

# INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

## 2004 SPECIAL 301 REPORT

### UKRAINE

#### EXECUTIVE SUMMARY<sup>1</sup>

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**Special 301 Recommendation:** IIPA recommends that Ukraine remain a Special 301 Priority Foreign Country (PFC). Consistent with this designation, IIPA recommends that the trade sanctions and the suspension of Ukraine's duty-free trade benefits under the Generalized System of Preferences ("GSP") currently in place should continue until Ukraine fulfills its obligations under the Joint Action Plan signed by then-President Clinton and President Kuchma in 2000. In order to terminate the PFC designation and the trade sanctions (and to restore GSP benefits), Ukraine must amend the Optical Disc Law of 2002 to correct and fully implement the optical media regulatory scheme set out in the Joint Action Plan, including the necessary criminal enforcement tools. At present, Ukraine is neither in compliance with the 2000 Bilateral Agreement, nor the 1992 Bilateral NTR Trade Agreement with the United States (which Ukraine agreed to implement by December 31, 1993). Ukraine's overall legal system for the protection of copyright and the related enforcement regime still falls short of compliance with the TRIPS obligations of the World Trade Organization. As a result, Ukraine should be prevented from accession to the WTO until it is in complete compliance.

**Overview of key problems:** The three problems that continue to be of the highest priority in Ukraine are: (1) the inadequate regulation and ineffective enforcement of optical media production and distribution facilities, that, for example, permitted a fourth optical disc plant to begin operations last year under the defective laws in place; (2) the complete absence of criminal prosecutions and deterrent sentencing, and a dramatically ineffective border enforcement, especially against large-scale pirate operations (involving music, film, and/or entertainment software); and (3) a legal regime in need of critical reforms.

**Actions to be taken by the government of Ukraine:** In order to reinstate GSP benefits and to end the trade sanctions, the Ukrainian government must meet the following six benchmarks:

- Amend the existing optical media law in several key areas, including licensing the production of matrices, clearly imposing an obligation to engrave all manufacturing equipment with a source identification code ("SID Code"), including equipment used for the production of blank (recordable) optical media and abolishing the SID Code requirement for imported optical discs;
- Fully implement a comprehensive optical media enforcement scheme by regularly carrying out effective (surprise) CD plant inspections by properly empowered inspectors, verifying SID codes that have been issued and including SID codes/inspections on all equipment used to make optical media, and imposing criminal sanctions against violators;

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<sup>1</sup> For more details on Ukraine's Special 301 history, see IIPA's "History" appendix to this filing at <http://www.iipa.com/pdf/2004SPEC301HISTORICALSUMMARY.pdf>. Please also see previous years' reports at <http://www.iipa.com/countryreports.html>.

- Enact and enforce effective border measures to stop the export and import of illegal material;
- Commence raids and follow up with criminal prosecutions against pirates engaged in commercial distribution (for example, against organized crime syndicates involved in entertainment software distribution), as well as using administrative procedures against store and other smaller-scale pirates and, refraining from returning previously seized pirated goods to the market;
- Undertake a review of the hologram system and its administration/enforcement to stop the practice of issuing holograms (currently, in the thousands) to *maile fide* companies using fraudulent license agreements; and
- Introduce the necessary legal reforms in the criminal code and administrative code (to impose criminal liability for licensing violations), and to the civil procedure code to facilitate better enforcement.

## **COPYRIGHT PIRACY AND ENFORCEMENT IN UKRAINE**

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### **Optical Media Production and Distribution Must Be Fully and Completely Regulated—Amendments Necessary to 2002 Law**

Three years ago, after significant worldwide pressure to act, Ukraine took several important steps to try to remedy its position as one of the world's largest producers and distributors of illegal optical disc media (CDs containing musical works, audiovisual VCDs, and CD-ROMs containing entertainment and business software). CD-R production by the plants is creating a growing problem where, through coordinated efforts, the plants sell such discs (often with pre-printed artwork) to pirates who subsequently illegally burn the music onto discs for public sale.

