

UKRAINE

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2014 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that Ukraine be retained as a Priority Foreign Country in 2014.¹

Executive Summary: On May 1, 2013, the U.S. Government designated Ukraine as a Priority Foreign Country (PFC), and on May 30th initiated an investigation under section 301 of the Trade Act of 1974. Under the Trade Act, countries are designated a PFC if “acts, policies and practices” are deemed “unreasonable and burden or restrict U.S. commerce” including “the denial of adequate and effective protection of intellectual property rights.” The 2013 designation of Ukraine as a PFC was based specifically on three critical shortcomings in Ukraine’s intellectual property rights (IPR) regime: (1) the failure to implement “an effective and systemic means to combat widespread online infringement of copyright and related rights;” (2) “the unfair, nontransparent administration of the system for collecting societies;” and (3) the “widespread use of infringing software by Ukrainian government agencies.”

The U.S. Government’s PFC investigation is now focused on rectifying these three serious problems, and determining the amount of economic harm to U.S. rights holders that they are causing; the investigation ends on February 28, 2014. These IPR shortcomings have caused, and continue to cause severe economic harm to (i.e., are a “burden” on) copyright rights holders in Ukraine, as well as to Ukrainian and other foreign rights holders, and have resulted in unfair and inequitable discrimination of market access opportunities for rights holders. While recognizing the present political circumstances in Ukraine, IIPA urges the U.S. Government to continue its efforts to correct these identified IPR deficiencies, and if the Government of Ukraine does not do so, to use all available remedies under U.S. trade laws to compensate for the economic losses incurred. In addition, Ukraine should remain a Priority Foreign Country until these matters are satisfactorily corrected.

Each of the identified problems are long-standing ones in Ukraine, for which solutions exist through administrative and executive actions, as well as legislative reforms. The ultimate goal of IIPA and its members is not to harm trade relations between the U.S. and Ukraine, but to enhance the economic climate and conditions in Ukraine for copyright creators and producers (U.S. and Ukrainian). In our view, undertaking the recommended actions on each of the three PFC-identified problems, as set out in detail below, would best accomplish this goal.

Weak copyright protection has been a problem in Ukraine for many years, but in the past few years the situation has substantially worsened, and piracy rates remain exceedingly high. Ukraine is a key country in the region for effective 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 Internet Service Providers (ISPs) that, while identified to Ukrainian enforcement officials, continue to act with impunity. In 2010, the Government of Ukraine developed an IPR “Action Plan” in cooperation with the U.S. Government, to combat and target the digital piracy problem; but, the plan was never implemented.

One key to correcting the deficiencies in Ukraine is improved and effective criminal enforcement. Ukraine is obligated to have effective enforcement, including criminal enforcement, in place 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 piracy of software, recorded music, films and books. Neither

¹For more details on Ukraine’s Special 301 history, see previous years’ reports at <http://www.iipa.com/countryreports.html>. For the history of Ukraine’s Special 301 placement, see <http://www.iipa.com/pdf/2014SPEC301HISTORICALCHART.pdf>. For a discussion of IIPA’s 2014 Key Initiatives and Challenges, see IIPA, *2014 Special 301 Submission*, at <http://www.iipa.com/pdf/2014SPEC301COVERLETTER.pdf>.



the proper resources and on-the-ground actions, nor the proper legal framework is in place for effective criminal enforcement. Ukraine (along with Russia) is a major source for free and pay-for-download piracy of music and film, and for 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 piracy, Ukraine's many open air markets and street stalls remain replete with illegal copies of recorded music, films, and software. Irregular and insufficient border enforcement is another reason that pirate physical material is flowing freely into and out of Ukraine. These problems need to be addressed.

The withdrawal of benefits to Ukraine under the Generalized System of Preferences (GSP) program is one of the remedies available to the U.S. Government at the conclusion of the PFC investigation as a way to compensate for U.S. rights holder losses due to Ukraine's IPR problems. IIPA filed a petition in 2011 to have Ukraine's GSP benefits suspended or withdrawn. Given the current IPR circumstances (and assuming the GSP program is re-authorized in 2014), IIPA recommends that the U.S. Government accept the IIPA petition and suspend or withdraw Ukraine's benefits completely until the Government of Ukraine properly and completely addresses the three identified problems in its IPR regime.

PRIORITY ACTIONS REQUESTED IN 2014

IIPA recommends the following priority enforcement actions and legal reforms to the Government of Ukraine in 2014. These would address the three PFC-identified problems – Internet piracy, unfair collective administration, and the use of illegal software by government agencies – as well as the other serious deficiencies in the Ukraine IPR regime.

