INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

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April 20, 2001

Section 301 Committee
Office of the U.S. Trade Representative
1724 F Street, N.W., Room 217
Washington, D.C. 20508

Attention: Sybia Harrison, Staff Assistant

Re: Written Testimony to Accompany IIPA's Appearance at the April 2001 Public Hearing Pertaining to the Identification of Ukraine as a Priority Foreign Country, Initiation of a Section 302 Investigation, and Proposed Determinations and Action, 66 Fed. Reg. 18,346 (2001).
Case: Docket 301-121: Ukraine

To the Members of the Section 301 Committee:

The International Intellectual Property Alliance (IIPA) submits this Written Testimony to supplement our appearance at the April 27, 2001 public hearing on the Identification of Ukraine as a Priority Foreign Country (PFC), the Initiation of a Section 302 Investigation, and Proposed Determinations and Actions by the U.S. government as a result of the PFC designation.

The Federal Register Notice of April 6, 2001 requested public comments that address:

(i) The acts, policies and practices of the Government of Ukraine that are the subject of this investigation; (ii) the amount of burden or restriction on U.S. commerce caused by these acts, policies and practices; (iii) whether the acts, policies and practices of Ukraine are actionable under section 301(b); and (iv) appropriate action under section 301 which could be taken in response. As noted, USTR proposes that appropriate action under section 301 should include the full or partial suspension of GSP duty-free treatment for products of Ukraine.

This written testimony briefly addresses all of these matters. More detail, especially about the "acts, policies and practices of the Government of Ukraine that are the subject of this investigation" including the losses incurred by the copyright industries, is provided in the IIPA's 2001 Special 301 filing on Ukraine, submitted to the Office of the U.S. Trade Representative on February 16, 2001, which is attached to this brief summary. We also include a description of the methodology used by our member associations to estimate trade losses due to piracy and piracy levels in Ukraine (Appendix A) to more directly address "the amount of burden [on the copyright industries] caused by these acts, policies and practices" of the Government of Ukraine.

I. The acts, policies and practices of the Government of Ukraine that are the subject of this investigation

In sum, the "acts, policies and practices of the Government of Ukraine that are the subject of this investigation" are Ukraine's failure to take any of the necessary and promised steps to eradicate the production and export of pirate optical media product (music CDs, VCDs, CD-ROMs containing business and entertainment software, and literary material). Ukraine has not implemented the three steps in the Action Plan announced in the joint statement issued by President Clinton and Ukrainian President Kuchma in June 2000; neither has Ukraine adopted the panoply of legislative reforms nor taken the proper steps to implement effective enforcement to stop, or even slow, the significant piracy problem of optical media production and copyright piracy in general.

There is nothing significant to report since our February 2001 Special 301 filing regarding Ukraine's implementation of the Action Plan in June 2000; that is, Ukraine has utterly failed to implement the Plan. At present, the illegal optical media plants continue to operate without regulation. We do have recent reports that some of the production lines (that we reported on in February) have been moved, or may, in some instances, have been taken out of Ukraine. Illegal optical media production continues, and in the absence of proper optical media regulations as required in the Action Plan, the legal system in Ukraine continues to offer no real deterrence to the unauthorized manufacture and distribution of U.S. copyrighted materials.

II. The amount of burden or restriction on U.S. commerce caused by these acts, policies and practices

As noted in our February 2001 Special 301 filing, and now further clarified, the losses to the copyright industries are staggering. In response to the request for comments on "the amount of burden or restriction on U.S. commerce caused by these acts, policies and practices" the following information is available: The Recording Industry Association of America (RIAA) estimates $160 million in losses (*i.e.*, $160 million that would have been repatriated back into the U.S. economy but for the piratical activities occurring in Ukraine). The Business Software Alliance (BSA) estimates its U.S. company losses were $16.8 million in 2000 (*i.e.*, "wholesale revenue piracy" losses resulting from piracy in Ukraine). The Motion Picture Association of America (MPAA) estimates that its losses were $40 million in 2000.

The loss figures are not available for the other members of the IIPA, namely the Association of American Publishers (AAP), the American Film Marketing Association (AFMA), the Interactive Digital Software Association (IDSA), or the National Music Publishers Association (NMPA). However, these industries are also hurt by piracy in Ukraine and the failure of the Government of Ukraine to deter piracy. In fact, all of the copyright industries are harmed by the optical media production problem there. To illustrate, the illegal optical media discs seized by authorities in Ukraine and in the other 12 countries where these Ukraine discs have been illegally distributed contain unauthorized recorded music (RIAA), audiovisual material (MPAA and AFMA), underlying

musical compositions (NMPA), business software (BSA), entertainment software (IDSA), and literary material (AAP).

