

UKRAINE

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2010 SPECIAL 301 REPORT ON COPYRIGHT ENFORCEMENT AND PROTECTION

Recommendation: IIPA recommends that Ukraine be retained on the Watch List in 2010, and that such a listing be coupled with a U.S. Government out-of-cycle review (OCR) for six months to assess the progress of whether the Government of Ukraine has accomplished the following urgent measures:

1. Enact Copyright and Criminal Code Amendments. Legislation to amend the Copyright Law and Criminal Code to address a number of deficiencies identified in this submission is currently pending in the Verkhovna Rada of Ukraine (draft laws # 3503, 4073 and 4439). Among other things, if enacted, these bills would fix existing shortcomings and make it possible to effectively prosecute corporate end-user piracy (use of unlicensed software in a business environment) and to stop the distribution of pirated works over the Internet. These amendments should be enacted without delay during the current parliamentary session.
2. Implement Government Software Legalization. The Government of Ukraine should take the following steps to implement the resolution of the Cabinet of Ministers regarding legalization of software in state executive bodies: (1) in the 2010 state budget (which is still in draft form) allocate to each Ministry dedicated funds for software legalization that are sufficient to meet each Ministry's software needs, and to perform software audits, in order to eliminate the use of unlicensed software in the public sector; (2) within three months, develop and make public an action plan for software legalization that identifies the steps that will be taken to implement the resolution of the Cabinet of Ministers, the individual who will be responsible for coordinating the implementation, and the individuals within each Ministry who will be responsible for carrying out that Ministry's part of the plan; and (3) put the plan into operation.
3. Increase Dedicated Enforcement Personnel. Considering the alarmingly high piracy rates in Ukraine, the current number of 130 officers serving in the IPR units of the Economic Police Departments is simply not sufficient for conducting effective and systematic actions to deter piracy. This number should be doubled to 260 officers, and these officers should be provided with effective training. Similarly, the current number of 19 state IP inspectors in the State Department of Intellectual Property (SDIP) empowered to combat illegal trade of pirated products throughout the 25 regions of Ukraine is inadequate. The number of inspectors should be increased to at least 25, so that each region has at least one dedicated inspector.
4. Increase Enforcement Actions. Law enforcement agencies should significantly increase the number of enforcement actions against all types of copyright theft in order to serve as an effective deterrent. Moreover, the main focus of law enforcement fighting IP crimes should be immediately shifted from targeting small companies and private individuals selling pirated discs, to addressing Internet piracy and corporate end-user piracy on larger scale.
5. Criminally Prosecute Rogue Collecting Societies and Website Operators. The enforcement officials in Ukraine should: (a) criminally prosecute the principals of the well-known rogue collecting societies (noted in detail in the report) that claim to offer "licenses" that they do not have the authority to grant; and (b) immediately takedown illegal websites that rely, in bad faith, on these false licenses, and prosecute the owners of such sites. The Government of Ukraine need not await the final outcome of accreditation (of collecting societies) to undertake proper criminal enforcement of those clearly engaged – under the Copyright Law – with illegal activity. The criminal case and criminal investigation launched by prosecutors against Oberih should be completed and forwarded to the courts within six months. Regarding the illegal



websites, the owners of the numerous pay-per-download and BitTorrent sites (mentioned in detail in this report) should be criminally prosecuted. Additionally, the Government of Ukraine should launch a series of roundtable discussions between rightsholders and the Internet Association of Ukraine (including the largest ISPs) to work out a voluntary solution on cooperation (and culminating in a Memorandum of Understanding). If a voluntary solution cannot be reached, the Government of Ukraine should propose amendments, no later than September 2010, to the Law on Telecommunications (in cooperation with rightsholders) to promote a fair and effective response to online piracy.

