

2004

## The End of Software Piracy in Eastern Europe? A Positive Outlook with International Help

Allison M. Collisson  
*Fordham University School of Law*

Follow this and additional works at: <https://ir.lawnet.fordham.edu/iplj>



Part of the [Entertainment, Arts, and Sports Law Commons](#), and the [Intellectual Property Law Commons](#)

---

### Recommended Citation

Allison M. Collisson, *The End of Software Piracy in Eastern Europe? A Positive Outlook with International Help*, 14 Fordham Intell. Prop. Media & Ent. L.J. 1005 (2004).

Available at: <https://ir.lawnet.fordham.edu/iplj/vol14/iss4/4>

This Note is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Fordham Intellectual Property, Media and Entertainment Law Journal by an authorized editor of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact [tmelnick@law.fordham.edu](mailto:tmelnick@law.fordham.edu).

---

# The End of Software Piracy in Eastern Europe? A Positive Outlook with International Help

## **Cover Page Footnote**

Professor Sonya Katal and Sam Moore

## NOTES

# The End of Software Piracy in Eastern Europe? A Positive Outlook With International Help

Alina M. Collisson\*

INTRODUCTION .....	1006
I. EFFORTS TO REDUCE SOFTWARE PIRACY.....	1010
A. <i>The East and the West: Two Very Different Systems</i> .....	1010
B. <i>Russia's Recent Efforts to Combat Piracy</i> .....	1015
C. <i>Ukraine's Recent Efforts to Combat Piracy</i> .....	1018
D. <i>Recent Efforts by the International Community to Combat Piracy</i> .....	1020
II. DEFICIENCIES IN RUSSIA'S AND UKRAINE'S LEGISLATIVE ACTIONS.....	1024
A. <i>Russia's Shortcomings</i> .....	1025
B. <i>Ukraine's Shortcomings</i> .....	1027
C. <i>Current International Efforts</i> .....	1030
1. Non-Governmental Organizations .....	1030
2. Governmental Action .....	1033

---

\* J.D. Candidate, Fordham University School of Law, 2004; B.A., Computer Science, Fordham University, 2000. The author would like to thank Professor Sonia Katyal for her guidance through early versions of this Note and Sam Moore for his invaluable help with later drafts.

1006 *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.* [Vol. 14:1005

III. PROPOSED SOLUTIONS: A PRACTICAL DEFINITION AND HANDS-ON APPROACH.....	1034
A. <i>International Assistance</i> .....	1035
B. <i>A Definition</i> .....	1036
1. Structure of the Proposed Definition.....	1037
2. Sample Definitions With International Reach.....	1040
C. <i>New Laws</i> .....	1042
D. <i>Enforcement of the New Laws</i> .....	1044
E. <i>Patience and Flexibility</i> .....	1046
F. <i>A Practical Approach</i> .....	1046
1. Everyone Wins .....	1047
2. Collaboration With Local Law Enforcement .....	1048
CONCLUSION.....	1050

#### INTRODUCTION

According to the Business Software Alliance (“BSA”), the use of illegal software in 2002 amounted to thirty-nine percent of all software used and resulted in \$13 billion of lost revenue worldwide.<sup>1</sup> The situation in Eastern Europe is of particular concern since, at seventy-one percent, it is “the region with the highest piracy rate, and it has been the region with the highest piracy rate in every study since 1994.”<sup>2</sup> What is perhaps even more startling is that Eastern Europe is credited with only a fourteen percent reduction in software piracy since 1994.<sup>3</sup> By comparison, the Asia/Pacific region shows a thirteen percent rate of reduction over the same period, but its current piracy level is

<sup>1</sup> See BUS. SOFTWARE ALLIANCE [BSA], EIGHTH ANNUAL BSA GLOBAL SOFTWARE PIRACY STUDY: TRENDS IN SOFTWARE PIRACY 1994–2002, at 2–3 (2003) [hereinafter 2003 BSA PIRACY STUDY], available at <http://www.bsa.org/globalstudy> (last visited Apr. 5, 2004). The thirty-nine percent piracy rate for 2002 was calculated by subtracting the volume of software legally obtained from the total software installed in each country surveyed by the BSA. See *id.* at 12; see also Victoria Shannon, *Piracy of Software Dropped Slightly in 2002*, INT’L HERALD TRIB., June 4, 2003, available at 2003 WL 56176568.

<sup>2</sup> 2003 BSA PIRACY STUDY, *supra* note 1, at 2.

<sup>3</sup> See *id.* at 4.

2004]      *ENDING SOFTWARE PIRACY IN EASTERN EUROPE*      1007

fifty-five percent, sixteen points lower than that of Eastern Europe.<sup>4</sup>

Software piracy broadly refers to activities that constitute copyright infringement, such as the unlawful duplication and distribution of copyrighted software.<sup>5</sup> More and more frequently, infringers duplicate and distribute computer programs and code via the Internet,<sup>6</sup> as households across the globe are increasingly able to acquire personal computers.<sup>7</sup> Any circulation of illegally copied materials may be troubling, but it becomes the subject of increased concern when the sale of such products is so widespread that it results in substantial economic loss to the copyright owners and strained international relations.<sup>8</sup>

The Eastern European nations, although not individually the worst offenders on the globe,<sup>9</sup> remain the subject of particular

---

<sup>4</sup> See *id.* North America is listed at the bottom of the list with only an eight percent reduction in piracy, but it has been the region with the lowest piracy rates overall, going from thirty-two in 1994 to twenty-four in 2002. See *id.*

<sup>5</sup> See BUSINESS SOFTWARE ALLIANCE, SOFTWARE PIRACY FACT SHEET, available at <http://www.bsa.org/usa/press/Fact-Sheets.cfm> (last visited Apr. 12, 2004).

<sup>6</sup> See generally Cheryl Hall, *Facing Down a Cyberattacker Victimized Alibre Chief Takes Uncommon Step of Going Public on Theft*, DALLAS MORNING NEWS, Oct. 24, 2003, at 1D (chronicling one company head's fight against a former employee he suspects copied and distributed his company's source code), available at 2003 WL 73505591; *Counterfeiting and Theft of Tangible Intellectual Property: Before the Comm. on Senate Judiciary*, 108th Cong., (2004) [hereinafter *Dudas Testimony*] (congressional testimony of the Honorable Jon Dudas, Acting Under Secretary of Commerce for Intellectual Property and Acting Director of the U.S. Patent and Trademark Office, explaining how increased access to the Internet coupled with higher bandwidth allows for faster, cheaper, and more efficient means to pirate protected materials), available at 2004 WL 2011142.

<sup>7</sup> See, e.g., *Report Says Software Piracy Is Rising Globally*, N.Y. TIMES, June 10, 2002, at A8.

