

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2008 SPECIAL 301 REPORT

UKRAINE

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

EXECUTIVE SUMMARY¹

The lack of effective enforcement in Ukraine continues to allow piracy to persist, and is still thwarting the development of a healthy legitimate market. Illegal copies of recorded music, films, games and software are readily available at the markets and shops throughout the country. Plus, the ever-increasing problem posed by Internet piracy is not being properly addressed by Ukrainian officials. Ukraine's Copyright Act remains in serious need of improvement, and government attempts to change the law have been far from reassuring to rightholders.

Ukraine needs to take several critical steps to improve enforcement and to substantially improve its copyright law.

First, it has to address the serious marketplace piracy at markets throughout Ukraine. This will require top-level clear and public pronouncements from the government that such piracy will not be tolerated, and then undertaking serious (that is, daily) effective raids against these markets and, in particular, the many warehouses that supply them. The law enforcement authorities need to – using search warrants – enter sales premises and suspected warehouses to seize illegal material, even if such premises/warehouses are closed. The lack of regular and repeated police raids, 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. Stores, kiosks or warehouses found with illegal material should be closed down, and after initial raids against these establishments, follow-up raids should continue with regular unannounced checks to clear these venues of illegal material.

Second, Ukraine's hologram system should be substantially improved or repealed. The system as it is implemented today lacks transparency, has serious loopholes, is not properly enforced and suffers from the wide-spread presence of counterfeit holograms. The Government of Ukraine should urgently revamp, in close cooperation with rightholders, the existing hologram system and allow rightholders to play a key role in its administration and implementation, or it should eliminate the system entirely.

Third, the Government of Ukraine must undertake criminal (not administrative) prosecutions, and impose deterrent penalties against those involved in retail 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 continue to be treated lightly by the courts, and despite the fact that this issue has been raised frequently and discussed in bilateral meetings, the Government of Ukraine has to date otherwise relied heavily on non-deterrent administrative penalties.

Fourth, the Government of Ukraine must ensure that Article 176 of the Criminal Code is amended to apply to all forms of piracy – including Internet and illegal software use – not just the illegal manufacturing and distribution of hard-copy works and sound recordings.

¹ For more details on Ukraine's Special 301 history, see IIPA's "History" appendix to this filing at <http://www.iipa.com/pdf/2008SPEC301HISTORICALSUMMARY.pdf>. Please also see previous years' reports at <http://www.iipa.com/countryreports.html>.

In addition, the government must move effectively against the growing threat of Internet piracy. Considering the scale of Internet piracy in Ukraine, this should not be an after-thought, but rather a top priority for Ukraine's law enforcement agencies, prosecutors and courts.

COPYRIGHT ENFORCEMENT

The Nature of Piracy in Ukraine in 2007

In 2005, Ukraine adopted significant improvements to its optical disc laws, which was, at the time, the top priority for copyright enforcement in Ukraine. 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, and the implementation of stronger criminal enforcement.

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. As a result of optical disc regulations, and mostly good cooperation between recording industry (IFPI/UAMI) inspectors and state inspectors (from the State Department of Intellectual Property, SDIP), there has been no new evidence of illegal production at the licensed optical disc plants in 2007. However, there is one exception. The Rostok plant, which was sued by rightholders in 2006, continues to refuse to permit inspections by IFPI/UAMI inspectors, so its production cannot be properly monitored.

While large-scale illegal industrial optical disc production has diminished significantly from its peak in 2000, large quantities of illegal optical disc material are still being imported. Most of this material is produced in Russia, including a lot of pre-release CDs and DVDs, which is estimated to be 70-80% of all pirated optical discs in Ukraine. In addition, underground CD-R burning operations continue to swamp the market with illegal product. This material is found throughout Ukraine.

Especially troubling is that both the smuggling operations and the CD-R production are being undertaken by organized criminal syndicates, which are flourishing in the absence of a deterrent criminal enforcement regime. The production, smuggling and distribution, for example of CDs and DVDs is well organized and orchestrated by criminal gangs. The U.S. and Ukraine rightholders report that, for example, there are 50 stalls and kiosks at the notorious Petrovka markets owned by three individuals. The stalls/kiosks are regularly (weekly) re-stocked, and are especially and reliably supplied with pre-release CDs and DVDs. Rightholder groups also report a steady supply of material from Russia, through Ukraine, into the countries of the European Union, and thus the need for better border enforcement by Ukrainian authorities.

