

# UKRAINE

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2013 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that Ukraine be designated a Priority Foreign Country (PFC) in 2013, as a result of very severe enforcement problems, as well as numerous longstanding legal deficiencies.<sup>1</sup> In addition, IIPA recommends that the U.S. Government immediately suspend or withdraw Ukraine's eligibility to continue receiving Generalized System of Preferences (GSP) benefits, regardless of its designation under Special 301.

**Executive Summary:** There are many examples of copyright enforcement problems in Ukraine at present, ranging from rampant copyright digital and hard-copy piracy, to governmental decisions related to the operation of collecting societies, to the use of unlicensed business software by government ministries. The issues with collecting societies and software legalization are long-festering problems. On the latter issue, by their own admission and despite claims to remedy the situation, various ministries within the Government of Ukraine (including the Ministry of Interior, the offices of State Tax Service, and the Prosecutor's Office) are continuously and blatantly using unlicensed software. These and other state institutions and governmental entities constitute the largest users of unlicensed software, setting a poor example for the business sector where illegal software use is practically the norm.

Piracy rates are exceedingly high in Ukraine and weak copyright protection has been a long-standing problem there, but in the past two years the situation has substantially worsened. Ukraine is a key country in the region for the enforcement of 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 ISPs that, while identified to Ukrainian enforcement officials, continue to act with impunity. To combat and target the digital piracy problem, in 2010, the Government of Ukraine developed an IPR "Action Plan" in cooperation with the U.S. Government. That plan was never implemented; instead, since the plan was adopted, some actions have been undertaken by Ukrainian officials that are not only contrary to the plan but would actually weaken, not strengthen, enforcement.

One very troubling on going problem relates to the operation of collecting societies. Ironically, while IIPA has long highlighted the problem of rogue societies issuing "licenses" which they lack authority from rights holders to grant, the Government of Ukraine instead decided to act against the legitimate society representing rights holders (UMRL). Although an investigation by the General Prosecutors Office found no wrongdoing by UMRL, the Government of Ukraine removed their accreditation which created tremendous confusion in the Ukrainian marketplace, and denied the ability of rights holders to determine how to license the use of their works. While this process plays out, non-representative collecting societies are "licensing" public performance venues, illegal websites and facilitating widespread digital and hard-copy piracy.

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. 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 free and pay-for-download piracy of music and film, as well as the source of some of the world's top BitTorrent systems. Ukraine also remains a global hot spot for high-quality illegal camcords of films that are uploaded to top sites and distributed across the Internet. In addition to digital

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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/2013SPEC301HISTORICALCHART.pdf>, as well as the previous years' reports, at <http://www.iipa.com/countryreports.html>. For a summary of IIPA's 2013 global issues, see our cover letter at <http://www.iipa.com/pdf/2013SPEC301COVERLETTER.pdf>.



piracy, 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.

IIPA members appreciate that a multi-national effort to stop the operations of demonoid.me is still ongoing, including actions in August 2012 by Ukraine enforcement officials against a server located in Ukraine. IIPA and its members are closely following the progress of the criminal case in Mexico, Ukraine and Panama, and hope that a proper criminal investigation will quickly commence and proceed accordingly. While the actions that began over a year ago in Mexico and are now proceeding in Ukraine are a positive step, this is but one of many illegal Internet distribution services in Ukraine that should be addressed—most notably, ex.ua which is back in operation after the highly publicized raid last year, and which has resumed its role as a primary hub for the distribution of infringing materials.

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 testified at a U.S. Government hearing on this petition in September 2012. Because of the serious and unabated problems of piracy in Ukraine, IIPA recommends that the petition be accepted and that GSP benefits be immediately suspended or withdrawn so that Ukraine does not receive these trade preferences until it properly and completely addresses its piracy problem.

## **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 2013:

### **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: (1) coordination by key agencies – including, the Ministry of Internal Affairs and General Prosecutors Office; (2) a significant increase in the number of raids and prosecutions; and (3) additional resources, especially for IPR police enforcement personnel (bringing the force up to at least 250 officers). IIPA recommends that effective criminal enforcement, including prosecutions and deterrent sentencing, should be directed at:

- Owners of the numerous free and pay-per-download and streaming film and music sites, as well as 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 from rights holders 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.

