

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2007 SPECIAL 301 REPORT

UKRAINE

Special 301 Recommendation: IIPA recommends that Ukraine remain on the Special 301 Priority Watch List.

EXECUTIVE SUMMARY¹

Although Ukraine has made significant improvements in its legal regime in recent years, there are still serious problems of piracy, especially the widespread sale of pirate optical disc material, and growing Internet piracy. In short, Ukraine needs to take several critical steps to improve enforcement. First, it has to address the serious marketplace piracy at such locations as Petrovka and Radioljubtel, by top-level pronouncements from the government that such piracy will not be tolerated and then by undertaking serious (that is, daily) effective criminal raids against those markets and the many warehouses that supply them. The occasional raids undertaken by the police, the failure to close down pirate selling points, and the absence of criminal convictions, are some of the reasons why these problems persist in Ukraine. Second, the Government of Ukraine must undertake criminal prosecutions and impose deterrent penalties against those involved in the market piracy and other types of commercial piracy – that is, against stall owners and operators, suppliers, and other large-scale distributors of pirate product. Unfortunately, in lieu of deterrent criminal sanctions, large-scale pirates and repeat offenders are being treated lightly by the courts and the Government of Ukraine has to date otherwise relied heavily on non-deterrent administrative penalties. In addition, the government must move effectively against the growing Internet piracy problem in Ukraine.

In 2005, Ukraine adopted significant improvements to its optical disc laws. At the same time, the Ukraine Government agreed to participate cooperatively with the copyright industries on enforcement — including the commencement of joint surprise plant inspections. The adoption of amendments to the optical disc law (effective August 2, 2005), was a crucial step toward Ukraine's implementation of the 2000 Joint Action Plan signed by the Governments of Ukraine and the United States. The production capacity of Ukrainian optical disc plants is still substantially higher than legitimate demand. As a result of optical disc regulations, illegal production has diminished from its peak of six years ago. However certain problems remain with the implementation of the licensing procedures and plant inspections. As a result, plants still have the ability to manufacture illegal material without detection. Further, large quantities of illegal optical disc material (most produced in Russia or at Ukrainian CD-R burning operations) are found throughout Ukraine and openly sold in the markets.

The major “missing” component of the Ukraine enforcement regime has been the absence of effective criminal prosecutions and deterrent sentencing, especially against large-scale pirate operations (involving music, film, and/or entertainment software). This, coupled with ineffective border enforcement has allowed the wide-scale commercial piracy operations to

¹ For more details on Ukraine's Special 301 history, see IIPA's “History” appendix to this filing at <http://www.iipa.com/pdf/2007SPEC301HISTORICALSUMMARY.pdf>. Please also see previous years' reports at <http://www.iipa.com/countryreports.html>.

continue in Ukraine (and, in some cases, to combine forces with operations in neighboring countries, such as Russia). Effective criminal enforcement is necessary for Ukraine to fully comply with the TRIPS obligations of the World Trade Organization.

Another key concern is the lack of progress on the legalization of software by the Government of Ukraine. After taking steps in 2003 and 2004 to adopt legalization reforms, the implementation of the program by the government, the largest consumer of illegal software in Ukraine, has been slow. According to official information from the State Department of Intellectual Property (SDIP) (www.sdip.gov.ua/ukr/help/statti/pcweek/), the current software piracy rate in state agencies exceeds 70% (noting that the rate is coming down at less than 5% a year). Illegal software usage by government agencies (including IPR enforcement entities) sends the wrong signal to the business community and Ukraine citizens about the value and protection of intellectual property. It also diminishes the efforts by rightholders to enforce and publicly educate Ukrainian society about intellectual property rights.

Actions That the Government of Ukraine Needs to Undertake

In order to provide more effective enforcement, we recommend that the Ukrainian Government take the following steps:

First, the government must act against retail piracy in markets and sales occurring in the streets — especially at big outdoor markets. In May 2005, in anticipation of a Eurovision event in Kiev, the government did effectively but only temporarily, crack down against street and kiosk piracy. This demonstrated that it can be accomplished when the proper political will and resources are allocated. But with the exception of that one instance, enforcement has failed to effectively and permanently stop the street and market piracy.