<sup>8</sup> See, e.g., Ann Saccomano, *Copyright Theft a Billion Dollar Business*, J. COM. ONLINE, Feb. 14, 2003 (stating that "[t]he International Intellectual Property Alliance is asking U.S. Trade Representative Robert Zoellick to monitor 56 countries for pirating U.S. intellectual property. Copyright violations drained the U.S. economy of \$9.2 billion in 2002, the group said. It estimates such theft costs the global economy of \$20-\$22 billion annually, not including Internet piracy."), available at 2003 WL 6547142; *Dudas Testimony*, *supra* note 6 (adding that in 2002, the U.S. software industry alone experienced losses of approximately \$2 billion).

<sup>9</sup> Globally, Vietnam is the worst offender, closely followed by China. See Jenni Malapitan, *Software Piracy*, PC MAG. MIDDLE & NEAR EAST, Feb. 5, 2003, available at <http://pcmag.dit.net/article.php?id=EpuuuulluktbcpsrQV> (last visited Apr. 5, 2004); Mark

concern due to the region's elevated rates of software piracy,<sup>10</sup> with an estimated two-thirds of all software in the region being pirated.<sup>11</sup> In addition, the European Commission is paying particular attention to the Eastern European countries that are seeking admission to the European Union, and may not accept them if their governments do not enact and enforce more effective anti-piracy laws.<sup>12</sup> Although this Note addresses the situation in Eastern Europe as a whole, it focuses on the Russian Federation ("Russia") and Ukraine because the rates of software piracy remain very high in these countries,<sup>13</sup> yet their governments continue to adopt relatively weak anti-piracy legislation.<sup>14</sup> Perhaps even worse, Russia and Ukraine do not adequately enforce these weak laws.<sup>15</sup> The lack of appropriate legislation and adequate

---

McDonald, *Pirates Bring Pop Culture to Russia*, HOUS. CHRON., Oct. 26, 2003, at A28; Shannon, *supra* note 1.

<sup>10</sup> See, e.g., Timothy Jacobs, *Software Piracy Plagues Latvia*, BALTIC TIMES, May 16, 2002 (describing the large amount of pirated software visible in Latvia's open-air market in Riga, and stating that Lithuania and Estonia have similar levels of piracy), available at 2002 WL 9217339; William J. Kole, *Romania Emerges as Major Center of Computer Crime; Internet Vampires Have Distant Victims*, WASH. POST, Nov. 2, 2003, at A17 (explaining how, due to the heavy emphasis on information technology during the communist era, Romanians have become expert hackers and software pirates); John Reed, *Shadow of the 'Evil Empire'*, FIN. TIMES, Jan. 4, 2003, at P2 (describing Warsaw's immense outdoor market, known as the "Russian market," as a haven for Polish and other Eastern European sellers and buyers of pirated goods); *Software Piracy Increasing in Croatia: Business Group*, AGENCE FR.-PRESSE, Dec. 4, 2002 (stating that Croatia is one of the Eastern European leaders in software piracy, ranking fifth "after Russia, Ukraine, Romania and Bulgaria"), available at 2002 WL 23664544.

<sup>11</sup> See Paul Meller, *Europe's Antipiracy Proposal Draws Criticism*, N.Y. TIMES, Oct. 20, 2003, at C2.

<sup>12</sup> See *id.*; see also AF, *Intellectual Property – Rightholders' Lobbies Join Forces to Combat Piracy*, EUR. REP., Oct. 30, 2002, available at 2002 WL 13768401. For instance, after four years of drafting efforts, the European Parliament finally approved a new anti-piracy law on March 9, 2004, which will provide for increased uniformity among the national laws of current and future members of the European Union and compel the governments of the nations with weaker anti-piracy laws to step up the creation and enforcement of intellectual property protection. See Paul Meller, *Europe Moves to Strengthen Piracy Laws*, N.Y. TIMES, Mar. 10, 2004, at W1 [hereinafter Meller, *Europe Moves*].

<sup>13</sup> See Ian Hopper, *Software Piracy Up, Study Shows*, TORONTO STAR, June 11, 2002, at C04, available at 2002 WL 22720452; 2003 BSA PIRACY STUDY, *supra* note 1, at 2.

<sup>14</sup> See, e.g., Dario Thurn, *Russia: Russian Poll Shows Up Intellectual Property Problems*, WMRC DAILY ANALYSIS, Mar. 20, 2003, available at 2003 WL 13279743.

<sup>15</sup> See *infra* notes 33–35 and accompanying text.

enforcement present more obstacles for these countries because both currently seek admission to the World Trade Organization (“WTO”),<sup>16</sup> but suffer from significant legal deficiencies relating to the conditions mandated by the Agreement on Trade-Related Aspects of Intellectual Property Rights (“TRIPS Agreement”).<sup>17</sup> If Russia and Ukraine could attain a balanced enforcement system that delivers better results but remains closely tailored to the local practices, these nations then would be able to reduce software piracy and other types of copyright infringement more effectively.<sup>18</sup>

Part I of this Note offers an overview of Russia’s and Ukraine’s efforts to curb software piracy and describes the requirements imposed by the international community. Part II exposes the deficiencies in the legislative actions and enforcement of these nations and illustrates the international community’s involvement in the reduction of global copyright infringement. The first section of Part III explores a proposed solution in the battle against software piracy that includes the creation of an international network to monitor and support the development of anti-piracy legislation in Russia, Ukraine, and the rest of Eastern

---

<sup>16</sup> World Trade Organization [WTO], *Accessions, Accessions in Progress*, at [http://www.wto.org/english/thewto\\_e/acc\\_e/acc\\_e.htm](http://www.wto.org/english/thewto_e/acc_e/acc_e.htm) (last visited Apr. 6, 2004).

<sup>17</sup> See Agreement on Trade-Related Aspects of Intellectual Property Rights, April 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND vol. 31, 33 I.L.M. 81 (1994) [hereinafter TRIPS Agreement]; cf. Fred Weir, *The Russian Economy Is Thriving on Piracy: Despite Laws to Combat the Illegal Trade, Half of All Goods Sold in the Country Are Fake*, S. CHINA MORNING POST, Jan. 13, 2003, at 13 (discussing Russia’s strong market for pirated goods despite Russia’s increasing anti-piracy legislation), available at 2003 WL 2325625. “December 31, 1999, in addition to being the last day of the 20th century, was the deadline for all but the least-developed countries to comply with the [TRIPS Agreement] requirements of the WTO for extending and harmonizing Intellectual Property Rights . . . .” WILLIAM LESSER, THE EFFECTS OF TRIPS-MANDATED INTELLECTUAL PROPERTY RIGHTS ON ECONOMIC ACTIVITIES IN DEVELOPING COUNTRIES I (2001) (footnote omitted) (prepared under the World Intellectual Property Organization (“WIPO”) Special Service Agreement), available at <http://www.wipo.int/about-ip/en/studies/index.html> (last visited Apr. 6, 2004).