- Owners of commercial entities who ignore and/or fail to act against end-user (software) piracy taking place in their businesses.

### **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 enforcement against enterprise end-user software piracy 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 of funds dedicated to full software legalization in each ministry (in 2013), and the creation of an effective software asset management policy and practice (including audits) – as set out in the Action Plan. Further, we recommend: (1) the development of (and public statements about) the plan for software legalization; (2) identifying both the steps to be taken to implement the resolution of the Cabinet of Ministers (designating the individuals responsible in the process); and (3) placing the plan's implementation under the Prime Minister's supervision.
- Moving aggressively against copyright-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, in the current parliamentary session, now Bill #0902) was introduced in the Verkhovna Rada in June 2010 and passed its first reading in February 2011, but there has been no progress since that time on adoption of the law. Amendments to the Copyright Law, if properly enacted (i.e., if the draft bill included proposed amendments submitted by rights holders) would improve the Copyright Law and other IPR laws of Ukraine by fixing current deficiencies pertaining to 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. Unfortunately, many of the copyright industries were shut out of the drafting process of Bill #6523 (now, #0902), and, due to a lack of transparency, do not know the details of what any current version contains. Here is the list of the key legal reforms that IIPA recommends:

- Fully implementing 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: (1) legal incentives for ISPs to cooperate with rights holders to effectively deal with Internet piracy; (2) rules that clarify the illegality of providing services that are intended to promote the infringement of copyright and related rights or that facilitate such infringement (including knowingly and intentionally providing links to infringing content); and (3) injunctive relief and a duty on Internet service providers (ISPs) to provide information to law enforcement agencies and rights holders. Additionally, Copyright Law amendments should 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.
- Amending 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, as well as remedies against

repeat infringers (even if each separate infringement is below the criminal infringement threshold); and, to establish in the Criminal Procedure Code, clear rules for prosecuting infringers.

- Amending 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 the local production of film prints.
- Implementing the 2003 resolution of the Cabinet of Ministers regarding legalization of software in state agencies – as required in the Action Plan.
- Amending the Copyright Law, the Civil Code, and regulations, to ensure that all relevant rights holders are entitled (in law and practice) to operate effectively through the collecting bodies of their choice (based on a criteria of “volume of rights” in active use) in the licensing of broadcasting, public performance and other communications to the public.
- Abolishing the hologram sticker system (or, at the very least, fixing it so that it cannot be used by infringers to make pirate product appear legitimate) – as required in the Action Plan. One draft proposal circulated in December 2012 would revise the hologram sticker system for videogames and software.

In January 2013, the State Intellectual Property Service of Ukraine (SIPSU) proposed a new set of copyright amendments, focusing on provisions pertaining to collective rights management. Unfortunately, the proposal would deny rights holders control over the management of their basic rights by collecting societies, and would unfairly usurp their rights of public performance, broadcasting and monies from private copying. This draft bill, if enacted, would violate basic international practices and principles of collective administration, and Ukraine’s international obligations.

## **COPYRIGHT ENFORCEMENT IN UKRAINE**

**Internet piracy in Ukraine in 2012:** Internet use is growing fast in Ukraine; it is now estimated that 34.1% 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 June 2012. This places Ukraine as the tenth 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 throughout Europe and the United States. In 2012, Ukraine was fifth in the world in terms of the number of connections by peers participating in the unauthorized file sharing of select Entertainment Software Association (ESA) member titles on public peer-to-peer networks. There are numerous open and notorious sites, and Ukraine has many free and pay-per-download music and video websites, as well as streaming services, some aimed at an international audience. Ukraine is the home of two of the world’s top 15 BitTorrent systems, and there are estimated to be over 21 major hosting sites currently distributing unlicensed material in Ukraine, and abroad. Yet, there was not a single Internet piracy-related criminal conviction in Ukraine in 2012.

The Action Plan was meant to specifically address Internet piracy. The Action Plan 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, including on Internet enforcement issues. But, unfortunately, the Government of Ukraine has not moved to implement the Action Plan and the problems of Internet piracy – in its myriad forms – persist.