The problem of wide-scale piratical activity in Ukraine, much of it by organized criminal syndicates, flourished in the 1990s because of Ukraine's weak criminal enforcement regime. Legal reforms were adopted in 2000 and 2002. However, as noted at the time by the copyright industries and the U.S. government, these reforms fell far short of the needed comprehensive steps necessary for effective enforcement. It was unfortunate that the Verkhovna Rada did not follow the government of Ukraine's proposal for proper optical disc regulation and instead adopted flawed laws; the consequence was the imposition of trade sanctions and suspension of GSP benefits. Over the past two years, the Rada has rejected long-awaited amendments to cure the problem. In fact, in May 2003, a bill to remedy the flawed system was given a first reading. However, the May 2003 bill was itself watered down from the original proposal worked on extensively by the copyright industries and the government of Ukraine. Provisions were added into the May 2003 bill with the support of the pirates that would have made the existing legal regime even weaker; in any case, the Rada never considered the bill after the first reading and, for another year, the necessary legal reforms were not adopted.

The benchmarks that the Ukraine government needs to meet to end the sanctions and restore GSP requires complete compliance with the 2000 Action Plan. For two years, the IIPA and its members have spelled out the details of what this compliance looks like in numerous filings. Instead, IIPA and the U.S. government have watched in frustration as myriad attempts to remedy the flawed enforcement provisions have either been stalled or defeated (with the

support of the pirates) in the legislature.<sup>2</sup> It is also true that over the past two years optical disc production has slowed in Ukraine. However, within the last year a fourth plant (formerly Lazer-Inforn, now Replitec) has come on line and there is the real possibility that others will follow now that the pirates have discovered that the government is not serious about regulating and effectively controlling their practices. That is why adoption of the necessary amendments is critical.

At present, the deficient laws have meant that: (1) there is no reliable mechanism for adequate surprise inspections of the plants; (2) mastering codes have been issued to plants that have no mastering facilities thus allowing facilities to produce masters and engraving codes without any oversight by the copyright owners; and (3) key enforcement tools (the use of production samples) that could aid in the detective work for uncovering illegal activity have been held back by the agency responsible for optical media licensing, the State Department for Intellectual Property (SDIP).

Although overall optical disc production has slowed, Ukraine, with the continuing involvement of organized crime groups, remains a major transshipment point (by trucks, railroads and boats), and a storage facility, for illegal discs produced in Russia and elsewhere because of very poor border enforcement. Pirate material from these countries continues to flood the Ukraine market. In 2003, one alleged Ukrainian pirate of software, whose operations are based in Russia, was arrested in Thailand.

At present, four plants are in operation in Ukraine, albeit at limited capacity (and with even a government acknowledgement of some illegal production still). The slowdown, or more accurately the “stall,” in overall production by the pirates is understandable. It took almost two years of debate for the Ukraine Parliament to adopt the Optical Disc Licensing Bill #8278-1, which entered into force on April 22, 2002. In addition to the law, an Implementing Decree was signed on January 30, 2002 and it set in motion a series of (13) regulatory laws that were necessary to put the law into force. Many of these implementing regulations were put into place; however, many key regulations have not been put into place.

In short, the 2002 Law is flawed and its deficiencies cannot be undone by regulation alone. IIPA was encouraged in 2001 and 2002 by the fact that the SDIP and the Ministry of Economy was willing to work with industry representatives to draft the necessary amendments, but such progress has stalled for almost two years. The government of Ukraine must now work to see that these amendments are adopted and then that the entire optical media scheme is implemented effectively.

A properly implemented plan to regulate the production, distribution and export of optical media would include provisions: to close plants that are caught illegally producing copyrighted material; to immediately seize infringing product and machinery used for its production (including spare parts and certain pieces of equipment) as well as equipment lacking the appropriate SID code; to introduce criminal liability for the individuals infringing these regulations at a deterrent level; and to monitor the importation of raw materials (optical-grade polycarbonate) used in the production of CDs, DVDs and CD-ROMs (and other optical disc

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<sup>2</sup> For a full history of the imposition of trade sanctions and the withdrawal of GSP benefits imposed against Ukraine by the U.S. government, see <http://www.iipa.com/rbc/2003/2003SPEC301UKRAINE.pdf> at page 12, i.e., last year's IIPA Ukraine filing.

media). All of the plants would be required to adopt source identification (SID) codes on all molds and mastering equipment to deter plants from infringing production of optical discs.

