

# UKRAINE

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

### 2012 SPECIAL 301 REPORT ON COPYRIGHT ENFORCEMENT AND PROTECTION

**Special 301 Recommendation:** IIPA recommends that Ukraine be elevated to the Priority Watch List in 2012, as a result of very severe enforcement problems, as well as numerous longstanding legal deficiencies.<sup>1</sup> In addition, in December 2011, IIPA filed a petition with the U.S. Government recommending the eligibility of Ukraine as a Generalized System of Preferences (GSP) beneficiary developing country be reviewed, and that its benefits be suspended or withdrawn absent immediate IPR improvements. IIPA also recommends that the U.S. Government should conduct an Out-of-Cycle (OCR) review of Ukraine in order to accelerate the implementation of the 2010 Action Plan by no later than mid-2012.

**Executive Summary:** Piracy rates in Ukraine are among the highest in Europe, including for both hard copy and digital copyright piracy. For IIPA members, Ukraine is a key country in the region for the enforcement of intellectual property rights (IPR) because it exports piracy, especially digital piracy, into both European Union markets and other countries in the Commonwealth of Independent States (CIS). For example, there are several notorious websites hosted in Ukraine by Ukrainian Internet service providers (ISPs) that, while identified to Ukrainian enforcement officials, have continued to act with impunity. In 2010, the governments of the U.S. and Ukraine developed an IPR “Action Plan” intended to target digital piracy. Not only has the plan never been implemented, but some actions have been undertaken by Ukrainian officials that are contrary to the proposed plan, and would weaken, not strengthen enforcement.

In short, Ukraine is not providing effective criminal enforcement, nor is there a proper legal framework in place for enforcement, as Ukraine is obligated to do under its treaty (including WTO/TRIPS) and bilateral commitments. Instead, Ukraine has established itself as a “safe haven” for criminal syndicates involved in copyright piracy, in particular, for digital piracy of business and entertainment software, recorded music, films and books. 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 some of the world’s top BitTorrent systems. Plus, the government needs to resolve the dire situation of “rogue” collecting societies and take enforcement steps against these unauthorized societies (while also halting the investigations and harassment of legal collectives). As a consequence of its many shortcomings, legitimate online marketplaces cannot develop for copyrighted materials in Ukraine, and, by exporting piracy, Ukraine is harming legitimate marketplaces elsewhere. Moreover, Ukraine remains a global hot spot for high-quality illegal camcords of films that are uploaded to top sites and distributed across the Internet.

Ukraine’s many open air markets and street stalls remain replete with illegal copies of recorded music, films, entertainment and business software. Irregular and insufficient criminal and border enforcement is a further reason that pirate physical material is flowing freely into and out of Ukraine. In the case of business software, various ministries within the Government of Ukraine (especially the Ministry of Interior, the offices of State Tax Inspection, and the Prosecutor’s Office) are blatantly using unlicensed software. This sets a poor example for the business sector, where illegal software use (i.e., end-user piracy) is practically the norm. In sum, a roadmap for effective enforcement already exists – the full implementation of the Action Plan, which was developed first by a formal document presented by the U.S. Government in October 2010, and approved and signed by the Government of Ukraine in February 2011 (the plan became “effective” October 2010). The plan was actually a formal summary of obligations made by the Government of Ukraine over the past several years, especially to address Internet piracy.

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<sup>1</sup>For more details on Ukraine’s Special 301 history, see IIPA’s “History” appendix to this filing at <http://www.iipa.com/pdf/2012SPEC301HISTORICALCHART.pdf>, as well as the previous years’ reports, at <http://www.iipa.com/countryreports.html>. For a summary of IIPA’s 2011 global issues, see our cover letter at <http://www.iipa.com/pdf/2012SPEC301COVERLETTER.pdf>.



**IIPA Priority Recommendations in Ukraine – Key Enforcement Actions and Legal Reforms:** Among the many issues and recommendations noted in this report, here is a list of priorities that IIPA recommends to the Government of Ukraine in 2012:

### **Criminal Enforcement**

Criminal enforcement is a key IIPA-member priority because it can, if undertaken correctly, address myriad piracy problems. To be effective, criminal enforcement requires: (a) coordination by key agencies – including, the Ministry of Internal Affairs and General Prosecutors Office; (b) a significant increase in the number of raids and prosecutions; and (c) additional resources, especially for IPR police enforcement personnel (bringing the force up to a minimum of 260 officers). IIPA recommends that effective criminal enforcement, including prosecutions and deterrent sentencing, should be directed at:

- Owners of the numerous pay-per-download and BitTorrent sites. Criminal enforcement authorities should be using existing laws to take down illegal websites dedicated to pirated music, film, business and entertainment software and/or printed materials (and including sites relying, in bad faith, on the false rogue collecting society licenses).
- Principals of the rogue collecting societies that claim to offer “licenses” to both online and physical businesses, that they do not have the authority to grant.
- Organized crime syndicates, applying criminal prosecutions and deterrent sentences, not, as has been done to date, relying on non-deterrent administrative penalties. Targets should include the syndicates operating websites and peer-to-peer operations, hard-copy distribution centers, camcording operations, and optical disc media production facilities (including CD-burning operations).
- Owners and operators of open air and street market piracy, especially the piracy occurring at large outdoor markets and in the streets at or around underground stations, and near local shops and supermarkets.
- Retail chain owners that are selling pirated entertainment software products bearing illegitimate holograms at retail chains. These actions should include: long-term closures of illegal businesses, and follow-up raids at stores, kiosks and warehouses. Law enforcement authorities should – using search warrants – enter sales premises and suspected warehouses to seize illegal material, even if such premises/warehouses are closed.

### **Administrative and Customs Enforcement, End-User Piracy, and Software Legalization**

There are several administrative and customs law enforcement efforts that we recommend as priorities, including:

- An emphasis on corporate end-user piracy enforcement targeting large-scale infringers (in lieu of the current targets which are small companies and individuals), and as applicable, also using criminal enforcement against large-scale infringers.
- Allocation in each ministry (in 2012) of funds dedicated to full software legalization and the creation of an effective software asset management policy and practice (including audits). Further, we recommend: (a) the development of (and public statements about) an action plan for software legalization; (b) identifying both the steps to be taken to implement the resolution of the Cabinet of Ministers (designating the individuals responsible in the process); and (c) placing the plan’s implementation under the Prime Minister’s supervision.
- Moving aggressively against infringing cable transmissions and retransmissions, public performances, and TV and radio broadcasting with administrative (and where, applicable, criminal) actions.

- Using the *ex officio* authority (in place since 2007) to improve border controls, especially along the Russian border, focused on railroad traffic.

## Legal Reforms

A Copyright Law amendments bill (Bill #6523) was introduced in the Verkhovna Rada in June 2010 and passed its first reading in February 2011. If enacted (with additional proposals submitted by rights holders to the Parliamentary committee) it would improve the Copyright Law (and other IPR laws of Ukraine) with amendments regarding temporary copies, damages, the imposition of takedown notices and third party (ISP) liability as well as excluding camcording from the scope of the private copy exception. There are some further amendments needed (i.e., the proposals submitted) at the next reading; but, overall, IIPA supports this legislation. Here is the list of the key legal reforms that IIPA recommends:

- Full implementation of the WIPO digital treaties – in the Copyright, Industrial Property, Criminal and Criminal Procedural Codes. Ukraine acceded to the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT) in 2002.
- Adopting amendments to the Law on Telecommunications to promote a fair and effective response to online piracy, including: (i) legal incentives for ISPs to cooperate with rights holders to effectively deal with Internet piracy; (ii) rules that clarify the illegality of providing services that are intended to promote the infringement of copyright and related rights; and (iii) injunctive relief and a duty on Internet service providers (ISPs) to provide information to law enforcement agencies and rights holders. Additionally, Copyright Law amendments be enacted to ensure that an unauthorized online distribution, communication or making available is considered an act of infringement, regardless of whether it is undertaken for profit-making purposes or other commercial benefit or advantage.
- Amendments to Article 176 of the Criminal Code (and separately, in the Civil Code) to ensure the availability of criminal remedies against online piracy of all works and sound recordings; and, to establish in the Criminal Procedure Code, clear rules for prosecuting infringers.
- Amendments the Copyright Act and Criminal Code to make camcording illegal by excluding camcording from any “private use” exception, and criminalizing this activity. Additionally, amendments to the Law on Cinematography to repeal the requirements of local production of film prints.
- Implementing the 2003 resolution of the Cabinet of Ministers regarding legalization of software in state agencies.
- Amending the Copyright Law and the Civil Code to ensure that all relevant right holders are entitled (in law and practice) to operate effectively through the collecting bodies of their choice in the licensing of broadcasting, public performance and other communications to the public.
- Abolishing the hologram stickering system (or, at the very least, fixing it so that it cannot be used by infringers to make pirate product appear legitimate).

