

UKRAINE

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2009 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that Ukraine be retained on the Watch List in 2009.

Executive Summary:¹ The persistent problem of physical piracy in Ukraine's many open air markets and street stalls, and the sharp increase in peer-to-peer and website-based Internet piracy, in combination with ongoing enforcement problems, continues to undermine the development of a healthy legitimate market in Ukraine. Illegal copies of recorded music, films, games and software are readily available at markets and shops throughout the country – and irregular criminal and border enforcement is causing material to flow freely in Ukraine, as well as to and from Russia and other territories. IIPA recommends that the Ukrainian Government re-double its efforts on-the-ground, and that it work to fix the investigative and prosecutorial systems, as well as undertake other legal reforms to improve enforcement, especially criminal enforcement, in Ukraine. One major positive development in 2008 was the establishment of a Music Industry Working Group at the initiative of Prime Minister Tymoshenko, which rapidly led to the signing of a Memorandum of Understanding between the Government of Ukraine and the music industry to work cooperatively to address the problem of hard-copy, Internet, and broadcast piracy. IIPA is hopeful that 2009 results in measurable and lasting progress as a result of this initiative.

In May 2008, Ukraine acceded to the World Trade Organization (WTO) and is thus obligated to fulfill the legal and enforcement standards of the TRIPs Agreement. In order to do so, and to improve the marketplace for the copyright industries, IIPA recommends that the Ukrainian government undertake the following critical steps to improve criminal enforcement and to enhance the IPR legal regime in Ukraine:

First, it should address its serious open air and street market piracy, focusing on the big outdoor markets like Petrovka and Radiolubitel in Kiev, Maya in Donetsk, Knyzhka and Sedmoy in Odessa, and Pivdenny in Lviv, as well as other sales occurring in the streets – and with long-term, not temporary, closures of illegal businesses. This will require public government pronouncements that such piracy will not be tolerated, followed by frequent and effective raids against these markets and, in particular, the many warehouses that supply them. Law enforcement authorities should – using search warrants – enter sales premises and suspected warehouses to seize illegal material, even if such premises/warehouses are closed. 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. The target for raids should include retail stalls at or around underground stations, near local shops and supermarkets, as well as against retail stores that now regularly sell illegal product.

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, websites and others involved in commercial piracy. In fact, the Government of Ukraine should undertake criminal (not administrative) prosecutions, and impose deterrent penalties against those involved in retail piracy and all other types of commercial piracy – that is, against stall owners and operators, suppliers, and any large-scale distributors of pirated product, including over digital networks. Unfortunately, in lieu of deterrent criminal sanctions, large-scale operators and repeat offenders continue to be treated lightly by the courts, or not at all with respect to online piracy, and despite the fact that this issue has been discussed frequently in bilateral meetings, the Government of Ukraine has to date otherwise relied heavily on non-deterrent administrative penalties.

¹ For more details on Ukraine's Special 301 history, see IIPA's "History" appendix to this filing at <http://www.iipa.com/rbc/2009/2009SPEC301HISTORICALSUMMARY.pdf> See also the previous year country reports at <http://www.iipa.com/countryreports.html>.



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 we recommend that the government expand the specialized intellectual property rights unit within the customs service, and that it provide it 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 – acting on the Memorandum of Understanding signed in 2008 – should make it a priority of enforcement agencies, prosecutors and courts to move decisively and effectively against Internet pirates, by targeting and taking down illegal websites, engaging Internet Service Providers to cooperate more actively with rightholders on enforcement (something they agreed to do for the first time in 2008), and acting against illegal peer-to-peer services. In addition, the Government of Ukraine should move more aggressively against on-line public performance, broadcasting as well as all other forms of Internet piracy – with a combination of legal reforms and improved enforcement.

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, Ukraine's hologram system should be substantially improved or repealed. The system has lacked transparency, and has serious loopholes and is not properly enforced resulting in wide-spread counterfeit holograms. The transparency problem seems to have been recently resolved through amendments to the hologram law (in October 2008), but the Government of Ukraine should urgently revamp, in close cooperation with rightholders, other parts of the existing hologram system and allow rightholders to play a key role in its administration and implementation, or it should eliminate the system entirely.