Second, the Government of Ukraine must: (a) continue to regularly inspect existing and new optical disc plants, including surprise inspections with copyright rightholder cooperation (also, during an inspection, when machinery is claimed to be temporarily inoperable, a subsequent surprise inspection must be undertaken to obtain exemplars from that plant); (b) disclose and open to rightholder inspection, the “evidence repository” of sample copies of all production runs of master stampers and finished disc produced in Ukraine, that the Ukraine Government alleges to have created (and which is an essential element of the optical disc regulatory scheme), and unconditionally permit rightholder access to exemplars and the database, as well as the detailed database of the equipment used in each plant; (c) close plants that have been found to be involved in illegal production (in breach of the licensing rules and/or the copyright law); (d) seize and destroy illegal material, including the materials and equipment used in the course of illegal production (plus the spare parts and pieces of equipment); (e) properly monitor the importation of raw materials (optical-grade polycarbonate) used in the production of optical disc media; and (f) properly license new plants and/or lines at existing plants (for example, the Rostok plant which received new lines without proper review), including requiring the adoption of SID codes. These SID codes should only be provided upon proper verification at the time of issuance (with comprehensive and in-depth follow-up inspections and maintenance of codes on all equipment, molds and mirror blocks). Plus, there needs to be monitoring of equipment used at the plants to make certain that the SID codes are in fact properly engraved on all molds, matrices, and other relevant equipment used for the production of optical discs (including reserve molds and equipment). Finally and perhaps most importantly, criminal trials and convictions against illegal plant operators and others involved in commercial piracy must, as a rule, follow plant inspections that have uncovered infringing activity.

Third, the Ukrainian Ministry of Science and Education has issued instructions to the licensing body to automatically suspend an operating license and seal the relevant production facilities if and when it is presented with forensic evidence of breach by a given optical disc plant of the licensing rules (including copyright infringement). However, this is not being fully and unconditionally implemented – plants must be fined and licenses withdrawn. IIPA recommends that any suspension should endure for at least the duration of an in-depth investigation into infringing behavior, and the possible subsequent criminal or administrative investigation, even if this evidence is presented by a private sector representative organization.

One positive step, which IIPA noted last year, was the government's establishment of a specialized unit for intellectual property rights crimes within the Economic Crime Division in the Ministry of the Interior (this unit has the exclusive authority to deal with intellectual property rights crimes). Rightholders report good cooperation from and with this unit. In another positive step, the General Prosecutor reconstituted economic crime status to criminal violations of author's and neighboring rights.

Fourth, the Government of Ukraine needs to properly implement the Customs Code amendments adopted in November 2006 (in force February 10, 2007) which provide customs officers with *ex officio* authority. The adoption of these provisions was a positive step. Now the government needs to expand the specialized intellectual property rights unit within the customs service with sufficient resources to effectively stop illegal material at the border (much of it coming, at present, from Russia by train, car, and courier). The Government of Ukraine must move away from relying on yet another bureaucratic entity at the central headquarters and instead devote more resources and willingness to effectively enforce intellectual property rights crimes at the border. These specialized customs units should be instructed and trained to focus on illegal shipments and smuggling of pirated product, rather than the creation of massive bureaucratic hurdles for legitimate importations.

Fifth, the Government of Ukraine should take affirmative steps to stop on-line piracy. Websites offering pirate material continue to thrive in Ukraine, with the support of local Internet service providers. Internet service providers must be liable for allowing illegal material to reside on their servers, or for inducing the distribution of illegal materials by third parties, and they must act to block rampant Internet piracy. Meetings in October 2006 between Ukraine Government and E.U. officials resulted in the enforcement of cease and desist orders against 35 ISPs. It showed that cooperative efforts, between ISPs, rightholders and the police, can be effective. In addition to downloading piracy another common type of Internet piracy is via mail order (with orders placed on-line and delivered by mail).

COPYRIGHT ENFORCEMENT

The optical disc law amendments (in force, August 2, 2005) and related enforcement legislation included many critical elements to secure better enforcement of illegal product. These included: (1) clear mandates for surprise inspections; (2) the licensing of the production of matrices (two mandatory copies of each production run/order for the licensing authorities) used to produce optical discs; (3) improved criminal sanctions for violations; and (4) the abolishment of a requirement for SID (source identification) coding for imported finished product (discs being imported into Ukraine).

There are, at present, seven optical media disc plants (producing CDs, DVDs or both) in operation in Ukraine – a total of 7 DVD and 10 CD lines. It is estimated by the recording industry (the International Federation of the Phonographic Industry, IFPI) that the current total production capacity of these plants is around 90 million units per year. The estimated demand for legitimate CDs in Ukraine is still less than one third of this total.

Complaints by rightholders against the Rostok plant and CD Master plant in 2004 and 2005 were mishandled by the Ukrainian authorities. The plants have been allowed to continue their operations despite detailed complaints from the recording industry (IFPI). Unfortunately, the relevant authorities in Ukraine, specifically the SDIP and its State Inspectors, failed to take meaningful and decisive action. The complaints reported large-scale illegal production. However, neither the plants nor their owners/managers have faced criminal investigation, let alone prosecution. However, pursuant to a Ukrainian forensic report which supported IFPI's findings of illegal production, SDIP fined CD Master for illegal production of a music disc by a U.S. artist. The fine was subsequently overturned by the Kiev Commercial Court on appeal from the plant. In the absence of any action against Rostok, the recording industry was forced to take civil (copyright infringement) action against this plant. The case is still before the court and the plant continues its operations unabated. An ongoing series of procedural hurdles and obstacles shows that civil infringement proceedings are not an alternative to criminal prosecution. The Government of Ukraine could have taken action under the pre-2005 optical disc regime but it failed to do so, nor has it made any progress since the adoption of the new law either. Passage of the new optical media disc law is not a substitute for enforcement.