<sup>18</sup> See generally WIPO, About WIPO, *Medium-Term Plan for WIPO Program Activities – Vision and Strategic Direction of WIPO*, ¶¶ 11–12, at <http://www.wipo.int/about-wipo/en/dgo/pub487.htm> (last visited Apr. 6, 2004) [hereinafter WIPO, *Plan for WIPO Program*] (emphasizing the need for a flexible and balanced approach to the integration of intellectual property laws into the legislations of developing economies).

Europe. Such an international network will be able to better understand, and therefore adapt, anti-piracy legislation for this region. The second section of Part III suggests a practical approach that balances the objectives of foreign companies who are victimized by piracy with the needs of local Eastern European communities in which some of these foreign companies operate.

### I. EFFORTS TO REDUCE SOFTWARE PIRACY

Increased globalization is driving a growing number of countries to create a uniform system of intellectual property rights, which, although not a new phenomenon,<sup>19</sup> has only gained true international momentum in the last decade.<sup>20</sup> One of the major objectives of this movement should be to reconcile the intellectual property regimes of Eastern Europe with those of the West to integrate them into a unified Europe and global organizations such as the WTO. Meanwhile, Russia and Ukraine have attempted on their own to limit piracy through a variety of methods that have proven ineffective.<sup>21</sup>

#### *A. The East and the West: Two Very Different Systems*

The intellectual property regimes of North America and Western Europe are built upon the author's exclusive right in his or

---

<sup>19</sup> For example, the Berne Convention instituted mutual protection of copyrights among its member nations as early as 1886. *See* Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, arts. 1, 5, 25 U.S.T. 1341, 828 U.N.T.S. 221 (last revised July 24, 1971) [hereinafter Berne Convention].

<sup>20</sup> The WTO's TRIPS Agreement, which became effective on January 1, 1995, was instrumental in bringing together member nations from all around the globe. *See* TRIPS Agreement, *supra* note 17. As of April 4, 2003, the WTO has 146 members from all continents except Antarctica, and all WTO members, with very few exceptions, are also bound by the TRIPS Agreement. *See* WTO, Understanding the WTO: The Organization, Members and Observers, at [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/org6\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm) (last visited Apr. 6, 2004); WTO, TRIPS: FAQs, *Frequently Asked Questions about TRIPS in the WTO*, at [http://www.wto.org/english/tratop\\_e/trips\\_e/tripfq\\_e.htm#Who'sSigned](http://www.wto.org/english/tratop_e/trips_e/tripfq_e.htm#Who'sSigned) (last visited Apr. 6, 2004); *see also* Meller, *Europe Moves*, *supra* note 12 (exemplifying the latest effort by the European Union to harmonize intellectual property protection among its current and future member nations).

<sup>21</sup> *See infra* Parts II.A–B.



her creation.<sup>22</sup> With such a clear and mature legal system comes stronger enforcement and overall, less illegal activity.<sup>23</sup> It is true that, in spite of its solid intellectual property system, the United States is not free of piracy,<sup>24</sup> but the aim is to discourage copyright infringement while not creating a regime that is rigorous to the point of infringing on personal liberties.<sup>25</sup>

Russia, Ukraine, and other countries in Eastern Europe have not had the same incentive-driven intellectual property systems that have been present in the West for over a century.<sup>26</sup> For instance, both governments appropriated the fruits of one's invention while they rewarded the inventor with vouchers redeemable for limited rewards provided by the state.<sup>27</sup> By rewarding creativity in such ways, intellectual property rights developed in a very different direction from those present in the American and Western European systems.<sup>28</sup> With the fall of

---

<sup>22</sup> See, e.g., U.S. CONST. art. I, § 8, cl. 8; 35 U.S.C. § 101 (2004). In Europe, as in the rest of the world, "modern" copyright protection started with the Statute of Anne in 1710. The Statute of Anne recognized the author as the owner of the work and instituted the concept of fixed term protection. See [intellectual-property.gov.uk](http://www.intellectual-property.gov.uk), *A History of Copyright*, at <http://www.intellectual-property.gov.uk/std/resources/copyright/history.-htm> (last visited Apr. 22, 2004). An electronic copy of the image of the Statute of Anne document is available at <http://www.copyright-history.com/anne.html> (last visited Apr. 22, 2004).

<sup>23</sup> Cf. Brian T. Jones, *Software Piracy and the Global Economy*, 3 ECON. REFORM TODAY (1998), at <http://www.cipe.org/publications/fs/ert/e29/jonee29.htm> (last visited Apr. 6, 2004) (citing the United States for examples of laws that help stop piracy).

<sup>24</sup> See 2003 BSA PIRACY STUDY, *supra* note 1, at 2, 7 (showing that year 2001 estimates for piracy in North America remain the lowest in the world, with the United States piracy rate at twenty-five percent).

<sup>25</sup> For example, the fair use exception to copyright infringement included non-commercial, limited personal use of protected materials. See 17 U.S.C. § 107 (2004).

<sup>26</sup> See generally Lana C. Fleishman, Note, *The Empire Strikes Back: The Influence of the United States Motion Picture Industry on Russian Copyright Law*, 26 CORNELL INT'L L.J. 189, 192-93, 236 (1993). Ukraine, having been part of the Soviet Union, shares the same legislative background. See generally NIS: *Intellectual Property - 301 Watch List*, BNA'S EASTERN EUROPE REPORTER (June 2000), available at <http://www.bisnis.-doc.gov/bisnis/country/000731BNAIPR301.htm> (last visited Apr. 27, 2004).

<sup>27</sup> Memorandum from John Richards, Professor of Law, Fordham University School of Law, to Patent Law Class 2 n.4 (Jan. 6, 2003) (on file with author).

<sup>28</sup> See Fleishman, *supra* note 26, at 236 (noting that under the Soviet regime, the government's interest in "promoting an ideology and directing public opinion and tastes" superseded regard for creators' rights, resulting in the exploitation of intellectual products, "which concomitantly destroyed the author's rights and his incentives to

communism and a sudden opportunity for entrepreneurship, Russia's and Ukraine's deficient approaches to intellectual property protection and the lack of enforcement against infringement quickly impacted the world economy in a negative way.<sup>29</sup> The fact that what the United States had been doing for over a century was a new concept for these countries—together with their vaguely-defined laws and the lessened ability to identify and punish acts of piracy at the local level—demonstrates their struggle to switch from one system to another.<sup>30</sup>

It was only by 1994, “[d]uring the Uruguay Round, [that] several developing countries and ‘transition economies’ (countries from Eastern and Central Europe in transition to a market economy) were learning the ropes of intellectual property law—by and large a set of ‘Western’ concepts.”<sup>31</sup> Also, Russia and Ukraine recognized the criminal side of copyright infringement only in the 1990s,<sup>32</sup> and enforcement remains minimal. For instance, according to the World Markets Research Centre, “The Russian government has promised to crack down on intellectual property infringements, but aside from high-publicity raids it has still not made major inroads into the counterfeit trade.”<sup>33</sup> Thus, although Russia has made progress in enacting legislation to

---

create”). The U.S. system of protection of intellectual property lies on the other side of the spectrum, by recognizing a fundamental character of intellectual property protection through the guarantee of direct benefit to the creator. Regardless of the creative result (that is, for copyrights and patents alike), the creator receives a market monopoly to use his or her creation for commercial advantage. *See* U.S. CONST., art. I, § 8, cl. 8.

