

# INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE



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April 20, 2001

GSP Subcommittee  
Office of the U.S. Trade Representative  
1724 F Street, N.W., Room F220  
Washington, D.C. 20508

Attention: Jon Rosenbaum  
Assistant USTR for Trade and Development

**Re: Request for Final Comments Concerning the  
Generalized System of Preferences (GSP) Pertaining  
to Ukraine, 66 Fed. Reg. 16,515 (2001).**  
**Case: Docket 01-112: Ukraine**

To the Members of the GSP Subcommittee:

The International Intellectual Property Alliance (IIPA) hereby submits these written comments to reiterate our earlier submissions pertaining to Ukraine and the Generalized System of Preferences (GSP) benefits. We request that Ukraine should be immediately and completely withdrawn or suspended as a GSP beneficiary as a result of its designation as a Priority Foreign Country due to its failure to provide adequate and effective protection and enforcement of intellectual property rights.

As you know, the IIPA filed its petition on June 16, 1999 to request the withdrawal or suspension of Ukraine's GSP benefits. That petition was accepted by the U.S. government on February 14, 2000; in support of that petition, we testified at the public hearing on May 12, 2000. We now conclude that, because of the absolute failure of the Government of Ukraine to adopt the Action Plan, to eradicate optical media piracy, or to take the other steps necessary to provide adequate and effective protection and enforcement, that Ukraine's GSP benefits should be immediately and completely withdrawn or suspended.

In sum, the Government of Ukraine has failed to take the necessary and promised steps to eradicate the production and export of pirate optical media product (music CDs, VCDs, CD-ROMs containing business and entertainment software, and literary material). Ukraine has not implemented the three steps in the Action Plan announced in the joint statement issued by President Clinton and Ukrainian President Kuchma in June 2000; neither has Ukraine adopted the panoply of legislative reforms nor taken the proper steps to implement effective enforcement to

stop, or even slow, the significant piracy problem of optical media production and copyright piracy in general.

For more details about the problems facing the copyright industries in Ukraine, we attach our Special 301 filing submitted to the Office of the U.S. Trade Representative on February 16, 2001, as well as a description of the methodology used by our member associations to estimate trade losses due to piracy and piracy levels in Ukraine (Appendix A).

There is nothing significant to report since our February 2001 Special 301 filing regarding Ukraine's implementation of the Action Plan in June 2000; that is, Ukraine has utterly failed to implement the Plan. At present, the illegal optical media plants continue to operate without regulation. We do have recent reports that some of the production lines (that we reported on in February) have been moved, or may, in some instances, have been taken out of Ukraine. Illegal optical media production continues, and in the absence of proper optical media regulations as required in the Action Plan, the legal system in Ukraine continues to offer no real deterrence to the unauthorized manufacture and distribution of U.S. copyrighted materials.

As noted in our February 2001 Special 301 filing, and now further clarified, the losses to the copyright industries are staggering. In response to the request for final comments, the following information is available: The Recording Industry Association of America (RIAA) estimates \$160 million in losses (*i.e.*, \$160 million that would have been repatriated back into the U.S. economy but for the piratical activities occurring in Ukraine). The Business Software Alliance (BSA) estimates its U.S. company losses were \$16.8 million in 2000 (*i.e.*, "wholesale revenue piracy" losses resulting from piracy in Ukraine). The Motion Picture Association of America (MPAA) estimates that its losses were \$40 million in 2000.

The loss figures are not available for the other members of the IIPA, namely the Association of American Publishers (AAP), the American Film Marketing Association (AFMA), the Interactive Digital Software Association (IDSA), or the National Music Publishers Association (NMPA). However, these industries are also hurt by piracy in Ukraine and the failure of the Government of Ukraine to deter piracy. In fact, all of the copyright industries are harmed by the optical media production problem there. To illustrate, the illegal optical media discs seized by authorities in Ukraine and in the other 12 countries where these Ukraine discs have been illegally distributed contain unauthorized recorded music (RIAA), audiovisual material (MPAA and AFMA), underlying musical compositions (NMPA), business software (BSA), entertainment software (IDSA), and literary material (AAP).