Criminal Enforcement

Criminal enforcement, including prosecutions and deterrent sentencing, focused on:

- 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 prosecute operators of sites dedicated to pirated music, film, business and entertainment software and/or printed materials (and including sites relying, in bad faith, on 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 instead of, 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 and managers of commercial entities who ignore and/or fail to act against unlicensed software use taking place in their businesses.

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 investigations (criminal searches) and prosecutions; (3) additional resources, especially for IPR police enforcement personnel (bringing the force up to at least 250 officers); and (4) coordination of enforcement practices and investigations of IP-related crimes, including the issuance of guidelines for police officers.

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

Administrative and customs enforcement, focused on:

- Actions against enterprise end-user software piracy targeting large-scale infringers, in lieu of the current targets which are small companies and individuals.
- Moving aggressively against copyright-infringing cable transmissions and retransmissions, public performances, and TV and radio broadcasting with administrative (and where, applicable, criminal) actions.
- Using *ex officio* authority to improve border controls, especially along the Russian border, focused on railroad traffic.

The government should allocate funds, on an ongoing basis, to achieve comprehensive software legalization in each ministry (in 2014), 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) developing and publicly promoting the plan for software legalization; (2) identifying 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.

Legal Reforms

Legal reforms focused on:

- Amendments to the Copyright Law, Law on Telecommunications and Code on Administrative Offences, 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. Amendments proposed by the State Intellectual Property Service of Ukraine (SIPSU) in 2013, intended to address at least some of these issues, would in fact weaken, not strengthen, the IPR enforcement regime.
- Copyright Law amendments 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.
- Criminal Code amendments to Article 176 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.
- Amendments to the Copyright Law and Criminal Code to make camcording in movie theaters illegal by excluding such 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.
- Implementation of the 2003 and 2004 resolutions of the Cabinet of Ministers regarding legalization of software in state agencies – as required in the Action Plan.
- Amendments to 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 stickering 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 2012 would have revised the hologram stickering system for videogames and software.
- Fully implementing the WIPO digital treaties – in the Copyright Law and Criminal Procedural Code. Ukraine acceded to the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT) in 2002.

COPYRIGHT ENFORCEMENT IN UKRAINE

Internet Enforcement: The failure by the Government of Ukraine to implement an effective and systemic means to combat widespread online infringement is one of the three PFC-identified problems in Ukraine. Coupled with very weak Internet enforcement, there has been an exponential increase in the number of illegal peer-to-peer hosting and website-based Internet piracy sites, including BitTorrent sites (some of the world’s largest), located in Ukraine, which target audiences throughout Europe and the United States. The growth of the online piracy problem in Ukraine continues to accelerate. In 2013, Ukraine was fourth 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 P2P networks, up from fifth in 2012 and 20th in 2011.

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.” *Ex.ua* is probably the most popular unlicensed download and streaming site in Ukraine, allowing free streaming and downloading of unauthorized copyrighted content. There are hundreds of other pirate sites including torrent sites (which comprise about half of the total illegal sites), hyperlinks, cyberlockers, and streaming sites, such as: *extratorrent.cc* and *sumotorrent*, which offer large quantities of unauthorized downloaded content from the BitTorrent network; futubox, which is managed in Ukraine and offers films and TV programming; and many other sites which offer unauthorized pre-release and recently released music and film materials via storage locker links posted by the administrator and users of the site. The recording industry reports that free and paid download sites (like *newalbumreleases.com*, *topalbums.ru*, *clubiza.ru*, *cerber.org*, *avaxhom.cc*, *frurap.ru*, *jams.to* – all sites hosted in Ukraine) remain a major source of piracy in Ukraine (some selling whole albums for US\$1). Some of these websites offer incentives such as free giveaways in return for users making monetary “deposits” onto the sites. Few of these sites have suffered any meaningful stoppages of their activities. In fact, in the *ex.ua* case, the site was back in operation after a few days stoppage in 2012, and the criminal case was closed. In 2013, there were two reported criminal cases against torrent sites (*megahsara.org* and *ost.cv.ua*); the first resulting in a fine and the latter in a sentence of one years probation. There were 14 pirate sites, targeted by anti-piracy organizations, including *www.my-hit.ru* and *fs.tu.ua*, which were closed by the police in 2013 (both of those sites were operational within a month). There were 22 sites that changed their hosting locations (that is, were taken down, but resurfaced) as the result of enforcement actions.