There are four significant shortcomings pertaining to these plants under the current licensing scheme: First, Ukrainian authorities—despite the provisions that require the issuance of SID codes only *after* a CD plant has provided the necessary information on its equipment—issued codes to two of the plants without having a comprehensive submission concerning the equipment held. Second, the Ukrainian authorities have not confirmed the application of codes on the relevant equipment. In contrast, the Noiprox plant (in L'viv) invited IFPI representatives to the plant to inspect the application of the code on their equipment. Third, Rostok (in Kiev), after producing CD-Rs without SID codes for more than a year, decided to produce blank CD-Rs with a SID code. There are no legal obligations to monitor molds (a major shortcoming of the licensing law). As a result, Rostok could be using a coded mold for one production run, and any number of other molds for undeclared production—all as a result of other regulatory shortcomings including the lack of checks on polycarbonate imports/use and production records. These CD-Rs subsequently enter the pirate market because copyrighted music and other works are recorded on these discs for sale in the Ukraine market. Fourth, it will be hard to authoritatively prove illegal activity without a comprehensive set of samples from each of the Ukrainian plants' lines and molds (because the plants prohibit visits).

Rostok, one of the plants operating in Kiev, has at least one line that is producing (audiovisual) DVDs, although there is no clear evidence it is replicating pirate product. The SDIP was not even aware of the DVD equipment in the plant, even though, under the optical disc licensing law, it should have been notified of the existence and operation of the additional DVD line. Once presented with this evidence by IFPI, SDIP failed to investigate the matter satisfactorily and instead accepted the plant's explanation that the code was being used by another facility. This illustrates the highly inefficient and flawed way in which the optical disc regulation is enforced in practice.

Even with the slight reduction in operational plants, key optical disc plant enforcement problems remain under the current law and regulations:

- The licensing authorities are not conducting effective plant inspections, let alone surprise inspections—the only means of effective plant production enforcement;
- The plants in operation were issued SID codes without proper verification at the time of issuance. No comprehensive and in-depth follow-up inspections have taken place since in order to verify the maintenance of these codes on all equipment and molds (and mirror blocks);
- The equipment used at the plants in operation has not been monitored to make certain that source identification (SID) codes are in fact properly engraved on all molds, matrices and all relevant equipment used in the production of optical discs in Ukraine;
- A database needs to be established by the Ukraine enforcement authorities (likely SDIP) to establish a complete and detailed inventory of the equipment used in the production of optical discs at the licensed plants.

It is now estimated by the recording industry (the International Federation of the Phonographic Industry, IFPI) that the current production capacity of optical media material is around 30 million units per year. The demand for legitimate CDs in Ukraine is still less than 10 million units. Most seriously, the current inability to properly regulate the existing four plants means that production of even more unauthorized material is a looming threat that can be

further exacerbated at any time. That is, if not properly regulated, the existing plants alone could ramp up their illegal operations to former levels.

In the absence of any legal authority to control and, where necessary, prevent import or export of equipment suspected of having been used in illegal production, two of the Ukraine plants suspended their operations in 2002 and moved their production lines to Belarus, Russia, and Bulgaria. Most of these former Ukrainian plants immediately recommenced pirate production, utilizing their traditional distribution routes and channels in Ukraine. The line that moved to Bulgaria returned to Ukraine last year; IFPI alerted the authorities of its return. The movement of these plant lines out of and then back into Ukraine was facilitated by the very weak border enforcement system in place, along with the SDIP's failure to properly regulate optical disc equipment—and it illustrates the overall failure of the optical disc plant licensing law and its enforcement.

The government of Ukraine has failed to use its existing criminal enforcement tools against illegal producers and distributors of optical media material. This was evident in 2002 by the termination (after 8 months of investigation) of one plant investigation because of a lack of sufficient evidence of any violations of the law against the illegal plant operators. This occurred even after the government of Ukraine openly acknowledged to several foreign governments the nature and scope of its illegal plant activity (culminating in the Joint Action Plan with the U.S. government).