6. Increase Enforcement Against Cable Retransmission, Broadcast and Public Performance Piracy. Based on the existing Memorandum of Understanding between the Ministry of Interior and rightsholders (within the music industry), the central and regional police economic crime units should provide details to rightsholders on how they are implementing the creation of a database of cable operators and public performance venues who commercially use phonograms but who have, to date, refused to pay royalties to authorized collecting societies. In addition to creating that database, commercial users should be inspected, and unauthorized users should be subjected to administrative and criminal prosecutions. IIPA recommends that every regional economic crime unit should report (on a monthly or quarterly basis) on the number of inspections undertaken, as well as evaluate the piracy rate for each region. The objective of this enforcement effort should be to bring piracy levels for these activities currently at 90% down to at least below 50% by the end of 2010.

7. Enforcement Against Unauthorized Holograms. While amendments to improve the current hologram sticker administrative procedure are pending (or in limbo), the Government of Ukraine should immediately intervene to stop the current issuance of hologram stickers for unauthorized MP3 musical releases (including releases by well-known international recording artists). At present, hologram stickers on obviously pirated content are being issued by the Government of Ukraine based on fraudulent contracts with unknown foreign (especially, Russian) firms. The Government of Ukraine should act immediately to terminate this practice, while awaiting administrative or legislative changes in the law to prevent such fraudulent practices and the issuance of holograms to unauthorized distributors.

Executive Summary:¹ Copyright theft in Ukraine is both rampant and intractable with piracy rates for some industries exceeding 80% (as they have for many years). In the case of business software, for example, the Government of Ukraine blatantly uses significant amounts of unlicensed software. For all of the copyright industries, enforcement remains weak. There has been a sharp increase in peer-to-peer and website-based Internet piracy in Ukraine in the past few years. In fact, Ukraine is now one of the few countries in the world (along with Russia) with pay-for-download piracy of music and film, as well as the source of two of the world's top fifteen BitTorrent systems, with sites such as torrents.ua advertising openly on billboards on the streets of Kiev. All of these factors continue to undermine the development of a healthy legitimate market in Ukraine. End-user piracy and digital piracy exist alongside physical piracy in Ukraine's many open air markets and street stalls where illegal copies of recorded music, films, games and software are readily available throughout the country. Additionally, irregular and insufficient criminal and border enforcement is causing physical material to flow freely in Ukraine, as well as from Russia and other territories. IIPA recommends that the Government of Ukraine re-double its efforts on-the-ground, and that it work to fix the investigative and prosecutorial systems, while also undertaking other legal reforms to improve enforcement, especially criminal enforcement in Ukraine against digital and hard-copy pirates. The U.S. Government should undertake a six month out-of-cycle review to assess the progress in Ukraine of accomplishing the important steps set out in this report.

¹ For more details on Ukraine's Special 301 history, see IIPA's "History" appendix to this filing at <http://www.iipa.com/rbc/2010/2010SPEC301HISTORICALSUMMARY.pdf> See also the previous yearly country reports at <http://www.iipa.com/countryreports.html>.

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, the Government of Ukraine should make appropriate changes in current procedural law and undertake aggressive enforcement against Internet piracy including Internet website takedowns, as well as raids and seizures of Internet pirate operations such as BitTorrent systems, in addition to taking steps (raids and seizures) against hard-copy pirates. The Government of Ukraine should follow these actions with criminal prosecutions and convictions, including the imposition of deterrent penalties against those involved in web-based and retail piracy and all other types of commercial piracy – that is, against digital network operators, as well as against physical pirate sites by prosecuting stall owners and operators, suppliers, and any large-scale distributors of pirated product. One way to accomplish this is to act on the Memorandum of Understanding signed in 2008 by: (1) making it a priority of enforcement agencies, prosecutors and courts to move decisively and effectively against Internet pirates; (2) engaging Internet Service Providers to cooperate more actively with rightholders on enforcement (something they agreed to do for the first time in 2008); and (3) acting against illegal peer-to-peer services. In addition, the Government of Ukraine should move more aggressively against on-line public performance, broadcasting and all other forms of Internet piracy, especially including the rogue collecting societies (like UPO AVTOR) and websites illegally selling music – with a combination of legal reforms and improved enforcement.

