



September 12, 2017

**Electronic Submission via [www.regulations.gov](http://www.regulations.gov)**

Mr. Erland Herfindahl  
Deputy Assistant U.S. Trade Representative  
for the Generalized System of Preferences  
Office of the United States Trade Representative  
600 17th Street, NW  
Washington, D.C. 20508

**Re: GSP Pending Country Practice Petitions  
USTR-2013-0010, Ukraine  
Request to Appear at the GSP Public Hearing and Pre-Hearing Brief**

To the GSP Subcommittee:

The International Intellectual Property Alliance (IIPA) hereby submits this Request to Appear at the September 27, 2017 public hearing on the GSP country practices review of Ukraine. IIPA was the original petitioner of the GSP review of Ukraine's intellectual property rights practices in the 2011 Annual GSP Review. Attached to this letter is IIPA's Pre-Hearing Brief.

The IIPA witness will be: Eric J. Schwartz, Counsel  
International Intellectual Property Alliance  
1818 N Street, N.W., Suite 800  
Washington, D.C. 20036  
Tel: (202) 355-7903; Fax: (202) 355-7899  
Email: [ejs@msk.com](mailto:ejs@msk.com)

Sincerely,

Eric J. Schwartz, Counsel  
International Intellectual Property Alliance



**Pre-Hearing Brief  
of the International Intellectual Property Alliance in the  
2017 GSP Annual Review  
of the Intellectual Property Rights Practices of  
Ukraine**

**Before the GSP Subcommittee  
Docket No. USTR-2013-0010, Ukraine**

**September 27, 2017**

## **I. Introduction**

The International Intellectual Property Alliance (IIPA) appreciates this opportunity to detail the serious copyright law reform and enforcement issues confronting copyright creators and producers in Ukraine, as requested in the Federal Register notice regarding the Generalized System of Preferences Country Practice Petition of Ukraine. See Generalized System of Preferences (GSP): Initiation of the 2017 Annual GSP Product and Country Practices Review; Deadlines for Filing Petitions; Notice of Change in Country Practice Hearing, 82 Fed. Reg. 154 (Aug. 11, 2017).

One factor for determining a country's GSP eligibility in accordance with the 1974 Trade Act (sections 502(b) and 502(c)) is "the extent to which such country is providing adequate and effective protection of intellectual property rights." 19 U.S.C. § 2462(c)(5). A second factor is whether a country is "provid[ing] equitable and reasonable access to [its] markets..." 19 U.S.C. § 2462(c)(4). The Government of Ukraine is not complying with either of these eligibility criteria. As detailed below, the Ukrainian legal and enforcement regime is inadequate and ineffective in many key areas, and it also denies equitable and reasonable access to its markets for some copyrighted materials.

In addition to failing to meet the GSP eligibility criteria, Ukraine is failing to comply with its international treaty obligations and its numerous bilateral commitments to the U.S. government, including a 2010 IPR Action Plan, intended to address digital piracy in Ukraine, which has persisted unabated for many years.

These are long-standing concerns. The IIPA filed its GSP petition initially on December 29, 2011, requesting a review of the Intellectual Property Rights Practices of Ukraine (in accordance with the annual GSP country practices review (76 Fed. Reg. 67531 (November 1, 2011))). The copyright deficiencies set out in that 2011 filing have persisted, and in some ways worsened, as technologies for and organizations engaged in the dissemination of unauthorized materials have grown more sophisticated. The IIPA has detailed the nature and extent of our

concerns in our annual Special 301 reports on Ukraine, including the most recent filing in February 2017.

In 2016, Ukraine benefited from over \$53.7 million in unilateral duty-free GSP benefits in the U.S. market (an increase from \$40.8 million in 2015). At the same time that Ukraine is benefiting from preferential access to the U.S. market, the members of the IIPA and other copyright-based industries are suffering millions of dollars in losses in Ukraine due to a weak IPR legal and enforcement regime.

If at the conclusion of its investigation, the GSP Subcommittee concurs with this assessment, IIPA recommends that Ukraine's GSP benefits be suspended or withdrawn, in whole or in part, until requisite improvements are made by Ukraine to remedy its intellectual property rights (IPR) protection and enforcement deficiencies.

The remainder of this filing details the myriad legal and enforcement deficiencies which are adversely affecting U.S. copyright owners of works and sound recordings, including the members of the IIPA, and, offers recommendations on ways to strengthen and improve the legal and enforcement regime in Ukraine.