A roadmap for improved enforcement against digital (and hard copy) piracy was agreed to in the U.S.-Ukraine Action Plan of 2010 – with very specific steps set out to effectively combat Internet piracy. The “plan” was actually a formal summary of commitments made by the Government of Ukraine (to the U.S. Government) over the past several years, but which have never been implemented.

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 2013, UAPA reported that the

police did commence some investigations, and eight LANs were taken down, and a few criminal prosecution cases were commenced against LAN operators.

In addition to infringing hosted content available for download, other common types of Internet piracy are: mail order – with orders placed online and products delivered by mail; sales of fake certificates of authenticity; and, the distribution of “cracked” product keys through locally hosted web-sites.

Legal reforms to address two issues are critically needed to effectively enforce against Internet piracy: (1) the current absence of any third party (ISP) liability in existing law; and (2) the inability of rights holders or enforcement authorities to collect information about suspected infringing website owners. As the U.S. Government noted in its 2013 designation of Ukraine as a PFC, the Ukraine IPR regime has failed “to institute transparent and predictable provisions on intermediary liability and liability for third parties that facilitate piracy; to introduce limitations on such liability for Internet Service Providers (ISPs); and to enforce takedown notices for infringing online content.” In fact, not only is there no clear third party liability that could incentivize cooperation between rights holders and ISPs, but the current 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.” Article 38 states that ISPs can only disable end-users from the Internet, or block access to (i.e., take-down) infringing websites, 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. Reportedly amendments were proposed in December 2013 to the Law on Telecommunications, but it is unclear whether these would make any effective changes. 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 content). The copyright industries have, for years, been seeking private agreements (with governmental assistance) with ISPs to establish effective mechanisms to takedown illegal websites and slow illegal peer-to-peer traffic, and some ISPs will delete links upon request. The anti-piracy organization UAPA and the Motion Picture Association of America (MPAA) report about a 20% response rate to notice and takedown requests (there are no laws mandating compliance).

Currently, the Criminal Procedure Code does not grant police with *ex officio* authority (although some government officials claimed otherwise); so the police 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. Amendments to the Law on Telecommunications have been proposed in recent years, but not enacted, which would have assisted the police in conducting Internet crime investigations by providing subscriber information. Legislative deficiencies and lack of cooperation with ISPs thwart any attempts to focus on enforcement against Internet piracy. The copyright industries report that the lack of clear prosecutorial and judicial procedures for Internet-related cases is a bar to effective enforcement, with existing procedures too complicated to be used effectively. IIPA continues to recommend the adoption of guidelines and more effective procedures for police, prosecutors and judges for these crimes. In 2012, a special police cyber crime unit was created (with IP officers from the Economic Police) for the purpose of combating Internet crimes. This was a positive development but many more steps, including effective criminal enforcement, need to be undertaken.

Collecting Societies: The second of two identified PFC-problems in Ukraine is the unfair, nontransparent administration of the system for the collective administration of rights. Collecting societies in the music sector, specifically in connection with broadcasting, public performances and other communications to the public, can provide an effective and indispensable means for licensing. Currently, the accreditation process in Ukraine for collecting societies is in chaos. After years of mismanagement by the Government of Ukraine, a 2013 court order invalidated the entire existing accreditation procedure. The court rescinded an executive order that had vested authority to implement the accreditation of collecting societies in the State Department of Intellectual Property (SDIP) – now re-named the State Intellectual Property Service of Ukraine (SIPSU). SIPSU was housed within the Ministry of Education and Science, the ministry with authority over IPR matters, but in a re-organization, the IPR portfolio last

year was moved to the Ministry of Economic Development and Trade. The 2013 court decision put SIPSU's authority to accredit authorized collecting societies on hold. The current situation effectively denies rights holders their fundamental right to make fair and open (transparent) decisions about whether to be represented by any particular society, and has prevented the development of the marketplace for legal music services, resulting in the loss of millions of dollars in legitimate business for music rights holders in Ukraine.

The main criteria for accreditation should be to accredit the organization based on a majority of national and international repertoire represented. The accreditation process should reflect commercial realities and be based on the society that represents the "majority of commercially relevant rights holders," as IIPA and other organizations have long suggested. Under IIPA's proposed solution, the current accreditation system would be re-constituted and societies granted operational licenses based on their representation of a majority of commercially relevant rights holders – whether they be Ukrainian, American, Russian, or otherwise, and which undertake their operations in a transparent matter. That would avoid the old system of providing favorable treatment to the undemocratic (non-representative), non-transparent collecting societies that also have internal government influences, and which have unfortunately been allowed to operate.