As a result of these failures and the losses incurred, IIPA believes that withdrawal or suspension of trade benefits and the imposition of sanctions, as required under U.S. trade laws, is necessary to get the Government of Ukraine to properly address this problem. We believe that immediate and complete withdrawal or suspension of all benefits by removing Ukraine from its country beneficiary status, plus the imposition of trade sanctions, is necessary at this time as the only viable option to fix these problems.

We hope that the actions of the U.S. government withdrawing or suspending trade benefits and sanctioning the most vulnerable exports of Ukraine to the U.S. will be a call to action for the Ukraine government to take the positive steps necessary to eradicate the optical media production problem. We further expect that, when properly implemented, the adoption of a proper copyright legal and enforcement regime will encourage investment for the benefit of U.S. and other foreign investors, as well as for the Ukraine copyright industries, so that in time we will be focusing on the

positive, rather than the negative, aspects of trade with Ukraine pertaining to copyright and neighboring rights material.

Sincerely,

Eric J. Schwartz  
Counsel, International Intellectual Property Alliance

# International Intellectual Property Alliance

## 2001 Special 301 Report

# UKRAINE

### EXECUTIVE SUMMARY<sup>1</sup>

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As the result of a very weak legal regime, and the absence of any meaningful enforcement activity by the government, Ukraine has maintained its position as the largest producer and exporter of illegal optical media disks (CDs, CD-ROMs, DVDs) in Central and Eastern Europe. However, during the past year, the government of Ukraine did commit itself to the adoption and implementation of new laws to end its status as the number one pirate CD producing country in the region. So, in mid-2000, there was good reason for optimism. 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 was meant to combat the unauthorized production and export of optical media products in Ukraine. In that joint statement, the government of Ukraine announced its commitment to implement the plan by November 1, 2000. The Action Plan consisted of three parts: (1) to close the plants, seize illegal material, and only to reopen the plants when there is a legal licensing scheme in place; (2) to adopt proper optical media production and distribution regulations, including identification (SID) coding and the monitoring of raw material and manufacturing equipment, as well as of exports of product; and (3) to improve significantly the copyright law and to introduce other legal reforms, including criminal and administrative penalties, necessary to implement a modern copyright regime.

Unfortunately, Ukraine has still not implemented the Action Plan, and the production and distribution of illegal optical media disks continues unabated. There have been extensive and ongoing discussions among the U.S. government, the copyright industries and the Ukrainian government leading up to and since the November deadline passed, to correctly implement the Action Plan. As a result of these discussions and some progress on the legislative front, namely a first reading in the Parliament of some of the necessary changes, then-USTR Ambassador Barshefsky announced on January 19, 2001, that a decision on whether to identify Ukraine as a Priority Foreign Country would be deferred until March 1, 2001.

IIPA is in full agreement with the decision by USTR and recommends that Ukraine be designated a Priority Foreign Country on March 1, 2001 if they do not fully implement the Action Plan by that date. If Ukraine does implement the plan by that date, they should be remain on the Priority Watch List so that continued implementation, including closure of plants found to be engaged in the production of illegal CDs and on-the-ground licensing and effective and sustained regulation of the plants and material, can be monitored. And, if upon regular and continued monitoring by the U.S. government after March 1, Ukraine fails faithfully to continue its implementation of the Action Plan, then the U.S. government should immediately designate Ukraine as a Priority Foreign Country.

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<sup>1</sup> For more details on Ukraine's Special 301 history, see IIPA's "History" Appendix to filing.

The problem of optical media production can be summarized as follows: there are at least five known CD plants and Ukraine is capable of producing over 70 million disks a year, which is more than Bulgaria produced at the height of its capacity. Losses to the music industry alone are estimated at \$210 million for the second straight year. This illegal material, consisting of musical CDs, and business and entertainment software CD-ROMS, is still flooding other countries, completing disrupting the already vulnerable markets throughout Central and Eastern Europe (including the Commonwealth of Independent States, C.I.S.), as well as established markets in Western Europe. In April 2000, for the first time, audiovisual VCDs (over 11,000) made in Ukraine were seized by the motion picture anti-piracy organization, in this case in Bulgaria. Since June 2000, literally hundreds of thousands of pirate CDs made in Ukrainian plants have been seized in at least 12 countries in Eastern and Western Europe. The high level of optical media piracy has been fueled by persistent legal deficiencies and a lack of any meaningful on-the-ground enforcement, including, but not limited to, the absence of optical media production controls and effective border enforcement. Only recently did Customs authorities take some action, seizing several thousand CDs. However there has, for the moment, not been any follow-up to these seizures.