## **COPYRIGHT ENFORCEMENT IN UKRAINE**

**Internet piracy in Ukraine in 2011:** Ukraine Internet penetration is growing fast – it is now estimated that 33.9% of Ukraine’s population, or 15.3 million people are on the Internet according to the International Telecommunications Union (a U.N. agency) as of March 2011; this places Ukraine as the 9<sup>th</sup> largest user of the Internet in Europe. All of the copyright industries – music, film, book and music publishing, entertainment software and business software – report very weak Internet enforcement, coupled with an especially sharp increase in the rate of illegal peer-to-peer hosting and website-based Internet piracy, including BitTorrent sites (some of the world’s largest), located in Ukraine, for target audiences primarily in the countries of Western Europe and the United States. There are numerous open and notorious sites including, for example: demonoid-me (940,000 visitors each month;

the site offers over 75,000 unauthorized movies and nearly 47,000 unauthorized television programs). Ukraine has many free and pay-per-download music and video websites, as well as streaming services, some aimed at an international audience. One particularly severe case of blatant and open piracy is the filesharing site EX.ua, which (according to a 2010 survey) is responsible for half of all the users who upload and download illegally in Ukraine, and whose popularity is growing. On January 31, 2012, EX.ua was raided by police; for two years rights holders have gathered and provided enforcement authorities with evidence of ongoing infringing activity by this site. On January 31, the site was briefly taken down, but it is currently back in operation.

In many cities and towns outside Kiev – especially where internet bandwidth is relatively slow – a problem exists with so-called “LAN” (Local Area Networks) sites. These are high-speed FTP sites that store massive amounts of content, most of it consisting of infringing movies, music and videogames. Local users can get access to these LAN networks by paying a fee and can then download as much content as they wish; there are no constraints on bandwidth limitations (as they might encounter when visiting infringing sites abroad). In 2011, the police did commence some investigations, and a few resulted in prosecutions of LAN operators (14 LANs had their operations taken down). In total, UAPA, the anti-piracy organization, reported that they worked with the police on 17 Internet investigations in 2011, of which 15 resulted in criminal proceedings commencing (although there are no reports on the disposition of these cases). According to a 2011 Entertainment Software Association (ESA) study, Ukraine is in the top 20 countries worldwide in terms of the number of detected connections from peers participating in unauthorized file sharing (taken from a sampling of ESA titles on peer-to-peer networks).

The recording industry reports that paid download sites like mp3fiesta.com remain a major source of piracy in Ukraine (some selling whole albums for US\$1). These sites use 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.

The independent segment of the film and television industry (IFTA) is especially concerned with the impact of Internet piracy because of its harm to legitimate online distribution services – harming consumers and rights holders alike. Revenue from these services, which is licensed country-by-country, is critical for the independents to finance the development of new creative works worldwide. Internet piracy is instantly exported into other markets, spreading high piracy rates; this not only undercuts anticipated revenue from the distribution of a particular film (including licensing fees such as theatrical, DVD and television rights), it also harms the ability of independent producers to secure financing for future productions.

In addition to infringing hosted content available for download, another common type of Internet piracy is via mail order – with orders placed online and delivered by mail, according to the Business Software Alliance (BSA). 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.

There are currently two major hindrances to effective enforcement against Internet piracy: (1) the absence of any third party (ISP) liability in the existing law; and (2) the inability of right holders or enforcement authorities to collect information about suspected infringing website owners. In fact, not only is there no clear third party liability that could lead to cooperation between rights holders and ISPs, but the Law on Telecommunications (Article 40, paragraph 4 on the “responsibility of operators”) bluntly states that 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 ISP association (IAU) – citing this statutory language – has taken the position that rights holders need to go after illegal websites directly, without ISP assistance or cooperation. Many of the websites offering pirated copyright materials are thriving in part because of the support of local ISPs (there are over 400 ISPs in Ukraine and over 150 sites offering pirated CDs and DVDs). 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. The Government of Ukraine has made no effort to move this process forward and makes it clear that IPR enforcement, especially on the Internet, is not a priority. Some ISPs will delete links upon request (MPAA estimates that in 2011, about 20% of the ISPs responded to takedown letters); but, most refuse rights holders requests and demand court orders. It has been over three years since IAU agreed to work more forcefully with right holders to reach a mutually acceptable solution to help stem Internet piracy, but these efforts stalled, which is why IIPA recommends that the Government of Ukraine must get involved to broker a private agreement, and, at the same time, adopt some key Internet enforcement legal reforms.