## **II. Interest of the IIPA in this GSP IPR Review**

IIPA is a private sector coalition, formed in 1984, of trade associations representing U.S. copyright-based industries working to improve international protection and enforcement of copyrighted materials and to open foreign markets closed by piracy and other market access barriers. Members of the IIPA include Association of American Publishers ([www.publishers.org](http://www.publishers.org)), Entertainment Software Association ([www.theesa.com](http://www.theesa.com)), Independent Film & Television Alliance ([www.ifta-online.org](http://www.ifta-online.org)), Motion Picture Association of America ([www.mpa.org](http://www.mpa.org)), and Recording Industry Association of America ([www.riaa.com](http://www.riaa.com)). Collectively, IIPA's five member associations represent over 3,200 U.S. companies producing and distributing materials protected by copyright laws throughout the world. These include entertainment software (including interactive video games for consoles, handheld devices, personal computers and the Internet) and educational software; motion pictures, television programming, DVDs and home video and digital representations of audiovisual works; music, records, CDs and audiocassettes; and fiction and non-fiction books, education instructional and assessment materials, and professional and scholarly journals, databases and software in all formats.

The U.S. creative industries represent a sector of the U.S. economy that regularly contributes to a positive balance of trade. It is essential to the continued growth and future competitiveness of these industries that U.S. trading partners provide free and open markets and high levels of copyright protection on which this trade depends, especially for works and recordings in the digital marketplace. Enforcing the IPR obligations in the GSP program is one effective trade tool to improve foreign markets in GSP-eligible countries such as Ukraine.

Unfortunately, at present in Ukraine, there are myriad obstacles to adequate and effective copyright protection, ranging from rampant copyright piracy to governmental decisions related to the operation of collecting societies that have—at least temporarily—removed the ability of

rightsholders to determine how their rights will be administered. Piracy rates are exceedingly high in Ukraine.

Weak copyright protection and enforcement has been a long-standing problem in Ukraine, and there has been little progress in the past few 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.

As the GSP Subcommittee is well aware, the U.S. government has taken these problems in Ukraine very seriously, and there has been a long history of actions taken in the context of the Special 301 deliberations. In May 2013, Ukraine was designated by the U.S. government as a Priority Foreign Country (PFC), which initiated an investigation under Section 301 of the Trade Act of 1974. 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.” 19 U.S.C. § 2411(d)(3)(B)(i)(II). The PFC designation was based specifically on three critical problems in Ukraine’s IPR regime, including the failure to implement “an effective and systemic means to combat widespread online infringement of copyright and related rights” and “the unfair, nontransparent administration of the system for collecting societies.” Although the investigation was closed and no action taken in 2014 “[i]n light of the current political situation in Ukraine,” the Trade Representative placed and then retained Ukraine on the Priority Watch List for the past three years because of the persistent problems that were the grounds for the PFC designation in 2013.

The two persistent problems to highlight are the lack of effective protection and enforcement against digital piracy and long-standing failures pertaining to the collective administration of rights, in particular, for the music industry. The specific problems for each are detailed in Section III below.

There is also a long history to Ukraine’s eligibility for GSP benefits tied to its IPR regime for the protection and enforcement of U.S. copyrighted works and recordings. To briefly recount that history: in June 1999, IIPA requested a review of Ukraine’s GSP benefits as a result of its then-existing IPR enforcement practices, focused mainly on hard-copy piracy, especially the wide-scale production and distribution of illegal optical media (CDs, DVDs, etc.) by various production facilities in Ukraine, and the exporting of those illegal copies throughout Europe and elsewhere in the world.

In 2000, the U.S. government accepted the IIPA petition and a review of Ukraine’s IPR regime was commenced. On August 24, 2001, “due to Ukraine’s failure to combat [optical media] piracy” Ukraine’s GSP benefits were completely suspended (and other trade sanctions were later imposed as well) by the President. See 66 Fed. Reg. 42246-50. During this period, there were extensive bilateral deliberations, including the development of a Joint Action Plan (2000) by the presidents of Ukraine and the United States, to address the IPR regime deficiencies. The subsequent implementation of that Action Plan, and, in 2005, the adoption of significant new optical disc laws meant to improve enforcement against optical disc piracy, resulted in the resumption of GSP eligibility, in January 2006. The IIPA supported that

decision: <http://iipawebsite.com/pdf/IIPA%20Ukraine%20GSP%20Press%20Announcement%20EJS%20012506%20FINAL.pdf>.

However, since the resumption of GSP eligibility in 2006, Ukraine has failed to fully implement the now decade-old plan to provide significantly improved enforcement on the ground, or to properly reform its laws or enforcement regime to address digital piracy.