Second, the Government of Ukraine should redouble its efforts against hard-copy pirates and especially organized criminal syndicates (engaged in both on-line and hard-copy piracy). These pirates are operating with impunity, because there have been few deterrent criminal sanctions. Large-scale operators and repeat offenders (especially, of physical pirated materials) continue to be treated lightly by the courts despite the fact that this issue has been a long-standing part of U.S.-Ukraine government discussions. In lieu of criminal prosecutions, the Government of Ukraine has to date, otherwise relied heavily on non-deterrent administrative penalties.

Third, the Government of Ukraine should amend its law to make camcording illegal (under the Criminal Code), and then move decisively – with criminal prosecutions – against camcording operations in Ukraine.

Fourth, the Government of Ukraine should systematically address its serious open air and street market piracy, focusing on the big outdoor markets, 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.

Fifth, the Government of Ukraine should properly implement the Customs Code amendments, in force since February 10, 2007, which provided customs officers with *ex officio* authority. The adoption of these provisions was a positive step; however, in order to give effect to these amendments, the government should expand the specialized intellectual property rights unit within the customs service, and 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 that are able to act locally in a quick and effective manner.

Sixth, Ukraine's hologram system should be substantially improved or repealed. The system lacks transparency (even after 2008 attempts to fix it), has serious loopholes, and is not properly enforced, resulting in wide-spread issuance of holograms for counterfeit copies based on forged documents. 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, if this is not possible, it should eliminate the system entirely.

Seventh, 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.

Eighth, 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, distribution and use 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.

COPYRIGHT ENFORCEMENT IN UKRAINE

The Nature of Piracy in Ukraine in 2009: The last few years have seen the rapid growth of 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 sites demonoid.com and free-torrents.org, as well as several well-known paid illegal MP3 sites, such as: mp3fiesta.com, mp3city.com.ua, lavamus.com, mp3ua, boxmp3.net, Mp3vim.com, and wermp3.com. These include free and pay-per-download musical and video websites, as well as streaming services. Ukraine is also the source of two of the world's largest BitTorrent systems (number 9 and number 11 – worldwide).

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 years. The hard goods piracy problem is also prevalent in some retail chains, many of which openly sell pirate product alongside legitimate product. In 2009, the motion picture industry, for example, saw an increase in the number of pirate discs. In Kiev, outlets with pirated discs are located in metro stations, bus stations and retail centers (and illegal activity at these sites only ebbs on the eve of planned police operations).

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 2009.

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 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. In early 2010, in Lugansk, the police conducted a raid against a network of shops with a huge organized pirate distribution system. This resulted in the seizure of one million discs; a criminal investigation is ongoing. One local anti-piracy organization (UAPA) notes that organized criminal groups in Odessa, Donetsk, Zytomir and Kiev have been identified. 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 a need for better border enforcement by Ukrainian authorities.

A persistent problem for the recording industry has been the proliferation of rogue collecting rights societies – such as Oberih and VAASP – which falsely claim “licenses” to repertoire, and the inability for legal societies to properly operate in Ukraine. In 2009, the Ministry of Education and Science (with approval from the Ministry of Justice) issued an executive order (Order #1175) for the accreditation of collecting societies, but providing that there could be no more than one authorized collecting society for each copyright sector – thus, one for broadcasting rights, one for public performances, etc. The executive order delegated the authority to implement the accreditation of organizations to the State Department of Intellectual Property (SDIP), and the executive order noted that the authorization of any particular organization would be based on the majority of the national and international repertoire represented. Two legitimate organizations – the Ukrainian Music Alliance (UMA) – broadcasting – and the Ukrainian Music Rights League (UMRL) – public performances – legitimately represent over 80% of the domestic and international repertoire for music. They were both properly accredited by SDIP. However, in August 2009, Oberih and VAASP (both discredited by the process and earlier case law, as well, their representation of less than 1% of legal repertoire), brought a legal challenge to the accreditation process in the Administrative Court of Kiev. When a Ministry of Education and Science representative testified that the delegation of authority to SDIP was improper, the court ruled against the accreditation process. The case is now on appeal at the Appeals Court of Kiev (with the original order remaining valid, pending a ruling from this court). There is no known time- table for a final decision. Regardless of the delay in the accreditation process, 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. The government need not await the final outcome of accreditation to undertake proper criminal enforcement of those clearly engaged – under the Copyright Law – with illegal activity. One positive step has been the launch, by prosecutors, of a criminal investigation into the activities of Oberih, the rogue collecting society. IIPA is hopeful that enforcement officials will conclude their investigation and properly prosecute those responsible for Oberih’s illegal operations (in addition to taking action against other rogue collecting societies, such as, UPO AVTOR, which license pirate websites).