Regulation and control of the plants that does exist is still not effective, especially for industry sectors not present or unable to provide appropriate resources in Ukraine and thereby unable to assist the authorities with inspections. For example, pirated entertainment software (game) discs are manufactured in Ukraine, without licenses and absent any royalty payments to rightful owners. In addition, key enforcement tools (the use of production samples) that could aid in the detective work for uncovering illegal activity have been held back by the relevant agency. Rightholders' organizations should get access to production samples of optical discs either directly or via SDIP so that they can properly conduct anti-piracy investigations.

Although there is currently no evidence of large-scale industrial production of pirate optical discs in Ukraine (at least not of music and film material), other forms of optical disc piracy, involving CD-R and DVD material, in particular, have increased. Especially troubling is the CD-R production undertaken by organized criminal syndicates which is flourishing in the absence of a deterrent criminal enforcement regime.

In addition, Ukraine remains a major transshipment point and storage facility for illegal discs produced in Russia and elsewhere because of very poor border enforcement. Pirate CDs and DVDs dominate the market in Ukraine and, as noted, are sold in markets, kiosks and street stalls. The Petrovka Market in Kiev, for example, has close to 300 stalls openly selling pirate material. (Other major pirate markets include: "Radio" in Kiev; "Mayk" in Donetsk; "Knizhka" and "7th Kilometer" in Odessa; "Yuzhny" in Lviv; and "Raiskiy Ugolok" in Kharkiv).

The June 2000 Joint Action Plan not only detailed plant licensing and inspection requirements, but also the adoption and implementation of criminal and administrative penalties, which are necessary to implement a modern copyright regime.

The IIPA and IFPI encourage the government to be more open with the forensic evidence that it acquires during inspections. The failure of the relevant state bodies to disclose to rightholders evidence obtained during raids and inspections has been a stumbling block to effective plant enforcement.

One misstep that has undercut effective enforcement was the adoption in 2000 of the Hologram Sticker law. The inconsistent and haphazard implementation of the Ukrainian hologram system (administered by the government) is seriously harming the interests of legitimate copyright owners while it permits suspect companies to receive thousands of holograms for foreign releases (music, film, entertainment software) for which they have no licenses despite objections from the legitimate licensees. Most often, the holograms are issued on the basis of false contracts, which are rarely verified. In such instances, pirate products are *de facto* authorized by the state for distribution and cannot be seized by law enforcement officials. Practice shows that one out of every two products seized is labeled with a false hologram (either counterfeit or with a reprinted title). The copyright industries are trying to compete against the pirates, even pricing their products lower (\$5 to \$7 per CD, for example; \$20 for DVDs, compared to the pirate price of \$4) and printing materials in Cyrillic for local distribution. However, legitimate rightholders cannot compete against the pirates without effective enforcement by the Ukraine Government to stop piracy, and to stop the misuse of the hologram system. The hologram law should either be revised and properly enforced, or be repealed.

Entertainment software companies, among others, continue to experience problems with the hologram stickering program. One Entertainment Software Association (ESA) member company reports that the stickering program remains highly ineffective, as pirates are able to obtain stickers to affix to their pirated products. Although the SDIP has apparently agreed to stop issuing stickers or “control marks” for games that have English titles or a direct translation of the title, it is still difficult to prevent stickers from being issued to pirates who adopt slight variations on the English titles. The same ESA member reports that although it only entered the market in 2005, over 70 labels/stickers had already been issued for its entertainment software products — all to pirates selling illegal versions of its games. The widespread use of false documents allows pirates to easily obtain hologram stickers; this legitimizes their pirated versions which in turn, allows them to distribute them pirate product through otherwise legitimate channels.

The Business Software Alliance (BSA) continues to report that the hologram stickering system acts as a hurdle to legitimate business and allows the pirates to continue their operations. In 2003 the Ukrainian Ministry of Education and Science passed an “order” requiring the SDIP to organize a voluntary registry for software manufacturers and distributors in Ukraine. This registry was intended to contain the names of software manufacturers and distributors, data about their registration, location, and contact details as well as information about management, type of business activity and a short description of all software products manufactured and/or distributed. Under the order, all software manufacturers/distributors can obtain a certificate to verify their registration. For a fee, the SDIP will provide users with information from this registry about a particular software manufacturer/distributor. The registry was intended to improve a level of copyright protection for computer programs and databases, as well as to provide information to the public regarding software manufacturers, distributors and licensing information. However, the BSA reports that the registry, to date, has not fulfilled its intended function to distinguish legal software manufacturers/distributors from illegal ones.