<sup>29</sup> *See generally* 2003 BSA PIRACY STUDY, *supra* note 1.

<sup>30</sup> *See generally* *Russia: Intellectual Property – Seminar with Rospatent and Others*, BNA'S EASTERN EUROPE REPORTER (Aug. 2000) (describing some of the efforts taken by the Russian Agency for Patents and Trademarks, which also regulates copyrights, to bring the Russian intellectual property regime more in line with the American system), available at <http://www.bisnis.doc.gov/bisnis/country/000731bnaiprsem.htm> (last visited Apr. 19, 2004); *infra* discussion Parts II.A–B.

<sup>31</sup> Daniel J. Gervais, *The Internalization of Intellectual Property: New Challenges From the Very Old and the Very New*, 12 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 929, 933 (2002).

<sup>32</sup> *See, e.g.*, Susan Tiefenbrun, *Piracy of Intellectual Property in China and the Former Soviet Union and its Effects Upon International Trade: A Comparison*, 46 BUFF. L. REV. 1, 52 (1998); Press Release, Central and Eastern Europe Business Information Center, First Criminal Conviction for Software Piracy (Mar. 12, 1997) (on file with author).

<sup>33</sup> Dario Thuburn, *Russia: Tens of Thousands of Fake Russian Medicines Uncovered*, WMRC DAILY ANALYSIS, Mar. 19, 2003, available at 2003 WL 13279546.

2004]      *ENDING SOFTWARE PIRACY IN EASTERN EUROPE*      1013

protect against piracy, the government seems to be doing little in terms of enforcing its laws.<sup>34</sup> The same can be said of Ukraine, which, despite tough trade sanctions imposed by the United States for the past several years, has not stepped up enforcement against the production and distribution of pirated goods.<sup>35</sup>

The staggering software piracy rates in Eastern Europe are the result of compounded factors, such as “the low income of average households, high prices for genuine goods, easy profits with little risk of punishment to counterfeiters, weak anti-counterfeiting laws, and a lack of effective law enforcement.”<sup>36</sup> Because the countries of Eastern Europe are still struggling to pull themselves out of post-communist economic hardships, they are not yet in a position to fully enforce copyright laws.<sup>37</sup> In addition, there is little public outrage against acts of piracy because the pirated goods provide income to citizens and those harmed are usually established entities in developed countries.<sup>38</sup> Eastern Europeans may see piracy simply as a way of fairly redistributing resources, and perhaps even as a benefit to the local economy.<sup>39</sup> The most common argument in favor of piracy is that legitimate products cost too much and it is impossible to afford them on the average income level in most Eastern European countries.<sup>40</sup> In a news conference held in March 2003, the head of the Russian Interior Ministry Department for the Prevention of Violations on the

---

<sup>34</sup> See Michael Mainville, *Is Russia a Haven for Software Pirates?: Allegations Surface That Another Application Is Being Shared Illegally* (Nov. 21, 2003), available at <http://www.pcworld.com/news/article/0,aid,113545,00.asp> (last visited Apr. 12, 2004).

<sup>35</sup> See generally Submission from Eric H. Smith, President, International Intellectual Property Alliance [IIPA], to James Mendenhall, Assistant U.S. Trade Representative 17 (Feb. 13, 2004) [hereinafter 2004 Special 301 Cover Letter], available at [http://www.iipa.com/special301\\_TOCs/2004\\_SPEC301\\_TOC.html](http://www.iipa.com/special301_TOCs/2004_SPEC301_TOC.html) (last visited Apr. 12, 2004).

<sup>36</sup> Dario Thuburn, *Russia: Russian Poll Shows Up Intellectual Property Problems*, WMRC DAILY ANALYSIS, Mar. 20, 2003, available at 2003 WL 13279743.

<sup>37</sup> See Interfax, *Russia Struggling to Curb Software, CD Piracy* (Mar. 17, 2003), available at 2003 WL 16568247.

<sup>38</sup> The Russian Interior Ministry estimates that the return from unauthorized copying on the grey market can result in profits of 200 to 400 percent. See *id.*; see also Weir, *supra* note 17.

<sup>39</sup> See Weir, *supra* note 17.

<sup>40</sup> See *id.*; McDonald, *supra* note 9, at A28; see also Tony Pappa, *Baltics Still a Haven for Piracy*, BALTIC TIMES, Feb 27, 2003, available at 2003 WL 10512184.

1014 *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.* [Vol. 14:1005

Consumer Market blamed the high prices charged for software, saying that it fuels demand for cheaper items, typical for a developing economy.<sup>41</sup>

The increased piracy in Russia and Ukraine not only put a large dent in their respective economies,<sup>42</sup> but restrictions and sanctions from the United States and other victim countries might have hampered a smoother rise out of their still-developing economic condition.<sup>43</sup> The United States has imposed objectives and deadlines on Russia and Ukraine for years, at times accompanied by economic sanctions.<sup>44</sup> Similarly, the international community, through the WTO, has mandated a variety of enforcement goals for the regulation and reduction of copyright violations before these and other Eastern European nations can join the WTO.<sup>45</sup> Russia and Ukraine criticize the internationally imposed trade and industry sanctions,<sup>46</sup> arguing that the penalties exacerbate their

---

<sup>41</sup> See Interfax, *supra* note 37.

<sup>42</sup> Cf. INT'L RES. & EXCHANGES BD., RUSSIA IN THE INTERNET AGE: BALANCING FREEDOM AND REGULATION 5–6 (2003) [hereinafter IREX Conference], available at <http://www.irex.org/mosnetconference/index.asp> (“A legitimate market also creates successive opportunities for lucrative employment in technology. With allegedly 88 percent of Russian software pirated, this is an enormous problem plaguing the nation’s IT market.”). In addition, according to the BSA, a mere ten percent reduction in Russia’s and Ukraine’s software piracy rates would result in doubling the number of information technology sector jobs, contributing billions of dollars to the economy, and adding tens of millions of dollars in tax revenues by year 2006. See BSA, RUSSIA: RUSSIA COULD DOUBLE ITS IT SECTOR AND PUMP BILLIONS INTO ITS ECONOMY, available at <http://global.bsa.org/idcstudy/pdfs/Russia.pdf?CFID=3777&CFTOKEN=86702736> (last visited Apr. 12, 2004); BSA, UKRAINE: UKRAINE’S EMERGING IT SECTOR COULD GROW TO MORE THAN A BILLION DOLLARS, CREATING NEW JOBS, BUSINESSES, AND ECONOMIC OPPORTUNITIES, available at <http://global.bsa.org/idcstudy/pdfs/Ukraine.pdf?CFID=-3777&CFTOKEN=86702736> (last visited Apr. 12, 2004).