One particularly blatant case of piracy is the filesharing site ex.ua, which is estimated to be responsible for half of all the users who upload and download illegally in Ukraine. The site serves as a user storage locker for illegal material to which anyone can gain access to download material; most of the files can be streamed as well, and with BitTorrent files attached, accessed with a peer-to-peer client. For over two years rights holders had gathered and

provided enforcement authorities with evidence of ongoing infringing activity by this site. On January 31, 2012, ex.ua was raided by police and the site was briefly taken down. However, despite the takedown of ex.ua in January 2012, the equipment was subsequently returned, and in June 2012 it resumed full operations and remains in operation a year later. The criminal case (investigation) against the site operators was closed in 2012 without any indictments or other action. In December 2012, ex.ua was listed by the U.S. Government as one of thirty “Notorious Markets” as a part of the Special 301 Out-of-Cycle review, because of the site’s ongoing illegal activity and what the U.S. Government described as its “full range of infringing content.” Other major illegal filesharing sites include fs.ua, which was very active in the short time that ex.ua was taken down, futubox, managed in Ukraine, offering films and TV programming, as well as sumotorrents (a very popular BitTorrent site) hosted in Ukraine.

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 and music. 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 2012, the police did commence some investigations, and a few resulted in prosecutions of LAN operators and two LANs were shut down.

The recording industry reports that free and paid download sites (like mp3fiesta.com, wemp3.com, and newalbumreleases.com, a site hosted in Ukraine) 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 BSA | The 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 rights 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 takedown 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 (the Motion Picture Association of America (MPAA) estimates that in 2012, less than 20% of the ISPs responded to takedown letters);

but, most refuse rights holders requests and demand court orders. It has been over four years since IAU agreed to work more forcefully with rights holders to reach a mutually acceptable solution to help stem Internet piracy, but these efforts stalled, which is why IIPA strongly recommends that the Government of Ukraine 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 (Bill #3271) were proposed but ultimately defeated; they were intended to assist the police in conducting Internet crime investigations by providing subscriber information. The 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. IIPA recommends the adoption of guidelines and more effective procedures for police, prosecutors and judges for these crimes. In May 2012, a special police cyber crime unit was created (with IP officers from the Economic Police) for the purpose of combating Internet crimes. While this is a positive development, more steps need to be taken to overcome the enforcement obstacles (as the closing of the case against ex.ua and the absence of supporting legislation, indicate).

**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 pirated product alongside legitimate product. Often times these pirated goods bear wrongly issued holograms which legitimizes the product and makes enforcement challenging. In December 2012, the Petrovka market in Kiev was listed by the U.S. Government as one of thirty Notorious Markets as a part of the Special 301 Out-of-Cycle review because of its ongoing illegal activity; the U.S. Government described that market as containing “300 stands that sell pirated and counterfeit goods, including music, films, games, software...”

It was reported that the police undertook about 280 raids against open markets and street stalls in 2012, about the same as in 2011. The copyright industries report, that for example, the “7-Kilometer” market in Odessa has 80 to 90 stalls selling pirate audiovisual product, the Mayak market in Donetsk has 200 such stalls, and the Petrovka market in Kiev has about 50 such stalls; the Barabashovo market in Kharkov has about 60, but because it is near a railway crossing point into Russia, it 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.

The camcording of motion pictures and the quick transference of these illegal copies on the Internet is still a problem for the motion picture industry; it is mostly undertaken 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. In 2012, as in 2011, some progress was evident in policing this activity as the number of identified video camcords was limited (there were only 2 cases in 2012); however, illegal audio theft – of film soundtracks – which can be later synched and sold with video camcords, was up significantly in 2012, to 17 cases. Amendments to the Copyright Law (Bill #6523, now #0902) 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.