III. Whether the acts, policies and practices of Ukraine are actionable under section 301(b)

In response to the question in the Federal Register Notice: "(iii) whether the acts, policies and practices of Ukraine are actionable under section 301(b)" the IIIPA believes the Ukraine's failure to address its piracy problem are clearly actionable under section 301(b) for all of the reasons stated in the Special 301 filing in February. Ukraine's optical media production and distribution and general enforcement failures are denying "adequate and effective intellectual property rights" to the copyright industries, and Ukraine has clearly not made "significant progress" to provide such adequate and effective protection of intellectual property rights. Significant progress would entail implementation of the June 2000 Action Plan as well as adoption of the legal and enforcement reforms detailed in our February filing. Unfortunately, there has not been progress, much less full and complete implementation of the Action Plan and other reforms.

IV. Appropriate action under section 301 which could be taken in response

In response to the question in the Federal Register Notice about "(iv) appropriate action under section 301 which could be taken in response" to Ukraine's activities, the IIPA recommends the only reasonable course of action left to our industries and the U.S. government—to immediately and completely withdraw or suspend GSP benefits (in accordance with our petition accepted last year by the U.S. government) and in addition to impose sanctions equal to the losses incurred by our industries.

To be clear, the IIPA and its member companies do not wish to penalize Ukraine at all; rather, we remain hopeful that Ukraine will fix its numerous copyright violations and move to eradicate piracy, especially by the proper control over and regulation of the optical media plants in accordance with the Action Plan. However, until the Government of Ukraine does move to fix these problems, we believe that immediate and complete withdrawal or suspension of trade benefits (GSP) and the imposition of sanctions, as required under U.S. trade laws, is the only viable option.

Since our filing in February (and the designation of Ukraine as a PFC by the U.S. government in March), there has been one development which, however, has not changed our assessment of the problems in Ukraine since our February filing. On April 5, 2001, the Ukraine Parliament (Rada) adopted new articles on criminal liability for IPR violations. To our knowledge these articles have not yet been signed by the President; he has 14 days to sign or veto the law once he receives it. While we laud the passage of penalties to criminalize IPR violations as a required feature of modern copyright systems, we are very concerned by some of the adopted provisions. In particular, our initial reading of the law (an unofficial translation) suggests that Article 136 retained the objectionable threshold to commence a criminal investigation only if there is "significant material damage" which will deter the police and prosecutors from using this new law except in the most severe circumstances. This is unfortunate, because in what could have been a positive step forward, the legislature has, over the objections of the copyright experts, adopted a watered-down provision that will not result in positive progress in the fight against piracy.

So, we reiterate our concerns in the Special 301 filing about the legal and enforcement deficiencies in Ukraine that have resulted in the PFC designation, which we believe is the proper, albeit unfortunate, outcome of the failure of the Government of Ukraine to implement the three-step action plan and of the Parliament to adopt the necessary reforms. In particular, IIPA is

concerned about Ukraine's failure to stop the unregulated production and distribution of optical media materials within Ukraine, and, as a result of poor border enforcement, into at least 12 other countries. This illegal production of optical media, as noted, cuts across all industries—sound recordings, musical compositions (the underlying songs on the discs), audiovisual, business and entertainment software, and literary works.

We hope that the actions of the U.S. government by withdrawing or suspending trade benefits and sanctioning the most vulnerable exports of Ukraine to the U.S. will be a call to action for the Ukraine government to take the positive steps to eradicate the optical media production problem and develop a proper copyright legal and enforcement regime. If undertaken properly, we further expect that this will encourage investment for the benefit of U.S. and other foreign investors, as well as for Ukraine copyright industries, so that in time we will be focusing on the positive, rather than the negative, aspects of trade with Ukraine pertaining to copyright and neighboring rights material.

Sincerely,

Eric J. Schwartz
Counsel, International Intellectual Property Alliance

International Intellectual Property Alliance
2001 Special 301 Report
UKRAINE

EXECUTIVE SUMMARY[1]

As the result of a very weak legal regime, and the absence of any meaningful enforcement activity by the government, Ukraine has maintained its position as the largest producer and exporter of illegal optical media disks (CDs, CD-ROMs, DVDs) in Central and Eastern Europe. However, during the past year, the government of Ukraine did commit itself to the adoption and implementation of new laws to end its status as the number one pirate CD producing country in the region. So, in mid-2000, there was good reason for optimism. On June 5, 2000, Ukraine formally announced an Action Plan in a joint statement issued by President Clinton and Ukrainian President Kuchma. The Action Plan was meant to combat the unauthorized production and export of optical media products in Ukraine. In that joint statement, the government of Ukraine announced its commitment to implement the plan by November 1, 2000. The Action Plan consisted of three parts: (1) to close the plants, seize illegal material, and only to reopen the plants when there is a legal licensing scheme in place; (2) to adopt proper optical media production and distribution regulations, including identification (SID) coding and the monitoring of raw material and manufacturing equipment, as well as of exports of product; and (3) to improve significantly the copyright law and to introduce other legal reforms, including criminal and administrative penalties, necessary to implement a modern copyright regime.