Seventh, the Government of Ukraine should ensure that Article 176 of the Criminal Code (and/or the Copyright Law) is amended to apply to all forms of piracy – for all works and uses on the Internet or other digital networks, including the copying and distribution of software, whether in physical or digital copies. Currently, the law only (clearly) applies to the illegal manufacturing and distribution of hard-copy works and sound recordings.

Eighth, the Government of Ukraine should amend its law to make camcording illegal (under the Criminal Code), and then move decisively against camcording operations in Ukraine

COPYRIGHT ENFORCEMENT IN UKRAINE

The Nature of Piracy in Ukraine in 2008: In addition to the rapidly growing problem of Internet piracy, one of the biggest problems in Ukraine for the copyright industries – of music, film, videogame and business software – remains the wide-spread availability of illegal material in open-air markets, such as Petrovka and Radiolubitel (in Kiev), Mayak (in Donetsk), as well as in Odessa, Lviv and other major cities. There has been little change in this problem in the past few two years.

Several years ago, the top priority for copyright enforcement in Ukraine was the unregulated production and distribution of optical discs. In 2005, Ukraine adopted significant improvements to its optical disc laws, and it 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 2008.

One special court case involving optical disc production and distribution should be noted: the Rostok plant, was sued by rightholders in 2006 (in several separate cases) based on forensic evidence of large-scale production of illegal music CDs after it refused to permit inspections by IFPI, so that its production could be properly monitored. Early in 2008, in the first of several (nearly identical) cases, the Commercial Court of Appeals held that Rostok had illegally manufactured pirated CDs (musical recordings) in violation of the rights of the copyright owners (record labels). The court – reviewing the relevant forensic evidence – ordered Rostok to pay damages of 1.05 million UAH (approximately US\$135,400). This was a very positive development, correcting an on-going problem, as well as some serious misapplications of the Ukrainian law by the lower court. Rostok appealed the decision to the Higher Commercial Court of Ukraine. In June 2008, the Higher Commercial Court – ignoring or misreading the procedural rules and applicable laws, overturned the Appeal Court's decision, as well as the Court of First Instance's decision, ordering a complete re-trial of the case by a new panel (i.e., a different judge). In July, the rightholders filed an appeal with the Supreme Court of Ukraine to quash the Higher Commercial Court's decision – based on its misapplication of the procedural rules and law. Before the Supreme Court could rule, the Higher Commercial Court sent the case back to the Court of First Instance. The entire proceeding to date shows the deficiencies in regulating optical disc production and distribution as a civil, rather than a criminal, matter and the shortcomings of civil enforcement. The other cases against Rostok brought in 2006 are still awaiting consideration in the lower court.

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 widely available in Ukraine. Some of it is being imported, predominantly from Russia, but most of it is being produced at underground CD-R burning operations in Ukraine.

In some cases, the smuggling operations and the CD-R production in Ukraine appear to be well-organized, which can only be effectively combated with criminal enforcement. For example, U.S. and Ukraine rightholders report that 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 (and sometimes, though to a lesser degree, in the reverse direction), as well as across the border from Ukraine into Poland and then to other countries of the European Union. The recording industry estimates that the bulk of the industrially manufactured pirated material available in Ukraine originated in Russia. Thus, there is the need for better border enforcement by Ukrainian authorities.

In addition to wide-spread hard copy piracy, there is wide-scale and rapidly growing peer-to-peer hosting and illegal websites located in Ukraine, for target audiences primarily in the countries of Western Europe and the United States, causing significant damage to US copyright industries, including the notorious torrent www.demonoid.com and several well-known paid illegal MP3 sites. These include free and pay-per-download musical and video websites, as well as streaming services.