Broadcast television piracy also remains a major problem for the motion picture industry, especially with regard to regional broadcasts. There are a large number of cable operators who transmit pirate and other product without authorization.

In recent years, BSA has reported on the troubling increase in Internet-based piracy. One common example involves the reselling of software in violation of licensing agreements (for example, software obtained using privileged licenses for a finite set of users which is then resold to the public on the Internet).

Ineffective Criminal and Border Enforcement

In 2006, the total number of pirate product seizures (1.3 million total optical discs) and criminal investigations did increase from prior years. In addition, the total number of administrative actions rose. However, because of a combination of poor border and ineffective criminal enforcement (especially against criminal syndicates), the upsurge in seizures and investigations has not had a marked impact on the piracy problem in Ukraine. Also, pirate and counterfeit goods should not be put back into circulation; the Ukrainian courts should be instructed to confiscate and destroy obvious pirate and counterfeit materials, even when cases are dismissed on procedural grounds.

Criminal Enforcement

The increased number of raids and seizures in 2006 was welcome, but unfortunately, not enough action has been directed at large-scale commercial piracy. In November 2006, there were a number of criminal verdicts of two and three-year suspended sentences. While verdicts of this “magnitude” were unheard of in 2005, they are not deterrent penalties because they are suspended and not served sentences. Many other cases were burdened by long delays. Also, although there were more administrative actions undertaken against stores, kiosks and other street piracy than in recent years, these actions were not frequent enough nor were they coupled with severe enough penalties to deter these crimes. As in years past, almost all of the actions were directed against sellers and small-scale distributors, with the criminal gangs involved in organized large-scale piracy remaining largely unscathed.

In fact, as a result of the too-high threshold for criminal prosecution, most cases in the past resulted in administrative actions. In February 2006 amendments to the Criminal Code Article 176, significantly lowered this threshold. It is hoped that this change will result in more cases being brought under criminal, rather than administrative proceedings. In addition, IPR-related offenses continue to be hampered by procedural problems such as the use of expert evidence. There needs to be clear sets of rules guiding procedure.

Provisions do exist in the Ukrainian Criminal Code (e.g., Article 28) to prosecute organized groups or criminal organizations, including those engaged in IPR offenses, but to date they have not been used for this purpose. New criminal sanctions, also added in February 2006 (effective March 2006) created additional penalties (of up to 7 years imprisonment) for organized crime syndicates. These new sanctions must be utilized.

The motion picture industry reports that over the last two years, there have been some encouraging signs of increased and geographically wider police activity, both in Kiev and elsewhere, against the retail sale and distribution of pirate products. During 2006, more than 650 criminal cases concerning IP crimes were initiated in Ukraine, with administrative sanctions

applied against 3300 individuals. A total of 1 million optical discs and 100,000 VHS tapes were seized by the police in 2006. Almost all of the discs seized by the police in 2006 were copies without hologram stickers.

The IFPI reported that in 2006, the number of raids, especially by the Economic Crime Division continued a positive trend upward from 2005. These raids were carried out throughout the country, and included some underground CD burning operations as well as warehouses filled with pirate optical discs. The IFPI and MPA reported a total of 161 raids in the Kiev-area. At these raids they reported: 19,901 video cassettes seized; 224,823 DVDs seized; 12,245 DVD-Rs seized; 5,524 CD-Rs seized; 71 DVD-R/CD-R burners seized; 114,156 CDs seized; and a number VHS recorders, DVD players and other material (including 767,800 blank DVD-Rs and CD-Rs and 102,900 blank VHS tapes) seized.

It is common, unfortunately, for cases to end without deterrent penalties, and worse, for pirates to petition the court successfully to have illegal products returned to them. The IFPI reports the following six examples of individuals involved in either large-scale piracy and/or repeat offenses, who received either a minimum fine or no conviction:

1. On October 5, 2005, an individual at the Petrovka market was caught with 607 illegal DVDs. Two other seizures of illegal material at the same market were undertaken against the same individual - 1499 DVDs seized on March 30, 2006 and 1450 DVDs on April 29. Although three separate criminal cases were opened and later joined, a year later only a single court hearing has taken place and no verdict has been rendered.

2. An individual at the Petrovka market was fined 1700 UAH (US\$337), in two administrative sanctions, in early 2006. On August 30, 2006, a criminal case was initiated in accordance with Article 203-1 of the Criminal Code after another seizure of pirated material was made against the same individual at the Petrovka Market (a total of 464 discs were seized plus 153 MP3s and 311 DVDs). An investigation is ongoing, but clearly the administrative sanctions were not a deterrent to the subsequent offenses.