Unfortunately, Ukraine has still not implemented the Action Plan, and the production and distribution of illegal optical media disks continues unabated. There have been extensive and ongoing discussions among the U.S. government, the copyright industries and the Ukrainian government leading up to and since the November deadline passed, to correctly implement the Action Plan. As a result of these discussions and some progress on the legislative front, namely a first reading in the Parliament of some of the necessary changes, then-USTR Ambassador Barshefsky announced on January 19, 2001, that a decision on whether to identify Ukraine as a Priority Foreign Country would be deferred until March 1, 2001.

IIPA is in full agreement with the decision by USTR and recommends that Ukraine be designated a Priority Foreign Country on March 1, 2001 if they do not fully implement the Action Plan by that date. If Ukraine does implement the plan by that date, they should be remain on the Priority Watch List so that continued implementation, including closure of plants found to be engaged in the production of illegal CDs and on-the-ground licensing and effective and sustained regulation of the plants and material, can be monitored. And, if upon regular and continued monitoring by the U.S. government after March 1, Ukraine fails faithfully to continue its implementation of the Action Plan, then the U.S. government should immediately designate Ukraine as a Priority Foreign Country.

[1] For more details on Ukraine's Special 301 history, see IIPA's "History" Appendix to filing.

The problem of optical media production can be summarized as follows: there are at least five known CD plants and Ukraine is capable of producing over 70 million disks a year, which is more than Bulgaria produced at the height of its capacity. Losses to the music industry alone are estimated at $210 million for the second straight year. This illegal material, consisting of musical CDs, and business and entertainment software CD-ROMS, is still flooding other countries, completing disrupting the already vulnerable markets throughout Central and Eastern Europe (including the Commonwealth of Independent States, C.I.S.), as well as established markets in Western Europe. In April 2000, for the first time, audiovisual VCDs (over 11,000) made in Ukraine were seized by the motion picture anti-piracy organization, in this case in Bulgaria. Since June 2000, literally hundreds of thousands of pirate CDs made in Ukrainian plants have been seized in at least 12 countries in Eastern and Western Europe. The high level of optical media piracy has been fueled by persistent legal deficiencies and a lack of any meaningful on-the-ground enforcement, including, but not limited to, the absence of optical media production controls and effective border enforcement. Only recently did Customs authorities take some action, seizing several thousand CDs. However there has, for the moment, not been any follow-up to these seizures.

In addition to the optical media regulations, other major legal reforms are needed to provide effective protection and enforcement for works and sound recordings. It was only in February 2000 that Ukraine even began to protect foreign sound recordings, as a result of its accession to the Geneva Phonograms Convention. That was a positive step. However, older works and sound recordings remain unprotected. Ukraine must amend its law to fix this problem, something it has long promised to undertake and is obligated to do under a bilateral trade agreement with the United States, as well as to comply with the World Trade Organization TRIPS Agreement for accession.

As an example, foreign sound recordings released prior to February 18, 2000, and works published prior to May 27, 1973 (the date of adherence to the Universal Copyright Convention) remain unprotected in Ukraine. Ukraine made progress in 2000 by finally agreeing to address this problem for works and sound recordings. However, in November, when amendments to the copyright law were adopted in the Parliament (and subsequently vetoed by the President), the provisions were absent from the bill.

In addition to adopting the legal reforms necessary to protect pre-existing material, Ukraine must adopt an effective criminal code, criminal procedures code, customs code, and administrative regulatory code so that commercial pirates who violate the copyright and neighboring rights laws, as well as the optical media production provisions, can be appropriately punished using a wide array of enforcement tools. The criminal code, criminal procedures code, customs code, and administrative code reforms were not considered in 2000.

On May 6, 1992, Ukraine signed a bilateral trade agreement with the U.S. that entered into force on June 23, 1992. That agreement included wide-ranging commitments for Ukraine to enact and enforce modern laws protecting intellectual property rights and to provide effective enforcement. In exchange, the U.S. granted Ukraine Most Favored Nation (MFN), now Normal Trade Relations (NTR), treatment; the Ukrainian deadline for meeting the IPR obligations was December 31, 1993. In December 1993, Ukraine did enact a new law on copyright and neighboring rights. On October 25, 1995, Ukraine adhered to the Berne Convention (Paris Act). On February 18, 2000, Ukraine adhered to the Geneva Phonograms Convention. All three of these acts were obligations, even if undertaken belatedly, to comply with the bilateral agreement.