Broadcasting and public performance piracy is estimated to be over 90%. Despite the fact that the Ukrainian Copyright Act provides for broadcasting and public performance rights, and collecting societies are in place, the overwhelming majority of users in Ukraine - radio and TV stations, restaurants, bars, shopping malls, dance schools, sports clubs, etc. – refuse to pay royalties to the relevant collecting societies. Thus, this is a very substantial problem.

Another on-going problem for the recording industry has been the proliferation of rogue collecting rights societies – such as Oberi'h – which falsely claim “licenses” to repertoire. Oberi'h lost its operating license in a lower court decision last year, and in January 2009, lost its appeal before the Kiev Administrative Appeals Court, to have its license reinstated. This means that Oberi'h is prohibited from operating as a collecting society; this will allow societies that are supported and licensed by the recording industry to strengthen their position in the legitimate marketplace. It is encouraging that the Ministry of Justice – as part of the Memorandum of Understanding Working Group process – has taken a position in support of the legitimate collecting societies, with an aim toward improving the licensing procedures and criteria for collecting societies (requiring societies to have a representative amount of licensed repertoire to be certified). We encourage the Government of Ukraine to work with the copyright industries to criminally prosecute the rogue societies and their operators that claim to offer “licenses” that they do not have, as well as to move against websites that rely, in bad faith, on these false licenses.

In 2008, the motion picture industry (Motion Picture Association of America, MPAA) reported its first-ever case in Ukraine (actually, two cases) against websites offering movies, music and games for pay-per-download. Criminal investigations have commenced in these cases. In the past, the MPAA reports that the only Internet cases brought were against websites offering pirated optical discs for sale (by mail).

One hindrance to effective enforcement against Internet piracy is the Law on Telecommunications (Article 40, paragraph 4 on the "responsibility of operators") which blankly states that Internet Service Providers (ISPs) "do not bear responsibility for the content of the information transmitted through their networks." Additionally, Article 38 states that ISPs can disable end-users from the Internet, or block access to (i.e., take-down) infringing websites only with a court order. In the past, the ISPs (the Internet Association of Ukraine, IAU) – citing this statutory language – have taken the position that rightholders need to go after illegal websites directly, without ISP assistance or cooperation. The copyright industries have, for years, been seeking private agreements (with governmental assistance) with ISPs to work cooperatively to take-down illegal websites and slow illegal peer-to-peer traffic which accounts for 70% of the Internet use in Ukraine. In December 2008, the IAU agreed to work more forcefully with rightholders to reach mutually acceptable solutions to help stem Internet piracy. This is a positive step, further reinforced by a 2008 decision by the Prime Minister to establish a music industry working group, tasked with, among other things, finding solutions to effectively address Internet piracy. The recent Memorandum of Understanding signed between the Ukraine music industry and the Ministry of the Interior to work cooperatively in order to "systematically tackle Ukraine's endemic music piracy" is the first result of this working group. The Memorandum of Understanding provides a "framework" for dealing with Internet piracy and is a very strong statement and positive step undertaken by the Government of Ukraine – its goal is to include the facilitation of regular meetings on solutions to the problem, as well as drafting legislative changes as needed. In addition to this, it is essential that the Government of Ukraine (at the highest levels) encourages ISPs to pro-actively cooperate with rightholders in the fight against on-line piracy. If such cooperation and concrete results fail to materialize, then we would recommend legislative measures to do so.

An example of the problems confronting the industries is one from the Ukrainian recording industry which brought a case in 2007 against a Ukrainian illegal website (www.mp3.ua). At the lower court level, the case was successful. Then, on appeal, the case was later dismissed on procedural grounds, and the clearly-illegal website continues to operate. We urge the Government of Ukraine (Ministry of the Interior) to commence a criminal proceeding against this 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. Now with the 2008 Memorandum of Understanding, and the IAU pledge to work cooperatively going forward, IIPA hopes that Internet piracy will get the attention it deserves and that 2009 will be a year of improved enforcement.

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 (based on its preliminary figures) that piracy rates are at 85% and annual losses last year were at \$308 million.