**Software legalization:** Various ministries within the Government of Ukraine (including the Ministry of Interior, the offices of State Tax Service, and the Prosecutor's Office, among many others) are blatantly using unlicensed software. Fixing this problem is part of the 2010 Action Plan, and it is now ten years since the Cabinet of Ministers passed a regulation (in 2003) establishing procedures for the use of software in government agencies. That 2003 regulation 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 the responsible system administrator. In 2004, the government issued a new regulation to implement legalization – assigning all procurement authority for software products to one entity, the State Department of Intellectual Property (SDIP) – now re-named the State Intellectual Property Service of Ukraine (SIPSU), in order to try to eliminate the use of pirated software products in the public sector. However, since then, implementation of the regulation by the government, the largest consumer of illegal software in Ukraine, has stalled. In late 2012, the government budgeted 100 million UAH (US\$12.3 million) for 2013 software legalization in state institutions (this is about 10% to 20% of the monies necessary for proper legalization). But, the government has already announced plans to revise (cut) this budgeted item at the end of the first quarter of 2013; in addition, no cabinet minister has ever been designated to implement a legalization program. Software piracy rates in Ukraine are very high, estimated at over 80%, as it has been for the past five years.<sup>2</sup> IIPA's recommendations on the steps the Government of Ukraine should take to address this problem are set out in the priorities section above. In sum, the Government of Ukraine (including the Rada) does not treat software piracy (by the government or businesses) as a priority problem that needs to be corrected. There are many enforcement failings, including weak or non-existent regulations for inspection orders (raids), evidentiary and prosecutorial procedural failings, and resource needs (including engaging the State Tax Service, as well as customs officials in software audits and prosecutions). The pending draft Copyright Law – with some further improvements as recommended by the software community – could correct some of these problems.

**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 by not undertaking proper actions against organizations which purport to grant "licenses" for which they do not have rights. The rogue or non-representative collecting societies help to support the notorious websites by "licensing" their activities, when they have no authority from rights holders to license any legal, or illegal, distributors.

The proliferation of rogue collecting rights societies – such as Oberih, Avtor, and the newly established (2012) ULASP – 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 SDIP (now re-named SIPSU); 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 (SIPSU). Despite various attempts by non-representative organizations to cancel the results of accreditation (over four years ago), IIPA supported that

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<sup>2</sup>BSA | The Software Alliance's 2012 Global Software Piracy Study, conducted with two leading independent research firms, IDC and Ipsos Public Affairs, measured the rate and commercial value of unlicensed PC software installed in 2011 in more than 100 markets. In 2011, the software piracy rate in Ukraine was 84%, representing a commercial value of unlicensed software of US\$647 million. These statistics follow the methodology compiled in the Ninth Annual BSA and IDC Global Software Piracy Study (May 2012), <http://portal.bsa.org/globalpiracy2011/index.html>. The BSA study covers piracy of all software run on PCs, including desktops, laptops, and ultra-portables, including netbooks. It includes operating systems, systems software such as databases and security packages, business applications, and consumer applications such as games, personal finance, and reference software. It also takes into account free software, open source software, and software as a service if it is paid for. It does not cover software that runs on servers or mainframes and routine device drivers, free downloadable utilities such as screen savers, and software loaded onto tablets or smartphones. The methodology used to calculate this and other piracy numbers are described in IIPA's 2013 Special 301 submission at <http://www.iipa.com/pdf/2013spec301methodology.pdf>.

accreditation and the reform brought on by Order #1175. Unfortunately, in 2012, a Ukraine court overruled Order #1175 on procedural grounds, which automatically cancelled the accreditation of UMA and UMRL. Currently, there are no authorized collecting societies for producers or performers rights; this has resulted in chaos in the Ukrainian public performance and broadcasting marketplace. Additionally, it has allowed the new rogue collecting societies to prosper in the chaotic market, the most prominent example being ULASP (which purports to represent major recording companies even though it has no such authorization).

IIPA understands that criminal investigations were launched into the activities of Oberih and ULASP, two of the rogue collecting societies. Unfortunately, the investigations have not concluded (and no information about their status has been provided to rights holders). IIPA calls upon the enforcement officials to quickly conclude their investigation and to properly prosecute those responsible for illegal operations (in addition to taking action against other rogue collecting societies, such as Avtor which has licensed pirate websites for years). Last year, U.K. police sent evidence to the Ukrainian police (via Interpol) in order to open a criminal investigation on Avtor, but no action was undertaken. IIPA strongly recommends that SIPSU acts on its existing authority to adopt a proper procedure for the authorized collecting societies for public performances and broadcasting (and that criteria include a volume of the rights of active users, proper and direct governance by rights holders, and an open and transparent accreditation process).

