

# UKRAINE

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2016 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that Ukraine be designated a Priority Foreign Country (PFC).<sup>1</sup>

**Executive Summary:** On May 1, 2013, Ukraine was designated by the U.S. Government as a PFC, and an investigation was initiated under section 301 of the Trade Act of 1974. Almost three years after that designation, and two years after the completion of the U.S. Government investigation, the intellectual property rights (IPR) problems that resulted in the PFC designation remain wholly unaddressed. These IPR shortcomings continue to cause severe economic harm to U.S. copyright rights holders in Ukraine, as well as to Ukrainian and other foreign rights holders. Correcting these problems would improve the local marketplace for the digital distribution of music, films, television programs, video games and books online to the benefit of Ukraine consumers and the local economy. IIPA urges the U.S. Government to work with the Government of Ukraine to address and correct these IPR deficiencies as quickly as possible (and as is appropriate under the current political and economic circumstances).

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 PFC designation of Ukraine in 2013 was based specifically on three critical problems in Ukraine’s 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.” On March 13, 2014, the U.S. Government completed its PFC investigation, focusing on the economic harm to U.S. rights holders caused by the three identified problems. It concluded that “certain intellectual property rights (IPR) acts, policies and practices of Ukraine are unreasonable and burden or restrict United States commerce and are thus actionable under section 301(b)” but “[i]n light of the current political situation in Ukraine, the Trade Representative has determined that no action under Section 301 is appropriate at this time.”

It is time to re-designate Ukraine as a Priority Foreign Country. Last April, the USTR Special 301 Report acknowledged that “[t]he three problems identified in the 2013 Special 301 Report have not been resolved.” Other than some enforcement training by Ukrainian officials, the U.S. Government noted that there has been no significant effort to address the digital piracy problem, and that “Ukraine continues to host some of the largest pirate sites in the world.” One of the IPR shortcomings, the problems relating to collective administration, could be resolved quickly and with a minimum of effort, even with the political limitations of the current Government of Ukraine. The current situation is chaotic: there are 19 collective management organizations claiming to represent various (and, in some cases the “worldwide repertoire” of) authors and producers, when, in reality, only a handful of these organizations have any legal authority to collect for them in Ukraine.

Weak copyright protection has been a longstanding problem in Ukraine, but it has substantially worsened in the past several years. 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 regionally. 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. Instead, Ukraine has become a safe haven for criminal syndicates involved in copyright

<sup>1</sup>For 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/2016SPEC301HISTORICALCHART.pdf>.



piracy. Neither proper resources nor on-the-ground actions have been dedicated to addressing piracy, and the legal framework has many key deficiencies, all resulting in weak enforcement.

## **PRIORITY ACTIONS REQUESTED IN 2016**

IIPA recommends the following priority enforcement actions and legal reforms to the Government of Ukraine in 2016. These priority recommendations are directly related to the designation of Ukraine as a PFC — they would improve online enforcement and address the failures relating to collecting societies:

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

- Owners and operators of the numerous free and pay-per-download and streaming film and music sites, as well as BitTorrent sites. Criminal enforcement authorities should use existing laws to prosecute operators of sites dedicated to pirated music, film, entertainment software and/or printed materials (including sites relying, in bad faith, on rogue collecting society licenses).
- Principals of the rogue collecting societies (e.g., UPO Avtor and ARMA Ukraine) that offer illicit “licenses” to both online and physical businesses without authority from rights holders.
- Organized crime syndicates. In lieu of the current reliance on non-deterrent administrative penalties, criminal enforcement targets should include the syndicates operating websites and peer-to-peer (P2P) operations, hard-copy distribution centers, camcording operations, and Optical Disc media production facilities (including disc-burning operations).