By allowing these problems to fester for years, weak digital enforcement has resulted in an exponential increase in the number of illegal peer-to-peer (“P2P”) hosting and website-based Internet piracy sites, including some of the world’s largest BitTorrent sites 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. Last year, Ukraine ranked third in the world in the number of connections by peers participating in the unauthorized file sharing of select video game titles on public P2P networks using PCs, retaining its position from 2015. Ukraine is also ranked sixth in the world for mobile infringement of video games.

In 2010, the governments of the U.S. and Ukraine developed an IPR “Action Plan” that was never implemented. In fact, some proposals suggested by the Government of Ukraine in the past few years would have weakened, not strengthened enforcement. There are some very important provisions in the Action Plan, that if properly implemented would result in significant improvements. For example, addressing the problems of ISP liability, notice and takedown, administrative remedies, and fixing or eliminating the hologram sticker program, are all covered in the 2010 Action Plan. But these issues have never been properly addressed by the Government of Ukraine.

The IPR criteria – noted above – are a condition, not only for obtaining GSP benefits in the first place, but also for retaining GSP benefits. The 1984 Act authorized the President to “withdraw, suspend, or limit the application of the duty-free treatment accorded under Section 501 of this title with respect to any article or **any country**” (emphasis added) and requires the President, when taking any such action, to “consider the factors set forth in Sections 501 and 502(c).” TTA 1984 Section 505(a)(1); TA 1974 Section 504(a)(1), as amended; 19 U.S.C. § 2464(a)(1). The Act also created a system of “general reviews” to ensure that these statutory criteria are met. TTA 1984 Section 505(b); TA 1974 Section 504(c)(2)(A), as amended; 19 U.S.C. § 2464(c)(2)(A); *see also* 15 C.F.R. 2007.3.

The U.S. government accepted the IIPA petition pursuant to Section 501 *et seq.* of the Trade Act of 1974, as amended, 19 U.S.C. § 2461 *et seq.*, and 15 C.F.R. Part 2007, and specifically to Section 502(c)(4) and (5) of the Trade Act (19 U.S.C. § 2462(c)((4) and (5)), and 15 C.F.R. 2007.0(b). A recommendation by the GSP Subcommittee to the President to “vigorously exercise” his authority and to suspend, withdraw or limit GSP benefits of Ukraine, in whole or in part, would comply with the explicit intent of Congress in enacting the statutory criterion on IPR in the GSP law.

As noted, over a decade ago, the optical media piracy problem in Ukraine was, in large measure, successfully addressed by a GSP review and suspension. But the problems of digital piracy and the failure to correct the collective administration problems have been left unresolved,

and worse, not seriously addressed by the Government of Ukraine. Instead, the Government of Ukraine needs to take proper actions—many detailed in the Action Plan—to properly address enforcement against digital piracy and the ability of rightsholders to determine how their rights will be administered, including through the collecting body of their choosing and the other enforcement issues highlighted in this filing. Failing to do so should result in the withdrawal of GSP benefits in Ukraine.

### **III. Ukraine is not providing “adequate and effective protection” for copyrighted works or sound recordings for U.S. rightsholders.**

As noted, in the Special 301 Report and in the context of the GSP review, there are two key areas where Ukraine is not providing “adequate and effective protection” for copyrighted works or sound recordings for U.S. rights holders. The first is digital piracy and the absence of effective enforcement; second, are the long-standing problems relating to collective administration.

Information regarding Ukraine and these problems have been previously presented to members of various U.S. government interagency groups (including the GSP Subcommittee and various individual members), plus the Special 301 interagency group, and the Trade Policy Staff Committee, in the context of USTR’s Annual Special 301 review and the GSP process. On February 9, 2017, IIPA filed its annual Special 301 submission to Assistant USTR for Innovation and Intellectual Property, Probir Mehta. This submission was widely distributed among the interagency for its internal consideration in the 2017 Special 301 Annual Review. IIPA’s entire report is available on the IIPA website ([www.iipawebsite.org](http://www.iipawebsite.org)) and is attached as an Appendix A to this filing.

The digital piracy problem is compounded by weak laws and weak enforcement. There are several websites in Ukraine that are on the U.S. government’s list of Notorious Markets. For example, *extratorrent.cc* (*extratorrent.com*) has been on the list since 2013; it was included on the December 2016 U.S. government Notorious Markets list (although it is now no longer hosted in Ukraine). The U.S. government identified *extratorrent* as a “source of malware” and noted that it was disrupting markets in India, Pakistan and China. There are also many pirate streaming sites, torrent sites (which comprise about half of the total illegal sites), cyberlockers, and linking sites in Ukraine. Many of these sites do not cooperate at all with rights holders on takedown notices, and have no incentive to do so because of the failure of the legal regime to hold the parties that run these sites liable.