During the seven years that Ukraine slowly and only in piece-meal fashion, implemented the bilateral IPR obligations, it became a "safe haven" for an increasing number of pirate manufacturers of musical recordings, business and entertainment software, and more recently, audiovisual material. A combination of legal reform and enforcement deficiencies have created conditions ripe for piracy: until 2000, foreign sound recordings weren't protected at all; older material including works and sound recordings, remain unprotected thereby undercutting any marketplace for newer material; the optical media plants are completely unregulated; and, there are no administrative or criminal sanctions, much less on-the-ground enforcement activities, to deter piracy. Until these problems are fixed and there is an operational system of deterrent criminal enforcement, pirated products will continue to flood Ukraine and the region, and the Ukraine marketplace for legitimate sound recording and works will not get itself established.

The failure to provide effective enforcement is a breach of the U.S. trade agreement (and any eventual World Trade Organization accession). Although criminal sanctions do exist for violations of copyright pertaining to works, they are currently insufficient to deter commercial piracy. These provisions are not even applicable to the violation of the rights of producers of sound recordings and other holders of neighboring rights. Consequently, there are currently no criminal sanctions for the violation of the rights of the record companies, whose products are so widely pirated in Ukraine. New provisions to revise the Criminal Code were drafted by the Ukrainian government (within the Ministry of Interior) in 1998. They are now finally being considered by the Parliament in early 2001. The Criminal Code must be amended to include strong sanctions to deter piracy of copyright works and sound recordings. The Criminal Procedure Code must be amended to provide police the authority to act *ex officio* to initiate criminal intellectual property cases.

In addition, Ukraine does not have an effective Customs code to deter piracy at the border; the current Customs Code does not even directly stipulate IPR infringements among the many other violations, nor does it provide customs officials with *ex officio* authority to seize material at the border. These failures permit illegal material to flow freely into and out of Ukraine. The Customs code must be amended to make border enforcement effective. Equally important as the copyright legal reform failures is the failure to take the steps necessary to properly enforce its copyright laws with police, prosecutor and judicial action to deter commercial piracy. The improvements in the enforcement legal regime of Ukraine -- to the criminal, criminal procedure, civil, administrative, and customs codes – plus the implementation of on-the-ground enforcement, are necessary for compliance with the bilateral trade agreement and for Ukraine's accession to the World Trade Organization.

COPYRIGHT PIRACY

The Need to Regulate Optical Media Production in Ukraine, and to Control the Export of Illegal Material in the Region

The absence of optical media regulation and criminal enforcement provisions has allowed Ukrainian plants to become a major source of the production, distribution and export of illegal optical disk media (CDs containing musical works, audiovisual DVDs, and CD-ROMs containing entertainment and business software). This has resulted not only in a flood of illegal optical media

product in Ukraine, but the export of millions of pirate CDs throughout Eastern, Central and Western Europe.

It is estimated by the recording industry (International Federation of the Phonographic Industry, IFPI) that the production capacity of optical media material is still around 70 million units per year; the demand for legitimate CDs in Ukraine is not more than 5 million units. The recording industry is aware of at least five plants that are producing predominantly pirate product; these five plants, also identified in last year's report, have been operating with impunity, allowing Ukraine to become one of the pirate CD manufacturing capitals of the world.

The Action Plan, originally announced by the Ukraine and U.S. governments in June 2000; was intended to address this problem to take the steps necessary to regulate optical disk plants, and to improve border enforcement to contain the problem within the borders of Ukraine. Proper optical media regulation in Ukraine would consist of: (1) instituting plant licensing, SID code and optical media regulations and penalties for noncompliance that include the closing of offending plants; and (2) appointment of the proper agencies and officials, as was done in Bulgaria, with the authority to undertake this enforcement effort and responsibility for putting these regulations in place.

The Action Plan, consistent with what the copyright industries have requested, would require Ukraine to immediately stop production of the illegal material and to set up plant monitoring procedures, like those established in Bulgaria in 1998, to regulate the production, distribution and export of optical media. Such regulations include provisions to close plants that are caught illegally producing copyrighted material; to seize infringing product and machinery; to introduce criminal liability for infringing these regulations; and to monitor the importation of raw materials (optical grade polycarbonate) used in the production of CDs, DVDs and CD-ROMs (and other optical disk media). All of the plants would be required under the Action Plan to adopt source identification (SID) codes, so that the source of illegally produced CDs can be traced and any necessary actions taken against infringing manufacturers.

