrawing GSP benefits from Belarus (for reasons unrelated to intellectual property matters).

APPENDIX B TO IIPA PRE-GSP HEARING BRIEF

METHODOLOGY FOR ESTIMATED U.S. TRADE LOSSES AND LEVELS OF COPYRIGHT PIRACY ABROAD IN 1999

Estimated trade losses due to piracy are calculated by IIPA's member associations. Since it is impossible to gauge losses for every form of piracy, we believe that our reported estimates for 2000 actually underestimate the losses due to piracy experienced by the U.S. copyright-based industries. This methodology is also used as the basis for the statistics provided in IIPA's February 18, 2000 Special 301 submission to the U.S. Trade Representative.

Pirate production for export for the records and music, computer programs and book publishing industries is included in the loss figure for the country of manufacture, not the country of ultimate sale. For example, the Recording Industry Association of America (RIAA) reports losses estimated at \$60 million from sales in several Eastern European countries and Russia, of Czech-produced CDs. The relevant amounts are included in the Czech Republic losses for records and music (which even notes that \$60 of the \$62 million in estimated losses in the Czech Republic are the result of exports); the loss figures in Russia and the other "receiving" Eastern European countries do not report these losses. There are rare exceptions noted in the filing. For example, in the Paraguay report, the RIAA notes that \$270 million of the estimated \$280 million in losses are due to the transshipment of pirate CDs from Asia. In the motion picture industry, losses are generally counted in the country in which the sale of product occurs.

COMPUTER SOFTWARE: BUSINESS APPLICATIONS

The Business Software Alliance (BSA)'s calculation method compares two sets of data -- the *demand* for new software applications, and the legal *supply* of new software applications.

Demand: PC shipments for the major countries are estimated from proprietary and confidential data supplied by software publishers. The data is compared and combined to form a consensus estimate, which benefits from the detailed market research available to these member companies.

Two dimensions break the shipments into four groups. Splitting the PC shipments between Home and Non-Home purchasers represents the market segments of each country. The PC shipments are also compared to the change in the installed base of existing PCs. The part of PC shipments which represents growth of the installed base is called "new shipments" and is separated from the "replacement shipments" which represent new PCs that are replacing older PCs.

A scale of the installed base of PCs by country compared to the number of white-collar workers was developed. PC penetration statistics are a general measure of the level of technological acceptance within a country. The level of penetration, for a variety of reasons, varies widely from country-to-country. This level is then ranked and each country is assigned to one of five maturity classes.

The number of software applications installed per PC shipment is provided by member companies, and the following ratios for the four shipment groups are developed:

Home-New Shipments
Non-Home - New Shipments
Home - Replacement Shipments
Non-Home - Replacement Shipments

For each shipment group, ratios are developed for each of five maturity classes. U.S. historical trends are used to estimate the effects of lagged technological development by maturity class.

Piracy rates can vary among applications. Grouping the software applications into three Tiers and using specific ratios for each Tier further refined the ratios. The Tiers were General Productivity Applications, Professional Applications, and Utilities. These were chosen because they represent different target markets, different price levels, and it is believed, different piracy rates.

Software applications installed per PC shipped are researched and estimated using these dimensions:

1. Home vs. Non-Home
2. New PCs vs. Replacement PCs
3. Level of Technological Development
4. Software Application Tier

From this work, a total software applications installed estimate was calculated for each country.

Supply: Data was collected by country and by the 26 business software applications. Shipment data was limited in some instances, hence, uplift factors were used to estimate U.S. and world-wide shipments.

Piracy Estimates: The difference between software applications installed (demand) and software applications legally shipped (supply) equals the estimate of software applications pirated. The piracy rate is defined as the amount of software piracy as a percent of total software installed in each country.

Dollar Losses: The legal and pirated software revenue was calculated by using the average price per application. This is a wholesale price estimate weighted by the amount of shipments within each software application category.

To develop the wholesale dollar losses for U.S. software publishers, the wholesale dollar losses due to piracy were reduced by the ratio of the software shipped by U.S. software publishers as a percent of software shipped by all software publishers.

COMPUTER PROGRAMS: ENTERTAINMENT SOFTWARE

The Interactive Digital Software Association (IDSA)'s calculation method uses market data of dedicated platform and PC entertainment software in both compact disc and cartridge formats, and hardware shipments along with an estimate of the level of piracy in the target country. Where possible, losses due to exports and/or online piracy are included. Export losses are attributed to the source country, where possible. Here are the basic steps involved in determining losses to entertainment software publishers:

1. For each dedicated platform, the 1998 entertainment software units are divided by hardware units. This results in the number of applications per dedicated platform.
2. For each multimedia PC, the 1998 entertainment software units are divided by hardware units. This results in the number of entertainment applications per multimedia PC.
3. The number of applications per PC or dedicated platform is estimated (this varies country-to-country). The actual number of applications per dedicated platform or PC is then subtracted, resulting in the number of illegal applications per hardware unit.
4. The number of illegal applications per hardware unit is divided by the estimated number of applications per hardware unit, resulting in the estimated percentage of illegal software units in use.
5. The illegal software units per hardware unit is multiplied by the average wholesale price (which varies country-to-country) which is multiplied by the number of legitimate hardware units. This results in the dollar amount lost to piracy.