Despite claims from the Government of Ukraine that adequate *ex officio* authority exists under current law, police continue to claim they are unable to instigate criminal operations against online piracy unless a rights holder first files a claim for damages. When criminal investigations are undertaken, police efforts are often stymied by a lack of cooperation from ISPs, which often refuse to provide available information on their infringing users. In December 2009, amendments to the Law on Telecommunications (draft # 3271) were proposed but ultimately defeated; they were intended to assist the police in conducting Internet crime investigations by providing subscriber information. 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. Thus, in general, the copyright industries report that the lack of clear prosecutorial and court procedures for Internet-related cases is a block on effective enforcement and that existing procedures are too difficult to be used effectively. Another impediment: procedures require that prosecutors identify the exact name of a website owner and the local network user(s) prior to commencing a case. IIPA recommends the adoption of guidelines and more effective procedures for police, prosecutors and judges for these crimes.

**Hard copy piracy:** The widespread availability of illegal material in open-air markets persists, in such places as: Petrovka (in Kiev), Mayak (in Donetsk), the “7-Kilometer” open market (in Odessa), and Barabashovo (in Kharkov), and, in other locations and 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. Often times these pirated goods bear wrongly issued holograms which legitimizes the product and makes enforcement challenging.

It was reported that the police undertook about 280 raids against open markets and street stalls in 2011. Some industries report a (slight) decline in hard copy piracy, as Internet piracy grows rapidly. Still, the size and scope of open market piracy in Ukraine is widespread. The Motion Picture Association (MPA) reports, that for example the “7-Kilometer” market in Odessa has 80 to 90 stalls selling pirate audiovisual product, the Mayak market in Donetsk and the Petrovka market in Kiev each have 200 such stalls, and the Barabashovo market in Kharkov has about 60, but because it is near a railway crossing point into Russia, serves as a distribution point within Ukraine, for Russian made optical disc media. The points of sale – the markets and street vendors – are occasionally raided, but these sites are rarely permanently shut-down, and operators rarely criminally prosecuted.

For the Entertainment Software Association (ESA), piracy at Internet and cyber cafés or “game clubs” continues unabated, with pirated and/or unlicensed versions of videogame software in wide use. Most of the hard copy piracy is produced in plants for PCs on discs and is manufactured in Ukraine, without licenses and absent any royalty payments to rightful owners. The problems persist despite efforts by police to initiate actions and raids, including seizures at retail outlets, warehouses, and Internet cafes. One on-going problem is post-raid investigations (which are unduly lengthy, costly, and non-transparent) and prosecutions – very few cases get to trial. Instead, it is common for cases to be simply dismissed or terminated without explanation, even when high volume seizures are involved.

The camcording of motion pictures, and the quick transference of these illegal copies on the Internet, is a major problem for the motion picture industry. The camcording problem in this hot spot is driven by criminal syndicates operating in Ukraine and Russia. As a consequence, illicit camcording shifts quickly between the two countries resulting in hard copy and Internet piracy. Illicit camcords sourced from Ukraine are quickly uploaded to the

Internet and burned to optical discs for distribution. Amendments to the Copyright Law (Bill #6523) and the Criminal Code are necessary to effectively enforce against illicit camcording. According to IFTA, DVD sales in Ukraine have been particularly hurt by piracy, with digital copies (often sourced from illegal camcords) being routinely offered for free online (and sold in hard copies). Unable to compete with free, legitimate distributors in Ukraine are not able to commit to distribution agreements, or alternatively offer drastically lower license fees which are inadequate to assist in financing of independent productions.

**Rogue collecting societies:** While the law in Ukraine provides for remuneration rights for the broadcasting or other public performances of musical works and sound recordings, it is estimated that over 90% of the broadcast and public performance market places are unlicensed. This problem has been significantly worsened by the Government of Ukraine which has prevented state broadcasters from complying with the law's licensing obligations. In addition, the Government of Ukraine has not undertaken proper actions against known pirate websites and other infringers, nor against collecting societies like Oberih and Avtor which purport to grant "licenses" for which they do not have rights. Instead (and incorrectly), the Government of Ukraine has directed its investigators, and IPR enforcement resources, on the operations of legitimate rightsholder organizations.

The proliferation of rogue collecting rights societies – such as Oberih and Avtor – which falsely claim "licenses" to repertoire, and the inability for legal societies to properly operate in Ukraine, remain a major problem for the recording industry. 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) – now re-named the State Intellectual Property Service; the executive order also 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. Despite various attempts by non-representative organizations to cancel the results of accreditation (three years ago), IIPA supports this accreditation and the reform brought on by Order #1175. In order for authorized collecting societies to function efficiently, we recommend that the regulatory framework increase their authority, including the possibility of inspections, representation in court, and cooperation with law-enforcement agencies, and that only organizations with a majority of relevant repertoire of material be authorized.