An ever growing concern in Ukraine is Internet piracy. Websites offering pirate material are thriving in Ukraine, with the support of local Internet service providers. The only reason the problem is not more severe is the relatively low level of Internet service penetration among Ukrainians. More criminal enforcement against Internet piracy is needed. As one example, the Ukrainian recording industry brought a successful case in 2007 against a Ukrainian illegal website (www.mp3.ua). But, even though the case was successful in court, the website continues to operate. The Government of Ukraine (Ministry of Interior) needs to commence a criminal proceeding against the website operator and any other Internet service provider hosting pirate sites. In addition to criminal enforcement, Internet service providers should be civilly 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. In late 2006, cooperative efforts between ISPs, rightholders and the police, were effective in taking down some websites. But in 2007, ISPs were less cooperative and took the position that they were immune from liability under current law, thus they have, for the most part, ignored rightholders' notice and takedown letters. It should also be stressed that none of the complaints rightholders submitted to the Ministry of the Interior resulted in the taking down of any illegal Internet site, let alone, the prosecution of any of the site owners.

In addition to downloading piracy, another common type of Internet piracy is via mail order – with orders placed on-line and delivered by mail. The Business Software Alliance (BSA) continues to report on the troubling increase in Internet-based piracy of business software. 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.

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, implementation of the program by the government, the largest consumer of illegal software in Ukraine, has been slow. According to official information from the 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 Ukrainian 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. Overall, the BSA reports in 2007 (based on its preliminary figures) piracy rates are at 84% and losses at \$213 million.

The adoption in 2000 of the Hologram Sticker law, was a step backward for effective enforcement. The seven-year history of this law shows that its inconsistent and haphazard implementation (administration) by the government has seriously harmed the interests of legitimate copyright owners. At the same time, it has permitted suspect companies to receive thousands of holograms for foreign releases (music, film, and 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 and licenses 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, rightholders cannot compete against the pirates without effective enforcement by the Ukraine Government to address the piracy problem, and to stop the misuse of the hologram system. The hologram system should be completely revised (or repealed) and properly enforced, with input from rightholders.

Entertainment software publishers (Entertainment Software Association, ESA) report that the hologram sticker program is their primary enforcement problem in Ukraine. The hologram program is implemented in a haphazard manner because SDIP grants holograms for generic game titles. One ESA member company had success in obtaining an agreement with SDIP to stop issuing holograms for its titles. However, the pirates simply modified and altered the game titles, or used generic descriptors (e.g., "Racing"), and otherwise successfully obtained holograms for their pirated games. One video game publisher is undertaking numerous civil cases to challenge the grants of "generic" title holograms.

The BSA continues to report that the hologram sticker 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.

The major piracy problem for the motion picture industry, (Motion Picture Association of America, MPAA) is hard-copy piracy of DVDs sold at retail stores and kiosks, which are regularly stocked with new and pre-release material. 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, and threatens the survival of legitimate distributors. 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 2007, the recording industry continued to suffer from pirate optical disc (including CD-R) distribution with estimated piracy levels at around 60% for international repertoire, and losses estimated at \$35 million (including losses from Internet piracy and mobile phone piracy in Ukraine). In addition, the music industry reports that only about 5% to 7% of the market is properly paying performance royalties, including thousands of large and small public venues and hundreds of broadcasters, including the largest state-owned broadcasters who operate without paying any copyright or related rights licenses.

For entertainment software publishers a continuing concern is piracy at Internet cafés or “game rooms,” where pirated and unlicensed versions of video game software is in wide use. Video game publishers estimate that there are some 200 cafés installing pirate copies of game software on café machines without appropriate licenses. Unfortunately, due to the absence of a large industry presence in the country, and the failure of the police to take enforcement actions without rightholder initiation, there has been little to address this problem and the even-larger problem of optical disc production (especially of CD-Rs), and distribution in Ukraine. ESA estimates that piracy levels in Ukraine were 80% in 2007 (which is a piracy level reflecting a weighted average of three forms of piracy: PC piracy, console piracy and handheld piracy).