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 – cable operators 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.

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). Unfortunately, in one case, against an illegal website (link.zp.ua), a criminal prosecution was ended (in May 2009) by the court because of “amnesty” provisions. Several criminal cases in Odessa, Sevastopol and Zaporozie were closed without disposition (i.e., a conviction) because criminal investigations ran on for several months after illegal servers were seized without further action.

As previously noted, 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. While some ISPs will delete links upon request, most refuse rightholders request and will demand court orders. In December 2008, the IAU agreed to work more forcefully with rightholders to reach mutually acceptable solutions to help stem Internet piracy. This was 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. Unfortunately, these efforts, and others between the Government of Ukraine and various copyright industries have stalled (despite the memoranda of understanding). IIPA continues to recommend that the Government of Ukraine (at the highest levels) encourage ISPs to pro-actively cooperate with rightholders in the fight against on-line piracy. If voluntary cooperation and concrete results fail to materialize, legislative measures to promote fair and effective responses to online piracy are recommended. Furthermore, procedures, subject to police, civil or criminal court approval, whereby ISPs can disclose information both to law enforcement officials and to private right owners for the purpose of detecting and taking action against piracy, should be introduced.

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 (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 continue to 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. The Government of Ukraine should ensure that these first cooperative efforts are further improved and built upon in particular, in view of the 2008 Memorandum of Understanding, and IAU's pledge to work cooperatively going forward.

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 the latest official information from the SDIP (sdip.gov.ua/ukr/help/statti/pcweek/), the software piracy rate in state agencies exceeds 70% (noting that the rate is coming down at less than 5% a year). As an example, about 53% of the copies of Microsoft Windows in use by central government bodies are unlicensed, and at least 74% of the copies of Microsoft Office in use by such bodies are unlicensed. Efforts by rightholders to get the Government of Ukraine to address this problem have yielded promises, but no action. 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 \$208 million.

The hologram stickering law adopted in 2000 failed to become an efficient solution for physical piracy in Ukraine. The 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. The latest example of the inefficiency of the hologram system is the mass appearance throughout the country in retail outlets of DVDs with Xbox games marked by original holograms – Xbox game consoles and related products are not available legally in the Ukrainian market at all because no rightsholder authorized the importation or distribution of their products in Ukraine. 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, for some industries, one out of every two products seized is labelled with a false hologram, and for others (for example, the motion picture industry), all illegal copies seized had false holograms. The copyright industries are trying to compete against the pirates, even pricing their products lower (\$5 to \$7 per CD, for example; \$10 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” with the close cooperation of rightsholders in order to bring transparency to the hologram sticker administration procedures and to properly enforce it.

All of the copyright industries – music, film, entertainment and business software companies – report problems with the administration of the current hologram stickering system. The Parliament has, for several years, considered but never adopted 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 and DVDs) seeking labels. This publication would assist rightholders in tracking applications and could help to prevent the issuance of stickers for pirated discs (for example: “legal” holograms have been found during raids). 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. The Government of Ukraine continues to issue hologram stickers without appropriate assurances that the hologram request is from a legitimate rightsholder or its authorized distributor, and without confirming the products that will bear the holograms are legitimate. One ESA member reports that Ukrainian officials continue to issue holograms to unauthorized distributors despite having been provided with a legal declaration listing the ESA member’s titles and identifying the authorized distributors for those companies.