The hologram stickering law adopted in 2000 failed to become an efficient solution for physical piracy in Ukraine. The eight-year history of this law shows that its inconsistent and haphazard implementation by the government has on many occasions 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, entertainment and business software) for which they have no licenses despite objections from the legitimate licensees. Very often, the holograms are issued on the basis of false contracts and licenses which are not adequately verified. In such instances, pirate products are *de facto* authorized by the state for distribution and cannot be seized by law enforcement officials. Moreover, the problem of false holograms of superior quality exists, leading to the conclusion that the hologram stickers are not protected enough from counterfeiting. Practice shows that one out of every two products seized is labelled with a false hologram. The copyright industries are trying to compete against the pirates, even pricing their products lower (\$5 to \$7 per CD, for example; \$15 to \$20 for DVDs, compared to the pirate price of \$3 to \$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. IIPA recommends that the hologram system be completely revised by making amendments to the Law "On distribution of specimen of audiovisual works, phonograms, videograms, computer programs and data bases" which would bring transparency to the hologram sticker administration procedures and properly enforcing it, with input from rightholders.

All of the copyright industries – music, film, entertainment and business software companies – report problems with the administration of the current hologram stickering system. According to SDIP, this matter is being seriously considered by the Government of Ukraine. The Parliament is in the process of considering a new draft law that would obligate SDIP to publish on its official website information about all current applications for stickers, and to indicate both the names of the applicants as well as the names of all works (CDs) seeking labels. This publication would assist rightholders in tracking applications and could help to prevent the issuance of stickers for pirated discs. The copyright industries support this notion of transparency in the process; it would be a very good step forward to fix the stickering system, but other steps also need to be taken in the proper administration of the program in order to rid it of its current problems.

Entertainment software publishers (Entertainment Software Association, ESA) report particular and ongoing problems with the hologram stickering program. The hologram program, as it has for other industries, has been implemented in a haphazard manner. Stickers are issued to companies with little scrutiny as to the identity of the real rightsholder or controls over the appropriate issuance of such holograms.

The 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.

The major piracy problem for the motion picture industry, (MPAA) is hard-copy piracy of DVDs – often multi-title discs (some with up to 20 films) – sold at the major outdoor markets in Kiev, Donetsk, Odessa, Kharkiv, Dnipropetrovsk and Lugansk. In addition, pirated discs are sold at retail stores and kiosks, which are regularly stocked with new and pre-release material. The illegal material consists of professional pressed discs made in Russia and imported into Ukraine (due to poor border enforcement), as well as discs pressed at Ukrainian (CD and DVD) plants containing games and movies that the plants sometimes claim to be legal or "grey" discs (i.e., made for other markets), but which are illegal. 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 pirated and other product without authorization. Internet piracy is a growing concern of the motion picture industry with several sites offering movies (as well as music and

games) for downloading. In addition, almost every major motion picture released in theaters in Kiev or Dnipropetrovsk was vulnerable to illegal camcording (video recording) in the theaters – these illegal copies then make their way to the Internet. There is no anti-camcording legislation in Ukraine law, which means the police will not act, absent the passage of a law specifying this activity as illegal.

In 2008, the recording industry continued to suffer from pirate optical disc (including CD-R) distribution with estimated piracy levels remaining at around 60% for international repertoire, and losses estimated at over \$35 million (including losses from Internet piracy and mobile phone piracy in Ukraine). In addition, the music industry reports that only about 8% of the market is properly paying broadcasting and public performance royalties. Apart from the thousands of large and small public venues that do not have a license to play music, there are hundreds of broadcasters, including the largest state-owned broadcasters, who also operate without paying any copyright or related rights licenses.