**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. In 2014, international IP experts prepared amendments (an anti-piracy draft law) to properly address the above problems (improving an earlier draft prepared by the State Intellectual Property Service of Ukraine (SIPSU)). Two drafts were presented to the Verkhovna Rada (Bill #3353 and Bill #3081-d) each containing antipiracy provisions.
- Amending the recently adopted e-Commerce Law (enacted in September 2015). The law as adopted has a number of shortcomings: in particular, it contains broad, and internationally inconsistent, exemptions from liability for service providers, including hosting service providers. These provisions should be narrowed and aligned with the proposed provisions in the Copyright Law amendments (Bill #3353). This would ensure that sites facilitating copyright infringement would not be able to apply the “safe harbor” provisions, and it would encourage cooperation by passive service providers.
- Adopting the Law “On Collective Management” (including the amendments provided by international experts in February 2015) to require relevant organizations to operate with proper transparency, accountability and rules of governance. In addition, any collective administration would be based on the basis of “volume of rights” (and also to be consistent with Article 168 of the EU-Ukraine Association Agreement requiring bilateral agreements with foreign organizations to operate transparently and effectively). The bill has broad support from international organizations (e.g., CISAC), but has been slowed by opposition in the Ministry of Economic Development and Trade (MEDT).
- 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. The Law on Cinematography should also be amended to repeal the requirements of the local production of film prints.

**Other issues** that should be addressed include:

- **Criminal enforcement**, including prosecutions and deterrent sentencing against owners and operators of open air and street market piracy, especially against the piracy occurring at large outdoor markets and in the streets at or around underground stations, and near local shops and supermarkets.
- Overall effective **criminal enforcement** which 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) proper resources, especially for police enforcement personnel dedicated to IPR crime (the Economic Crime and Cyber Crime police units – which did in 2015 have increases in personnel), and including specialized IPR prosecutors within the General Prosecutors Office; and (4) coordination of enforcement practices and investigations of IP-related crimes, including the issuance of guidelines for police officers.
- **Administrative and customs enforcements**, focused on moving aggressively against copyright-infringing cable transmissions and retransmissions, public performances, and TV and radio broadcasting with administrative (and where, applicable, criminal) actions. *Ex officio* authority should be used to improve border controls, especially along the Russian border, focused on railroad traffic.
- **Additional legal reforms** including:
  - 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. Bill #3081-d contains amendments to Article 176 to criminalize online infringements, and includes provisions pertaining to camcording.
  - Abolishing the hologram sticker system (or, at the very least, fixing it so that it cannot be used by infringers to make pirated products appear legitimate); this was a requirement of the 2010 Action Plan.
  - 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**

As noted, the designation of Ukraine as a PFC was based on its failure to provide effective online enforcement, and for its myriad failures relating to collecting societies. These two issues are treated in depth in this section.

**Internet Enforcement:** Weak digital enforcement has resulted in an exponential increase in the number of illegal P2P hosting and website-based Internet piracy sites, including BitTorrent sites (some of the world's largest), located in Ukraine. Some Internet pirates have purposefully moved their servers and operations to Ukraine in the past few years to take advantage of the current lawless situation. Many of these illegal services and sites target audiences throughout Europe and the United States. In 2015, Ukraine remained third in the world in terms of the number of connections by peers participating in the unauthorized file sharing of select video game titles on public P2P networks using PCs, up from 18th in 2011. Ukraine is also ranked sixth in the world for mobile piracy.

Two of these Ukrainian sites have been perennial notables on the U.S. Government's list of Notorious Markets as a part of an annual Special 301 Out-of-Cycle review. *Ex.ua* is one of the most popular download and streaming sites in Ukraine, allowing free streaming and downloading of unauthorized copyrighted content (according to Alexa it is the 18th most visited site in Ukraine). The U.S. Government has listed *ex.ua* every year since 2012 as a Notorious Market because of the site's ongoing illegal activities. In addition to *ex.ua*, the U.S. Government has also included *extratorrent.cc* on the Notorious Markets list for several years (although it is now no longer hosted in

Ukraine). As the U.S. Government noted in its report in December 2015, these two sites “continue to benefit from Ukraine’s status as a haven for online piracy.” The U.S. Government report continued: “[a]lmost 35 million users visit *ex.ua* every month to download and stream content including reportedly infringing music, videos, movies, TV series, e-books, and audiobooks, and software that one commenter alleges is uploaded by site administrators themselves. Similarly, *extratorrent.cc* allegedly has extremely high rates of piracy with more than 75 million visits a month and a 14 percent increase in August 2015 compared to August 2014.” In 2012, *ex.ua* was, for a short time, the focus of an enforcement action and preliminary criminal investigation. But, after what the U.S. Government characterized as “political criticism and [local] popular opposition,” the site was back in operation days after its suspension, and all enforcement actions and the criminal case were halted. Among the many pirate websites in Ukraine are torrent sites (which comprise about half of the total illegal sites), hyperlinks, cyberlockers, and streaming sites. Examples include: linking and streaming sites such as *kinogo.co*, *kkiste.to*, *kinofilms.tv*; P2P and tracker sites such as *oday.kiev.ua*, *pslan.com*, *torrentroom.com*; and sites offering unlicensed pay for download musical recordings, such as *mp3caprice.com*.