Factory-replicated pirated entertainment software products on optical disc continue to be locally produced (and, with the flawed hologram system “legalized”) for sale in the market. Pirated products are generally available at large outdoor markets and through street vendors, though there are instances where pirated product is available through retail establishments who simply claim that the products are, to their knowledge, legitimate as they bear the holograms.

Effective Criminal Enforcement is Needed as a Follow-up to the Legal Reforms

The major “missing” component of the Ukraine enforcement regime has been the absence of effective criminal prosecutions and deterrent sentencing. This, coupled with ineffective border enforcement, has allowed wide-scale commercial piracy to continue in Ukraine. In some cases, commercial piracy operations act in concert 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.

Six Recommended Actions for the Government of Ukraine

IIPA makes six recommendations that would improve enforcement in Ukraine:

First, the Government of Ukraine should act against retail piracy in the big outdoor markets like Petrovka and Radiolubitel in Kiev, Maya in Donetsk, Knyzhka and Sedmoy in Odessa, and Pivdenny in Lviv, and other sales occurring in the streets – and with long-term, not temporary, closures of illegal businesses. As has been noted before, there is evidence that this step is a matter of political willpower. This was demonstrated in May 2005 during the Eurovision event in Kiev, when the government did effectively (but alas, only temporarily), crack down against street and kiosk piracy.

Second, the Government of Ukraine should follow raids and seizures, as well as Internet website takedowns, with criminal prosecutions and convictions against illegal retail or production operators, and others involved in commercial piracy.

Third, the Government of Ukraine should properly implement the Customs Code amendments adopted in November 2006 (in force February 10, 2007) which provided 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 since much of it is coming, at present, from Russia by train, car, and courier. The Government of Ukraine should 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 with specialized customs units.

Fourth, the Government of Ukraine should move more aggressively against on-line public performance, broadcasting and other Internet piracy.

Fifth, the Government of Ukraine should continue improvements in its optical disc media enforcement, most importantly, with the imposition of criminal penalties against producers of optical disc media at plants or CD-burner operations.

Sixth, the Government of Ukraine should amend Article 176 of the Criminal Code to ensure that criminal liability applies to any type of illegal use of copyrighted materials. The current version of this article is often interpreted by the law enforcement authorities as applying only to manufacturers and distributors of illegal copies.

Optical Disc Piracy and Enforcement

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. The June 2000 Joint Action Plan not only detailed plant licensing and inspection requirements, but also the adoption and implementation of criminal and administrative penalties, which could and should be used effectively against all forms of pirated product.

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 including: (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).

However, a few elements of the optical disc regime still need to be properly implemented. These include: (a) regular surprise inspections of existing and new optical disc plants with copyright rightholder participation (and that, during an inspection, when machinery is claimed to be temporarily inoperable, a subsequent surprise inspection is undertaken to obtain exemplars from that plant); (b) disclosure and openness with rightholders of the “evidence repository” sample copies of all production runs of master stampers and finished disc produced in Ukraine, including unconditional access (i.e., without the need for a court order) for rightholder’s representatives to the exemplars and the database (which should detail the equipment used in each plant); (c) closure of plants that have been found to be involved in illegal production (in breach of the licensing rules and/or the copyright law); (d) seizure and destruction of illegal material, including the materials and equipment used in the course of illegal production (plus the spare parts and pieces of equipment), as well as the destruction of pirate discs carried out with the involvement of rightholders; (e) proper monitoring of the importation of raw materials (optical-grade polycarbonate) used in the production of optical disc media; and (f) proper licensing of 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). Last, 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).

The Ukrainian Ministry of Science and Education 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. 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 in the past, 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. Another previously noted positive step was the General Prosecutor's decision to reconstitute economic crime status to criminal violations of author's and neighboring rights.

Complaints by rightholders against the Rostok plant and CD Master plant in 2004 and 2005 were mishandled by the Ukrainian authorities and remain unresolved. The plants have been allowed to continue their operations despite detailed complaints from the recording industry (IFPI) due to the lack of decisive action by SDIP and its state inspectors. Plus, neither the plants nor their owners/managers have faced criminal investigation, let alone prosecution. 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 entertainment software publishers report that secure identification (SID) markings on pirate video game discs purchased through Internet sales in Asia, the U.S., and the United Kingdom, indicates that the discs originated in Ukraine, and probably from the Rostok plant.