The history of copyright enforcement in Ukraine the past few years has unfortunately consisted of a series of missteps, undercutting effective enforcement. Distribution, including the import, export, wholesale and retail trade of audio and audiovisual products, could have been properly regulated by Presidential Decree # 491 of May 20, 1998. At the time, IIPA welcomed adoption of the decree as a positive step against piracy, but unfortunately, the decree was never implemented. Instead, on March 23, 2000, the Parliament adopted the Ukraine Law on Distribution of Copies of Audiovisual Works and Phonograms (the "Hologram Sticker" law). This law did not contribute at all to the improvement of copyright enforcement against CD plants. Adopted over the objections of the copyright industries, this new law instead offered a harmful alternative to plant licensing regulations. It is unclear whether the new law actually, or only effectively, repealed the 1998 Decree but it clearly ended any hope of proper implementation of the 1998 provisions.

The controversial Hologram Sticker law was finally implemented in January 2001. And the Hologram Sticker law has already proven to be open to abuse and fraud. To make matters worse, the law completely exempts exports, the real problem with the overproduction problem that exists in Ukraine; and it exempts manufacturers, the real source of the problem. Finally, such a system establishes an unworkable administrative burden on legitimate businesses and keeps legal product from the market, thus permitting more pirate material to flourish in the vacuum. The copyright

industries expect that the Hologram Sticker law will be critically reviewed as part of the proper implementation of the Action Plan, and be replaced with effective optical media regulations.

Another step, undertaken in 1999, was the closure and reorganization in a weaker form of the Ukraine Copyright Agency (SCAU). The government of Ukraine needs to clarify the authority and role of the Ukraine Copyright Agency vis-à-vis other government agencies, including its role, if any, in verifying the legality of the issuance of certificates for import, export, and the wholesale and retail trade of copyright material. The Copyright Agency, in essence an authors' collecting society, and the State Department on Intellectual Property are not equipped to monitor and close down plants that are engaged in piratical activity. That should be left to the economic police authorities in an enforcement based agency within the government.

COPYRIGHT LAW AND RELATED ISSUES

Amendments to the Copyright Act and Related Enforcement Laws are Necessary

IIPA remains concerned that Ukraine has not, to date, enacted the crucial legal reforms necessary for a modern and effective copyright regime. In 2000, some of the important provisions were drafted but not enacted. Key pieces of enforcement reform were not considered at all. In early January 2001, the Parliament scheduled consideration of copyright law amendments after a previous version adopted in November 2000 that was unsatisfactory was partially vetoed by the President and therefore not enacted. Unfortunately, the Law as currently under Parliamentary consideration would still not properly correct a number of grave copyright deficiencies; also, other important legal reforms are needed.

In sum, the legislative deficiencies in Ukraine include the lack of: (1) protection for sound recordings created before February 18, 2000 and for works created prior to May 27, 1973, as required by the Berne Convention and WTO/TRIPS; (2) full national treatment of neighboring right-holders with regard to rights and remedies; (3) optical media plant regulations to stem the commercial-scale pirate production of CDs, CD-ROMs and DVDs; (4) criminal penalties and procedures and administrative regulations to deter commercial piracy; (5) Customs code amendments to grant clear *ex officio* authority to Customs officials to seize suspected illegal material at the border; and (6) civil *ex parte* search procedures necessary for effective end-user piracy actions (and required by WTO/TRIPS).

Not since 1993 has Ukraine adopted any significant revision of its copyright law. The Supreme Soviet of Ukraine passed a new Law on Copyright and Neighboring Rights on December 23, 1993, which came into force on February 23, 1994. That law was closely modeled on the Russian Federation's 1993 copyright law. Separate legislation and regulations on broadcasting were also adopted.

In 1998, a criminal penalties bill was drafted, but it has never been adopted by the Parliament. The absence of adequate criminal penalties for copyright and neighboring rights violations is a major deficiency in the current legal regime. As part of the Action Plan, Ukraine has agreed to enact a criminal penalties bill, as well as appropriate administrative remedies to deter

piracy. *It is imperative that the criminal and administrative remedies are adopted quickly to stem the growth of organized criminal activity in the production of illegal material, including optical disk media*. At present, for example, there are no criminal sanctions for the violation of the rights of record producers.

In the 1992 bilateral trade agreement with the United States, Ukraine acknowledged its successor status to the Soviet Union's adherence to the Universal Copyright Convention, effective May 27, 1973. This confirmed that the point of attachment for copyright relations between the United States and Ukraine existed from this date forward at least for works (but likely not including sound recordings). The 1992 agreement also stipulated a bilateral obligation of both countries to provide a full retroactive term of protection to each other's works on the date when both countries became members of the Berne Convention in accordance with Article 18 of Berne (this is also a WTO/TRIPS obligation). The United States unilaterally provides full retroactive protection for all Ukrainian works and sound recordings; that protection was extended from a term of 75 years to a term of 95 years in amendments adopted by the Congress in 1998.