The recording industry reports that the free and paid download sites hosted in Ukraine remain a major source of piracy in Ukraine (some selling whole albums for US\$1) with some ISPs such as “Hosting Solutions Ltd.” specifically attracting pirate sites. Hosting Solutions also provides hosting services to other pirate sites including: *torrentbit.net*, *btloft.com*, *bitloft.org*, *torrentz-cd.com*, *torrentpond.com*, *btmon.com* and *torrentz.wf*. Some of these websites offer incentives such as free giveaways in return for users making monetary “deposits” onto the sites. One positive development: in 2015, there were three criminal case verdicts against the owners of pirated websites; there were no such cases in 2014. The three cases resulted in imprisonment (of five-year, three-year and two-year terms) against the site owners of: *see.od.ua*, *kinopab.net* and *imperia-kino.com.ua*. In addition, the owner of the torrent site *tr.vik.ua-biz.info* was fined 3400 UAH (US\$130) in a court decision in December 2015.

There were 31 criminal digital piracy investigations opened in 2015, compared with 71 in 2014. In 2015, there were 61 pirate sites targeted by anti-piracy organizations which were closed by the police or site owners (compared to 28 in 2014), although some were operational almost immediately after their “closure.”

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). It has never been implemented.

The U.S. Government noted in its 2013 designation of Ukraine as a PFC that the Ukraine IPR regime 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., takedown) infringing websites, with a court order. In the past, the Internet Association of Ukraine (IAU), representing the ISPs, has taken the position that rights holders need to go after illegal websites directly, without ISP assistance or cooperation, citing this statutory language.

Many of the websites offering pirated copyright materials are thriving in part because of the support of local ISPs (there are hundreds of ISPs in Ukraine and well over 100 sites offering pirated content). The copyright industries have, for years, been seeking private agreements (with governmental assistance) with ISPs to establish effective mechanisms to take down illegal websites and slow illegal P2P traffic, and some ISPs will delete links upon request. In 2015, there were several conferences and meetings organized to try to get ISPs, broadcasters, advertisers and rights holders (via the Ukrainian Anti-Piracy Association (UAPA)) together to cooperatively agree on procedures to respond to takedown notices, and take effective action, against unauthorized sites. The 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). In 2015, UAPA issued 3,602 takedown notices to ISPs and cease and desist letters to site operators in Ukraine (compared with 1,119 in all of 2014).

A 2015 draft law (Bill #3353) would have instituted notice and takedown provisions (and in a positive note, allowed rights holders to do so directly, as is the international standard, without the need for a state authority or court), and would have required that material taken down “stay down.” A version of this same bill is now pending in the Verkhovna Rada. Also recommended for inclusion in any new law are two critical reforms for effective digital enforcement: (1) third party (ISP) liability consistent with global norms; and (2) the ability of rights holders or enforcement authorities to collect information about suspected infringing website owners. Unfortunately, the Internet Association Ukraine (IAU) is opposed to the current draft law.

Currently, the Criminal Procedure Code does not grant police *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, which would have assisted the police in conducting Internet crime investigations by providing subscriber information, have been proposed in recent years, but not enacted. 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. In November 2015, there was a re-organization of the police, leaving many vacancies in enforcement agencies, including within the cyber crime unit (which currently has half the number of officers necessary to undertake their work).

**Collecting Societies:** The current collective administrative system in Ukraine, with 19 competing collecting societies, is chaotic, and will not be corrected until the accreditation procedures are fixed. The unfair and nontransparent administration of rights was cited as a reason for the designation of Ukraine as a Priority Foreign Country. The U.S. Government acknowledged in its 2015 Special 301 report that there has been no progress on this issue since the PFC designation in 2013.