In addition to the optical media regulations, other major legal reforms are needed to provide effective protection and enforcement for works and sound recordings. It was only in February 2000 that Ukraine even began to protect foreign sound recordings, as a result of its accession to the Geneva Phonograms Convention. That was a positive step. However, older works and sound recordings remain unprotected. Ukraine must amend its law to fix this problem, something it has long promised to undertake and is obligated to do under a bilateral trade agreement with the United States, as well as to comply with the World Trade Organization TRIPS Agreement for accession.

As an example, foreign sound recordings released prior to February 18, 2000, and works published prior to May 27, 1973 (the date of adherence to the Universal Copyright Convention) remain unprotected in Ukraine. Ukraine made progress in 2000 by finally agreeing to address this problem for works and sound recordings. However, in November, when amendments to the copyright law were adopted in the Parliament (and subsequently vetoed by the President), the provisions were absent from the bill.

In addition to adopting the legal reforms necessary to protect pre-existing material, Ukraine must adopt an effective criminal code, criminal procedures code, customs code, and administrative regulatory code so that commercial pirates who violate the copyright and neighboring rights laws, as well as the optical media production provisions, can be appropriately punished using a wide array of enforcement tools. The criminal code, criminal procedures code, customs code, and administrative code reforms were not considered in 2000.

On May 6, 1992, Ukraine signed a bilateral trade agreement with the U.S. that entered into force on June 23, 1992. 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, the U.S. granted Ukraine Most Favored Nation (MFN), now Normal Trade Relations (NTR), treatment; the Ukrainian deadline for meeting the IPR obligations was December 31, 1993. In December 1993, Ukraine did enact 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. All three of these acts were obligations, even if undertaken belatedly, to comply with the bilateral agreement.

During the seven years that Ukraine slowly and only in piece-meal fashion, implemented the bilateral IPR obligations, it became a “safe haven” for an increasing number of pirate manufacturers of musical recordings, business and entertainment software, and more recently, audiovisual material. A combination of legal reform and enforcement deficiencies have created conditions ripe for piracy: until 2000, foreign sound recordings weren’t protected at all; older material including works and sound recordings, remain unprotected thereby undercutting any marketplace for newer material; the optical media plants are completely unregulated; and, there are no administrative or criminal sanctions, much less on-the-ground enforcement activities, to deter piracy. Until these problems are fixed and there is an operational system of deterrent criminal enforcement, pirated products will continue to flood Ukraine and the region, and the Ukraine marketplace for legitimate sound recording and works will not get itself established.

The failure to provide effective enforcement is a breach of the U.S. trade agreement (and any eventual World Trade Organization accession). Although criminal sanctions do exist for violations of copyright pertaining to works, they are currently insufficient to deter commercial piracy. These provisions are not even applicable to the violation of the rights of producers of sound recordings and other holders of neighboring rights. Consequently, there are currently no criminal sanctions for the violation of the rights of the record companies, whose products are so widely pirated in Ukraine. New provisions to revise the Criminal Code were drafted by the Ukrainian government (within the Ministry of Interior) in 1998. They are now finally being considered by the Parliament in early 2001. The Criminal Code must be amended to 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 Customs Code does not even directly stipulate IPR infringements among the many other violations, nor does it provide customs officials with *ex officio* authority to seize material at the border. These failures permit 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. The improvements in the enforcement legal regime of Ukraine – to the criminal, criminal procedure, civil, administrative, and customs codes – plus the implementation of on-the-ground enforcement, are necessary for compliance with the bilateral trade agreement and for Ukraine’s accession to the World Trade Organization.

## **COPYRIGHT PIRACY**

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### **The Need to Regulate Optical Media Production in Ukraine, and to Control the Export of Illegal Material in the Region**

The absence of optical media regulation and criminal enforcement provisions has allowed Ukrainian plants to become a major source of the production, distribution and export of illegal optical disk media (CDs containing musical works, audiovisual DVDs, and CD-ROMs containing entertainment and business software). This has resulted not only in a flood of illegal optical media

product in Ukraine, but the export of millions of pirate CDs throughout Eastern, Central and Western Europe.