<sup>43</sup> Cf. Weir, *supra* note 17 (relating the story of a detective working on behalf of an Italian company attempting to combat counterfeiting, who encountered local officials and others asking him to stop because the anti-piracy efforts would ruin the local economy).

<sup>44</sup> See, e.g., Dario Thuburn, *Ukraine: Ukraine Targets WTO Membership in Early 2004*, WMRC DAILY ANALYSIS, Feb. 28, 2003 [hereinafter Thuburn, *Ukraine*], available at 2003 WL 13277748.

<sup>45</sup> In particular, the TRIPS Agreement sets out detailed requirements for WTO accession. See *id.*; see also TRIPS Agreement, *supra* note 17.

<sup>46</sup> For instance, in 2002, the United States has imposed sanctions amounting up to \$75 million on Ukraine for failing to alleviate CD piracy. See Thuburn, *Ukraine*, *supra* note 44.

2004]      *ENDING SOFTWARE PIRACY IN EASTERN EUROPE*      1015

internal economic problems and make their anti-piracy efforts more difficult and lengthy.<sup>47</sup>

*B. Russia's Recent Efforts to Combat Piracy*

Russia has made various efforts to accommodate U.S. demands and international community requirements to reduce its growing levels of copyright violations. The Soviet Union, of which Russia was a part, joined the Paris Convention for the Protection of Industrial Property in 1965<sup>48</sup> and the Universal Copyright Convention in 1973,<sup>49</sup> but still excluded national protection for computer code and software.<sup>50</sup> At an early stage in the development of the Soviet Union's intellectual property legislation, the government addressed piracy issues, in particular when the United States pressured Soviet President Mikhail Gorbachev to take measures to reduce the unauthorized distribution of American films.<sup>51</sup> This pressure came just as the Soviet Union signed the Berne Convention<sup>52</sup> in 1990. The Soviet Union would not be admitted as a member, however, until it endorsed legislation that adequately dealt with the piracy issue.<sup>53</sup> Eventually, the government enacted a new copyright law in 1991,<sup>54</sup> but by the time it became effective, the Soviet Union dissolved, and Russia took up the new responsibility.<sup>55</sup> The transition from the communist

---

<sup>47</sup> Cf. Jean Raymond Homere, *Intellectual Property Rights Can Help Stimulate the Economic Development of Least Developed Countries*, COLUM. J.L. & ARTS 277, 285 (2004) ("Further, many developing countries argued that they do not have the necessary resources to monitor and enforce intellectual property rights to the extent required by TRIPs. They also complained that stronger intellectual property protection would result in a technology transfer blockade and would act as an impediment to economic development in such poorer countries." (footnotes omitted)).

<sup>48</sup> See WIPO, Paris Convention for the Protection of Industrial Property, *Contracting Parties*, at <http://www.wipo.int/treaties/en/ip/paris/index.html> (last visited Apr. 12, 2004).

<sup>49</sup> See Connie Neigel, *Further Developments: Piracy in Russia and China: A Different U.S. Reaction*, 63 LAW & CONTEMP. PROBS. 179, 184 (2000).

<sup>50</sup> See *id.* at 185.

<sup>51</sup> See *id.*

<sup>52</sup> See Berne Convention, *supra* note 19.

<sup>53</sup> See Neigel, *supra* note 49, at 185.

<sup>54</sup> The new copyright law became chapter IV of the Fundamentals of Civil Legislation. See *id.*

<sup>55</sup> See *id.* at 186.

regime is significant not only politically, but (perhaps to a lesser degree), also in terms of intellectual property protection. As Russia enacted various intellectual property laws, it finally granted protection to computer software.<sup>56</sup> In 1993, Russia enacted a wide-ranging law, On Copyright and Neighboring Rights, and joined the Berne Convention for the Protection of Literary and Artistic Works in 1995.<sup>57</sup> In 1998, Russian President Boris Yeltsin signed a law that obligated plants that burn audiovisual material to CDs to obtain operating licenses.<sup>58</sup> The government enacted another law with similar aims in 2001.<sup>59</sup> This new law, entitled On Licensing Separate Activities, requires plants that manufacture optical media products to obtain their licenses from the Ministry of Press and Information—certainly a move toward better enforcement.<sup>60</sup> In addition, 2002 Russian legislation created a set of laws, called the Reproduction Licensing Regulations, to further regulate the reproduction and licensing of optical media.<sup>61</sup>

Rospatent manages Russia's copyright protection efforts in addition to patent and trademark procedures.<sup>62</sup> With the help of the World Intellectual Property Organization ("WIPO"), Rospatent engaged in efforts to provide feedback regarding the amendments to the national copyright laws, which were scheduled for completion in November 2003, but are not yet enacted.<sup>63</sup> Russia is

---

<sup>56</sup> See *id.*

<sup>57</sup> See *id.*

<sup>58</sup> See IIPA, 2003 SPECIAL 301 REPORT ON GLOBAL COPYRIGHT PROTECTION AND ENFORCEMENT app. C at 261 (2003) [hereinafter 2003 SPECIAL 301 RUSSIA], available at [http://www.iipa.com/special301\\_TOCs/2003\\_SPEC301\\_TOC.html](http://www.iipa.com/special301_TOCs/2003_SPEC301_TOC.html) (last visited Apr. 12, 2004).

<sup>59</sup> See *id.*

<sup>60</sup> See *id.*

<sup>61</sup> See *id.*

<sup>62</sup> Rospatent has federal and executive authority to confer exclusive rights to intellectual property products, such as inventions, trademarks, computer programs and databases. See Rospatent, *About Rospatent*, at <http://www.fips.ru/ruptoen2/index.htm> (last visited Apr. 12, 2004). Since 1999, Rospatent also has been responsible for overseeing the creation and enhancement of copyright laws through national legislation and international support. See *id.*

<sup>63</sup> See 2003 SPECIAL 301 RUSSIA, *supra* note 58, at 263; IIPA, 2004 SPECIAL 301 REPORT ON GLOBAL COPYRIGHT PROTECTION AND ENFORCEMENT app. C at 203 (2004) [hereinafter 2004 SPECIAL 301 RUSSIA], available at [http://www.iipa.com/special301\\_TOCs/2004\\_SPEC301\\_TOC.html](http://www.iipa.com/special301_TOCs/2004_SPEC301_TOC.html) (last visited Apr. 12, 2004).