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 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”) expressly 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 hundreds of sites offering pirated content). The copyright industries have, for years, sought private agreements (with governmental assistance) with ISPs to establish effective mechanisms to take down illegal websites and slow illegal P2P traffic. In the absence of legislation, however, these voluntary efforts have generally not succeeded, although, some ISPs will delete links upon request. There have been many conferences in recent years 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 to take effective action against unauthorized sites, so far without success. Legislation is needed to institute proper notice and takedown provisions, including a requirement that service providers terminate access to individuals (or entities) that have repeatedly engaged in infringement, and the retention of information for law enforcement, as well as to provide clear third party liability regarding ISPs.

Currently, the Criminal Procedure Code does not grant police *ex officio* authority, 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 Cyber Police Department was established within the National Police Department for the purpose of combating Internet crimes. Last year, 30 investigators were reportedly recruited to join this unit. The formation of this unit, and its full staffing, if undertaken, would be positive news but it has been reported more recently that the unit is not yet fully resourced; this may be due, in part, to a late 2015 re-organization of all police units still being implemented.

The current collective administrative system in Ukraine, with 18 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 PFC. As noted, the U.S. government acknowledged in its April 2016 Special 301 report that there has been no progress on this issue since the PFC designation in 2013, and there has been no progress since April 2016.

Collecting societies in the music sector, specifically in connection with broadcasting, public performances and certain 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 contain music and audiovisual material, claimed to be "licensed" from the rogue collecting societies.

The main criterion for accreditation should be to accredit the organization based on a majority of national and international repertoire represented, and the organization should be owned and managed by rights holders. 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 reconstituted, and societies would be granted operational licenses provided they meet statutory criteria. Further, no more than 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. This would prevent accreditation to a society that had a nominally high volume of repertoire (when in fact, most of the repertoire is never actually performed), and avoid favorable treatment to undemocratic, non-representative and non-transparent collecting societies, which, with their internal governmental influences, have, unfortunately, been allowed to operate.

Last, Ukraine has made several bilateral commitments (to the United States) to improve its IPR regime and is not in compliance with these obligations. These commitments include: the 2010 IPR Action Plan; the 2000 Joint Action Plan; and the 1992 Bilateral Trade Agreement.

The 2010 IPR Action Plan was developed by agreement of the two governments – first, by a formal document presented by the U.S. government in October 2010, and approved and signed by the Government of Ukraine in February 2011 (the plan is "effective" October 2010). The "plan" was actually a formal summary of obligations made by the Government of Ukraine over the past several years, especially targeting digital piracy. Information on the 1992 and 2000 commitments and agreements has been detailed in prior IIPA filings.

There are two sets of priority actions—enforcement steps and legal reforms—that the Government of Ukraine should address to improve its IPR regime.

The key enforcement actions that IIPA and its members recommend to the Government of Ukraine are: first, focus criminal enforcement on: (a) owners and operators (and syndicates) of the numerous free streaming and pay-per-download sites, as well as P2P and BitTorrent sites, including sites dedicated to pirated music, film, entertainment software and printed materials, as well as on the principals of rogue collecting societies and camcording operations—using existing laws; and (b) owners and operators of open air and street market piracy, especially at large outdoor markets, at or around underground stations, near local shops and supermarkets, and hard



copy distribution centers. Second, coordinate key agencies, including the Ministry of Internal Affairs and the General Prosecutors Office and their respective enforcement practices and investigations; significantly increase the number of investigations (*i.e.*, criminal searches) and prosecutions; properly resource enforcement authorities, including the specialized “cyber police” units; and establish specialized IPR prosecutors within the General Prosecutors Office. Unfortunately, the Government of Ukraine has not undertaken these steps.

The key legal reforms needed are to: (1) fully implement the WIPO Internet Treaties (the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT)); (2) enact into law Bill #3081-d, and then properly implement it, to effectively address online piracy; (3) enact a collective administrative law (like the “Law On Collective Management” drafted by international experts in 2015) to require organizations to operate with proper transparency, accountability and rules of governance; and (4) amend the Copyright Law and Criminal Code to make camcording in movie theaters illegal—excluding camcording from any “private use” exception and criminalizing this activity. The Government of Ukraine has not taken steps to properly address these legal shortcomings.