Another misstep that undercut effective enforcement was the adoption of the controversial Hologram Sticker law in 2000. The implementation of the Ukrainian hologram system (administered by the government) is seriously harming the interests of legitimate record companies while it permits suspect companies to receive thousands of holograms for foreign repertoire for which they have no licenses despite objections from the legitimate licensees. These holograms are ultimately found in the market on pirate products.

In January 2003 the Ukrainian Ministry of Education and Science passed an "order" requiring the State Department of Intellectual Property (SDIP) to organize a voluntary registry for software manufacturers and distributors in Ukraine. This registry, in place as of March 2003, was intended to contain the names of software manufacturers/distributors, data about their registration, location, and contact details as well as information about management, type of business activity and a short description of all software products manufactured/distributed. According to the government, as of January 2004, 109 companies that produce and distribute software had used the registry. Under the order, all software manufacturers/distributors can obtain a certificate to verify their registration. For a fee, SDIP will provide users with information from this registry about a particular software manufacturer/distributor.

The registry was intended to improve the level of copyright protection for computer programs and databases, as well as to provide information to the public regarding software manufacturers, distributors and licensing information. The Business Software Alliance (BSA) reports that the registry, to date, has been ineffective likely due to its voluntary nature.

The details of the six basic features of an effective optical media regulatory scheme, many of which are missing from the 2002 Law, can be found in prior IIPA filings available on the IIPA website at <http://www.iipa.com/rbc/2003/2003SPEC301UKRAINE.pdf> at page 5.

The deficiencies of the 2002 Optical Disc (OD) Law are:

- It does not properly regulate all of the equipment used in the production of (illegal) discs. In particular it essentially does not cover the molds (and their components), or matrices used in the manufacturing process;
- It keeps some of the important records and licensing information out of reach of investigators seeking information on possible illegal activity;
- It leaves loopholes in the requirement that Ukrainian plants comply with the international identification practices, namely SID coding, in all production facilities and on all equipment including all molds (and mirror blocks), leaving room for manipulation of the use of the international unique identifiers;
- It does not require plant operators to keep sample copies of the discs (all of this evidentiary and coding information is essential to identify the source of the illegal material);
- It does not effectively regulate the issuance, denial, suspension, or revocation of a license for plants producing or distributing discs—the law allows convicted plant operators to be reissued a license, and delays the suspension of licenses even in cases of clear violations;
- It does not permit effective or proper inspections of the plants—for example, surprise inspections are permitted only after compliance with cumbersome and timely procedures that eviscerate their effectiveness;
- It also does not allow for either the effective securing of evidence or the seizure of equipment and discs during plant visits;
- It contains loopholes for import and export of some of the tools (matrices and manufacturing equipment) essential to produce discs;
- It sets the liability for violators at a level that is too limited—with low minimum penalties;
- There are no provisions for confiscation or destruction of discs, material or equipment;
- It has weak administrative and criminal penalties (a high threshold will bar use of the criminal penalties in many cases).

## **Lack of Criminal Enforcement, Border Enforcement and Other Enforcement Deficiencies**

In addition to the optical media law, other key enforcement tools include: (1) criminal enforcement efforts targeted at the criminal syndicates (and administrative remedies directed against smaller scale activities); and (2) strong border enforcement measures to stop illegal optical media production and distribution and to slow the export or transshipment of that material.

In recent months there have been encouraging signs of increased police activity, both in Kiev and elsewhere, against the retail sale and distribution of pirate products. However, significant improvement will only occur when the number of actions and cases of effective police action undertaken against large-scale commercial piracy grow. There remain serious concerns over the very few deterrent prosecutions or sentences by the courts, and the few administrative actions against stores, kiosks and other street piracy to report. The most critical of these steps is for Ukraine to use its criminal code to crack down on the organized crime syndicates distributing material in and out of Ukraine. Over the past few years there have been some successful raids and seizures (detailed in previous IIPA filings), but few, if any, resulted in successful deterrent criminal prosecutions. In fact, as a result of the too-high threshold for criminal prosecution (i.e., material damage amounting to at least UAH 12,300/US\$2,306), most

cases result in administrative actions. IPR related offenses are hampered by procedural problems such as the use of expert evidence, and instead need to have clear sets of rules guiding procedure. In addition, there are overall problems with police competence pertaining to IPR criminal investigations.