MOTION PICTURES

Many factors affect the nature and effect of piracy in particular markets, including the level of development of various media in a particular market and the windows between release of a product into various media (theatrical, video, pay television, and free television). Piracy in one form can spill over and affect revenues in other media forms. Judgment based on in-depth knowledge of particular markets plays an important role in estimating losses country by country.

Video: Losses are estimated using one of the following methods:

1. For developed markets:
 - a. The number of stores that rent pirate videos and the number of shops and vendors that sell pirate videos are multiplied by the average number of pirate tapes rented or sold per shop or vendor each year;
 - b. The resulting total number of pirate videos sold and rented each year in the country is then multiplied by the percent of those pirate videos that would have been sold or rented legitimately and adjusted to reflect the US producers' share of the market.
2. For partially developed markets:
 - a. The number of legitimate videos sold or rented in the country each year is subtracted from the estimated total number of videos sold or rented in the country annually to estimate the number of pirate videos sold or rented annually in the country;
 - b. The resulting total number of pirate videos sold and rented each year in the country is then multiplied by the percent of those pirate videos that would have been sold or rented legitimately and adjusted to reflect the US producers' share of the market.
3. For fully pirate markets:
 - a. Either: (a) the number of blank videos sold in the country annually is multiplied by the percent of those tapes used to duplicate US motion pictures to equal the number of pirate copies of US motion pictures sold in the country each year; or, (b) the number of VCRs in the country is multiplied by an estimated number of US motion pictures on video that would be rented and sold per VCR per year;
 - b. The figure resulting from each of the foregoing calculations is an estimate of the number of legitimate sales of videos of US motion pictures that are lost each year in the market due to video piracy. These estimates are adjusted to reflect the wholesale price of legitimate videos, to equal losses due to video piracy.

TV and Cable: Losses are estimated using the following method:

1. The number of TV and cable systems that transmit U.S. motion pictures without authorization is multiplied by the average number of U.S. motion pictures transmitted without authorization by each system each year;

2. The resulting total number of illegal transmissions is multiplied by the average number of viewers per transmission;
3. The number of viewers of these illegal transmissions is allocated among those who would have gone to a theatrical exhibition or who would have rented or purchased a legitimate video. The number of legitimate transmissions of the motion picture that would have been made is also estimated;
4. These figures are multiplied by the producers' share of the theatrical exhibition price, the wholesale share of the video cost or the license fee per legitimate transmission, as appropriate, to estimate the lost revenue from the illegal transmissions.

Public Performance: Losses are estimated using the following method:

1. The number of vehicles and hotels that exhibit videos without authorization is multiplied by the average number of viewers per illegal showing and the number of showings per year;
2. The resulting total number of viewers of unauthorized public performances is allocated among those who would have gone to a theatrical exhibition or who would have rented or purchased a legitimate video. The number of legitimate TV and cable transmissions that would have been made of the motion pictures is also estimated;
3. These figures are multiplied by the producers' share of the theatrical exhibition price, the wholesale share of the video cost or the license fee per legitimate transmission, as appropriate, to estimate the lost revenue from the illegal performances.

SOUND RECORDINGS AND MUSICAL COMPOSITIONS

RIAA generally bases its estimates on local surveys of the market conditions in each country. The numbers produced by the music industry generally reflect the value of sales of pirate product rather than industry losses, and therefore undervalue the real harm to the interests of record companies, music publishers, performers, musicians, songwriters and composers.

Where RIAA has sufficient information relating to known manufacture of pirate recordings that emanate from a third country, this loss data will be included in the loss number for the country of manufacture rather than the country of sale.

In certain instances where appropriate, RIAA employs economic data to project the likely import or sale of legitimate sound recordings, rather than merely reporting pirate sales. In these instances, projected unit displacement is multiplied by the wholesale price of legitimate articles in that market rather than the retail price of the pirate goods.

BOOKS

The book publishing industry relies on local representatives and consultants to determine losses. These experts base their estimates on the availability of pirate books, especially those found near educational institutions, book stores and outdoor book stalls. A limitation here is that experts can only gauge losses based on the pirated books that are sold; it is impossible to track losses for books which are pirated but not available for public purchase. The trade loss estimates are calculated at pirate prices which are generally (but not always) below the prices which would be charged for legitimate books. Also included are conservative estimates of losses due to unauthorized systematic photocopying of books.

PIRACY LEVELS

Piracy levels are also estimated by IIPA member associations and represent the share of a country's market that consists of pirate materials. Piracy levels together with losses provide a clearer picture of the piracy problem in different countries. Low levels of piracy are a good indication of the effectiveness of a country's copyright law and enforcement practices. IIPA and its member associations focus their efforts on countries where piracy is rampant due to inadequate or non-existent copyright laws and/or lack of enforcement.