One significant enforcement problem has been Ministry of the Interior experts, who have been very slow to issue their expert examination reports. In addition, these experts have missed pre-arranged meetings to conduct court-ordered examinations, refused access to premises, substituted the services of ill-prepared junior examiners, lost evidence and/or produced incomplete and inaccurate reports. There have been many reports by these experts that have issued and have been generally helpful to rightholders (i.e., plaintiffs). One needed follow-up measure is for discs in separate cases to be compared to provide forensic links.

Regulation and control of the plants that does exist is still not effective, especially for industry sectors not present or unable to provide sufficient resources in Ukraine and thereby unable to assist the authorities with inspections. For example, pirated entertainment software (game) discs are manufactured in Ukraine, without licenses and absent any royalty payments to rightful owners, and enforcement actions are limited. In addition, as noted above, 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.

There are, at present, eight optical media disc plants (producing CDs, DVDs or both) in operation in Ukraine – a total of 18 CD/DVD 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, which far exceeds the estimated demand for legitimate CDs and DVDs in Ukraine.

Raids, Seizures and Other Enforcement Action in 2007

The overall number of seizures of illegal materials increased in 2007. The number of seizures by the Ministry of the Interior increased by about 10%, and those by SDIP's IP inspectors by about 45%. However, the Customs Service of Ukraine did not increase its seizures, which is surprising in light of the ongoing large-scale problem of the importation of pirated optical discs from neighboring Russia. It is estimated that, in total, over 2.2 million illegal copies were seized in 2007.

Overall, there have been an increasing number of raids and seizures over the past several years, but unfortunately, not enough action has been directed at large-scale commercial piracy. As a part of the 2005 amendments, Article 203-1 of the Criminal Code was modified to permit the police to initiate their own criminal actions without rightholder complaints. This positive step however, has not led to the type of effective enforcement envisioned. That's because of a combination of poor border and ineffective criminal enforcement (especially against criminal syndicates). So even with an upsurge in seizures and investigations, this has not had a marked impact on the piracy problem in Ukraine. Similarly, 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.

Thus, the actions need to be directed at retail stalls at or around underground stations, near local shops and supermarkets, as well as against retail stores that now regularly sell illegal product. The failing hologram stickering system is making matters worse. What is needed (beyond repealing the hologram law) are sustained actions at higher operational levels (i.e., not just kiosks, but at warehouses, wholesale centers, major distribution points), and by regular, not periodic, raids and seizures, followed by criminal prosecutions that result in deterrent sentences.

In 2006, amendments to the Criminal Code Article 176 significantly lowered the previously too-high threshold for criminal prosecution (which had resulted in more administrative, in lieu of criminal, actions). But, the hoped for criminal, rather than administrative proceedings, have not yet materialized. In 2007, the Ministry of Interior commenced more cases (479) in the first half of 2007, than in all of 2006. However, for the same period only 102 court decisions were rendered, and any penalties imposed were not severe enough to be considered deterrent. 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. Criminal sanctions (added 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 several 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. In the last year with reported statistics (2006), more than 650 criminal cases concerning IP crimes were initiated in Ukraine, with administrative sanctions applied against 3300 individuals. That year, a total of 1 million optical discs and 100,000 VHS tapes were seized by the police, almost all of which were copies without hologram stickers.

In 2007, IFPI reported a total of 1,027 raids on pirate retail outlets in Kiev. In those raids it was reported that the Ministry of the Interior officers seized 25,000 videotapes, 20,000 audiocassettes, and 1,354,000 pirated optical discs. It was further reported that 74 pirate warehouses and underground replication facilities were uncovered, and 12 distribution channels were stopped as a result of the raids. SDIP's IP inspectors carried out inspections of 814 people and business entities, and commenced 380 administrative cases for IP infringements; they seized a total of 439,406 pirated materials.