One positive step was the launch, by prosecutors, of a criminal investigation into the activities of Oberih, the rogue collecting society. Unfortunately, it has taken far too long to conclude an investigation in this case of clear-cut piracy. IIPA calls upon the enforcement officials to quickly conclude their investigation and to 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). Prosecutors have never communicated the status of the Oberih investigation to rights holders; U.K. police have recently sent evidence to the Ukrainian police (via Interpol), in order to open a criminal investigation on Avtor.

**Software legalization:** In the case of business software, various ministries within the Government of Ukraine (especially the Ministry of Interior, the offices of State Tax Inspection, and the Prosecutor's Office) are blatantly using unlicensed software; the government should be leading by example, in a country where illegal software use by businesses (i.e., end-user piracy) is practically the norm. In 2003, the Cabinet of Ministers 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. Over eight years ago, the government issued a new regulation to implement legalization – assigning all procurement authority for software products to one entity, SDIP (now SIPS), in order to try to eliminate the use of pirated software products in the public sector. However, since then, implementation of the program by the government, the largest consumer of illegal

software in Ukraine, has been very slow. Piracy rates in Ukraine are very high for business software, with PC software piracy rates exceeding 80% in each of the past five years.<sup>2</sup> The IIPA's recommendations on the steps the Government of Ukraine should take to address this problem are set out in our priorities section above. In sum, the Government of Ukraine (including the Rada) does not treat piracy, including business software piracy (by the government or businesses) as a priority problem to be corrected. There are many enforcement failings, including weak or non-existent regulations for inspection orders (raids), and evidentiary and prosecutorial procedural and resource failings as well (including engaging the Tax Inspections, as well as Customs officials in software audits and prosecutions). The pending draft Copyright Law – with some further improvements as recommended by the business software community – could correct these problems.

**Hologram stickering:** All of the copyright industries – music, film, entertainment and business software companies – report persistent problems with the administration of the current hologram stickering system which was adopted in 2000. In short, the system has failed as an enforcement tool, and should either be abolished or completely revised. As a result of ineffective oversight by Intelzakhist, the body responsible for administration of the hologram system, holograms are often issued on the basis of false contracts and licenses. Unauthorized music compilations of 100+ tracks in mp3 format on each CD (featuring “the best hits” of well-known artists) are widely available with holograms. Unauthorized videogame discs (such as discs with Xbox games) bearing holograms are found in many retail outlets throughout the country. In sum, the system has done considerably more harm than good to the interests of legitimate copyright owners while it has permitted suspect companies (based on false contracts and unverified licenses) 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. This makes the pirate product *de facto* “authorized” by the state for distribution which means it cannot be (or is not) seized by law enforcement officials.

For some industries, one out of every two illegal products seized is labeled with a false hologram, and for others (for example, the motion picture industry), all illegal copies seized had false holograms. Were the hologram requirement effectively administered it could potentially benefit rights holders. However, in practice, the hologram requirement actually benefits those engaged in the distribution of pirated product. Consequently, IIPA recommends an immediate moratorium on the hologram regime. While IIPA favors abolishing the system entirely, at the very least, IIPA urges a complete revision of the law to bring transparency to the hologram sticker administration procedures (along with proper enforcement). One “fix” would require SDIP (now SIPS) 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 would assist right holders in tracking applications.

**Broadcast and public performance piracy:** Broadcast television piracy is a major problem for the motion picture, music publishing and recording industries – both with regard to regional and nationwide broadcasts. Broadcasting, cable retransmission, 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 (including the largest state-owned broadcaster), restaurants, bars, shopping malls, sports clubs, etc. – refuse to pay royalties to the relevant authorized collecting societies. IIPA continues to recommend that the Government of Ukraine create a database, inspect commercial users, set a goal to bring these 90+% piracy levels down below 50% in one year (by relying on regional police economic crime units and state IP inspectors), and subject unauthorized users to administrative and