3. On February 26, 2004, an individual was caught in Kiev with a warehouse full of illegal products (12,000 CD-Rs, 3 printers, 3 computers). On April 16 2005, another warehouse owned by the same individual was found with duplicators and 1500 recorded CD-Rs, 20,000 blank CD-Rs and other materials (the individual was duplicating and distributing music, videos and software on the CD-Rs). Two criminal cases were opened and resulted in fines, as well as the confiscation of discs and equipment, however, he has not received any jail time.

4. On October 7, 2005, an individual was caught in the Donetsk region with 452 pirate DVDs. On May 12, 2006, 231 pirate DVDs were seized from the same person. Although two criminal cases were opened, they resulted only in the confiscation of the discs and a meager fine of 1700 UAH (US\$337).

5. In the Lugansk region IFPI investigators received information that a website was offering large quantities of music CDs for sale, so a test purchase was made in September 2005. The discs (which arrived via airmail from Ukraine) were pirate CD-Rs, not CDs as advertised on the site. The website owner was located – offering 30,000 illegal music files/albums for sale on his site. A police raid found 2 color printers, thousands of inlays, 5 CD-R burners and 3,000 blank CD-Rs (computer records also revealed customers worldwide: in the U.S., Japan, U.K., Italy, Australia, Poland, Canada, Norway, Brazil, etc). During the raid another 3,000 pirate pre-recorded CD-Rs were seized – they had been packaged for shipment abroad.

On September 12, 2006 despite evidence of a large-scale operation, the court closed the case (per Article 7 of the Criminal Procedure Code noting the defendant was not a public threat). All discs and equipment were returned to the defendant (including the IFPI's test purchase discs). Rightholders claimed at least 54,000 UAH (US\$10,700) in damages.

6. In May 2005 in Lugansk, a warehouse filled with illegal products was raided – including 90,000 pirate DVDs, CDs and CD-Rs, as well as computers and other equipment. Evidence seized indicated that the warehouse owner was importing illegal material (music, video, software) from Russia, with a wide distribution to shops in Lugansk. A criminal case was initiated under Article 176(2) of the Criminal Code. On November 10, 2005, the case was closed per the Amnesty Act and all illegal products and equipment were returned to the defendant along with a (meaningless) order instructing him not to sell discs that had “signs of counterfeiting.”

Border Enforcement

Ukraine has also failed to properly police its borders, which has resulted in wide-scale shipment from and transshipment of pirated materials through Ukraine, to other countries in Eastern and Central Europe — including Poland, Hungary, Lithuania, Romania and Slovakia, and other countries such as Israel. In fact, border enforcement is probably the weakest link in Ukraine's enforcement regime, as it allows large-scale smuggling operations to move pirate product mainly produced in Russia into Ukraine for the local market or for shipment to other countries. The common trade regime among Russia, Ukraine, and Belarus will only exacerbate the border enforcement problems, putting additional pressure on neighboring countries. There have been some minor seizures by customs authorities of CDs and other materials over the past several years, but cooperation has been spotty and activity has not been nearly enough to stem the flow.

Some of the copyright industries report customs cooperation the border. But, overall, much more needs to be done to improve border enforcement to the extent needed to have a real impact on cross-border trade in pirated goods. The Ukraine Government must devote more resources and show more willingness to enforce IPR crimes at the border. The motion picture industry (MPA), for example, continues to report that piracy persists a result of poor border enforcement allowing an influx of pirated DVDs from Russia.

Customs officials were granted *ex officio* authority to properly conduct enforcement investigations (in amendments to the Customs Code in 2004, and further amendments in 2006). With this *ex officio* authority customs officials can seize illegal material at the border without a court order. The police and other enforcement officials also reportedly have equivalent *ex officio* authority (for example, under Article 203-1 of the Criminal Code to act against optical discs offered without hologram stickers). But, in practice they still depend on rightholder complaints to commence investigations — this needs to be corrected. Without proper implementation of this authority (by police and border officials), and without proper confiscation of pirate materials (which IIPA understands can only constitutionally be undertaken by the courts), the problems will continue to worsen. Waiting for rightholders to file complaints in each instance given the widespread scope of the illegal activity is a recipe for failure.

Other Enforcement Issues

Article 203-1 of the Criminal Code was modified as part of the amendments adopted in August 2005. It is now no longer necessary for rightholders to file complaints before the police can initiate criminal actions.