#### **IV. Ukraine is not providing “equitable and reasonable access to [its] markets” for copyrighted works of certain U.S. rightsholders.**

In addition to the requirement to provide “adequate and effective” copyright protection, GSP eligibility requires Ukraine to provide “equitable and reasonable access to [its] markets...” 19 U.S.C. § 2462(c)(4). The motion picture industry is confronting several critical market barriers to access.

One such barrier is an obligation to manufacture film prints and digital encryption keys in Ukraine. 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. To correct this market barrier, the Law on Cinematography should be amended to repeal the local production of film prints requirement.

Another market barrier is the customs valuation rules implemented by Customs authorities that assess valuation on projected royalties, rather than on the underlying carrier medium. 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 revised 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, which is still in force.

Last, in December 2015, the Government of Ukraine adopted a law on VAT that discriminates against foreign films. It applies to the distribution, theatrical exhibition and other public performances of films.

**V. Conclusion**

For the reasons stated in this submission and in the Appendix, IIPA requests that the U.S. suspend Ukraine's eligibility, or withdraw or limit the GSP benefits of Ukraine, in whole or in part, unless or until it corrects the deficiencies in its IPR regime.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Eric J. Schwartz", is enclosed in a light yellow rectangular box.

Eric J. Schwartz, Counsel  
International Intellectual Property Alliance

**APPENDIX A**

# UKRAINE

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2017 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that Ukraine be retained on the Priority Watch List in 2017.<sup>1</sup>

**Executive Summary:** In May 2013, Ukraine was designated by the U.S. Government as a Priority Foreign Country (PFC), which initiated an investigation under section 301 of the Trade Act of 1974. 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 was based specifically on three critical problems in Ukraine’s IPR regime, including the failure to implement “an effective and systemic means to combat widespread online infringement of copyright and related rights” and “the unfair, nontransparent administration of the system for collecting societies.” On March 13, 2014, the U.S. Government completed its PFC investigation, noting 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.”

Ukraine has been on the Priority Watch List since 2015 because the same problems that were the grounds for the PFC designation four years ago persist today. These problems are causing severe economic harm to U.S. copyright rights holders in Ukraine as well as to Ukrainian and other rights holders. One positive note in 2016 was the transnational enforcement operation, which included Ukrainian authorities, that led to the arrest in Poland of the Ukrainian operator of *kickasstorrents* (*kat.cr*). The site, one of the largest torrent sites in the world, has been described by U.S. criminal enforcement agents as a “lucrative flea market” for “infringing movies, television shows, video games, music and computer software.”

Last April, USTR’s Special 301 Report acknowledged the lack of progress by Ukraine in “addressing the three problems identified in the 2013 Special 301 Report.” The Report recognized as a positive step, the formation of a Cyber Police Department within the National Police Department, which was created to focus on telecommunication and Internet crimes, including IPR violations. But problems persist with “long-standing concerns about endemic corruption and mismanagement, including in IPR protection and enforcement.” The U.S. Government acknowledged that “little has changed” with the unauthorized collecting societies, and although one rogue collecting society was “de-credited” in [2015] and “reportedly [the government] suspended two more societies pending investigation[,]...approximately 15 other collecting societies continue to operate, collecting royalties without paying right holders.” There was no progress (as the U.S. Government confirmed) on legislative reforms in 2015 regarding collective management. In 2016, not only was there no forward progress on this issue, but proposals were floated that, if enacted, would significantly worsen the situation by the creation of a single state-run “super” collective management organization.

Similarly, the U.S. Government expressed its frustration with the “stalled” attempts at legislative reforms to improve the government’s response to online infringement, even though “Ukraine continues to host some of the largest pirate sites in the world serving IP infringing content to a global audience.” The copyright industries agree with the U.S. Government that improving these problems would “advance [the Government of Ukraine’s] own agenda for economic improvement, particularly in promoting foreign direct investment.” If undertaken properly, fixing these problems will improve the marketplace for the digital distribution of music, films, television programs, video games

---

<sup>1</sup>For more details on Ukraine’s Special 301 history, see previous years’ reports at <http://www.iipawebsite.com/countryreports.html>. For the history of Ukraine’s Special 301 placement, see <http://www.iipawebsite.com/pdf/2017SPEC301HISTORICALCHART.PDF>.



and books online, benefiting Ukrainian consumers and the local economy. Instead, the Ministry of Economic Development and Trade (MEDT) is pushing IPR “reform” legislation that, if adopted, would not improve online enforcement, or collective administration, consistent with international norms.