It is estimated by the recording industry (International Federation of the Phonographic Industry, IFPI) that the production capacity of optical media material is still around 70 million units per year; the demand for legitimate CDs in Ukraine is not more than 5 million units. The recording industry is aware of at least five plants that are producing predominantly pirate product; these five plants, also identified in last year's report, have been operating with impunity, allowing Ukraine to become one of the pirate CD manufacturing capitals of the world.

The Action Plan, originally announced by the Ukraine and U.S. governments in June 2000; was intended to address this problem to take the steps necessary to regulate optical disk plants, and to improve border enforcement to contain the problem within the borders of Ukraine. Proper optical media regulation in Ukraine would consist of: (1) instituting plant licensing, SID code and optical media regulations and penalties for noncompliance that include the closing of offending plants; and (2) appointment of the proper agencies and officials, as was done in Bulgaria, with the authority to undertake this enforcement effort and responsibility for putting these regulations in place.

The Action Plan, consistent with what the copyright industries have requested, would require Ukraine to immediately stop production of the illegal material and to set up plant monitoring procedures, like those established in Bulgaria in 1998, to regulate the production, distribution and export of optical media. Such regulations include provisions to close plants that are caught illegally producing copyrighted material; to seize infringing product and machinery; to introduce criminal liability for infringing these regulations; and to monitor the importation of raw materials (optical grade polycarbonate) used in the production of CDs, DVDs and CD-ROMs (and other optical disk media). All of the plants would be required under the Action Plan 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.

The history of copyright enforcement in Ukraine the past few years has unfortunately consisted of a series of missteps, undercutting effective enforcement. Distribution, including the import, export, wholesale and retail trade of audio and audiovisual products, could have been properly regulated by Presidential Decree # 491 of May 20, 1998. At the time, IIPA welcomed adoption of the decree as a positive step against piracy, but unfortunately, the decree was never implemented. Instead, on March 23, 2000, the Parliament adopted the Ukraine Law on Distribution of Copies of Audiovisual Works and Phonograms (the "Hologram Sticker" law). This law did not contribute at all to the improvement of copyright enforcement against CD plants. Adopted over the objections of the copyright industries, this new law instead offered a harmful alternative to plant licensing regulations. It is unclear whether the new law actually, or only effectively, repealed the 1998 Decree but it clearly ended any hope of proper implementation of the 1998 provisions.

The controversial Hologram Sticker law was finally implemented in January 2001. And the Hologram Sticker law has already proven to be open to abuse and fraud. To make matters worse, the law completely exempts exports, the real problem with the overproduction problem that exists in Ukraine; and it exempts manufacturers, the real source of the problem. Finally, 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. The copyright

industries expect that the Hologram Sticker law will be critically reviewed as part of the proper implementation of the Action Plan, and be replaced with effective optical media regulations.

Another step, undertaken in 1999, was the closure and reorganization in a weaker form of the Ukraine Copyright Agency (SCAU). The government of Ukraine needs to clarify the authority and role of the Ukraine Copyright Agency vis-à-vis other government agencies, including its role, if any, in verifying the legality of the issuance of certificates for import, export, and the wholesale and retail trade of copyright material. The Copyright Agency, in essence an authors' collecting society, and the State Department on Intellectual Property are not equipped to monitor and close down plants that are engaged in piratical activity. That should be left to the economic police authorities in an enforcement based agency within the government.

## **COPYRIGHT LAW AND RELATED ISSUES**

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### **Amendments to the Copyright Act and Related Enforcement Laws are Necessary**

IIPA remains concerned that Ukraine has not, to date, enacted the crucial legal reforms necessary for a modern and effective copyright regime. In 2000, some of the important provisions were drafted but not enacted. Key pieces of enforcement reform were not considered at all. In early January 2001, the Parliament scheduled consideration of copyright law amendments after a previous version adopted in November 2000 that was unsatisfactory was partially vetoed by the President and therefore not enacted. Unfortunately, the Law as currently under Parliamentary consideration would still not properly correct a number of grave copyright deficiencies; also, other important legal reforms are needed.