In addition to enforcement against hard copy piracy, Ukraine enforcement officials must also begin actions against on-line piracy. It is estimated that there are over 400 ISPs in Ukraine and that over 150 of these support sites offering pirate DVDs (for, on average, US\$10). The late-2006 actions against ISPs, with cease and desist letters, showed that it is possible to act against Internet piracy. In fact, it resulted in three of the largest infringing sites being taken down, at least temporarily. However, the police noted a procedural problem undertaking these operations, namely, that unless an individual files a claim for damages for Internet piracy, they would not initiate further criminal action. This appears to be contrary to government claims that *ex officio* police authority exists at present.

In 2006, the recording industry continued to suffer from pirate optical disc (including CD-R) distribution with estimated piracy levels at around 55% to 60% for international repertoire, and losses estimated at \$30 million (including losses from Internet piracy and mobile phone piracy in Ukraine).

Pirate films continue to appear in Ukrainian kiosks within weeks of their U.S. theatrical release. Video retail stores stock pirate product, including pre-release material that is available within days of U.S. theatrical release. Recent seizures of pirate product and market monitoring reveal a disturbing increase in the number of pirate DVDs containing up to twenty film titles each. This type of piracy is not limited to Kiev, but is found nationwide. As a result, legitimate distributors are struggling to survive.

Pirated entertainment software products continue to be exported from and through Ukraine (from Russia). ESA member companies report that production of pirated entertainment software is occurring at factories in the country for both local consumption and export. Ukraine-sourced pirated video games also bear the "marks" or "logos" of the pirate operation producing and distributing the pirated games. Also of increasing concern is piracy at unlicensed Internet game rooms or cafés, where pirated and unlicensed versions of video game software is in wide use.

The Ukraine law enforcement officials reported the following: in 2006, there was a total of 820 criminal IPR cases opened (compared with 483 in 2005, 455 in 2004, and 374 cases in 2003). Of these, 300 cases were Article 176 cases (37%, down from 52% last year). The figures for 2005 and 2004 were 298 and 311 cases, respectively. There were 500 Article 203-1 cases involving the illegal circulation of optical discs; there were 115 of these cases in 2005 (the first year the provisions were adopted). These involved music, video and software games. In the first 11 months of 2006, the government further reported that 293 cases were transferred to the criminal courts (up from 138 in 2005). Of these, there were 40 verdicts -- 60% received a fine (generally, 3400 UAH, US\$674); 30% imprisonment, with suspended sentences, 10% (4 cases) received correctional labor. In the first 11 months of 2006, the administrative courts handled 2,300 cases (down from 3,800 last year); of these 1,530 individuals were fined, 160 cases were closed (timed out), and 210 dismissed on other grounds.

Further, the SDIP reported the Government of Ukraine seized a total of 1.3 million items in 2006, up from 850,000 items in 2005, 600,000 in 2004, and 300,000 in 2003. A total of

90,000 items were destroyed in 2006, down from 100,000 in 2005, and compared with 70,000 and 80,000 respectively in 2004 and 2003. There were 3,700 administrative cases undertaken in 2006, compared with 5,100 in 2005, 4,300 in 2004, and 2,000 in 2003.

The Tax Police did not report seizure totals in 2006. In 2005, they seized a total of 280,000 items (including 60,000 discs); in 2004, they seized 340,000 items (including 150,000 discs); in 2003, they seized 200,000 (including just 5,000 discs). The customs authorities reported only 9,000 discs were seized in 2006 but that was only reporting for four months. By comparison, for the full year of 2005, 350,000 discs were seized; in 2004, it was 100,000; in 2003, it was just 34,411. The State Inspectors (in all 16 regions) reported 250,000 discs and tapes seized in 2006, compared with 400,000 in 2005. They did not report totals of the number of discs destroyed or any similar disposition. In 2005, they reported 100,000 destroyed, 450 administrative protocols, and 100 criminal cases opened. The figures for 2004 were 270,000 items seized, 40,000 destroyed, 390 administrative protocols, and 58 criminal cases opened. In 2003, the figures were 50,000 items seized, 25,000 destroyed, 110 administrative protocols, and 40 criminal cases opened. Last, the Security Service Units reported 55,000 discs seized, compared with 120,000 in 2005.

Against software piracy, the IIPA and BSA continue to urge the police to broaden their focus from CD piracy actions to include actions against PC manufacturers and corporate end-users. In addition, the police need to act not only against small resellers and end-users but against organized crime operations.

History of GSP Petition

As a result of Ukraine's serious optical disc piracy problem, the IIPA filed a 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 and the U.S. Government suspended Ukraine's GSP benefits on August 24, 2001 after hearings and extensive review.