## **PRIORITY ACTIONS REQUESTED IN 2017**

IIPA recommends the following priority enforcement actions and legal reforms to the Government of Ukraine in 2017:

### **Criminal enforcement:**

- Focus criminal enforcement on: (1) owners and operators (and syndicates) of the numerous free streaming and pay-per-download sites, as well as peer-to-peer (P2P) and BitTorrent sites, including sites dedicated to pirated music, film, entertainment software and printed materials, as well as on the principals of rogue collecting societies and camcording operations—using existing laws; and (2) owners and operators of open air and street market piracy, especially at large outdoor markets, at or around underground stations, near local shops and supermarkets, and hard copy distribution centers.
- Coordinate key agencies, including the Ministry of Internal Affairs and the General Prosecutors Office and their respective enforcement practices and investigations; significantly increase the number of investigations (i.e., criminal searches) and prosecutions; properly resource enforcement authorities, including the specialized “cyber police” units; and establish specialized IPR prosecutors within the General Prosecutors Office.

### **Legal reforms:**

- Fully implement the WIPO Internet Treaties (the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT)).
- Enact the anti-piracy provisions in Bill #3081-d, and make all the necessary amendments to provide effective procedures to address online piracy.
- Enact the Law “On Collective Management” (based on text drafted by international experts in 2015) to require organizations to operate with proper transparency, accountability and rules of governance.
- Amend the Copyright Law and Criminal Code to make camcording in movie theaters illegal—excluding camcording from any “private use” exception and criminalizing this activity.

## **COPYRIGHT ENFORCEMENT IN UKRAINE**

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.

**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 some of the world’s largest BitTorrent sites 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 2016, Ukraine ranked third in the world in the number of connections by peers participating in the unauthorized file sharing of select video game titles on public P2P networks using PCs, retaining its position from 2015. Ukraine is also ranked sixth in the world for mobile infringement of video games.

One positive step in late 2016 was the shutting down of the pirate site *ex.ua*, and the takedown by enforcement officials of *fs.to*, one of largest pirate sites in Ukraine with over 20 million users per month. For years,

*ex.ua* was one of the most popular sites in Ukraine, allowing free streaming and downloading of unauthorized copyrighted content; it has also been on the U.S. Government's list of Notorious Markets since 2012. 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. It is hoped that the 2016 takedown against this site will be permanent, and that a criminal case will now proceed (although there are troubling reports that *ex.ua* has resurfaced as a cyberlocker at *fex.ua*). Another site that has been on the Notorious Markets list since 2013 is *extratorrent.cc* (*extratorrent.com*); it was included on the December 2016 U.S. Government Notorious Markets list (although it is now no longer hosted in Ukraine). The U.S. Government identified *extratorrent* as a "source of malware" and noted that it was disrupting markets in India, Pakistan and China. Among the many pirate websites in Ukraine are streaming sites, torrent sites (which comprise about half of the total illegal sites), cyberlockers, and linking sites. Examples include linking and streaming sites such as *kinogo.co*, *kkiste.to*, *kinofilms.tv*; *stream-tv2.ag*, *video.online.ua* (among many others); P2P and tracker sites such as *oday.kiev.ua*, *pplan.com*, *torrentroom.com*; and sites offering unlicensed pay for download musical recordings, such as *mp3caprice.com*. One particular site to highlight is *dnj.to* (formerly *jams.to*), a linking site that caters to the international market; it is hosted by the ISP Infium UAB which also hosts many cyberlockers and proxy sites, and which has not cooperated at all with rights holders on takedown notices.

In 2016, the recording industry reported three criminal cases (covering 14 domain names) to the Cyber Police; one was against an ISP directly. All three cases were opened by the police and the investigations continue. In 2015, there were three criminal case verdicts against the owners of pirated websites (with terms of imprisonment ranging from two to five years). There were no such cases in 2016.

There were 55 criminal digital piracy investigations opened in 2016, compared to 31 in 2015. In 2016, there were 78 pirate sites targeted by anti-piracy organizations which were closed by the police or site owners (compared to 61 in 2015), 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 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 hundreds of sites offering pirated content). The copyright industries have, for years, sought private agreements (with governmental assistance) with ISPs to establish effective mechanisms to take down illegal websites and slow illegal P2P traffic (but, in the absence of legislation, these voluntary efforts have generally not succeeded); although, some ISPs will delete links upon request. In 2016 (as 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 to take effective action against unauthorized sites. The UAPA and the Motion

Picture Association of America (MPAA) report a little better than a 20% response rate to notice and takedown requests (there are no laws mandating compliance). In 2016, UAPA issued 2,285 takedown notices to ISPs and cease and desist letters to site operators in Ukraine (compared to 3,602 in 2015 and 1,119 in 2014). Some of the ISPs currently respond to notice and takedown requests, but many do not, in large part because the Telecommunications Law explicitly stipulates that they have no responsibility for the content on their websites (even with knowledge it is infringing). Legislation, as detailed in the "Legal Reforms" section, is needed to institute proper notice and takedown provisions, including so-called "stay down" provisions for repeat infringers, and the retention of information for law enforcement, as well as to provide clear third party liability regarding ISPs.