In October 25, 1995, when Ukraine adhered to the Berne Convention, its instrument of accession included a declaration stating that it would *not* apply Berne's Article 18 obligations to protect pre-existing foreign works in Ukraine. Ukraine's decision not to grant protection to pre-existing U.S. copyrighted works (prior to May 1973) is incompatible with its bilateral trade agreement with the U.S., as well as with Ukraine's Berne (Article 18), national treatment, and any future TRIPS obligations for works and sound recordings. As part of the Action Plan, Ukraine agreed to correct this deficiency with amendments to the Copyright Law for both works and sound recordings.

On February 18, 2000, Ukraine adhered to the Geneva Phonograms Convention, also an obligation of the bilateral trade agreement. However, the copyright law does not provide protection for pre-existing sound recordings. This creates an intolerable situation for the recording industry. By waiting almost seven years to join Geneva Phonograms, Ukraine permitted an explosive growth of illegal cassette tape and optical media disk piracy of foreign musical recordings to flourish. And by excluding pre-existing sound recordings, Ukraine continues to act as a safe haven for back-catalog pirates. There can be no adequate enforcement efforts against music piracy in Ukraine until protection is afforded for new and older material. As noted above, as a part of the Action Plan, Ukraine agreed to correct this deficiency with amendments to the copyright law but has so far continually failed to comply with the ensuing obligations.

As mentioned, a major legal shortcoming in Ukraine is the lack of effective criminal penalties to deter piracy. Current Ukrainian law provides absolutely no criminal sanctions for the violation of the rights of record producers. In the Soviet era, identical criminal sanctions for copyright infringement were a part of the criminal codes in each of the republics of U.S.S.R. The codes of several of the countries of the C.I.S., including Ukraine, contain important deficiencies that have not been corrected. These include the lack of jail terms; no protection for infringements involving producers of sound recordings or performers; and sanctions that are extremely small (only negligible fines and obligatory labor provisions).

Ukrainian law (Article 136) currently provides for up to two years' imprisonment and fines ranging from 50 to 120 times the minimum wage (roughly U.S.$1,000 to $2,400) for copyright violations (and is silent for sound recording infringements). In any case, these penalties, which have never been applied, are insufficient to deter commercial piracy.

The Action Plan requires passage of an effective IPR criminal and administrative penalties bill. The current draft criminal penalties bill would amend Article 136 to increase penalties of up to three years' imprisonment and up to 400 times the minimum wage (U.S.$8,000) for repeat offenders. It would also make criminal penalties applicable against phonogram (sound recording) piracy. However, the draft bill still contains a provision that should be eliminated before final adoption. As in Russia, the penalties under the draft could only be imposed for "substantial material damage" – this is a standard that creates an unwarranted threshold for copyright piracy. Instead of this vague standard, the law should be amended to include a low and clear threshold to instigate a criminal action; not only would this help to identify criminal infringing acts for prosecutors, but it would also provide critical guidance for the police when they are conducting initial raids and need to assess, in a particular situation, whether a case should be brought under the criminal code or the administrative code.

The criminal code revision now under consideration needs improvement before adoption. The Ukraine government should raise the penalties that were in the draft circulated last year. In particular, the fines should be raised to deterrent levels, and the Code must eliminate any unnecessary thresholds that will act to prevent police and prosecutors from effectively stopping commercial piracy. The availability and application of criminal penalties at levels sufficient to deter piracy are necessary to effective copyright protection, as well as WTO/TRIPS obligations.

With respect to criminal procedures, police should be able to act *ex officio*, and to initiate an intellectual property criminal case for further investigation and submission to the court, including the authority to hold confiscated products and equipment for use at trial. None of this is currently permissible under the existing criminal procedures code. The current draft criminal code amendments, IIPA understands, would not provide any of this authority in Ukraine; provisions granting this authority should be adopted in 2001.

Ukrainian criminal procedures require rightholders to file complaints to initiate actions. Prosecutors, not the police, are responsible for initiating infringement cases. Enforcement would be improved if the police were afforded *ex officio* authority to initiate cases without any formal complaint of the copyright owner; the criminal procedure code should be so amended. It is not clear if the proposed amendments to the criminal code would make any changes to the criminal procedure code as well, but these also should be part of any amendments package in 2001.

As a result of its Normal Trade Relations (NTR, formerly known as MFN) status, Ukraine is now a beneficiary under the Generalized System of Preferences (GSP) program, a U.S. trade program which offers preferential trade benefits to eligible countries; that is, duty-free tariffs on certain imports. In order to qualify for such unilaterally granted trade preferences, the U.S. Trade Representative must be satisfied that the country meets certain discretionary criteria including whether it provides "adequate and effective protection of intellectual property rights . . ." This includes whether a country is providing adequate and effective protection and enforcement of copyright and neighboring rights. Ukraine is not fulfilling the statutory obligations of GSP. So, at the same time that Ukraine is causing millions of dollars of losses to the U.S. due to piracy, it imported $27.3 million worth of products without duty, or over 5.2% of its total imports into the U.S. in 1999 (the last full year of available GSP statistics), and over $36.6 million in the first 10 months of 2000, an increase of 47.1% during the same period in 1999.