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, and 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 camcording of theatrical motion pictures with an almost equal number of illegal camcorded motion pictures coming from Ukraine as originate in Russia. These illegal copies then make their way to the Internet. There is no explicit 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 2009, efforts by the Government of Ukraine to adopt clear criminal sanctions were stalled (after legislation was introduced in the Rada in February 2009); as a result, proper enforcement languished. Internet piracy is also a very serious concern for the motion picture industry with several sites offering movies (as well as music and games) for downloading and streaming. Every quarter, the anti-piracy organization UAPA sends the central police a list of infringing sites and infringing links and the central police then disseminate this information to the regional offices. Unfortunately, ISPs frequently do not respond to police requests to takedown or block access based on these notifications, and instead demand a court order. For instance, an ISP in Odessa refused to cooperate with known infringing activity and refused to block torrent.lt and linkomania.net, despite a series of police requests. For the motion picture industry, hard-copy piracy of DVDs persists. These DVDs and DVD-Rs are often multi-title discs (some with up to 20 films) – sold at the major outdoor markets in Kiev, Donetsk, Odessa, Kharkiv, Dnipropetrovsk and Lugansk, as well as in other cities in Ukraine. 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.

In 2009, 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. 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 cable operators and 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).

The book publishing industry continues to face the following forms of book piracy in Ukraine: illegal photocopying, print piracy, and the recording of audio CDs (for English language teaching courses) at a point-of-sale (meaning that a customer requests audio materials and on-site, the relevant course book and material is recorded on a hard-drive for the customer). Although the problem remains significant, one publisher did report good cooperation from law enforcement authorities. After the publisher initiated a complaint against copy shops, the police issued a

warning letters and then conducted raids against the shops. The raided shops signed the warning letters and appear to have withdrawn all the pirated books subject of the complaint from their shelves. Unfortunately, despite the fact that illegal photocopying occurs rather openly, enforcement action is taken only when a rights holder initiates a complaint.

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 – necessary to combat digital and hard-copy piracy. For hard-copy piracy, the weak criminal enforcement system, 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.

Internet Piracy: The Government of Ukraine has the past two years agreed to working groups and industry agreements to work to tackle the problem of Internet piracy – both the server-based and peer-to-peer (BitTorrent) piracy – and to work on getting Internet Service Provider (ISP) cooperation. In fact, many of the websites offering pirated material of films, music, videogames and business software, are thriving in part because of the support of local Internet Service Providers. The music, film and software industries, in particular, have sought to get better cooperation with ISPs via agreements signed either with the Government of Ukraine or directly with the ISPs. In 2008, a Memorandum of Understanding was signed between the music industry and the Ministry of the Interior. The motion picture industry is also seeking 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 procedural problems 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. Another initial investigatory procedural hurdle is failure of ISPs to cooperate with law enforcement agencies and to provide available information on users suspected in the distribution of pirated products (the police claim they cannot initiate criminal proceeding absent this information). In December 2009, amendments to the Law on Telecommunications (draft # 3271) were proposed which were intended to assist the police in conducting Internet crime investigations by providing subscriber information. Unfortunately, these amendments were defeated in the third reading of the bill, in large measure due to ISP objections. The business software industry, for example, reports that legislative deficiencies and lack of cooperation with the ISPs thwart any attempts to focus on enforcement against Internet piracy.

The recording industry reports that paid download sites remain one of the largest sources of piracy in Ukraine. There are now over 30 Ukrainian or Russian illegal pay-per-download digital musical sites. They are all based on the same business model as the original Russian *allofmp3.com* site, with professional looking interfaces capable of deceiving unfamiliar users into believing they are legal sites. Some of these websites offer incentives such as free give-aways in return for users making monetary “deposits” onto the sites. One popular Ukrainian website -- *mp3fiesta.com* – sells albums for \$1.

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.