Two legitimate organizations – the Ukrainian Music Alliance (UMA) (broadcasting), and the Ukrainian Music Rights League (UMRL) (public performances) – represent over 80% of the domestic and international repertoire for music. They were both registered by SDIP (SIPSU), under the prior regulations, although their status as the only accredited organizations in their respective areas (broadcasting and public performance) was revoked by SIPSU in 2012 despite their fair and transparent operations, as well as support from local and international rights holders. A new accreditation process was announced, and then overturned by an administrative court decision in January 2014 – leaving everything at a standstill. And worse, in the vacuum, rogue collecting societies continue to operate and prosper in the chaotic market.

In 2013, the Government of Ukraine proposed a "solution" to establish the state-owned UACRR as the only collecting society for composers, music publishers, producers and performers. This proposal came from the prior management of UACRR, and was not supported by rights holders. Under new management, UACRR changed its status and became a non-profit governmental organization, and the only Ukrainian member of CISAC (the international organization for collecting societies). Reconfirming UMA and UMRL as accredited registered rights management organizations (in their respective areas) would greatly improve the situation for producers and performers; the organizations need to be able to operate fully (and, if it would improve the efficiency of their operations and other societies to do so jointly in some areas, that should be a voluntary, contractual arrangement).

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 because the Government of Ukraine has not undertaken proper actions against organizations which purport to grant "licenses" for which they do not have rights.

In 2013, the General Prosecutors Office (GPO) and SIPSU undertook investigations into the activities of the collecting societies (both those supported by rights holders, and the rogue societies). The Government of Ukraine should complete its thorough investigations, and take actions against societies based on any of their improper activities including violations of laws and regulations, and should cancel their registrations. Urgent action is needed to bring order to the licensing environment to ensure that rights holders and their licensed societies are not undermined by these unscrupulous organizations operating under false mandates.

Last, the procedure for authorizing a collecting society for private copying levies should be amended. The current regulation (order #503 from 2003) did not specify that there should be a single organization for this type of activity. As in the other areas, this has led to non-representative collecting societies (like VAAP) to seek authorization and collect this type of revenues alongside UMA, a rights holder supported organization.

Software Legalization: The third ground for the PFC investigation is the use of unlicensed software by various ministries within the Government of Ukraine (especially the Ministry of Interior, the offices of State Tax Inspection, and the Prosecutor's Office) and the lack of any systemic means to deal with this situation. Industry reports indicate the personal computer (PC) software piracy rate in Ukraine was 84% in 2011, with a commercial value of unlicensed software installed that year of \$647 million.² The use of unlicensed software by government agencies is a significant part of this problem. SIPSU, Ukraine's agency dedicated to IPR protection, estimates the software piracy rate in Ukrainian state agencies to be 40%; industry sources believe the rate to be significantly higher in part because many older computers are not even part of the government's assessment.

Regulations were passed in 2003 and 2004 to ensure the use of licensed software in government agencies but the Government of Ukraine failed to properly finance or implement these measures. The 2003 regulation provided for government institutions to use properly licensed 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, SDIP (now SIPSU), in order to try to eliminate the use of pirated software products in the public sector.

The continued use of illegal software by state agencies sets a poor example for the business sector, where illegal software use (i.e., enterprise end-user piracy) is practically the norm. IIPA has long recommended that the Government of Ukraine allocate to each ministry on an ongoing basis dedicated funds for software legalization, that it perform software audits, and, that it expeditiously develop and make public an action plan for ongoing software legalization including an organized procurement program that can be properly administered.

In April 2013, the Government of Ukraine re-iterated the need for licensed software in state agencies and pledged to allocate 100 million UAH (US\$12.02 million) for software licensing in state institutions. But, those monies were never disbursed, even though tenders were twice announced during the year only to later be cancelled by the Government of Ukraine. Notably, the 100 million UAH would have addressed only a small fraction (perhaps 10%) of the widespread unlicensed software use within many ministries and state institutions. This follows a pattern: in 2005, the Government agreed to a tender, but only 6% of the monies were ever allocated and spent. In 2011, the Ministry of Education's request for centralized funds to purchase legal software in government ministries for the 2012 budget year was denied by the Cabinet of Ministers. The 2014 state budget has no funds allocated for software legalization.