Currently, the Criminal Procedure Code does not grant police *ex officio* authority, 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 Cyber Police Department was established within the National Police Department for the purpose of combating Internet crimes. In 2016, 30 investigators were reportedly being recruited to join this unit. The formation of this unit, and its full staffing, if undertaken, is positive news. Unfortunately, it is reported that the unit is not yet fully resourced; this may be due, in part, to a late 2015 re-organization of all police units still being implemented.

**Collecting Societies:** The current collective administrative system in Ukraine, with 18 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. As noted, the U.S. Government acknowledged in its April 2016 Special 301 report that there has been no progress on this issue since the PFC designation in 2013, and there has been no progress since April.

Collecting societies in the music sector, specifically in connection with broadcasting, public performances and certain 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 contain music and audiovisual material, claimed to be "licensed" from the rogue collecting societies.

The main criterion for accreditation should be to accredit the organization based on a majority of national and international repertoire represented, and the organization should be owned and managed by rights holders. 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 reconstituted, and societies would be granted operational licenses provided they meet statutory criteria. Further, no more than 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. This would prevent accreditation to a society that had a nominally high



volume of repertoire (when in fact, most of the repertoire is never actually performed), and avoid favorable treatment to undemocratic, non-representative and non-transparent collecting societies, which, with their internal governmental influences, 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 half 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 created in violation of the Copyright Law. These societies claim to have the power to license on behalf of all rights holders based on an interpretation of current law, despite having no international mandate. This has led to parallel licensing, unfair competition and legal and commercial uncertainty. A 2016 “moratorium” on regulations has halted the registration of any new societies, but does not solve the problem.

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.

**Criminal Enforcement:** Now that the Cyber Police Department within the National Police Department of Ukraine has been formed it needs staffing, staff training and resources. The lack of effective criminal prosecutions and deterrent sentencing is a lingering problem in Ukraine for both digital and hard copy piracy. In 2005, the Criminal Code (Article 176) was amended to lower the threshold for criminal prosecution. The current threshold is 16,000 UAH (or US\$588). 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 every rights holder does not exceed the threshold, a criminal case does not proceed (the losses cannot be combined).

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; (4) the lack of presumptions that rights holders are the infringed (harmed) party to commence a criminal proceeding; and (5) 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). A proposal to establish a specialized IP court (perhaps in 2017) is also under consideration – it should be properly staffed with qualified IP-trained jurists.

Provisions 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. Other (related) lingering enforcement problems: (1) 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; (2) the confiscation and destruction of infringing goods, as well as materials and equipment used for their manufacturing is not clearly a part of the Criminal Code sanctions; (3) the requirement that parties in all cases – beginning January 1, 2017 – be represented by local counsel (no more *pro se* or power of attorney representations).

**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 the first half of 2016, the Economic Police seized about 5,000 optical discs in the Lviv region, but there were no reports of any seizures at any of the Notorious Markets.

The copyright industries continue to report persistent problems with the administration of the hologram sticker system (adopted in 2000). The holograms sticker system should be repealed.

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. Between 2011 and early 2017, over 126 camcords (including audio only and video only recordings) have been sourced from Ukraine. In 2016, there were at least seven videos and nine audio or video only films sourced from Ukraine as compared to 13 illicit video recordings in 2015. As noted, legal reforms are needed to amend the Copyright Law and the Criminal Code to effectively enforce against illicit camcording (Bill #3081-d included an amendment to the Criminal Code Article 176 to criminalize camcording, but was vetoed after passage, and is currently back in the Verkhovna Rada for reconsideration). Theatrical piracy is also a problem in Ukraine, especially a small theaters which screen pirate prints without a license which is a violation of the Administrative Code (Article 164-6). In 2016, there were 29 incidents of theaters engaging in these acts; 22 theaters were ordered to close operations, and criminal cases are pending.

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.

**Administrative and Customs Enforcements:** The Government of Ukraine should focus administrative enforcement actions by moving aggressively against copyright-infringing cable transmissions and retransmissions, public performances, and TV and radio broadcasting with administrative (as well as, where applicable, criminal) actions. In addition, *ex officio* authority should be used to improve border controls, especially along the Russian border, focused on railroad traffic.