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. 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 Intellectual Property Service of Ukraine (SIPSU) (formerly known as the State Department of Intellectual Property (SDIP)). SIPSU is currently administered by the Ministry of Economic Development and Trade (after a re-organization which moved the IPR portfolio from the Ministry of Education and Science). The 2013 court decision put SIPSU’s authority to accredit authorized collecting societies on hold. The current chaos 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. In addition, pirate websites such as *fs.ua* and *slavpeople.com*, which contain audiovisual material, claim to be “licensed” from the rogue collecting societies (for example, ARMA Ukraine).

The main criterion 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 and repertoire, as IIPA and other organizations have long suggested. IIPA’s proposed solution is the enactment of a new Law “On Collective Management” consistent with the draft worked on by U.S. and EU experts (and consistent with all the major international rights holders organizations). Under that draft, the current accreditation system would be re-constituted,

and societies would be granted operational licenses provided they meet statutory criteria. Further, only one society representing the majority of commercially used rights and repertoire (in each sector or category) would be appointed as the collective management organization (CMO) benefiting from an extended collective license. 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.

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. The SIPSU “inspections” of the societies, undertaken in 2015, was political theater that did not properly identify and disqualify the rogue societies, such as UPO Avtor.

Last, IIPA continues to recommend amending the procedure for authorizing a collecting society for private copying levies. 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 non-representative collecting societies (like VAAP) to seek authorization and collect this type of revenues alongside UMA, a rights holder supported organization. In 2013 VAAP applied for authorization and was rightly denied it in a decision later confirmed by one court. Despite that, in December 2014 VAAP re-applied and was accredited by SIPSU as an authorized collecting society for private copying levies. This has added to the chaos of collective management in Ukraine. The 2014 decision by SIPSU violates Ukrainian law requiring a society to have at least two years’ experience in collecting and distributing royalties; SIPSU should immediately revoke the authorization of VAAP.

**Criminal Enforcement:** The lack of effective criminal prosecutions and deterrent sentencing is a lingering problem in Ukraine for both digital and hard copy piracy. Amendments to the Criminal Code (Article 176) in 2005 lowered the high threshold for criminal prosecution. The current threshold is 13,780 UAH (or US\$532). The main concern with the threshold is that there is no unified approach on how to calculate a valuation of the copyright material in question, so the threshold acts as a bar to criminal enforcement, resulting in rights holders having to use 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, a criminal case does not proceed.

There are other criminal procedural problems as well, including: (1) rules regarding the use of expert evidence (denying the use of rights holder experts); (2) non-deterrent sentences for repeat offenders; (3) delays and case dismissals that can be fixed with changes to the Criminal Code or Criminal Procedure Code; 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.

**Other Key Enforcement Issues:** Hard copy piracy, especially at outdoor markets, remains a problem. Several such markets have been designated in the past few years as Notorious Markets by the U.S. Government, although there have been improvements in enforcement at some of these markets, such as the Petrovka Market in Kiev. The so-called “7-Kilometer” open market in Odessa with over 5,000 stalls, and the Barbashovo Market in Kharkov, remain significant sources of illegal materials, especially for the motion picture industry. In 2015, the motion picture industry reports that the local anti-piracy organization seized 249,372 Optical Discs nationwide (not just at these markets) — most were seized at an Optical Disc plant in Kiev.

The copyright industries continue to report persistent problems with the administration of the current hologram sticker 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. Currently, there is a draft bill being proposed by MEDT to repeal the hologram sticker system. IIPA recommends that this law be adopted and that the State Enterprise Intelzakhyst that administers the program, should also be abolished.

The camcording of motion pictures in theaters and the quick transfer of these illegal copies on the Internet remains a major 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 2015, at least 13 illicit video recordings were sourced from Ukrainian theaters, up from two in 2012. There was only one audio recording sourced from Ukrainian theaters (down from five in 2014). Amendments to the Copyright Law and the Criminal Code are necessary to effectively enforce against illicit camcording, and there was no progress on this legislation in 2015. Bill #3081-d includes an amendment to the Criminal Code Article 176 to criminalize camcording.

The current Customs Code gives Customs officials *ex officio* authority to properly conduct enforcement investigations. Using this *ex officio* authority, customs officials can seize illegal material at the border without a court order. Unfortunately, customs authorities within the State Fiscal Service are not sufficiently engaged in enforcement measures, and thus under-utilize 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.

Broadcast and cable television piracy continues to be a major problem for the motion picture and recording industries — both with regard to regional and nationwide broadcasts.