For a proper legalization program to be implemented, the Council of Ministers has to make this matter a priority and instruct the Ministry of Finance to allocate the proper monies – and do so over multiple years of budgeting and procurement. IIPA understands that multi-year budget expenditures are not provided for under present funding structures, but believes that the Ukraine authorities and the Verkhovna Rada (the legislative body) can find a workable solution to ensure this problem is addressed on an ongoing basis. This issue has always been susceptible to quick, inadequate and marginal fixes in lieu of commitments to long-term solutions that address – in a meaningful way – a problem that is both harmful to businesses and detrimental to the effective functioning of the government. SIPSU needs to be empowered to implement and enforce an ongoing legalization program with appropriate checks and balances, accountable directly to the Council of Ministers, for example, so that software legalization receives more than sporadic attention, and there is a systemic plan in place.

Criminal Enforcement: One significant shortcoming in the Ukraine enforcement regime that cuts across all the copyright industries, and impacts digital and hard-copy piracy has been the absence of effective criminal prosecutions and deterrent sentencing.

²Data on software piracy rates and commercial values are taken from the 2011 BSA Global Software Piracy Study at www.bsa.org/globalstudy. This study assesses piracy rates and the commercial value of unlicensed software installed on personal computers during 2011 in more than 100 markets. The study includes a detailed discussion of the methodology used. BSA plans to release an updated study in the second quarter of 2014.

Some of the impediments preventing effective enforcement are statutory or procedural. Amendments made in 2005 to the Criminal Code (Article 176) significantly lowered the excessively high threshold for criminal prosecution. However, the current threshold, 12,180 UAH or US\$1,450 (as of January 2014) remains too high and continues to serve as a bar to effective criminal enforcement, resulting in rights holders using less effective administrative actions instead. 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 and prevents the initiation of criminal investigations and prosecutions. 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 (denying the use of rights holder experts); (2) non-deterrent sentences for 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, but there are only about 100 officers serving in that division for the entire country, too few to conduct effective and actions sufficient to deter piracy. 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. There needs to be more and better resources dedicated exclusively to copyright and related rights violations, and officers should be provided with effective training (including IT skills), equipment, and high-speed broadband connections (IIPA members have in the past, and continue to be willing to help train these officials). The current number of state IP inspectors in SIPSU 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.

Other Key Enforcement Issues: As detailed in prior IIPA filings, 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 (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).

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 2013, 11 illicit video recordings were sourced from Ukrainian theaters, up from two in 2012. The number of audio recordings sourced from Ukrainian theaters increased from 17 in 2012, to 31 in 2013. Amendments to the Copyright Law (Bill #6523, now #0902) and the Criminal Code are necessary to effectively enforce against illicit camcording.

All of these copyright industries – music, film, and software companies – continue to report persistent problems with the administration of the current hologram stickering system which was adopted in 2000. Some legal plants producing CDs and DVDs have been able to obtain unauthorized holograms which are then sold, without authorization, in Ukraine. In addition, optical disc piracy (especially of CD-Rs and DVDs), still persists, as one large raid on an optical disc plant in November 2013 revealed. 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. Details of all of these issues have been provided in prior IIPA filings.

According to the Government of Ukraine, in 2013 (through November), a total of 1,100 criminal investigations were initiated (compared with 960 in 2010), and about 1,600 administrative cases were conducted (down from 4,700 in 2010). The administrative actions were mostly undertaken against stores, kiosks and other forms of street-level 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 2013 that there were 189 police actions – 42 relating to resellers, 117 to enterprise end-users, 30 to hard disc loaders. These actions resulted in the commencement of 116 criminal cases (a significant decrease from 2012); of these, 46 cases were sent to the courts for their consideration (a decrease from 2012). Notwithstanding the requirements of the new Criminal Procedure Code, many complaints of right holders against suspected targets were denied by law enforcement agencies, and criminal proceedings were never completed. Most investigations targeted small businesses, and most large companies continue to enjoy immunity from investigation or prosecution (mostly attributable to a lack of political will to make software piracy enforcement a priority). BSA reports that only 25% to 30% of opened criminal cases end up in court and of those, only 30% result in convictions of any kind. In the majority of cases, courts terminate cases without imposing any sentence, and the remaining cases result in low fines or suspended sentences.