After Ukraine's adoption of the optical disc law in August 2005, the U.S. Government announced on August 31, 2005 that it was terminating the 100% *ad valorem* duties that had been in place since January 2002 on Ukrainian exports. It then announced an out-of-cycle review in October 2005, which concluded in January 2006. Effective on January 23, 2006, the U.S. Government announced that it was lowering the designation of Ukraine from a Priority Foreign Country to placement on the Priority Watch List; coupled with that designation, the U.S. Government also announced, effective on January 23rd, the reinstatement of GSP benefits for Ukraine. In the first 11 months of 2006, \$20.2 million worth of Ukrainian goods benefited from the GSP program.

LEGAL REFORMS

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

The key missing legal reforms needed for effective enforcement (and TRIPS compliance) are: (1) amendments to the Criminal Procedure Code to give the police proper authority to commence investigations *ex officio*; (2) amendments to the Customs Code (which was revised in November 2006 to give clear *ex officio* authority) to repeal the restrictive "commercial purpose" threshold and the onerous registration and fee requirements for IP-

related materials; and (3) the addition of key administrative remedies. The law of 2003 included in the Civil Procedure and Commercial Procedure Codes *ex parte* search provisions necessary for effective end-user (software) piracy actions. In 2004, the Highest Commercial Court of Ukraine adopted recommendations to implement these procedures. However, practical difficulties remain, most critically, the inability of the authorized enforcement agency (the state executive service) to actually undertake *ex parte* searches in spite of the new Civil Procedure Code (since the Civil Code does not apply to administrative remedies).

Copyright Law: The Copyright Law of 2001 fixed a major deficiency of the old law, namely, the protection for pre-existing works and sound recordings. Several problematic provisions in the 2001 law were never corrected, such as Article 43.3; this provision permits the over-regulation and consolidation of power into government collecting rights societies. The Ukrainian Cabinet of Ministers has, under this provision, adopted fixed tariffs for the broadcasting of sound recordings, which totally undermines the right of phonogram producers to freely negotiate their fees with users. Article 43.3 of the Copyright Act should be deleted and the tariff decision by the Council of Ministers should be withdrawn. Collective management should be a private, not a government, enterprise; legal entities and foreign rightholders should be permitted to be members on their own in Ukrainian collecting rights societies. In addition, as noted below, Ukraine must further revise the Copyright Law to fully comply with the digital treaties in order to properly protect the production and dissemination of materials on digital networks.

The Government of Ukraine has, for the past several years, considered major copyright law reform. Unfortunately, a draft bill in 2006 which contained a number of highly objectionable provisions was presented to the Council of Ministers for submission to the RADA with little or no rightholder input; we strongly recommend that the drafters continue to work with rightholders and U.S. Government experts at an early stage of drafting, to ensure that any new law is compatible with international norms and business practices. The latest draft bill, prepared for Inter-Ministerial review, over-regulates the collective management of rights and includes unwarranted government intervention in the exploitation of copyrights (among two of its many shortcomings).

Criminal Code and Criminal Procedure Code: The criminal code was completely revised in 2001, 2003, and again in February 2006 (effective March 2, 2006). The 2006 amendments lowered the threshold for criminal responsibility under Article 176 to one-tenth their former level. This is a very positive step. Article 176 now provides sanctions including fines ranging from 200 to 1000 minimum tax-free incomes, approximately US\$640 to US\$3,200, or correctional labor for a term of up to two years, or imprisonment for a term of up to two years with confiscation of infringing material. The threshold for criminal liability is met when material damage caused by an infringement equals or exceeds 4000 UAH (US\$793) – that is, “substantial material damage.” The sanctions provide an increase for repeat offenders and cases where the material damage equals or exceeds 200 minimum tax-free incomes (i.e., “large material damage”). In these instances, fines can reach up to 1,000 to 2,000 times the minimum tax-free incomes (previously it was 500 to 1,000 times), which is the equivalent of US\$3,200 to \$6,400, with a term of imprisonment ranging from two up to five years. Additionally, the 2006 amendments added even more severe penalties for actions against organized crime groups where the material damage equals or exceeds 1000 minimum tax free-incomes (i.e., “very large material damage”), as well as for officials abusing their official positions. In those cases, fines can reach up to 2,000 to 3,000 times the minimum tax-free incomes and a term of imprisonment ranging from three to six years. The criminal code provisions sanction both copyright and neighboring rights violations.

Another missing element in the criminal code (or copyright law) is a provision that makes possession for a commercial purpose (of illegal copies of works or sound recordings) a criminal offense; the Government of Ukraine should introduce and push for the passage of such a provision.

The Criminal Procedure Code must also be fixed in law and practice so that police can act *ex officio* to initiate criminal intellectual property cases. Ukrainian criminal procedures in practice (although not required by the code) currently require rightholders to file complaints to initiate actions. This acts as a bottleneck to successful enforcement. The Criminal Procedure Code should be changed so that police initiate intellectual property criminal cases and investigations for submission to the court; it must also be clear that the police (as they sometimes do in software cases) have the authority to hold confiscated products and equipment for use at trial.