Although administrative actions are undertaken against stores, kiosks and other forms of street-level piracy, these actions have historically not been coupled with severe enough penalties to deter these crimes (most fines are from US\$40 to a maximum of US\$400).

## **LEGAL REFORMS**

Here is a short summary of the recommended legal reforms needed in Ukraine (some of these have been briefly noted elsewhere in this filing):

**Copyright Law:** As noted, various proposals to amend the Copyright Law have been introduced in recent years including bills introduced last year (Bill #3353 and Bill #3081-d), that are pending in the Verkhovna Rada. Bill #3353 was approved by the Cabinet of Ministers after it was re-drafted (combining elements of the other bill) by the MEDT, and is currently pending for consideration. It is generally an improvement over prior drafts, although some additional improvements are needed before final passage; it is facing opposition from illegal website operators and ISPs. Bill #3081-d passed a first reading in the Verkhovna Rada on January 28, 2016, but it needs further amendments to comply with international norms on notice and takedown and with regard to third party liability.

The bills include amendments not only to the Copyright Law, but also the Law on Telecommunications, and the Code on Administrative Offences, intended to improve digital piracy enforcement. To be effective, notice and takedown should not (as earlier drafts of the bill proposed) create a highly bureaucratic set of procedures; these would render efforts to take down infringing materials time-consuming, costly or unworkable. Nor should they provide broad exclusions from liability. Rather they should incorporate third party liability under generally accepted standards (including provisions to reasonably gather and retain evidence).

Other deficiencies in the Copyright Law remain, including: the need to more clearly define temporary copies, to impose damages, and to exclude camcording from the scope of the private copy exception. Three other

amendments to the Copyright Law (some parts of previous bills, never enacted) should be adopted: (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 proposal does include an anti-camcording amendment; it would specifically exclude camcording in movie theaters from the scope of the Copyright Law's private copy exception. The law would thereby prohibit the reproduction of audiovisual works during their exhibition in theatres and at other premises intended for public consumption, and so, should be enacted.

**Law on Collective Management:** New law and subsequent regulations to govern the activities of Ukrainian collective management organizations are needed to improve the current situation, and to restore public trust and basic business practices for the administration of public performance rights and the broadcast markets. IIPA recommends the completion of a long-delayed draft Law on Collective Management, and that any such law incorporate the recommendations of European Union and U.S. experts in the music industry, including for provisions pertaining to extended collective management (for broadcasting, public performances, cable retransmissions and private copying levies). Collective administration should be based on transparency, good governance (established and controlled by rights holders), and on the basis of the volume of rights in active legal use in Ukraine.

**e-Commerce Law:** An e-Commerce Law was adopted in September 2015. As noted, it includes broad ISP liability "safe harbors" which are not consistent with international norms and far exceed U.S. law (as well as the Association Agreement with the European Union). The law should be amended to align with the provisions in the pending Copyright Act amendments (which are consistent with international norms, as well as U.S. and EU laws).

**Criminal Code and Criminal Procedure Code:** In addition to the criminal threshold, 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 – such a provision is contained in Bill #3081-d. 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 (including against optical disc producers or distributors). Police should be granted (and should use) the authority to initiate intellectual property criminal cases and investigations for submission to the court. It should also be clear that the police have the authority to seize all copyright products and equipment, for use at trial (they currently only do so in software cases).

**WIPO Digital Treaties:** In 2001, Ukraine acceded to the WCT and the WPPT, which entered into force in 2002. 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.

**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.

**Customs Code:** The Customs Code of Ukraine has included some administrative improvements in recent years. But IIPA recommends the abolition 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:** The Government of Ukraine continues to maintain onerous market access barriers. Two of these barriers were noted last year: (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 December 2015, the Government of Ukraine adopted a law on VAT that discriminates against foreign films.

The compulsory manufacturing requirement is included in the Law of Cinematography (amended in 2010) requiring 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.

In addition, several years ago, 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.

## **GENERALIZED SYSTEM OF PREFERENCES (GSP)**

IIPA filed a petition in 2011 to have Ukraine's Generalized System of Preferences (GSP) benefits suspended or withdrawn. Given the current IPR circumstances, IIPA recommends that the U.S. Government accept the IIPA petition and move to suspend or withdraw Ukraine's benefits, if there is no progress by the Government of Ukraine to properly address the problems identified in its IPR regime.