Ukraine must also target criminal prosecutions against organized criminal syndicates for activities including IPR crimes. Provisions do exist in the Ukrainian criminal code (e.g., Art. 28) to prosecute organized groups or criminal organizations, including those engaged in IPR offenses, but to date they have not been used for this purpose.

In addition, Ukraine has failed to properly police its borders that permit this wide-scale shipment from and transshipment of these materials through Ukraine, to other countries in Eastern and Central Europe. The possible establishment of a common trade regime between Russia, Ukraine, and Belarus will only exacerbate the border enforcement problems, putting additional pressure on neighboring countries such as Slovakia, Hungary and Romania. There have been some minor seizures by customs authorities of CDs and other materials over the past few years, but cooperation has been spotty and the activity has not nearly been enough to stem the flow. Comparisons of seizures by Polish and Czech customs officials against those by Ukraine officials bear out the paucity of seizures by Ukraine border enforcers. Plus, customs authorities have not commenced or undertaken criminal investigations of pirating operations, especially against organized crime syndicates. Ukrainian customs officials are unable and unwilling at present to cooperate with local industry officials. This lack of cooperation is not helping to improve the training and experience that customs officials need to acquire for effective enforcement.

There are two reasons why border enforcement remains weak: (1) a lack of willpower and coordination in the government, and (2) improper authority. Ukrainian border officials need to better coordinate their activities and need to get direction from the highest levels of the government that this is a priority. Effective in January 2004, a new Customs Code went into force to provide customs officials with *ex officio* authority to seize illegal material at the border without a court order. The police and other enforcement officials also reportedly have equivalent *ex officio* authority, but in practice they still depend on rightholder complaints to commence investigations—this needs to be corrected. Without proper implementation of this clear authority on the part of police and border officials, and proper confiscation of pirate materials (which IIPA understands can only constitutionally be undertaken by the courts), the problems will continue to worsen. Waiting for the rightholders to file complaints in each instance given the widespread scope of the illegal activity is a recipe for failure. Also, a statutory deficiency still exists because the Customs Code narrows its sanctions to only those activities meeting a “commercial purpose” threshold, which hampers effective enforcement (especially against the widespread cross-border suitcase trade in pirated goods).

There is an additional matter hampering effective enforcement. Almost five years ago, the Ukraine Copyright Agency (SCAU) was closed and then reorganized into a much weaker structure. The government of Ukraine never clarified 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. This needs to be corrected. The lack of coordination for enforcement is a long-standing problem. Clear government strategies and lines of authority should be developed.

In addition to the enforcement against hard copy piracy, Ukraine enforcement officials must also begin actions against on-line piracy. It is estimated that there are over 400 ISPs in Ukraine and that over 150 of these sell pirate DVDs (for on average US\$10).

In 2003, the recording industry, hardest hit by the optical disc production and distribution problem, estimated piracy levels at 75% for international repertoire, and losses estimated at \$125 million (including losses from exports of pirate product made in Ukraine).

In 2003, estimated losses for the motion picture industry were \$45 million.

During the first half of 2003, Ukraine law enforcement officials reported that officers had inspected shops, businesses and warehouses and provided anecdotal evidence of effective enforcement. For example, the Tax Police conducted 1,322 inspections, and in one instance (in the Petrivka market in Kiev), seized 11,000 illegal items worth UAH 184,000 (US\$34,500). Customs officials reported total seizures in the first half of the year of 10,218 discs plus 12,594 audiovisual materials (tapes and DVDs). No year-end totals were available as of the time of this filing for the total number of inspections, raids and seizures by police and customs officials.

## LEGAL REFORMS

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A history of the key legal reforms made by Ukraine in the past few years is available on the IIPA website at <http://www.iipa.com/rbc/2003/2003SPEC301UKRAINE.pdf> at page 13, including Copyright Law and Criminal Code reforms, as well as accession to the Geneva Phonograms Convention and the WCT/WPPT.