**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 required in the 2010 Action Plan. 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. 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 strongly 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 SIPSU (formerly, 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 would assist rights holders in tracking applications.

**Broadcast and public performance piracy:** Broadcast television piracy continues to be 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, especially in the absence of authorized collecting societies. IIPA continues to recommend that the Government of Ukraine re-appoint an authorized collecting society for public performances, and that it 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 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. The motion picture industry

reported 19 cases of unauthorized feature film exhibitions (that is, films shown without authorization by a licensed theatrical distributor, and unregistered with the State Cinema Agency). One further troubling development in 2012, was a draft bill that, if enacted, would exempt cable operators from paying any retransmission fees.

**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. The anti-piracy organization (UAPA) reported in 2012 it participated with the police on five criminal cases involving Internet piracy; however, in 16 cases where UAPA filed complaints against pirate sites the police refused to open criminal investigations due to the absence of a crime.

Some of the impediments preventing effective enforcement are statutory or procedural: 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\$1,318 (as of January 2013) 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: (1) the use of expert evidence; (2) treatment of repeat offenders; (3) needed changes in the Criminal Code or Criminal Procedure Code to avoid delays and case dismissals; and (4) 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; in 2012, a new unit (taken from the Economic Police) was formed to focus on cyber crimes. IIPA continues to recommend that there needs to be more and better resources dedicated exclusively to copyright and related rights violations, and that 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 SIPSU (formerly, SDIP) 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. In 2012, the number of State IP inspectors was increased to 22 inspectors. Other agencies – the State Tax Service and the Security Service – are, unfortunately, not actively engaged in IPR enforcement. On October 17, 2012, a resolution of the plenum (of the highest economic court) was adopted, setting proper IPR civil procedures; as a way of guiding lower courts. This could prove helpful; the same guidelines for criminal court procedures is strongly recommended as well.

**Raids, Seizures and Other Enforcement Actions in 2012:** According to the Government of Ukraine, in 2012 (through October), it seized 296,000 optical discs (down from 700,000 in all of 2011); there were a total of 617 criminal investigations commenced (compared with 960 in 2010), and administrative measures were applied in about

1,838 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 (most fines were from US\$40 to a maximum of US\$400).

The software industry (BSA) reported in 2012, that there were 313 *ex officio* raids – 53 relating to resellers, 214 to commercial end users, 46 to hard disc loaders. These raids resulted in 213 criminal cases commencing (a slight decrease from 2011); of these, 85 cases were sent to the courts for their consideration (an increase from 2011). As in recent years, almost all requests for raids against suspected targets were denied by law enforcement agencies. There were 289 requests by software rights holders against businesses using unlicensed software in 2012; the police initiated (on their own authority) 30 investigations. Most of these investigations targeted small businesses, and most large companies enjoyed immunity from investigation or prosecution (mostly attributable to a lack of political will to make software piracy enforcement a priority).

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 10% to 15% of opened criminal cases end up in court and of those, only 15% result in convictions of any kind. In the majority of cases, courts close proceedings without imposing any sentence, and the remaining cases result in low fines or suspended sentences. 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 74 hard copy cases in 2012, assisting in the seizure of 104,000 optical discs, but, that all of the cases resulted in suspended sentences or probation.

**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, BSA, the Music Association and UAPA) to improve IPR protection, has been wholly ineffective. The regulation and control of the plants that now exists 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. The 2012 changes to the Criminal Procedure Code, which now prevent police from commencing action without rights holder initiation, against optical disc producers (including labs), distributors and sellers, will make enforcement less, not more, effective. There are, at present, eight optical media disc plants (producing CDs, DVDs or both) in operation in Ukraine. In 2011, two criminal cases were commenced against large-scale optical disc producers (who manufactured discs without the required secure identification (SID) codes); those cases are still pending.

**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); further amendments to the Customs Code were adopted in 2012 (in force, June 2012). 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 be reliant on a centralized bureaucracy), and that it be provided with sufficient resources to effectively stop illegal material at the border. Improved border enforcement was also a part of the 2010 Action Plan.