Customs officials were granted *ex officio* authority to properly conduct enforcement investigations (in the 2012 Customs Code). Using this *ex officio* authority customs officials can seize illegal material at the border without a court order. Unfortunately, customs authorities within the new Ministry of Revenue and Duties 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; cooperation with right holders could be improved as well.

LEGAL REFORMS

Copyright Law: Various proposals to amend the Copyright Law have been introduced in recent years. Bill #6523 (later, Bill #0902) was introduced in the Verkhovna Rada in June 2010 and passed its first reading in February 2011, but was rejected in April 2013. In January 2013, SIPSU proposed a further revised set of copyright amendments, focusing on the collective administration of rights. If enacted, it would have denied rights holders control over the management of their basic rights by collecting societies, unfairly usurped their rights of public performance, broadcasting and monies from private copying and violated basic international practices and principles of collective administration, and Ukraine's international obligations. It too was rejected in 2013.

Separately, amendments intended to improve digital piracy enforcement were proposed in May 2013 (and revised in June, September, and December) to the Copyright Law, the Law on Telecommunications, and the Code on Administrative Offences. Unfortunately, the proposal, even in its latest iteration, has attempted to address only one piece of the complete architecture required for Internet enforcement, namely a notice and takedown regime. In its current form, the notice and takedown proposal will not be effective in reducing infringement or deterring commercial operators from engaging in practices designed to provide access to infringing materials. Instead, if enacted, the draft law(s) would create a highly bureaucratic set of procedures that would render efforts to take down infringing materials time-consuming, costly, and ultimately unworkable. It is our view that this legislation would create new impediments rather than result in progress in the fight against Internet piracy, and that the draft bill, even with the further amendments in December meant to tighten the timetables for compliance, should be withdrawn from consideration. The December 2013 draft would still establish an overly burdensome notice and takedown system (with a daisy chain of notices to ISPs and websites, and huge evidentiary burdens on rights holders), using unreasonable timetables and providing very broad exclusions from liability; some of its definitions are also in need of clarification. Other deficiencies in the Copyright Law, included for revision in the 2010 package, include the need to

more clearly define temporary copies, impose damages, and exclude camcording from the scope of the private copy exception. Unfortunately, many of the copyright industries have not been afforded appropriate opportunities to provide input into the copyright law drafting process over the past few years.

There are three other important recommended amendments to the Copyright Law (which were contained in the old Bill #0902): (1) revising Article 52 to provide licensees of foreign music companies equal treatment as local right holders; (2) 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 to the Copyright Law is needed. The Copyright Law reform proposals (Bill #6523, now #0902) included an anti-camcording amendment that would have specifically excluded camcording in movie theaters 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; it should be enacted.

Criminal Code and Criminal Procedure Code: The threshold for criminal responsibility under Article 176 remains too high. IIPA additionally recommends amending 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. Any amendment to the Criminal Code should also ensure that repeat copyright infringements (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.

Ukrainian criminal procedures require rights holders to file complaints to initiate actions, which acts as a bottleneck to successful enforcement; the 2012 amendments made it a requirement also for the initiation of police actions against optical disc producers, lab operators, disc distributors and sellers. Police should be granted (and use) the authority to initiate intellectual property criminal cases and investigations for submission to the court; it should 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 WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonogram Treaty (WPPT), which entered into 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 of the treaty obligations, especially with regard to technological protection measures by requiring proof of "intentional" circumvention, which is a major impediment to protection. Recent attempts to reverse one (proper) implementation measure (Resolution No. 71 – January 18, 2003), which ensures the proper enforcement of cable retransmission rights, is a serious concern.

Administrative Remedies: Administrative remedies (as required by the 2010 Action Plan) do 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, and procedures that introduce unnecessary delays and impose unreasonable deadlines, leading to unnecessary case dismissals, should be corrected. 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 (this amendment is part of Bill #6523, now #0902).

Customs Code: The Customs Code of Ukraine provides clear *ex officio* authority (Article 257) to customs officials. The Customs Code was further revised in 2012. While some administrative improvements were 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 for some industries.

Market Access: There are two serious barriers to market 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, amended in 2010) requires the production of film prints locally for the issuance of a state distribution certificate. The required local production rule was reiterated by the State Film Agency, and entered into force in 2012.

Customs Valuation: In 2009, Ukrainian customs authorities declared new customs valuation rules. Rather than assessing duties on the underlying carrier medium, the new rules assess 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 which affirmed the duties on royalties for both theatrical and home entertainment imports. These valuation procedures are governed by CMU Resolution No. 446.