Raids, Seizures and Other Enforcement Actions in 2009: The Government of Ukraine reported that, in the first 9 months of 2009, 1,010 IPR crime cases were commenced; in that same period, administrative sanctions were imposed against approximately 5,900 individuals, and about 1.5 million optical discs were seized.

The Government of Ukraine further reported that, in the first 11 months of 2009, there were 686 inspections undertaken by the “state inspectors on intellectual property,” which resulted in 394 administrative actions (which were forwarded to the courts for further action). Of these actions, 49 involved orders to seize material (220,000 items in total worth \$4.37 UAH, or \$545,500) and 42 criminal cases were initiated. The government did not report on the disposition of these cases.

The copyright industries note that, at present, there are only 18 State IP inspectors nationwide for all IP matters where SDIP is engaged. 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 against distributors of counterfeit discs without rightholder complaints. This positive step however, has not led to the type of effective enforcement envisioned. In actuality, it is not possible to open a criminal file (per Article 176 of the Criminal Code) without a complaint of the rightholder. So, even with an upsurge in raids and seizures, 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.

The business software industry (BSA) reported 311 *ex officio* end-user piracy raids resulting in 126 criminal cases commencing; of these, 58 cases were sent to the courts for their consideration. There is no additional information on the disposition of the criminal investigations or cases.

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 8690 UAH (up from 5000, with inflationary increases as of January 2010) 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 rightholders for unauthorized online distributions. Additionally, the enforcement officials have applied the existing threshold on a per-rightholder basis, which means that when illegal material is seized, if the material for each rightholder 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, 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 rightholders and many Ukrainian government officials recognize the need for these legislative 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., and in 2009, the Government of Ukraine did, for the first time, initiate (several) criminal cases classified as organized crimes. Criminal sanctions (in force in 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 2009, more than 1,010 criminal cases concerning IP crimes were initiated in Ukraine, with administrative sanctions applied against 5,900 individuals. In 2009, more than 1.5 million optical discs were seized by the police, almost all of which were copies without hologram stickers.

In 2009, the ESA was aware of only three new cases that were initiated by the police against retail outlets and a game café. 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. The ESA reports that, unfortunately, it is common for the Ministry of Internal Affairs to refuse to proceed with investigations or to transfer cases to prosecutors, even when large volume seizures are involved. Similar delays occur at the prosecutorial level. Once a case is referred to a prosecutor, often the prosecutor decides to simply terminate the case or return the case to investigation, thus delaying the procedure further. 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. 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. In 2009, Ukrainian tax authorities exercised enforcement authority, and initiated several cases against retail pirates. These cases initiated by the tax authorities are pursued as administrative actions and tend to move more quickly than criminal cases. However, actions brought by the tax authorities are often re-classified as criminal cases, resulting in further procedural delays, and increasing the likelihood that a case will be dismissed. The ESA is open to the tax authorities playing a role in copyright enforcement, but it is important that this new trend not become subject to the same procedural delays that undermine criminal enforcement efforts.

The copyright industries provided the following examples of raids, seizures and criminal investigations undertaken in 2009:

- On February 12, 2009, a professional camcorder was caught by Leningrad Theater personnel attempting to camcord the film "The Confessions of a Shopaholic" – this was the first ever arrest of a camcorder. The case resulted in a fine and the confiscation of the video camera.
- On December 3, 2009, professional camcorders were caught in a Kiev cinema by theater personnel attempting to camcord the film "Anti-Killer 2" – a Russian film. The thieves were using an expensive high definition drive camcorder with a stabilized zoom lens. Six individuals were involved in the camcording but only two were detained, and unfortunately, in January 2010, a criminal case against the individuals was "denied," underscoring the need for legislative changes to the law to stop camcording.
- On October 15, 2009, police, with the assistance of the anti-piracy organization (UAPA), raided a warehouse in Kiev after months of deliberations. They confiscated 140,000 DVDs, 130,000 polygraph inlays, 135,000 DVD jewel boxes, 5,000 fake hologram stickers, 2 PCs and 1 notebook full of information (logs) about distribution activity throughout Ukraine.
- On November 25, 2009, police in Kiev raided a warehouse seizing 150,000 optical discs containing film, music and videogames, plus approximately 12,000 counterfeit hologram stickers, 3 PC and a notebook, 2 printers, hundreds of stampers for optical discs and hundreds inlays in electronic files. This raid and the raid of October 15 were both undertaken against the same distribution organization operating in Ukraine.