For entertainment software publishers, a continuing concern is piracy at Internet and cyber cafés or “game clubs,” where pirated and/or unlicensed versions of videogame software are in wide use. Piracy of entertainment software persists despite recent efforts by police to initiate actions and raids, and to seize pirated videogames at retail outlets, warehouses, and Internet cafes. Enforcement, unfortunately, stalls at the investigative stage, with officials from the Ministry of Internal Affairs who have been largely uncooperative with most rightsholders. Investigations are unduly lengthy, costly, and non-transparent with little or no information shared with rightsholders about the progress of a case. Some cases, for example, that were first initiated in 2006 against retail operations and warehouses, are still on-going; these cases involve seizures of anywhere from 10 to 2,500 discs (although most cases average seizures of about 40 to 50 illegal discs). Even then, despite long investigations, it is rather common for cases to be simply dismissed or terminated without explanation.

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; some material is exported to Russia (although some illegal videogame product also continues to enter the country from Russia). Pirated entertainment software is generally available at large outdoor markets, through street vendors, and in retail establishments (which claim that the products are, to their knowledge, legitimate since they often bear 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, now that Ukraine is a member as of May 16, 2008.

Optical Disc Piracy and Enforcement: Although there is currently no evidence of large-scale industrial production of pirated 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.

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). Rightsholders 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 right holders against the Rostok plant and CD Master plant in 2004 and 2005 were mishandled by the Ukrainian authorities. The plants should not have been allowed to continue their operations after detailed complaints were filed by the recording industry (IFPI), and the plant owners and managers should have faced criminal investigations and prosecution. However, in the absence of any action against Rostok by the government, the recording industry was forced to take civil (copyright infringement) action against this plant. As described above, these proceedings have proven

to be highly unpredictable and unsatisfactory for rightholders. Civil proceedings (with all of their procedural hurdles and obstacles) should not have been the primary tool to stop this illegal activity – this could more effectively be accomplished with proper criminal proceedings.

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, nine optical media disc plants (producing CDs, DVDs or both) in operation in Ukraine – a total of 27 CD and/or 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 70 million units per year, which far exceeds the estimated demand for legitimate CDs and DVDs in Ukraine.

Raids, Seizures and Other Enforcement Actions in 2008: The Government of Ukraine reported that, in the first 11 months of 2008, there were 998 intellectual property cases considered in the courts – 442 of which were for copyright and related rights violations, and 500 were for cases concerning the illegal distribution of optical discs. Additionally the government reported 646 IPR-related criminal cases (under Criminal Code Art. 203-1) were initiated which lead to some sanctions in 2008 (not specified in the report). Separately, 5,198 administrative protocols were issued based on intellectual property violations including the distribution of illegal audio and video tapes as well as discs. Over one million units of pirated audiovisual products were seized with a total value of 19 million UAH (US\$2.4 million), and counterfeited trademark products with a total value of 7.7 million UAH (US\$974,000). A total of 91 illegal underground production facilities were closed down, 48 of which produced pirated audiovisual products. Further, four Internet sites were raided -- two of these were sites selling optical discs and the other two against servers selling downloadable content (including film and music materials). However, the copyright industries reported that no criminal case (under Article 176 or 203-1 of the Criminal Code) resulted in an actual sentence served (even for repeat offenders).

The State IP inspectors reported that, in the first 11 months of 2008, 665 companies were inspected, including CD/DVD retailers, TV and radio companies, computer game clubs, and public performance outlets. These inspections resulted in 366 administrative sanctions, and the seizure of over 200,000 units of pirated product with a total estimated value of 3.6 million UAH (US\$455,000). The government further reported that, in these cases, the Administrative Code resulted in court-ordered seizures and the destruction of pirated goods. Last, the State IP inspectors carried out 74 inspections of Optical Disc plants and facilities in the first 11 months of 2008, according to the government (although they did not provide information of the number of surprise inspections, or the seizure and disposition of material at these plants and facilities). The copyright industries note that, at present, there are only 18 State IP inspectors nationwide for all IP matters. As such (and for a country of 46 million), we recommend that the government fund additional resources for IPR enforcement.

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. 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 coupled with severe enough penalties to deter these crimes. As in years past, almost all of the actions were directed against small-scale sellers and distributors.