The Law of May 2003 actually introduced broad changes to numerous laws relating to the protection of intellectual property; it amended Article 176 of the Criminal Code pertaining to violations of the rights of authors and neighboring rights, adding new sanctions for IPR violations. The 2003 amendments maintained the existing practices regarding the confiscation of infringing (including imported) material; and no amendments were made to the administrative offenses code.

Even with these improvements, Ukraine is not in compliance with WTO TRIPS obligations; the draft package of legislative proposals under discussion in Ukraine in 2002 would not have corrected this shortcoming. The key missing pieces needed for effective enforcement (and TRIPS compliance) are: (1) amendments to the criminal procedure code; (2) amendments to the customs code (the customs code revision, effective January 1, 2004, omitted the necessary IP-related provisions); and (3) the addition of key administrative remedies. The Law of May 2003 included in the Civil Procedure and Commercial Procedure Codes *ex parte* search provisions necessary for effective end-user (software) piracy actions. However, these provisions have not yet been applied in practice.

### Copyright Law

The Copyright Law of 2001 fixed a major deficiency of the old law, namely, the protection for pre-existing works and sound recordings. The most important next step to create legitimate markets for music and motion pictures is for the Ukrainian police to use these provisions to rid the marketplace of back-catalog material that has flooded the market along with optical media products because of the past and present legal and enforcement deficiencies.

Several other provisions in the 2001 Law are also troubling, such as Article 43.3; this provision permits the over-regulation and consolidation of power into government collecting rights societies. The Ukrainian Cabinet of Ministers has, under this provision, adopted fixed tariffs for the broadcasting of sound recordings, which totally undermines the right of phonogram producers to freely negotiate their fees with users. Article 43.3 of the Copyright Act should be deleted and the tariff decision by the Council of Ministers should be withdrawn. Collective management should be a private, not a government, enterprise; plus, legal entities and foreign rightholders should be permitted to be members on their own in Ukrainian collecting rights societies.

## **Other Legal Reform Issues**

### **Criminal Code and Criminal Procedure Code Reforms**

A revised criminal code came in force on September 1, 2001, and was further amended in May 2003. As revised in 2003, Article 176 provides sanctions including fines ranging from 200 to 1000 minimum tax-free incomes, approximately US\$640 to US\$3,200, (up from 100 to 400 times), or correctional labor for a term of up to two years, or imprisonment for a term of up to two years with confiscation of infringing material. The threshold for criminal liability is met when material damage caused by an infringement equals or exceeds 200 minimum tax-free incomes (i.e., “substantial material damage”). The sanctions foresee an increase for repeated offenders and cases where the material damage equals or exceeds 1,000 minimum tax-free incomes (i.e., “very substantial material damage”), such as for officials abusing their “official positions.” In those cases fines can reach up to 1,000 to 2,000 minimum tax-free incomes (previously 500 to 1,000 times), and the term of imprisonment ranges from two up to five years. Effective in January 2004, a new system for the calculation of minimum tax-free incomes entered into force, applicable to the Article 176 provisions—the current minimum monthly wage is UAH 205 (US\$38.43). The criminal code provisions do sanction both copyright and neighboring rights violations (the latter of which were first included in the criminal code in 2001).

In general, the criminal penalties can only be imposed for “substantial material damage”—this represents an unwarranted threshold for copyright piracy. As a result of the May 2003 amendments, the threshold for criminal liability is now UAH 12,300 (US\$2,306), whereas before January 2004, it was UAH 3,400 (US\$637)—obviously, this is a substantial increase in the threshold for activities to qualify as a crime. The provision creates two problems: (1) It sets a threshold that is too high; and (2) the threshold will be impossible to prove with the certainty necessary for criminal proceedings. Activities that fall below the threshold can be sanctioned by the much weaker administrative offenses code; while far short of deterrent sanctions, if properly implemented and prosecuted, those penalties can provide some relief for certain low-level offenses.