- On January 22, 2010, police in Lugansk conducted a massive regional operation against a large group of retailers of illegal material. This network of retailers owned approximately 15 shops, all used to distribute both legitimate and pirate films, videogames and software. During this operation, more than 1 million optical discs without hologram stickers were seized. These consisted of optical discs containing four to six films per disc, and included all newly released movies, many of which are still in theaters, such as "Avatar," "Alvin and the Chipmunks 2," "Sherlock Holmes," etc. This raid also uncovered the location of several warehouses used to store illegal discs and as well as information about the group's distribution network and plans.
- The recording industry also reported several raids in Kiev where pirated DVDs and CDs, smuggled from Russia via trains to a storage facility were seized (140,000 infringing copies in one instance, 149,000 in another). Additionally, a clandestine manufacturing operation was raided (resulting in the seizure of over 26,000 optical discs and 387 CD/DVD burners were confiscated along with over \$267,000 and UAH 80,000 in cash – a criminal investigation per Article 203-1 of the Criminal Code is ongoing; there was a raid near Odessa resulting in the seizure of 93,000 pirated optical discs and the launching of a criminal case; and, a raid in the oblast (region) of Rivne in which 33,000 pirated discs were seized, along with CD and DVD burners, computers, artwork and packaging devices (a criminal case is ongoing).

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). Rightholders report good cooperation from and with this unit. Unfortunately, the division is woefully understaffed, with just 130 officers throughout the entire country. In 2009, a Cyber Crime Unit was created within the Ministry of the Interior but it will not focus on any copyright piracy issues.

In November 2009, a multi-agency order was signed into law to improve IPR protection. The order is called: "On Establishing a Program of Coordinated Actions of Law Enforcement Agencies and Supervising Authorities on Counteraction of Illegal Manufacturing, Distribution and Realization of Audio and Video Products, Optical Discs and Other Objects of Intellectual Property and for the Protection of Rights of UEFA" (# 1055/491/753/1120/656/52, November 24, 2009). The order was signed by the Police, Customs, Tax, the Ministry of Culture, the Security Service, the Ministry of Education as well as representatives of Microsoft (Ukraine), the BSA, the Music Association and UAPA.

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. It is estimated by the recording industry (the International Federation of the Phonographic Industry, IFPI) that the total production output of the Ukrainian plants in 2009 was 23.5 million units.

Ineffective Border Enforcement: Ukraine still fails properly to police its borders because Customs authorities are not sufficiently engaged in enforcement measures. 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. At least one industry reports that virtually all of the material is Russian-made. There have been some minor seizures by customs authorities of illegally produced CDs and other pirated 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. The recording industry continues to report serious problems with Customs because they do not stop the importation of blank media for which a levy has not been paid. The State Customs Service of Ukraine (SCSU) has the authority to stop importations in violation of the law. Ukrainian law provides for the payment of a levy on blank media (e.g. CD-Rs) to compensate for private copying; the levies are to be paid to UMA, a collecting society of rightsholders. Unfortunately, the SCSU is not, in practice, stopping imports for non-payment of the levy. Moreover, SCSU has no legal obligation to collect and share data on its collection of imported blank media. As a result, UMA cannot sue individual importers for non-payment of the levy.