One ESA member reported that in 2007, there were 20 cases involving its pirated video game products. These cases involved the seizures of illegal games -- ranging from 5 to 800 copies of the company's titles (noting that the total number of materials seized was likely higher as it included products from other publishers). Unfortunately, of the 20 cases initiated in 2007, 14 are still pending with a prosecutor; two cases were initially dismissed, but on a court appeal were remanded to a prosecutor's office for further investigation.

The copyright industries provided the following examples of raids, seizures and criminal investigations undertaken in 2007.

In April 2007, State Department of Service for Economic Crime (SDSEC) officers raided and shut down a clandestine factory situated in an apartment in Kiev. The owner of the apartment was found to be copying and storing exemplars of phonograms and audiovisual works on CDs and DVDs on computers with CD-RW and DVD-RW drives, and then distributing these copies throughout Kiev. During the raid, the investigators seized a computer, two CD-RW ROMs and four DVD-RW ROMs, one full-color printer, 12,000 CDs and 4000 DVDs, and about 10,000 inlay cards. Further investigation led to the arrest of another person from Kiev, who is accused of acting as an accomplice (delivering the CDs in his car).

On 10 May, SDIP officers raided an illicit distribution network and warehouse in a private residential area near Kiev; one individual was caught illegally storing and distributing, in bulk, counterfeit exemplars of audio and audiovisual works throughout Kiev and other regions of Ukraine. A total of 10,000 DVDs, 1000 CDs, a computer containing the CD wholesale statistics and seven DVD-RW ROMs for multiplying the counterfeit products were seized by the police. A further police investigation uncovered several accomplices and over 40,000 DVDs and as well as artwork.

In another action, a warehouse was raided and closed near Kiev and over 10,000 DVDs and CDs, approximately 20,000 inlay cards, more than 3000 jewel cases and a computer with information on the criminal enterprise were seized.

From March through May 2007, the Ministry of Interior undertook a series of raids on markets and retail outlets in Kiev, accompanied by special operational teams of police and rightholder representatives. The raids uncovered 275 acts of distribution, seized 250,000 illegal CDs, and resulted in 29 criminal cases being brought to court (23 individuals were indicted). The seized products were destroyed, amid wide television and radio coverage.

In October, the police raided the notorious Petrovka market -- two major CD distributors were targeted. The raided netted 3,851 DVDs and 1,679 CDs (worth a total of 115,000 UAH). In late December 2007 (during the holidays), following a high-level complaint by IFPI, Ukrainian Police and SDIP inspectors conducted a wave of raids on various open air markets and street vendors within Ukraine. The largest number of raids took place in Kiev. At the Knyzhkovyi market (part of the Petrovka market) in Kiev, seven stalls were raided and 4,461 pirate DVDs and 2,524 CDs seized. In addition, police officers raided several street vendors elsewhere in Kiev, seizing 2,944 pirate DVDs and 1,425 CDs. As a result of these raids, 95 administrative sanctions were commenced, and a criminal case was initiated against several of the pirate street vendors. Also in December 2007, raids were carried out in other parts of Ukraine, including Zhitomir, Kirovograd, Chernigov, Lvov, Dnepropetrovsk and Odessa. During those raids 14,380 pirate optical discs were seized. The raids also resulted in the identification of several warehouses and CD-R, DVD-R burning facilities (suppliers of pirated discs to distributors throughout Ukraine). Unfortunately, as is common even after successful raids, subsequent prosecutions and convictions, if any, are not nearly strong enough to serve as deterrents. Often, when an action is dismissed by a prosecutor, the seized goods are simply handed back to the infringers.

Last, it was reported that in 2007, 417 criminal cases were initiated in accordance with Article 176 of the Criminal Code. In addition, 549 cases were initiated in accordance with Article 203 of the Criminal Code. It was also reported that 7,118 administrative actions were undertaken against IPR infringers in 2007.

Internet Piracy

In addition to enforcement against hard copy piracy, Ukraine enforcement officials must also begin actions against online 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, those actions 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.

Ineffective 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. Poor border enforcement allows large-scale smuggling operations to move pirate product into Ukraine for the local market or for shipment to other 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. In fact, the recording industry (IFPI/UAMI) reports that since a majority (70% to 80%) of all illegal material in Ukraine is of foreign origin, and customs authorities report average border seizures of 1,500 to 2,000 CDs per month, millions of illegal copies of music are entering Ukraine each year without interference.