The criminal code should have been (and now needs to be) amended to include a low and clear threshold to instigate a criminal action. IIPA recommends a threshold no higher than 50 times the minimum daily wage. Not only would this help to identify criminal infringing acts for prosecutors, but also it would 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. Another missing element in the criminal code (or copyright law) is a provision that makes the possession for commercial purpose of illegal copies of works or sound recordings a criminal offense; the government of Ukraine should introduce and push for the passage of such a provision. Even more troubling than the statutory

shortcomings is that now, two years after enactment of the criminal code amendments, deterrent criminal sanctions (under the old or new code) have yet to be imposed in a copyright or neighboring rights case.

The criminal procedure in law and practice must also be fixed so that police act *ex officio* to initiate criminal intellectual property cases. Ukrainian criminal procedures in practice (although not required by the code) currently require right holders to file complaints to initiate actions. This acts as a bottleneck to successful enforcement. This should be changed to improve police actions so that police initiate intellectual property criminal cases and investigations for submission to the court; it must also be clear that the police (as they sometimes do in software cases) have the authority to hold confiscated products and equipment for use at trial.

### **Administrative Remedies**

As part of the Joint Action Plan in 2000, Ukraine agreed to adopt and implement appropriate administrative remedies to deter piracy as well to enact criminal penalties. Ukraine authorities need to more effectively use administrative remedies to remove the business licenses of infringing retail stores, kiosks, and other smaller scale pirates. Administrative remedies must be properly implemented alongside available and properly implemented criminal penalties at levels sufficient to deter piracy for effective copyright protection and to comply with WTO TRIPS obligations.

### **Customs Code Reforms**

Effective January 1, 2004, the Customs Code of Ukraine (Law No. 92-IV, "On Amending the Customs Code of Ukraine") entered into force. It provides clear *ex officio* authority to customs officials to seize suspected illegal material at the border. This closes a legal loophole previously missing from the enforcement regime of Ukraine. Unfortunately, the new Customs Code narrowed the sanctions (permissible under the old code) to those meeting a "commercial purpose" threshold; this will limit the effectiveness of the new code. In addition, the registration requirements and fees (which we understand were not repealed by the new law) must be abolished; these provisions act as a bar to effective border enforcement action by causing a confusing maze of unnecessary regulation.

### **Civil Code Should Not Weaken Copyright Law**

A new civil code was adopted in January 2003, and came into force on January 1, 2004. Chapter IV of the Civil Code (Intellectual Property Rights) contains 90 articles in total, 15 in the section on copyright, and 8 pertaining to neighboring rights. Most of the copyright and neighboring rights provisions duplicate provisions in the Copyright Law of 2001. For many years, IIPA had urged that civil code reform exclude anything but passing reference to copyright and neighboring rights because of fears that duplicate provisions would jeopardize effective application of the copyright law (and breach the bilateral trade agreement). This exercise is a phenomenon not unique to Ukraine, as civil code reform, with contradictory provisions to the copyright law, 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.

Experts in Ukraine report that the new civil code provisions, since they duplicate the copyright law ones and do not contradict them, will not weaken implementation or enforcement of the copyright law. IIPA continues to monitor the progress of copyright law implementation

and enforcement. In sum, IIPA urges that the enforcement agencies and the judiciary in Ukraine rely on the copyright law for effective enforcement, and that the Civil Code Chapter IV provisions should not be used in any way to weaken these activities.

### **Government Software Asset Management**

In September 2003, the Cabinet of Ministers of the Ukrainian government passed a regulation establishing procedures for the use of software in government agencies. It provides for (among other things) government institutions to use properly licensed and legally held software, and prohibits public servants from installing, using, or copying software without prior consultation with a responsible system administrator. This regulation comes into force on March 25, 2004.

### **WIPO Digital Treaties**

In 2001 Ukraine acceded to both of the digital treaties—the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonogram Treaty (WPPT). The Copyright Law of 2001 included amendments to implement these treaties. Unfortunately, the amendments fall short of complete and effective implementation, especially with regard to technological protection measures (requiring proof of “intentional” circumvention, which could prove a major impediment to protection). Ukraine needs to fully implement the treaties with amendments to its copyright law.

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