WIPO Digital Treaties: In 2001, Ukraine acceded to the two digital treaties — the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonogram Treaty (WPPT). The Copyright Law of 2001 included amendments intended to implement these treaties. Unfortunately, the amendments fell short of complete and effective implementation, especially with regard to technological protection measures (requiring proof of “intentional” circumvention, which could prove a major impediment to protection). Ukraine needs to fully implement the treaties with amendments to its copyright law. In 2006, amendments were considered but never adopted; the amendments were drafted without any input from rightholders, which is unfortunate, because there were several glaring deficiencies. Given the stake in effective enforcement that rightholders have, the Government of Ukraine should work with rightholders on any future copyright amendments and, at an early stage in the drafting process (certainly before submission to the Verkhkhovna RADA).

Administrative Remedies: As part of the Joint Action Plan in 2000, Ukraine agreed to adopt and implement appropriate administrative remedies to deter piracy as well as to enact criminal penalties. The proper remedies do now exist, but they are not being used effectively to remove the business licenses of infringing retail stores, kiosks, and other smaller scale pirates. Administrative remedies must be properly implemented alongside available and properly implemented criminal penalties at levels sufficient to deter piracy. Further amendments have been proposed, but never adopted, to increase the maximum fines from the current US\$500 to close to US\$1000 – IIPA urges the passage of this law to create stiffer administrative penalties. Another provision that needs amendment is the two-month deadline for administrative cases to be processed or terminated (Article 38); a more realistic and extended deadline should be provided, or the deadline eliminated altogether. Administrative courts should be able to hear infringement cases even in the absence of the infringer – such delays, and the deadlines, lead to many unnecessary case dismissals.

Customs Code: The Customs Code of Ukraine (Law No. 92-IV, “On Amending the Customs Code of Ukraine”) entered into force on January 1, 2004; it was again amended in November 2006 (effective March 2, 2007). It provides clear *ex officio* authority (Art. 257) to customs officials to seize suspected illegal material at the border. The threshold remains at about US\$260 (Art. 250(1), part 2; Art. 252 (1), part 2). For optical discs, a maximum of 20 discs can be imported or exported for personal use under the Optical Disc Law. The 2004 Customs Code narrowed the applicable sanctions to acts meeting a “commercial purpose” threshold; this limits the effectiveness of the 2004 code. The 2006 amendments introduced new criteria

replacing the “commercial purpose” criteria; the sanctions now apply to “goods destined for manufacturing or other business activity.” In addition, the notification and registration requirements, and the fees, were not repealed by the 2006 amendments. They were, however, amended: the current fee is US\$400 for the first application; US\$200 for all others; and per Art. 256, it is no longer necessary to register specific items and titles, rather record labels and/or trademarks may be registered in lieu. This is an improvement, but the abolishment of the registration system altogether with its unnecessary maze of regulations would be an even better improvement as it interferes with effective border enforcement.

Civil Code: Effective January 1, 2004, a new Civil Code came into force. Chapter IV of the Civil Code (Intellectual Property Rights) contains 90 articles in total -- 15 pertaining to copyright, and 8 pertaining to neighboring rights. Most of the copyright and neighboring rights provisions duplicate provisions in the Copyright Law of 2001 which ultimately may confuse judges who have to rule on IPR enforcement matters (IIPA had urged that civil code reform exclude anything but passing reference to copyright and neighboring rights to avoid this outcome). Ukrainian officials have assured U.S. Government and IIPA members that the Civil Code will not weaken implementation or enforcement of the copyright law. In this regard, IIPA urges the enforcement agencies and the judiciary in Ukraine to rely on the copyright law, not the Civil Code Chapter IV, for effective enforcement.

Dubbing Law: On January 16, 2006, a new law (Cabinet of Ministries #20) was adopted that calls for mandatory dubbing in Ukrainian for films shown in cinemas, on television, or via home video. The law requires that 20% of the films shown in cinemas, television, or on home video to be mandatorily dubbed; and those figures increased to 50% on January 1, 2007, and will further increase to 70% on July 1, 2007. This market barrier will have a significant negative impact on audiovisual market development, particularly for MPA member companies and other foreign companies in Ukraine.

Government Software Asset Management: In 2003, the Cabinet of Ministers of the Ukrainian Government passed a regulation establishing procedures for the use of software in government agencies. It provided for government institutions to use properly licensed and legally held software, and prohibited public servants from installing, using, or copying software without prior consultation with a responsible system administrator. In 2004, the government issued a new regulation to implement legalization. It assigned all procurement authority for software products to a single entity, SDIP, in order to try to eliminate the use of pirated software products in the public sector. Unfortunately, the Government of Ukraine has been slow to enact this program.