In sum, the legislative deficiencies in Ukraine include 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 WTO/TRIPS; (2) full national treatment of neighboring right-holders with regard to rights and remedies; (3) optical media plant regulations to stem the commercial-scale pirate production of CDs, CD-ROMs and DVDs; (4) criminal penalties and procedures and administrative regulations to deter commercial piracy; (5) Customs code amendments to grant clear *ex officio* authority to Customs officials to seize suspected illegal material at the border; and (6) civil *ex parte* search procedures necessary for effective end-user piracy actions (and required by WTO/TRIPS).

Not since 1993 has Ukraine adopted any significant revision of its copyright 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. Separate legislation and regulations on broadcasting were also adopted.

In 1998, a criminal penalties bill was drafted, but it has never been 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. As part of the Action Plan, Ukraine has agreed to enact a criminal penalties bill, as well as appropriate administrative remedies to deter

piracy. *It is imperative that the criminal and administrative remedies are adopted quickly to stem the growth of organized criminal activity in the production of illegal material, including optical disk media.* At present, for example, there are no criminal sanctions for the violation of the rights of record producers.

In the 1992 bilateral trade 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 (but likely not including 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 (this is also a WTO/TRIPS obligation). 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. As part of the Action Plan, Ukraine agreed to correct this deficiency with amendments to the Copyright Law for both works and sound recordings.

On February 18, 2000, Ukraine adhered to the Geneva Phonograms Convention, also an obligation of the bilateral trade agreement. However, the copyright law does not provide protection for pre-existing sound recordings. This creates an intolerable situation for the recording industry. By waiting almost seven years to join Geneva Phonograms, Ukraine permitted an explosive growth of illegal cassette tape and optical media disk piracy of foreign musical recordings to flourish. And by excluding pre-existing sound recordings, Ukraine continues to act as a safe haven for back-catalog pirates. There can be no adequate enforcement efforts against music piracy in Ukraine until protection is afforded for new and older material. As noted above, as a part of the Action Plan, Ukraine agreed to correct this deficiency with amendments to the copyright law but has so far continually failed to comply with the ensuing obligations.

As mentioned, a major legal shortcoming in Ukraine is the lack of effective criminal penalties to deter piracy. 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 small (only negligible 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 U.S.\$1,000 to \$2,400) for copyright violations (and is silent for sound recording infringements). In any case, these penalties, which have never been applied, are insufficient to deter commercial piracy.

The Action Plan requires passage of an effective IPR criminal and administrative penalties bill. The current draft criminal penalties bill would amend Article 136 to increase penalties of up to three years' imprisonment and up to 400 times the minimum wage (U.S.\$8,000) for repeat offenders. It would also make criminal penalties applicable against phonogram (sound recording) piracy. However, the draft bill still contains a provision that should be eliminated before final adoption. As in Russia, the penalties under the draft could only be imposed for "substantial material damage" – this is a standard that creates an unwarranted threshold for copyright piracy. Instead of this vague standard, the law should be amended to include a low and clear threshold to instigate a criminal action; not only would this help to identify criminal infringing acts for prosecutors, but it 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.

The criminal code revision now under consideration needs improvement before adoption. The Ukraine government should raise the penalties that were in the draft circulated last year. In particular, the fines should be raised to deterrent levels, and the Code must 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 to effective copyright protection, as well as WTO/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. None of this is currently permissible under the existing criminal procedures code. The current draft criminal code amendments, IIPA understands, would not provide any of this authority in Ukraine; provisions granting this authority should be adopted in 2001.

Ukrainian criminal procedures require rightholders 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 proposed amendments to the criminal code would make any changes to the criminal procedure code as well, but these also should be part of any amendments package in 2001.

As a result of its Normal Trade Relations (NTR, formerly known as 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; that is, duty-free tariffs on certain imports. In order to qualify for such unilaterally granted trade preferences, the U.S. Trade Representative must be satisfied that the country meets certain discretionary criteria including whether it provides "adequate and effective protection of intellectual property rights . . ." This includes whether a country is providing adequate and effective protection and enforcement of copyright and neighboring rights. Ukraine is not fulfilling the statutory obligations of GSP. So, at the same time that Ukraine is causing millions of dollars of losses to the U.S. due to piracy, it imported \$27.3 million worth of products without duty, or over 5.2% of its total imports into the U.S. in 1999 (the last full year of available GSP statistics), and over \$36.6 million in the first 10 months of 2000, an increase of 47.1% during the same period in 1999.