Some of the copyright industries report customs cooperation at 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 as 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 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 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 (and do so as well, under Article 176 of the Criminal Code) — this disparity 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. Some of the copyright industries report that *ex officio* authority has not resulted in improved customs enforcement because of the successful smuggling of CDs and DVDs across borders, without passing through inspections and official declarations.

GSP Benefits

In 2006, \$23.8 million worth of Ukrainian goods benefited from the GSP program. In the first 11 months of 2007, that figure was \$44.5 million.

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 full TRIPS compliance given that Ukraine is very likely joining the World Trade Organization in 2008) are: (1) amendments to the Criminal Procedure Code to give the police proper authority to commence investigations *ex officio*; (2) amendments to the Customs Code (which was revised in November 2006 to give clear *ex officio* authority) to repeal the restrictive “commercial purpose” threshold and the onerous registration and fee requirements for IP-related materials; (3) the addition of key administrative remedies; and (4) the major overhaul or abolition of the hologram stickering program. The law of 2003 included in the Civil Procedure and Commercial Procedure Codes *ex parte* search provisions necessary for effective end-user (software) piracy actions. In 2004, the Highest Commercial Court of Ukraine adopted recommendations to implement these procedures. However, practical difficulties remain, most critically, the inability of the authorized enforcement agency (the state executive service) to actually undertake *ex parte* searches in spite of the revised Civil Procedure Code (since the Civil Code does not apply to administrative remedies).

Copyright Law: The Copyright Law of 2001 fixed several major deficiencies, but some problems remain, 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. A March 2007 draft bill, which contained a number of highly objectionable provisions, was never adopted. The Government of Ukraine has now pledged that it will give rightholders and U.S. Government experts, at an early stage of the next consideration of the draft bill, an opportunity to comment. We commend this procedure as it will help to ensure that any new law is compatible with international norms and business practices.

Criminal Code and Criminal Procedure Code: The Criminal Code was completely revised in the past several years, including amendments in 2007 (May 31, 2007). The 2006 amendments lowered the threshold for criminal responsibility under Article 176 to one-tenth their former level. This was a very positive step. The criminal code provisions sanction both copyright and neighboring rights violations. The 2007 amendments (to Articles 176 and 203-1) require the compulsory destruction of seized pirated material, as well as production equipment, in criminal cases. This was another positive step.

There are several key provisions that still need to be added. First, Article 176 of the Criminal Code does not clearly apply to many forms of piracy (i.e., on the Internet), but only (clearly) to hard-copy piracy – this must be fixed urgently. Article 176 is often interpreted by law enforcement authorities as only applying to the manufacturers and distributors of illegal copies, but not to businesses which regularly use illegally copied software. In addition, a provision for “administrative recidivism” must be revised so that a repeat infringement (within 12 months) would automatically lead to a criminal, not administrative, prosecution.

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), in force in March and May 2002, respectively. The Copyright Law of 2001 included amendments intended to implement these treaties. Unfortunately, the amendments fell short of complete and effective implementation, especially with regard to technological protection measures (requiring proof of “intentional” circumvention, which could prove a major impediment to protection). Ukraine needs to fully implement the treaties with amendments to its copyright law. The 2007 draft bill contained many deficiencies to full treaty implementation. IIPA continues to urge the Government of Ukraine to 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 2,538 UAH (US\$500) to close to 5,076 UAH (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 entered into force on January 1, 2004; it was again amended in 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 1,319 UAH (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 2,032 UAH (US\$400) for the first application; 1,015 UAH (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. 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 December 20, 2007, Ukraine's Constitutional Court issued a ruling interpreting Article 14 of the Law on Cinematography (Law of January 13, 1998) relating to the dubbing/subtitling of foreign films distributed in Ukraine. This ruling means that foreign films cannot be distributed in Ukraine if they are not dubbed, subtitled or have added soundtracks in the national language (i.e., Ukrainian). This ruling will significantly increase the cost of distribution in Ukraine for foreign distributors, and impede the development of the legitimate audiovisual market.

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.