2004]      *ENDING SOFTWARE PIRACY IN EASTERN EUROPE*      1017

actively pursuing the improvement of its copyright laws, which experienced the first reading of the amendments, as reviewed and passed by the government, in October 2002.<sup>64</sup> These amendments seek to extend copyright protection to sound recordings and pre-existing works, and include steps towards adopting the WIPO digital treaties.<sup>65</sup> The Law on Copyright and Neighboring Rights specifically recognizes the primacy of international treaty law over Russian law.<sup>66</sup> Russia's new Civil Procedure Code, effective February 2003, provides regulatory guidelines for taking legal action in cases of copyright and neighboring rights violations.<sup>67</sup> Improvements also came in the form of new amendments to the arbitration procedures, which now provide for "civil *ex parte* search provisions" that allow the government to initiate legal action instead of having to wait for the copyright holder to file a complaint.<sup>68</sup>

Russia has two bodies of criminal law that address piracy: the Criminal Procedure Code ("CPC") and the Criminal Code.<sup>69</sup> The government recently amended both codes to strengthen the law surrounding copyright infringement.<sup>70</sup> The 1996 amendments to two CPC articles place the bulk of the responsibility to investigate and prosecute copyright violations with the prosecutor's office, which requires a formal complaint from the copyright owner to begin the action.<sup>71</sup> Effective January 1997 and updated several times since then, article 146 of the Criminal Code was the first law in Russian history to criminalize the violation of intellectual

---

<sup>64</sup> See 2003 SPECIAL 301 RUSSIA, *supra* note 58, at 263.

<sup>65</sup> See *id.*; 2004 SPECIAL 301 RUSSIA, *supra* note 63, at 203.

<sup>66</sup> Article 3 of the law states that "[w]here an international treaty to which the Russian Federation is party contains rules different from those specified in this Law, the provisions of the international treaty shall be applicable." Russian Federation Law on Copyright and Neighboring Rights art. 3, signed July 9, 1993, available at <http://orwell.ru/info/unesco> (last visited Apr. 12, 2004).

<sup>67</sup> See 2003 SPECIAL 301 RUSSIA, *supra* note 58, at 267; 2004 SPECIAL 301 RUSSIA, *supra* note 63, at 204.

<sup>68</sup> 2003 SPECIAL 301 RUSSIA, *supra* note 58, at 267; 2004 SPECIAL 301 RUSSIA, *supra* note 63, at 204.

<sup>69</sup> See generally 2003 SPECIAL 301 RUSSIA, *supra* note 58, at 264–65.

<sup>70</sup> See *id.*

<sup>71</sup> The two Criminal Procedure Code ("CPC") articles affected by the amendments are numbers 27 and 126. See 2003 SPECIAL 301 RUSSIA, *supra* note 58, at 264.

1018 *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.* [Vol. 14:1005

property laws.<sup>72</sup> It sets the guidelines for fines, terms of imprisonment, and hours of compulsory correctional labor for infringement convictions.<sup>73</sup> Article 146 of the Criminal Code was amended last year to lower the economic injury threshold from “grave harm” to “significant damage” and also set a pre-determined penalty for each level of harm.<sup>74</sup>

### *C. Ukraine’s Recent Efforts to Combat Piracy*

Although Ukraine took steps to reduce the unlawful duplication and distribution of foreign media products, such as CDs, it still has not achieved the level required by the United States.<sup>75</sup> In February 2000, Ukraine committed to the Geneva Phonograms Convention that aims to protect producers of sound recordings from the unauthorized reproduction of such recordings on a commercial scale.<sup>76</sup> In June 2000, President of Ukraine Leonid Kuchma and U.S. President Bill Clinton signed a joint action plan that called for optical media plant licensing and regulation of product source

---

<sup>72</sup> See, e.g., Bjorn Hammarback, *New Criminal Code*, at <http://www.ulfsbo.nu/ussr/busilaw.html> (Jan. 24, 1997). The amendments to article 146 of the Criminal Code became effective in December 2003. See 2004 SPECIAL 301 RUSSIA, *supra* note 63, at 203.

<sup>73</sup> See 2004 SPECIAL 301 RUSSIA, *supra* note 63, at 203; *State Duma Approved the Bill on Plagiarism*, A&G INFO. SERV., Mar. 19, 2003, available at 2003 WL 10371276.

<sup>74</sup> See 2004 SPECIAL 301 RUSSIA, *supra* note 63, at 203.

<sup>75</sup> Associated Press, *Ukraine’s Parliament Approves Draft Bill to Combat CD Piracy in First Reading*, Jan. 17, 2002 (on file with *Fordham Intellectual Property, Media & Entertainment Law Journal*).

<sup>76</sup> See Geneva Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms, Oct. 29, 1971, 25 U.S.T. 309. Article 2 of the convention states:

Each Contracting State shall protect producers of phonograms who are nationals of other Contracting States against the making of duplicates without the consent of the producer and against the importation of such duplicates, provided that any such making or importation is for the purpose of distribution to the public, and against the distribution of such duplicates to the public.

*Id.* Article 3 states:

The means by which this Convention is implemented shall be a matter for the domestic law of each Contracting State and shall include one or more of the following: protection by means of the grant of a copyright or other specific right; protection by means of the law relating to unfair competition; protection by means of penal sanctions.

*Id.*



2004]      *ENDING SOFTWARE PIRACY IN EASTERN EUROPE*      1019

identification to facilitate locating disc manufacturers.<sup>77</sup> The joint action plan also called for the institution of certain necessary regulatory bodies that would oversee the creation and enforcement of these regulations.<sup>78</sup> In January 2001, Ukraine implemented the Law on Distribution of Copies of Audiovisual Works and Phonograms.<sup>79</sup> This law was aimed at regulating optical disc manufacturing plants and disc distribution in the Ukraine by issuing hologram stickers (hence, the name “Hologram Sticker Law”) for the legitimate products that entered the market.<sup>80</sup> Also in 2001, Ukraine reworked its copyright law to offer protection for “pre-existing foreign works and sound recordings [that are] less than 50 years old”<sup>81</sup> and implement the two WIPO treaties aimed at preventing digital piracy—the WIPO Copyright Treaty (“WCT”) and the WIPO Performances and Phonogram Treaty (“WPPT”).<sup>82</sup> In the same year, Ukraine included criminal penalties for “infringements involving producers of sound recordings or performers” for the first time in its criminal code reform.<sup>83</sup> It appears that these efforts were at least minimally successful, since the rate of plant production of pirated optical discs has gradually slowed since 2000.<sup>84</sup>

Most recently in January 2002, Ukraine enacted the Optical Disc Law.<sup>85</sup> Facilitated by an implementing decree that was signed by Ukrainian officials that same month, this new law entered into force in April 2002.<sup>86</sup> Other recent efforts include an order from the Ministry of Education and Science in January 2003 for the State Department of Intellectual Property (“SDIP”) to

---

<sup>77</sup> See IIPA, 2003 SPECIAL 301 REPORT ON GLOBAL COPYRIGHT PROTECTION AND ENFORCEMENT app. C at 3 (2003) [hereinafter 2003 SPECIAL 301 UKRAINE].