IIPA filed a petition with the U.S. government on June 16, 1999 to request the suspension or withdrawal of Ukraine's GSP benefits. That petition was accepted on February 14, 2000 and

public hearings were held on May 12, 2000. The U.S. government has not yet made a final decision on suspending or withdrawing Ukraine's GSP benefits, but IIPA continues to believe that suspension of these trade benefits should be undertaken when it is apparent that such measures are necessary to get adequate and effective copyright protection and enforcement in Ukraine.

Amendments to the civil code (Chapter IV) pertaining to copyright are also under consideration in Ukraine. This is one draft law that Ukraine should be discouraged from passing because it is a dangerous development in breach of the bilateral trade agreement. It is also a development not unique to Ukraine, as it has been considered in several countries of the C.I.S., including the Russian Federation, as part of the comprehensive reform of the civil codes of these nations. In Ukraine, as in other countries in the C.I.S., the efforts to revise the civil code will result in the addition into that code of new copyright provisions inconsistent with Berne, WTO/TRIPS, and the bilateral trade agreement. Efforts to so revise the civil code in Ukraine should be opposed.

Last, Ukraine was not a signatory to either of the two new WIPO "digital" treaties. Ukraine should be encouraged to accede to and implement both the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonogram Treaty (WPPT). Acceding to and implementing these treaties will protect against Internet and other forms of digital piracy, and help the development of electronic commerce in Ukraine. Accession and implementation provisions were agreed to by the Interparliamentary Assembly of the Member States of the Commonwealth of Independent States (C.I.S.) in December 2000 in St. Petersburg as a way to modernize the copyright and neighboring rights laws of countries in this region. In fact, these resolutions and recommendations were agreed to by all 12 members states of the C.I.S., working in conjunction with officials from the W.I.P.O.

ENFORCEMENT

Until the Action Plan is fully implemented, the enforcement situation for the copyright industries will continue best to be summarized as one of complete failure. The general lack of protection and enforcement of the rights of copyright owners is preventing entry by the U.S. creative industries into the country, and stifling the development of local copyright industries. There is no effective legal structure in place to stop rampant optical media production, almost no border enforcement to stop the exporting of that material, and little internal police or judicial activity to crack down on commercial pirates, much less on retail-level activity.

The Ukraine enforcement problem is twofold. First, there are extremely high levels of piracy of all copyrighted products -- music, sound recordings, business applications software, interactive entertainment software (on all platforms, CDs and cartridges), motion pictures, videos, television programming, and books and journals, throughout Ukraine (and the C.I.S.). Second, levels of piracy in the entire region are expected to get worse until the government fully implements the Action Plan and imposes strict monitoring of the illegal optical disk media production facilities in Ukraine that are producing these disks in Ukraine for foreign distribution.

The International Federation of the Phonographic Industry (IFPI) and the Recording Industry Association of America (RIAA) report that Ukraine is still the second largest music market after Russia in the C.I.S.; and it is the largest center of pirate music production. The recording industry

reports that piracy of international repertoire is estimated to be at least 95%. The total value of pirate sales, including exported CDs, is estimated at some $200 million.

It is estimated the Ukraine exported at least 30 to 40 million pirate CDs in 2000. These include not only declared exports of product, but also many thousands of smuggled shipments as well.

The pirate production is damaging not only the Ukrainian market, but also other markets in the region, as well as in the EU. For example, Bulgarian authorities reported significant numbers of pirate CDs entering their market from the Ukraine — an ironic twist that clearly indicates that the Ukraine has firmly taken the mantle from Bulgaria as one of the world's prime producers and exporters of pirate CDs. Hundreds of thousands of pirate CDs (Latin American and international repertoire) have also been transported from the Ukraine to South America.

To add to the severity of the problem, Ukrainian CD plants and their related distribution companies offer their entire illegal catalog of recordings for sale via the Internet. These companies have no licenses from any music publishers or sound recording producers to replicate this material.

Throughout 2000, seizures of Ukrainian-made pirate CDs took place all across Europe. In one instance at the Frankfurt Airport in Germany, a shipment of 500,000 pirate CDs was seized. In July, a shipment of 110,000 pirate Ukrainian CDs was intercepted in Lithuania. Thousands of pirate CDs from Ukraine were seized on Malta in the Summer of 2000. In March, 50,000 illegal CDs were destroyed in the Kiev Stadium as part of an anti-piracy event organized by Ukraine's Tax Police. The illegal CDs were seized in February during a wide-scale operation on 2,000 retail outlets. In December 2000, 10,000 CDs were seized in London, all originating from Ukraine, illustrating how far the Ukraine problem has reached into Western European markets. And these are just some of the many examples of such seizures of Ukraine-produced material.