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).

## **COMPLIANCE WITH EXISTING OBLIGATIONS TO THE UNITED STATES**

Ukraine is a member of the Berne Convention, the Geneva Phonograms Convention, and the WTO (TRIPS) Agreement.

In 2001, Ukraine acceded to the WIPO Internet Treaties (the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (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.

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. For example, addressing the problems of ISP liability, notice and takedown, administrative remedies, and fixing or eliminating the hologram sticker program, are all covered in the 2010 Action Plan, and have not been properly addressed by the Government of Ukraine.

## **LEGAL REFORMS**

The recommended legal reforms needed in Ukraine, in addition to full WIPO Digital Treaty implementation, as well as some of the other reforms already noted in this filing, include:

**Copyright Law:** Bill #3081-d (now under reconsideration) has a variety of provisions on ISP liability, camcording sanctions and notice and takedown. There is an alternative bill (Bill #4629) as well. To be effective, notice and takedown should not (as earlier drafts 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).

In sum, Bill #3081-d, introduced in 2016, would have instituted notice and takedown provisions without the need for a state authority or court (but, by a licensed lawyer), and included a “repeat infringer clause” which would have served to prevent infringing content from reappearing. This bill included amendments to the Copyright Law, the Law on Telecommunications and the Code on Administrative Offences, to promote a fair and effective response to online piracy, including: (1) legal incentives for web operators and ISPs to cooperate with rights holders to remove infringing online content; and (2) a duty to provide information to law enforcement agencies and rights holders. The bill also includes amendments to the e-Commerce Law enacted in September 2015 to correct the overbroad exemptions from liability for ISPs and hosting service providers, which go beyond international norms. The bill was adopted by the Verkhovna Rada (the Parliament) in late 2016, but vetoed by the President who sent it back to the Verkhovna Rada for further amendment. Important amendments are needed to make the procedures simpler and workable, to clarify definitions, and address burdensome notice requirements, as well as to clarify and align the scope of this legislation and the e-Commerce Law.

Providing clear third party (ISP) liability is critical to effective enforcement and cooperation with rights holders. There is currently no liability for legal entities engaged in IPR crimes. Unfortunately, the IAU has worked against ISP liability reforms, including basic notice and takedown provisions, in the many bills proposed recent years.

Other deficiencies in the Copyright Law require: (1) clearly defining temporary copies; (2) excluding camcording from the scope of the private copy exception (in addition to the Criminal Code amendment); (3) revising Article 52 to provide licensees of foreign music companies equal treatment as local right holders; (4) making either the non-payment of music rights royalties or of private copying levies an infringement of copyright and/or related rights; (5) 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); and (6) ensuring 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.

**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. The draft bill has broad support from international organizations (e.g., IFPI, ICMP, CISAC), but has been rejected by the MEDT. Instead, in late 2016, proposals (Bill #4461) were endorsed by the Government of Ukraine (MEDT) that are contrary to the advice of the EU and U.S. experts, and would make these organizations less transparent and less likely to fairly compensate rights holders. The Bill #4461 proposes the creation of a single "super" collective management organization, combining all music rights holder interests (songwriters, lyricists, publishers, producers and performers), which would not work effectively or be market driven, and is contrary to international practice (and contrary to the EU-Ukraine Association Agreement and the EU Directive on Collective Rights Management).

**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:** Bill #3081-d includes amendments to Article 176 to ensure the availability of criminal remedies against online piracy of all works and sound recordings (current law only applies clearly to hard copy piracy); it would also sanction camcording. Also needed are: (1) remedies against repeat infringers (within twelve months) that would automatically lead to criminal, not solely, administrative prosecution (and, even if each separate infringement is below the criminal infringement threshold); (2) clear rules in the Criminal Procedure Code for prosecuting infringers, and remedies 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).

**Administrative Remedies:** Administrative remedies 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 ISSUES**

The Government of Ukraine continues to maintain onerous market access barriers. Two of these barriers are: (1) an obligation to manufacture film prints and digital encryption keys in Ukraine; and (2) customs valuation rules that assess valuation on projected royalties, rather than on the underlying carrier medium. In December 2015, the Government of Ukraine adopted a law on VAT that discriminates against foreign films. It applies to the distribution, theatrical exhibition and other public performances of 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. The Law on Cinematography should be amended to repeal this requirement of local production of film prints.

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 revised 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 (which is still in force).

### **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.