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 rights 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 (Bill #6523, now #0902, would have corrected 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**

IIPA set out its legislative priorities above (“legal reform priorities”) for effective enforcement and full TRIPS compliance, since Ukraine is a member of the World Trade Organization. The 2010 Action Plan sets out legislative steps to improve the Copyright Law and the hologram sticker system. A history of key legal reforms in Ukraine in the recent past 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 enterprise end-user (software) piracy actions. In 2004, the Highest Commercial Court of Ukraine adopted recommendations to implement these procedures. But, 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 serious 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, and the order of the Ministry of Education and Science (Order #1175) which was intended to address this problem, was an administrative fix that cannot substitute for the needed Copyright Law amendments on this matter (as was illustrated in 2012 by a court vacating Order #1175, thus putting the legal framework for proper accreditation in jeopardy).

One positive note: in June 2010 and again in 2012, the highest Economic Court – in resolutions – 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 which should be corrected (Bill #6523, now #0902, would fix this). 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, now #0902): (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, now #0902) that had a first reading in the Verkhovna Rada, included an anti-camcording amendment that would have specifically excluded camcording from the scope of the Copyright Law’s

private copy exception. The law, if enacted, would have prohibited the reproduction of audiovisual works during their exhibition in theatres and at other premises intended for public consumption. IIPA and its members (the motion picture industry (MPAA)) seek urgent consideration and enactment of a law to address this problem.

**Criminal Code and Criminal Procedure Code:** The Criminal Code was completely revised in the past several years, including amendments in 2007 and in 2012 (in force, November 19, 2012). As noted, the threshold for criminal responsibility under Article 176 remains high. IIPA makes the following recommendations: 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 twelve 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 rights holders to file complaints to initiate actions which acts as a bottleneck to successful enforcement; the 2012 amendments made it a requirement for the initiation of police actions against optical disc producers, lab operators, disc distributors and sellers. Police should initiate, and be able to 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. One positive change in the revised 2012 Criminal Procedure Code is the recognition of legal entities as harmed parties (for the first time); this will allow companies, including foreign rights holders, to seek procedural relief in criminal proceedings.

**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 would be 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 2010, Ukraine agreed to adopt and implement appropriate administrative remedies to deter piracy (in addition to criminal penalties). Proper administrative 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. Further amendments have been proposed, but never adopted, to increase the maximum fines, which IIPA continues to recommend. 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, now #0902 if enacted, would have done).

**Customs Code:** The Customs Code of Ukraine (amended in 2006; effective March 2, 2007) provides clear *ex officio* authority (Article 257) to customs officials. The Customs Code was further revised, in force, June 2012. While some administrative improvements have been made in recent years, IIPA recommends the abolishment of the customs registration system altogether because it is an unnecessary maze of regulations which interferes with effective border enforcement.

**Market Access:** There are two serious market barriers to access confronting IIPA members, and in particular, the motion picture industry. These barriers are: (1) an obligation to manufacture film prints and digital encryption keys in Ukraine; and (2) customs valuation rules that assess valuation on projected royalties, rather than on the underlying carrier medium. In more detail, these market barriers are as follows:

Compulsory Manufacturing of Film Prints: Ukrainian law (Law of Cinematography) requires the production of film prints locally (in force, March 2010); this rule requires local film print production for the issuance of a state distribution certificate. The required local production rule was reiterated by the State Film Agency and entered into force on August 15, 2012.

Customs Valuation: In November 2009, Ukrainian customs authorities declared new customs valuation rules. Rather than assessing duties on the underlying carrier medium, the new rules assessed valuations based on projected royalties. To further complicate matters, Ukrainian customs officials stated that the new ruling would be retroactive (three years), and would be enforced with serious penalties for valuations based on the carrier medium rather than royalties. Contrary to rumors that these rules might be reversed, in May 2012 a new Customs Code was adopted (effective June 1, 2012) which affirmed the duties on royalties for both theatrical and home entertainment imports. These valuation procedures are governed by CMU Resolution No. 446.

**Generalized System of Preferences:** In the first eleven months of 2012, almost US\$69.9 million in imports to the U.S. from Ukraine enjoyed unilateral duty-free treatment under the GSP program. In 2011, over US\$53.2 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.