<sup>78</sup> See *id.*

<sup>79</sup> See *id.* at 4–5.

<sup>80</sup> See *id.* at 5.

<sup>81</sup> *Id.* at 13–14.

<sup>82</sup> See *id.* at 16. For more details on the WIPO Copyright Treaty and the WIPO Performances and Phonogram Treaty, see *infra* notes 114–17 and accompanying text.

<sup>83</sup> 2003 SPECIAL 301 UKRAINE, *supra* note 77, at 14.

<sup>84</sup> See *id.* at 3; IIPA, 2004 SPECIAL 301 REPORT ON GLOBAL COPYRIGHT PROTECTION AND ENFORCEMENT app. C at 11 (2004) [hereinafter 2004 SPECIAL 301 UKRAINE].

<sup>85</sup> See 2003 SPECIAL 301 UKRAINE, *supra* note 77, at 5–6.

<sup>86</sup> See 2004 SPECIAL 301 UKRAINE, *supra* note 84, at 11.

compile a listing of software manufacturers and distributors.<sup>87</sup> This is a directory of manufacturers and distributors who voluntarily provided details about their identity, products, and market.<sup>88</sup> SDIP will make the information from this directory available to the users who request it and pay a fee.<sup>89</sup> In addition, a new Ukrainian amendment to its Customs Code, effective January 2004, “provide[s] clear *ex officio* authority to customs officials to seize suspected illegal material at the border for effective border enforcement and to commence criminal investigations.”<sup>90</sup> According to the International Intellectual Property Alliance (“IIPA”),<sup>91</sup> this amendment “closes a legal loophole previously missing from the enforcement regime of Ukraine.”<sup>92</sup>

*D. Recent Efforts by the International Community to Combat Piracy*

Expanding globalization makes the lack of uniformity among international intellectual property laws increasingly evident.<sup>93</sup> Given the global nature of commercial transactions, effective international cooperation cannot be implemented without comprehensive legal standards and detailed definitions that all participant nations are able to understand and use.<sup>94</sup> Not only is there a need for a minimal level of reciprocity, but as globalization grows and erases commercial borders it becomes increasingly important to have a multilateral agreement that establishes rules and instills discipline among the participating nations.<sup>95</sup> Such rules

---

<sup>87</sup> See 2003 SPECIAL 301 UKRAINE, *supra* note 77, at 5.

<sup>88</sup> *See id.*

<sup>89</sup> *See id.*

<sup>90</sup> *Id.* at 15; see also 2004 SPECIAL 301 UKRAINE, *supra* note 84, at 18.

<sup>91</sup> *See infra* notes 190–95.

<sup>92</sup> 2004 SPECIAL 301 UKRAINE, *supra* note 84, at 18.

<sup>93</sup> See World Trade Organization [WTO], Understanding the WTO: The Agreements, *Intellectual Property: Protection and Enforcement*, at [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/agrm7\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm7_e.htm) (last visited Apr. 12, 2004) [hereinafter WTO, *IP Protection*].

<sup>94</sup> *See supra* notes 19–20.

<sup>95</sup> See WTO, A Summary of the Final Act of the Uruguay Round, *Agreement on Trade Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods*, at [http://www.wto.org/english/docs\\_e/legal\\_e/ursum\\_e.htm#nAgreement](http://www.wto.org/english/docs_e/legal_e/ursum_e.htm#nAgreement) (last visited Apr. 12, 2004) [hereinafter WTO, *TRIPS Summary*].

2004]      *ENDING SOFTWARE PIRACY IN EASTERN EUROPE*      1021

are necessary to alleviate the tension created by the deficiencies in many nations' legal approaches toward the protection of goods in international trade.<sup>96</sup> More specifically, the world needs a system that provides "more order and predictability, and for disputes to be settled more systematically."<sup>97</sup> The Uruguay Round of the General Agreements on Tariffs and Trade ("GATT") finalized the TRIPS Agreement in April 1994 and introduced, for the first time, a comprehensive set of intellectual property rules into the global trading system.<sup>98</sup> The TRIPS Agreement outlines the steps for the investigation and determination of infringement, legal enforcement and remedies, and official authority over the fate of confiscated goods (such as their destruction).<sup>99</sup> It also proposes sufficient judicial power to "order prompt and effective provisional measures, in particular where any delay is likely to cause irreparable harm to the right holder, or where evidence is likely to be destroyed."<sup>100</sup> Other recommendations entail stricter border control and efficient criminal prosecution for piracy at a commercial level.<sup>101</sup>

At a minimum, Russia, Ukraine, and the rest of the Eastern European countries that experience rampant piracy are called upon to conform to the standards dictated by the TRIPS Agreement.<sup>102</sup> Meanwhile, as the United States continues to suffer long-term economic loss in its copyright industries, it insists on economic sanctions because there appear to be few other effective means of persuading Eastern Europeans that anti-piracy efforts should be given a more significant role in their legal systems.<sup>103</sup> Piracy is by nature an international problem, but it has to be eliminated from each nation's inner core. It clearly cannot be resolved by the victim country or organization stepping in to forcibly legislate and

---

<sup>96</sup> *See id.*

<sup>97</sup> WTO, *IP Protection*, *supra* note 93.

<sup>98</sup> *See generally id.*

<sup>99</sup> *See* WTO, *TRIPS Summary*, *supra* note 95.

<sup>100</sup> *Id.*

<sup>101</sup> *See id.*

<sup>102</sup> *See generally* Maria Golovnina, *Video Pirates Hurt Russian Trade*, ORLANDO SENTINEL TRIB., Oct. 20, 2002, at H4.