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<sup>2</sup>BSA's 2011 software piracy statistics will not be available until after the filing deadline for this submission, but will be released in May 2012, at which time piracy rates and U.S. software publishers' share of commercial value of pirated software will be available at [www.iipa.com](http://www.iipa.com). In 2010, the software piracy rate in Ukraine was 86%, representing a commercial value of unlicensed software attributable to U.S. vendors of US\$314 million. These statistics follow the methodology compiled in the Eighth Annual BSA and IDC Global Software Piracy Study (May 2011), <http://portal.bsa.org/globalpiracy2010/index.html>. These figures cover packaged PC software, including operating systems, business applications, and consumer applications such as PC gaming, personal finance, and reference software – including freeware and open source software. They do not cover software that runs on servers or mainframes, or routine device drivers and free downloadable utilities such as screen savers. The methodology used to calculate this and other piracy numbers are described in IIPA's 2012 Special 301 submission at <http://www.iipa.com/pdf/2012spec301methodology.pdf>.

criminal prosecutions. The law should, additionally, be clear that wholesale blatant copyright and related rights infringements could lead to station broadcast license suspensions or cancellations from the state.

**Criminal enforcement:** The most significant shortcoming in the Ukraine enforcement regime has been the absence of effective criminal prosecutions and deterrent sentencing which are necessary to combat digital and hard-copy piracy. Despite 2006 amendments to the Criminal Code (Article 176) to significantly lower the previously too-high threshold for criminal prosecution, the current threshold is still high. The threshold is now 10,730 UAH or US\$1,336 (as of January 2012, including minimum wage adjustments) which serves as a bar to effective criminal enforcement and results in less effective administrative actions in lieu. This is particularly true for online piracy matters where the valuation of damages (by law enforcement agents, prosecutors and the courts) is too difficult to calculate absent an official methodology; this prevents the initiation of criminal investigations and prosecutions against online piracy. Additionally, enforcement officials have applied the threshold on a per-rights holder basis, which means that when illegal material is seized, if the material for each rights holder does not exceed the threshold, the criminal case does not proceed. There are other procedural problems as well, including: (a) the use of expert evidence; (b) treatment of repeat offenders; (c) needed changes in the Criminal Code or Criminal Procedure Code to avoid delays and case dismissals; and (d) the lack of guidelines for judges on sentencing and developing expertise in IPR cases (IIPA recommends that the highest specialized court in civil and criminal cases issue guidelines for judges in this regard). Provisions do exist in the Ukrainian Criminal Code (e.g., Article 28) for prosecuting organized groups or criminal organizations, including for IPR offenses, but these provisions have been under-utilized by prosecutors. One lingering enforcement problem (in criminal and civil cases) is the required proof of ownership (including a complete chain of title), and the denial of standing to licensees (especially of foreign record companies) in court.

Enforcement efforts are further hampered by a lack of resources. The Government of Ukraine established a specialized unit for intellectual property rights crimes within the Economic Crime Division in the Ministry of the Interior. This was a positive step, but with only about 100 officers serving in that division for the entire country, there are simply too few officers to conduct effective and systematic actions to deter piracy; IIPA recommends that this number should be increased. In 2009, a Cyber Crime Unit was also created within the Ministry of the Interior; in 2011, it commenced its work on IPR (including copyright) enforcement. IIPA continues to recommend that there should be a team of officers dedicated exclusively to copyright and related rights violations, and these officers should be provided with effective training (including IT skills), equipment, high-speed broadband connections, etc. (with IIPA members willing to help train these officials, as many IIPA members, including BSA, MPAA, RIAA and others have done over the years). Similarly, the current number of state IP inspectors in SDIP (SPIS) empowered to combat various IPR infringements throughout the 25 regions of Ukraine is inadequate and should increase to 25 at a minimum, so that each region has at least one dedicated inspector. In populated cities such as Kiev (2.5 million people), Kharkyv (1.5 million), and Dnypropetrovsk, Odessa and Donetsk (1+ million, each), to be effective, IIPA recommends a team of at least three inspectors as the minimum number available. Unfortunately, contrary to the Action Plan commitment to increase the number of State IP inspectors, their numbers have been significantly reduced. Other agencies – Tax Administration and the Security Service – are, unfortunately, not actively engaged in IPR enforcement. A resolution of the plenum (judges of the highest court) on proper IPR criminal procedures, as a way of guiding lower courts, would be helpful as well.

**Raids, Seizures and Other Enforcement Actions in 2011:** According to the Government of Ukraine, in 2011, it seized 700,000 optical discs (down almost 65% from 2010); there were a total of 800 criminal investigations commenced (compared with 960 in 2010), and administrative measures were applied in about 3,000 cases (down from 4,700 in 2010). The administrative actions were mostly undertaken against stores, kiosks and other street piracy. Unfortunately, these actions were not coupled with severe enough penalties to deter these crimes.