The Business Software Alliance (BSA) estimates that trade losses due to software piracy in the Commonwealth of Independent States (C.I.S.) other than Russia were $32.7 million in 2000 (these are preliminary figures for 2000 and will be finalized later in 2001). The level of piracy was estimated to be 90%. The software industry continued to experience exceptionally high levels of pirate product from Ukraine in particular. There was one reported seizure of mostly computer programs (along with sound recording material and videocassettes) in February 2001; a total of 30,000 optical disks was seized. So the software industry is vulnerable to the same optical media production and distribution problems that plague the recording (and audiovisual) industries.

In 2000, the industry began working with Ukrainian police to accomplish the first raids of reseller pirates, but this initiative did not progress very far. Criminal and civil litigation remain nonexistent, and the absence of *ex parte* provisions makes it impossible for rightholders to collect evidence without police assistance. Disappointingly, attempts at a government legalization decree remained bogged down for another year, and were unsuccessful.

The entertainment software industry (Interactive Digital Software Association, IDSA) is also vulnerable to the same optical media production and distribution problems as the other industries. The IDSA reports that material has been confiscated throughout Eastern and Central Europe that was made illegally in Ukraine, and that production levels are up several hundred percent from recent years in Ukraine. As in the music industry, the Ukraine producers have created a regional problem not just of production, but of the distribution and export of material throughout Ukraine,

the Czech Republic, Poland, Hungary, Russia, Belarus and the rest of the countries of the C.I.S. These are region-wide organized criminal operations for the most part.

The Motion Picture Association (MPA) reports that for the sixth straight year, the video piracy rate is at 99% and broadcast piracy remains at 95% (cable and satellite rates are unavailable). As in prior years, the main piracy problem for MPA remains rampant video piracy in shops and street kiosks. Pirate films regularly appear in Ukrainian kiosks within weeks of their U.S. theatrical release. Most are back-to-back copies of videos recorded from U.S. cinema screens. Police lack legislative enforcement tools, and organized criminal groups are believed to be heavily involved.

Broadcast television piracy is also widespread. There are three national television stations, two run by Ukrainian State Television, which broadcast original Ukrainian programming and retransmitted Russian signals. There also are many regional channels, which almost exclusively broadcast pirated films. Some of these stations use legitimate U.S. videos to make pirate broadcasts, often broadcasting the U.S. FBI anti-piracy warning at the beginning of those videos.

The Ukrainian Copyright Agency and the National Council for Television and Radio, which has licensing authority over Ukrainian television, have not been effective. The Ukrainian government should require compliance by broadcasters with copyright laws to obtain and maintain their licenses.

MPA estimates that trade losses in 2000 due to audiovisual piracy in Ukraine remained at $40 million (unchanged since 1995).

The book industry continues to experience piracy as well, with most of the problem being books illegally printed in the Ukraine for sale in Russia. This includes both overruns of licensed works and the production of unlicensed works, which flow freely into Russia and the other countries in the C.I.S. as the result of lax border enforcement.

Last, in 1998, the Ukraine government promised to establish an interministerial committee on intellectual property enforcement. In February 2000, the Ukraine government announced that it was finally going to organize this committee. To date, there are no reports it has formally met, and if it has, there are no apparent signs of its activity or effectiveness in combating the spread of pirated material especially aimed at the production and distribution of optical disk media. As noted elsewhere, effective enforcement entails not only domestic (internal) enforcement, but proper border enforcement, to stop the flow of goods into and out of Ukraine. This necessitates that Ukrainian authorities coordinate their activities as well as provide customs officials with the proper authority to seize illegal material at the border without a court order, and give police and other enforcement officials the equivalent proper *ex officio* authority. Without this clear authority on the part of police and border officials, piracy will continue to worsen.

In sum, copyright piracy threatens not only foreign investment but also the development of local copyright industries in Ukraine and in the other countries of the C.I.S. This threat must be met by a coordinated legal and enforcement response. All enforcement agencies (that is, the police, prosecutors, judges, customs officials and the ministries of Justice, Interior, and Taxation) should treat commercial copyright infringement as a serious crime, and should have the tools in the criminal, criminal procedure, customs, and administrative codes to deal appropriately with the problem. In addition to the legal tools, clear government strategies and lines of authority should be

developed. And finally, the training of judges, prosecutors, customs officials, and police should be part of ongoing enforcement efforts once the legal reforms are in place, to develop an effective enforcement regime.