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 persist. Waiting for rightholders to file complaints against hard-copy piracy in each instance 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 2009, \$53.6 million worth of Ukrainian goods benefited from the GSP program; in 2008, that figure was over \$105 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 rightsholders in

addressing Internet piracy; (4) the addition of key administrative remedies; (5) a major overhaul or abolition of the hologram sticker program; and (6) clear criteria for the operation of 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 a number of problems remain, especially in the sphere of the collective management of rights. A major shortcoming is the accreditation of non-representative collecting societies which have been allowed to carry out collections on behalf of all music rightsholders (including foreign rightsholders) when they do not control any "volume of rights" by legitimate negotiated direct agreement with rightsholders. One order of the Ministry of Education and Science (Order #1175) was intended to address this problem, but this administrative reform is not a substitute for the needed Copyright Law amendments (and it suffered significant setbacks by the courts as described above in this report). What is needed is a more comprehensive reform by legislation. In particular, the copyright industry-supported draft bill # 3503 proposes amendments to the existing copyright law, as well as other relevant legislation (in particular, it proposes to amend Article 176 of the Criminal Code to extend its application to cases of digital piracy and illegal public performance). However, the recording industry is particularly concerned by the progress in the Rada of two competing bills (draft # 4451 and 2451), which if adopted, would worsen the treatment of copyright and neighboring rights law in Ukraine, harming the recording industry, and reversing some of the positive developments initiated by the SDIP for the recording industry, at an administrative level. Moreover, collective management should be a private, not a government, enterprise.

Neither the Copyright Law of Ukraine nor the Criminal Code clearly provide that the use of illegal copies of software is an infringement – this should be corrected. According to the current wording of Article 1 of the Copyright law the installation, duplication and sale of unauthorized software is a violation of the copyright law, but the use of such copies is not. In addition, 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.

Anti-Camcord Legislation (Copyright Law amendments): The illicit recording of a movie in a theater remains the single most prolific source of movie piracy. As a result of camcorder piracy, illegal copies of many motion pictures are available on the Internet, as well as on street corners and flea markets around the world, within days of the film's legitimate theatrical release. Camcorder pirates, such as the ones found in Ukraine, are often sophisticated criminals who sell master recordings to illicit labs which then illegally duplicate the films onto optical discs, and package and distribute them to dealers around the world. A single illicit recording of a first-run motion picture widely distributed on the Internet (and on street corners) can destroy a producer's ability to recoup the investment made in its production. Thus, the losses are exponentially greater than the selling price of the pirate product or the single act of theft; the economic harm affects the complete lifecycle of a film, eroding all aspects of the economic value chain and impacting thousands of legitimate jobs involved in the production and distribution of films. To facilitate enforcement and prosecution of illegal camcording, it is imperative that Ukraine advance an amendment currently pending before the Verkhovna Rada that would specifically exclude camcording from the scope of the Copyright Law's private copy exception (draft law: "On the Amendments to Several Laws of Ukraine on Copyright and Related Rights", # 4073, February 17, 2009). The law, if enacted, would prohibit the reproduction of audiovisual works during their exhibition in theatres and at other premises intended for public consumption. The motion picture industry (MPAA) appreciates the Government of Ukraine's attention to this matter and urges expedited passage of this important legislation.

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.

However, 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, any amendment to the Criminal Code should ensure that repeat copyright infringement (within 12 months) would automatically lead to a criminal, and not solely an 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. As submitted previously, 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, as well as ensuring that the law is correctly applied. One area of concern includes recent attempts to reverse one (proper) implementation measure (Resolution No. 71 – January 18, 2003) which ensures the proper enforcement of cable retransmission rights. For all amendments, 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\$314) to close to 5,076 UAH (US\$629). However, given the long-standing practice of the courts imposing minimum fines for administrative violations (and not even considering the maximum fines available), IIPA urges the passage of a law to substantially increase the minimum amount of the administrative fines, which are currently very low -- 170 UAH (or approximately \$21). 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 of 2004 was 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. It

also gives Customs the authority to stop the importation of products which are in violation of the law, such as the legal requirement to pay levies for blank media (as noted, above). However, for suspected illegal material, threshold remains at about 1,319 UAH (US\$163) (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\$252) for the first application; 1,015 UAH (US\$126) 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 made no progress towards its implementation in 2009.