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). However, the current threshold at 5000 UAH shows that any monetary threshold can serve as a bar to effective criminal enforcement. That is because it is so difficult – especially for Internet piracy matters – for law enforcement agents and prosecutors (and the

courts) to calculate the value of illegal file-sharing; thus, the threshold serves as a bottleneck to initiate criminal investigations and prosecutions as there is no official methodology for proving damages suffered by rightsholders for unauthorized online distributions. Additionally, the enforcement officials have applied the existing threshold on a per-rightsholder basis, which means that when illegal material is seized, if the material for each rightsholder does not exceed the threshold, the criminal case does not proceed. As a result, the hoped for criminal, rather than administrative proceedings, have not yet materialized. In addition, IPR-related offenses continue to be hampered by procedural problems such as the use of expert evidence. Additionally, there should be clear provisions for the automatic criminal prosecution of repeat offenders. Last, there needs to be clear sets of rules guiding procedure, and as needed changes in the Criminal Code or Criminal Procedure Code to facilitate better investigator and prosecutorial activities to avoid delays and case dismissals (as a result of delays), and practice guidelines issued by the Supreme Court for judges to develop expertise in Internet (and other IPR) cases. Although rightsholders and many Ukrainian government officials recognize the need for these amendments, there has been resistance from some in the Ministry of Justice, which is unfortunate.

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.

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 pirated products. According to MPAA statistics, in 2008, more than 985 criminal cases concerning IP crimes were initiated in Ukraine, with administrative sanctions applied against 5,568 individuals. In 2008, more than 1 million optical discs were seized by the police, almost all of which were copies without hologram stickers.

One ESA member company reported that in 2007, there were 20 cases involving its pirated videogame 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 entertainment software publishers). Unfortunately, of the 20 cases initiated in 2007, 14 remain pending with a prosecutor; two cases were initially dismissed, but on appeal were remanded to the prosecutor's office for further investigation. In 2008, ESA learned of only three new cases that were initiated by the police against retail outlets and warehouses. Enforcement is generally slow with investigations unduly lengthy in duration. Although the procedures call for an investigation (conducted by investigative officers of the Ministry of Internal Affairs) to be completed within 2 months, investigators can, and do delay cases for years, then terminate the cases – after 3 years – citing an inability to find culpability. For example, one ESA member company reports that a case initiated in January 2008 (involving over 2,500 seized games) is still pending due to pre-trial investigative delays at the Ministry of Internal Affairs, whose investigators exhibit a general unwillingness to proceed with criminal cases. Similar delays occur at the prosecutorial level. Court procedures – should a case get to court – are generally more efficient (typically the court issues a verdict after two to four hearings), although deterrent penalties are not meted out. For example, most court cases result in (up to two years of) suspended sentences. In 2008, one ESA member company reported that four of its five cases handled in 2008 resulted in a criminal verdict with damages awarded, but with suspended sentences. (One case was dismissed by the court but the court did order the destruction of the pirated product). The courts usually order the destruction of the illegal material after a verdict is rendered, but when cases do not proceed to court, the seized pirated product is routinely returned to the infringer, even when the rightholder's attorney requests the destruction of the clearly-illegal product. The pirated product then typically re-enters the retail market.

The copyright industries provided the following examples of raids, seizures and criminal investigations undertaken in 2008, including some against web operations:

- On February 20, 2008, the antipiracy organization (UAPA) assisted the security services and police in the investigation and closure of one well-known website (www.uadvd.com.ua). This website, first launched in 2006, distributed new release and pre-release motion pictures.
- On August 18, 2008, in Kiev, the police in cooperation with UAPA, raided a DVD-R laboratory. The raid resulted in the seizure of 12 DVD-R burners (with a capacity of 200 discs a day), plus three color printers,

2,000 blank DVD-Rs, 10,000 inlays, 2,000 jewel boxes, and 5,000 recorded DVD-Rs. A criminal case has been opened in accordance with Article Art. 203-1 ("Illegal distribution of optical discs without hologram stickers") of the Criminal Code.