The business software industry (BSA) reported in 2011, that there were 303 *ex officio* raids – 62 relating to CD sellers, 203 to end-users, 34 to hard disc loaders and only four to Internet piracy. These raids resulted in 230 criminal cases commencing (a slight increase from 2010); of these, 58 cases were sent to the courts for their

consideration (a slight decrease from 2010). As in recent years, almost all requests for assistance by rights holders for raids against suspected targets were denied by law enforcement agencies.

ESA, like other copyright industries, reports continued frustration with the pace at which investigations are undertaken and the rarity with which cases reach trial. Officers often refuse to proceed with investigations or to transfer cases in a timely manner to prosecutors, even when high volume seizures are involved. In some instances, ESA member companies did agree to support cases (as complainant), at the request of prosecutors, only to incur great expenses, and were provided with little or no information about progress of the case. In rare instances in which cases do make it to court, there is a high likelihood that judges will dismiss the case. The hurdles that the copyright industries face in Ukraine are ineffective investigations and prosecutions and non-deterrent sentencing for the few cases that do reach trial. For example, BSA reports that only 15% to 20% of filed criminal cases end up in court and of those, only a very small percentage result in convictions, much less any sentence. Ukrainian tax authorities will exercise enforcement authority, and initiate cases, usually against retail pirates (as administrative actions).

The anti-piracy organization (UAPA) reported that it worked with the police on 73 hard copy cases in 2011, assisting in the seizure of 205,000 optical discs, but, that all of the cases resulted in suspended sentences or probation. As noted, MPAA reported 14 LANs were taken down in 2011.

**Optical Disc Piracy and Enforcement:** There is currently no evidence of large-scale industrial production of pirated optical discs in Ukraine – at least not of music and film material; but, other forms of optical disc piracy involving CD-R and DVD material, in particular, persist. However, some legal plants producing CDs and DVDs have been able to obtain unauthorized holograms which are then sold, without authorization, in Ukraine.

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. A multi-agency order signed into law in November 2009 (with the approval of 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) to improve IPR protection, has been wholly ineffective.

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. There are, at present, eight optical media disc plants (producing CDs, DVDs or both) in operation in Ukraine.

**Ineffective Border Enforcement:** 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 (Article 203-1) customs officials can seize illegal material at the border without a court order. Unfortunately, Customs authorities are not sufficiently engaged in enforcement measures and thus are under-utilizing their authority, with the exception of some minor seizures by customs authorities of illegally produced CDs and other pirated materials over the past several years; cooperation with right holders could be improved as well. The State Customs Service of Ukraine (SCSU) is the agency responsible for stopping importations. IIPA recommends an expansion of the specialized intellectual property rights unit within the Customs Service (and that it not rely on a centralized bureaucracy), and that it be provided with sufficient resources to effectively stop illegal material at the border.

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 right holders. 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. Under the Copyright Law, the non-payment of private copying levies does not constitute an infringement of copyright and related rights (although Bill #6523 would correct this problem).

But, until the law is amended, there is no viable mechanism for enforcement of the law, and widespread violation thereof, undermining the rule of law.

## **LEGAL REFORMS**

In the “legal reform” section above, IIPA notes its legislative priorities for effective enforcement and full TRIPs compliance (now that Ukraine is a member of the World Trade Organization). 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/rbc/2010/2010SPEC301UKRAINE.pdf>.

The Copyright Law and related IPR amendments in 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 (as amended) fixed several major deficiencies, but a number of problems remain, especially in the sphere of Internet enforcement, and, the collective management of rights. The accreditation of non-representative collecting societies remains a major problem for the music industry, because it allows rogue societies to undertake collections on behalf of all music rights holders (including foreign rights holders) when they do not control any “volume of rights” by legitimate negotiated direct agreement with rights holders. The order of the Ministry of Education and Science (Order #1175) which was intended to address this problem is an administrative fix that cannot substitute for the needed Copyright Law amendments on this matter.

One positive note: in June 2010, the Supreme Court – in a resolution – declared that the storage of illegal copies of software in a computer memory could be a copyright infringement. 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 (which Bill #6523 would do). 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 or storage of such copies is not.

There are three other important recommended amendments to the Copyright Law (contained in Bill #6523): (1) Article 52 to allow licensees of foreign music companies to be treated equally to local right holders; (2) an amendment making either the non-payment of music rights royalties or of private copying levies, an infringement of copyright and/or related rights; and (3) adding statutory damages and/or a system of enhanced damages in order to adequately compensate right holders and deter further infringement (Article 52 – to double actual damages).