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 and

public hearings were held on May 12, 2000. The U.S. government has not yet made a final decision on suspending or withdrawing Ukraine's GSP benefits, but IIPA continues to believe that suspension of these trade benefits should be undertaken when it is apparent that such measures are necessary to get adequate and effective copyright protection and enforcement in Ukraine.

Amendments to the civil code (Chapter IV) pertaining to copyright are also under consideration in Ukraine. This is one draft law that Ukraine should be discouraged from passing because it is a dangerous development in breach of the bilateral trade agreement. It is also a development not unique to Ukraine, as it has been considered in several countries of the C.I.S., including the Russian Federation, as part of the comprehensive reform of the civil codes of these nations. In Ukraine, as in other countries in the C.I.S., the efforts to revise the civil code will result in the addition into that code of new copyright provisions inconsistent with Berne, WTO/TRIPS, and the bilateral trade agreement. Efforts to so revise the civil code in Ukraine should be opposed.

Last, Ukraine was not a signatory to either of the two new WIPO "digital" treaties. Ukraine should be encouraged to accede to and implement both the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonogram Treaty (WPPT). Acceding to and implementing these treaties will protect against Internet and other forms of digital piracy, and help the development of electronic commerce in Ukraine. Accession and implementation provisions were agreed to by the Interparliamentary Assembly of the Member States of the Commonwealth of Independent States (C.I.S.) in December 2000 in St. Petersburg as a way to modernize the copyright and neighboring rights laws of countries in this region. In fact, these resolutions and recommendations were agreed to by all 12 members states of the C.I.S., working in conjunction with officials from the W.I.P.O.

## **ENFORCEMENT**

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Until the Action Plan is fully implemented, the enforcement situation for the copyright industries will continue best to be summarized as one of complete failure. The general lack of protection and enforcement of the rights of copyright owners is preventing entry by the U.S. creative industries into the country, and stifling the development of local copyright industries. 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 until the government fully implements the Action Plan and 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 still the second largest music market after Russia in the C.I.S.; and it is the largest center of pirate music production. The recording industry

reports that piracy of international repertoire is estimated to be at least 95%. The total value of pirate sales, including exported CDs, is estimated at some \$200 million.

It is estimated the Ukraine exported at least 30 to 40 million pirate CDs in 2000. These include not only declared exports of product, but also many thousands of smuggled shipments as well.

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 numbers of pirate CDs entering their market from the Ukraine — an ironic twist that clearly indicates that the Ukraine has firmly taken 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.

To add to the severity of the problem, Ukrainian CD plants and their related distribution companies offer their entire illegal catalog of recordings for sale via the Internet. These companies have no licenses from any music publishers or sound recording producers to replicate this material.

Throughout 2000, seizures of Ukrainian-made pirate CDs took place all across Europe. In one instance at the Frankfurt Airport in Germany, a shipment of 500,000 pirate CDs was seized. In July, a shipment of 110,000 pirate Ukrainian CDs was intercepted in Lithuania. Thousands of pirate CDs from Ukraine were seized on Malta in the Summer of 2000. In March, 50,000 illegal CDs were destroyed in the Kiev Stadium as part of an anti-piracy event organized by Ukraine's Tax Police. The illegal CDs were seized in February during a wide-scale operation on 2,000 retail outlets. In December 2000, 10,000 CDs were seized in London, all originating from Ukraine, illustrating how far the Ukraine problem has reached into Western European markets. And these are just some of the many examples of such seizures of Ukraine-produced 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 were \$32.7 million in 2000 (these are preliminary figures for 2000 and will be finalized later in 2001). The level of piracy was estimated to be 90%. The software industry continued to experience exceptionally high levels of pirate product from Ukraine in particular. There was one reported seizure of mostly computer programs (along with sound recording material and videocassettes) in February 2001; a total of 30,000 optical disks was seized. So the software industry is vulnerable to the same optical media production and distribution problems that plague the recording (and audiovisual) industries.

In 2000, 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 rightholders to collect evidence without police assistance. Disappointingly, attempts at a government legalization decree remained bogged down for another year, and were unsuccessful.