- After months of joint cooperation and investigation with UAPA and the Economic Crime police in the city of Zaporozie, in November 2008, the police raided and closed a Ukrainian Internet website (www.link.zp.ua). The website (a content hosting site) offered users movies, music and games for downloading on the bases of subscription fee (a pay-per-download system). The service was run by a company called "KM LINK" in Zaporozie which maintains, develops and assembles computer networks, as well as acting as a service provider for downloading content. This was the first action undertaken by law enforcement in Ukraine against a pirate downloading website (all prior actions were against on-line sites selling hard-copy discs). A criminal case has been commenced (with the help of UAPA). Analyses of the servers revealed about 10,000 movies, music and games titles that were being offered as part of the download service. The police are proceeding with a criminal case in accordance to Article 176 of the Criminal Code. The company (KM LINK) employed 10 people; the person in charge of running the IPR unit responsible for the website was taken into custody and interrogated, and all the employees have been told that they are part of the investigation underway.
- Last, one of Ukraine's biggest sites (boasting over 1.5 million users), www.infostore.org, was closed by the police in December 2008. This site hosted child pornography which was the principle reason for the raid; an investigation is ongoing.

Internet Piracy: The rise in Internet piracy has finally drawn the attention of the Government of Ukraine with the establishment of the Music Industry Working Group and the subsequent signing of the Memorandum of Understanding between the music industry and the Ministry of the Interior in 2008. The motion picture industry would also like to sign a similar memorandum with the ISP association (IAU) to, among other things, set procedures for notice and takedown of illegal material. This is also a priority for the software industry – both to get cooperation with the ISPs, and to establish the rules of liability for users (and distributors) of software. It is estimated that there are over 400 ISPs in Ukraine and that over 150 of these support sites offering pirated DVDs (for, on average, US\$2 to \$5). In late 2007 and again in early 2008, for example, actions against ISPs, with cease and desist letters, showed that it is possible to act against Internet piracy, and 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. It is hoped that this issue, at least for the music industry, can be resolved in the new Working Group. The software industry, for example, reports that the lack of cooperation with the ISPs is the reason it has – temporarily – abandoned its focus on Internet piracy and focused instead on hard-copy piracy. In general, the copyright industries report that the lack of clear prosecutorial and court procedures for Internet-related cases is hampering the ability of the enforcement officials to act effectively against digital piracy. Or they report that existing procedures are too difficult to be used effectively. For example, the procedures require that prosecutors must know the exact name of the website owner and the local network user(s) to commence a case. IIPA continues to recommend the adoption of guidelines and more effective procedures for police, prosecutors and judges for these crimes.

Ineffective Border Enforcement: Ukraine still fails to properly police its borders. As a result, 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 – continues. There have been some minor seizures by customs authorities of CDs and other materials over the past several years, but cooperation with right holders is still not ideal and activity has not been nearly enough to stem the flow.

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 (MPAA), 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 pirated 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 2007, \$44.5 million worth of Ukrainian goods benefited from the GSP program. In the first 11 months of 2008, that figure was over \$93 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 now that Ukraine is a member of the World Trade Organization) are: (1) amendments to the Criminal Procedure Code to give the police proper authority to commence investigations *ex officio*; (2) amendments to the Customs Code (which was revised in November 2006 to give clear *ex officio* authority) to repeal the restrictive “commercial purpose” threshold and the onerous registration and fee requirements for IP-related materials; (3) the adoption of an ISP responsibility framework that lays out the role and responsibilities of ISPs with respect to cooperative efforts with rightholders in addressing Internet piracy; (4) the addition of key administrative remedies; (5) a major overhaul or abolition of the hologram sticker program; and (6) criteria for collecting rights societies (so that, only organizations with a relevant repertoire of material can be certified). 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. The Government of Ukraine has 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, as noted, 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” should 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. 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\$321) to close to 5,076 UAH (US\$642) – 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\$167) (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\$257) for the first application; 1,015 UAH (US\$128) 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.

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, and there were no new developments in 2008.