**Anti-Camcord Legislation (Copyright Law amendments):** The illicit recording of a movie in a theater remains the single most prolific source of movie piracy in Ukraine which is why an amendment is needed. The Copyright Law reform (Bill #6523), currently under consideration by the Verkhovna Rada, includes an anti-camcording amendment that would specifically exclude camcording from the scope of the Copyright Law’s private copy exception. 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); but, the threshold for criminal responsibility under Article 176 remains high.

Amendments we recommend include: fixing Article 176 of the Criminal Code to clearly apply to all forms of piracy (i.e., on the Internet), not only (as it clearly does now) to hard-copy piracy. Second, 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. Last, relevant criminal sanctions should be included in the code for intentional infringements related to the obligation to pay music rights royalties.

As noted, police practice under the Criminal Procedure Code must also be fixed so that police exercise their authority to act *ex officio* to initiate criminal intellectual property cases. Ukrainian criminal procedures in practice (although not required by the code) currently require right holders to file complaints to initiate actions which acts as a bottleneck to successful enforcement. Police should 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 seized 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 concern remains: the attempts to reverse one (proper) implementation measure (Resolution No. 71 – January 18, 2003) which ensures the proper enforcement of cable retransmission rights.

**Administrative Remedies:** As part of the Joint Action Plan in 2000, Ukraine agreed to adopt and implement appropriate administrative remedies to deter piracy (in addition to criminal penalties). While proper administrative remedies now exist, they are not being used effectively to remove the business licenses of infringing retail stores, kiosks, and other smaller scale pirates. Further amendments have been proposed, but never adopted, to increase the maximum fines, which IIPA recommends. 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. One major enforcement hurdle in the Administrative Code of Ukraine (Article 51.2) is the requirement to prove intent of the infringer; intent, while relevant in criminal proceedings, has no relevance in administrative sanctions, and should be deleted from the code (which Bill #6523 would do).

**Customs Code:** The Customs Code of Ukraine (amended in 2006; effective March 2, 2007) provides clear *ex officio* authority (Article 257) to customs officials. But, for suspected illegal material, a monetary threshold remains. Also, 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 which limited the code’s effectiveness. Amendments in 2006 replaced the “commercial purpose” criteria; the sanctions now apply to “goods destined for manufacturing or other business activity.” The notification and registration requirements, and the fees, were not repealed by the 2006 amendments. While some administrative improvements have been made in recent years, IIPA recommends the abolishment of the registration system altogether because it is an unnecessary maze of regulations which interferes with effective border enforcement.

**Market Access:** There are three serious market access issues that the motion picture industry is confronting. The first, is the set of rules governing the compulsory manufacturing of film prints and digital encryption keys. Under current law (in effect March 18, 2010) film prints must be produced locally; the rule requires local film print production for the issuance of a state distribution certificate. The rules are so unclear, however, as a result of other, conflicting laws, that movie distributors are uncertain about the rules, and the State Film Agency continues to issue distribution visas irrespective of a print’s place of production. The local production rule was reiterated by the State Film Agency in March 2011; it is applicable to analog and digital prints.

The second market barrier is the set of rules governing foreign ownership and investment restrictions. Ukrainian laws prohibit the direct ownership or establishment of television stations by foreign companies, and foreign investment is limited to 30% in these enterprises. There are also (apparently) domestic broadcast quotas (no less than 30%) as well and requirements for Ukrainian language usage on television programming.

The third market barrier is the customs valuation rules that customs authorities declared in November 2009. Rather than assessing duties on the underlying carrier medium, the new rules assess valuations based on projected royalties. Since the new rules went into force, several cases have resulted, and their rulings only add to the current uncertainty. There were three cases in 2011 (one in July, two in November) which ruled that royalties should not be used in customs valuations; the Government of Ukraine should fix and clarify the rules.

**Generalized System of Preferences:** In the first eleven months of 2011, almost US\$44.4 million in imports to the U.S. from Ukraine enjoyed unilateral duty-free treatment under the GSP program. In 2010, over US\$39.1 million in imports received GSP benefits. On December 29, 2011, IIPA filed a petition with the U.S. Government recommending the eligibility of Ukraine as a GSP beneficiary developing country be reviewed, and that Ukraine's GSP benefits be suspended or withdrawn, in whole or in part, if requisite improvements are not made by Ukraine to remedy its IPR deficiencies, because Ukraine currently does not comply with the "adequate and effective protection" obligations of the GSP program.