The entertainment software industry (Interactive Digital Software Association, IDSA) is also vulnerable to the same optical media production and distribution problems as the other industries. The IDSA reports that material has been confiscated throughout Eastern and Central Europe 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, the Ukraine producers have created a regional problem not just of production, but of the distribution and export of material throughout Ukraine,

the Czech Republic, Poland, Hungary, Russia, Belarus and the rest of the countries of the C.I.S. These are region-wide organized criminal operations for the most part.

The Motion Picture Association (MPA) reports that for the sixth straight year, the video piracy rate is at 99% and broadcast piracy remains at 95% (cable and satellite rates are unavailable). As in prior years, the main piracy problem for MPA remains rampant video piracy in shops and street kiosks. Pirate 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 believed to be heavily involved.

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

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 2000 due to audiovisual piracy in Ukraine remained at \$40 million (unchanged 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. This includes both overruns of licensed works and the production of unlicensed works, which flow freely into Russia and the other countries in the C.I.S. as the result of lax border enforcement.

Last, in 1998, the Ukraine government promised to establish an interministerial committee on intellectual property enforcement. In February 2000, the Ukraine government announced that it was finally going to organize this committee. To date, there are no reports it has formally met, and if it has, there are no apparent signs of its activity or effectiveness in combating the spread of pirated material especially aimed at the production and distribution of optical disk media. As noted elsewhere, effective enforcement entails not only domestic (internal) enforcement, but proper border enforcement, to stop the flow of goods into and out of Ukraine. This necessitates that Ukrainian authorities coordinate their activities as well as provide customs officials with the proper authority to seize illegal material at the border without a court order, and give police and other enforcement officials the equivalent proper *ex officio* authority. Without this clear authority on the part of police and border officials, piracy will continue to worsen.

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 (that is, the police, prosecutors, judges, customs officials and the ministries of Justice, Interior, and Taxation) should treat commercial copyright infringement as a serious crime, and should have the tools in the criminal, criminal procedure, customs, and administrative codes to deal appropriately with the problem. In addition to the legal tools, clear government strategies and lines of authority should be

developed. And finally, the training of judges, prosecutors, customs officials, and police should be part of ongoing enforcement efforts once the legal reforms are in place, to develop an effective enforcement regime.

# INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

## 2001 SPECIAL 301 REPORT

# METHODOLOGY

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 2001 actually underestimate the losses due to piracy experienced by the U.S. copyright-based industries.

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.

## BUSINESS SOFTWARE APPLICATIONS

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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 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.

## **ENTERTAINMENT SOFTWARE**

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The Interactive Digital Software Association (IDSA) draws piracy rates from numerous estimates provided by member and non-member company representatives, distributors and enforcement personnel based on local market conditions. Separate estimates of piracy rate pertaining to console- and PC-based software are calculated, and then averaged into a single piracy rate based on the prevalence of each platform in the market.

Trade loss figures reported in this 2001 Special 301 Report are preliminary and are based only on partial data samples. These figures are likely to underestimate those to be reported upon completion of our review.

This year's dollar loss figures rely in part on estimates provided by member companies. These estimates are generated using proprietary methodologies that integrate market data of dedicated platform and PC entertainment software in both compact disc and cartridge formats and hardware shipments. These methodologies take into account market conditions including but not limited to the installed base of a given platform (console, PC-based, handheld, etc.) and actual distribution and sales figures.

Dollar loss figures also incorporate inferences from seizure statistics that result from border and other enforcement actions in the countries of production, export and import. These losses are attributed to the country of production where such is known. This aspect of the methodology relies on conservative estimates about the total number of piratical goods produced based on the numbers seized.

The methodology also assumes that piratical goods in the marketplace displace to some degree legitimate product sales. In these instances, displaced sales are multiplied by the wholesale price of legitimate articles rather than the retail price of the pirate goods.

## MOTION PICTURES

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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: As used in the document the term encompasses movies provided in video cassette as well as in all optical disc formats. 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 videos 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:

The estimated number of pirate videos of U.S. motion pictures sold or rented in the country each year is adjusted to reflect the wholesale price of legitimate videos which equals losses due to video piracy.

TV, Cable and Satellite: 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 TV, cable and satellite transmissions, as appropriate, to estimate the lost revenue from the illegal performances.

## **SOUND RECORDINGS AND MUSICAL COMPOSITIONS**

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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**

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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.