<sup>103</sup> For example, the United States maintains its imposition of trade sanctions against Ukraine through 2004. *See, e.g.*, 2004 Special 301 Cover Letter, *supra* note 35, at 17.

enforce anti-piracy laws, so enforcement must rely on international efforts such as the WTO's TRIPS Agreement.<sup>104</sup> The TRIPS Agreement is a promising step in the right direction, but due to the general goals that it advocates for its 134 members, it may be prone to misinterpretation and fail to address effectively the remedying of software piracy in the former communist bloc.<sup>105</sup> As a result, sanctions might speak louder than harmonious theoretical accord. On the other hand, they are not a permanent solution, and aside from signaling the importance of the problem to Russia's and Ukraine's leadership, sanctions only alienate and frustrate these and other Eastern European governments.<sup>106</sup>

WTO membership conditions appear to offer a more balanced approach. Without the imposition of direct economic sanctions, the WTO nevertheless applies some of the necessary pressure to curtail illegal copying and distribution.<sup>107</sup> Russia, for instance, currently faces a dilemma because its WTO membership depends, among other things, on a significant reduction in piracy.<sup>108</sup> Ukraine, too, is heavily negotiating admission to the WTO, aiming for membership this year.<sup>109</sup> Having first applied a decade ago, Ukraine is being held back mainly by its failure to institute and enforce better anti-piracy legislation.<sup>110</sup>

A similar set of standards is promulgated by WIPO, which works with its 179 member states, including Russia and Ukraine,<sup>111</sup> to integrate and harmonize intellectual property legislation in their legal systems for better protection of works and increased cooperation among the states and private

---

<sup>104</sup> See generally TRIPS Agreement, *supra* note 17.

<sup>105</sup> See, e.g., WEERAWIT WEERAWORAWIT, THE TRIPS AGREEMENT (World Bank, 1999) (cautioning that for a complete understanding of the TRIPS Agreement, member nations must consider all provisions, no matter how basic or general, and especially the preamble, in spite of its "idiosyncratic language," since it sets the stage for effective regulation of global intellectual property rights), available at [http://www1.worldbank.org/wbiep/trade/manila/TRIPS\\_handbook.pdf](http://www1.worldbank.org/wbiep/trade/manila/TRIPS_handbook.pdf) (last visited Apr. 27, 2004).

<sup>106</sup> See *supra* notes 46–47 and accompanying text.

<sup>107</sup> See, e.g., Thuburn, *Ukraine*, *supra* note 44.

<sup>108</sup> See Interfax, *supra* note 37.

<sup>109</sup> See Thuburn, *Ukraine*, *supra* note 44.

<sup>110</sup> See *id.*

<sup>111</sup> See WIPO, *Member States*, at [http://www.wipo.int/about-wipo/en/members/member\\_states.html](http://www.wipo.int/about-wipo/en/members/member_states.html) (last visited Apr. 12, 2004).

organizations.<sup>112</sup> WIPO's Copyright and Related Rights Sector is devoted to the development of a uniform legal system for the global protection of copyrighted works.<sup>113</sup> Two treaties adopted in December 1996 specifically address copyrights in the digital era: the WIPO Copyright Treaty ("WCT")<sup>114</sup> and the WIPO Performances and Phonograms Treaty ("WPPT").<sup>115</sup> Together they promote the WIPO Digital Agenda, which was approved by the member states at their General Assemblies in September 1999.<sup>116</sup> The agenda "sets out a series of guidelines and goals for WIPO in seeking to develop practical solutions to the challenges raised by the impact of new technologies on intellectual property rights."<sup>117</sup>

An encouraging step is that Ukraine joined the WCT in March 2002 and WPPT in May 2002, together with some other Eastern European countries and the United States.<sup>118</sup> Russia, on the other hand, is not yet a member of these treaties, but is involved in

---

<sup>112</sup> See WIPO, *Development of Intellectual Property Law*, at [http://www.wipo.int/activities/en/development\\_iplaw.html](http://www.wipo.int/activities/en/development_iplaw.html) (last visited Apr. 12, 2004).

<sup>113</sup> See WIPO, *Copyright and Related Rights*, at <http://www.wipo.int/copyright/en/index.html> (last visited Apr. 12, 2004) [hereinafter WIPO, *Copyright and Related Rights*].

<sup>114</sup> See WIPO Copyright Treaty and Agreed Statements Concerning the WIPO Copyright Treaty, Dec. 20, 1996, WIPO Doc. CRNR/DC/96, available at <http://www.wipo.int/clea/docs/en/wo/wo033en.htm> (last visited Apr. 12, 2004).

<sup>115</sup> See WIPO Performances and Phonograms Treaty and Agreed Statements Concerning the WIPO Performances and Phonograms Treaty, adopted Dec. 20, 1996, available at <http://www.wipo.int/clea/docs/en/wo/wo034en.htm> (last visited Apr. 14, 2004).

<sup>116</sup> E-mail from Ecommerce, [ecommerce@wipo.int](mailto:ecommerce@wipo.int), to [ecommerce-updates@listbox.wipo.int](mailto:ecommerce-updates@listbox.wipo.int) (Oct. 21, 1999), available at <http://listbox.wipo.int/wilma/ecommerce-updates/199910/msg00000.html> (last visited Apr. 14, 2004).

<sup>117</sup> WIPO, *Copyright and Related Rights*, *supra* note 113.

The ten-point Digital Agenda lays down a set of guidelines and goals which reflect the Organization's commitment to seek practical solutions to the challenges raised by the impact of electronic commerce on intellectual property rights, and its desire to ensure that all countries participate in the process of defining policy and addressing the issues in order to adapt intellectual property law for the digital age.

*Id.*; see E-mail from Ecommerce, *supra* note 116.

<sup>118</sup> WIPO Copyright Treaty, Dec. 20, 1996, 36 I.L.M. 65 (1997); WIPO Performances and Phonograms Treaty, Dec. 20, 1996, 36 I.L.M. 76 (1997).

1024 *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.* [Vol. 14:1005

consultation with WIPO with respect to better copyright legislation.<sup>119</sup>

## II. DEFICIENCIES IN RUSSIA'S AND UKRAINE'S LEGISLATIVE ACTIONS

Eastern European outdoor markets offer what could be deemed the most visible evidence of pirated software, music, and films.<sup>120</sup> For example, Microsoft estimates annual losses of \$900 million from such retailers alone.<sup>121</sup> One of the most infamous outlets is Moscow's Gorbushka Market, which, with its 1,800 kiosks, is a haven for the daily waves of over 30,000 buyers and sellers of mostly pirated goods.<sup>122</sup> It seems as though anything can be found there, and at a much lower cost than a legitimate copy.<sup>123</sup> Not only is there minimal enforcement, if any, of copyright protection laws,<sup>124</sup> but in addition, some pirated goods allegedly are being produced by Russia's military factories.<sup>125</sup> Other examples of massive outdoor markets that sell enormous amounts of pirated goods can be found in Kiev<sup>126</sup> and Warsaw.<sup>127</sup> These markets have common traits regardless of the location, such as the types of

---

<sup>119</sup> See generally Press Release, WIPO, General Meets with Head of Russia's ROSPATENT (Feb. 27, 2003), available at <http://listbox.wipo.int/wilma/pressinfo-en/200302/msg00007.html> (last visited Apr. 12, 2004).

<sup>120</sup> See, e.g., David McGuire, *Congressional Caucus to Examine Entertainment Piracy*, NEWSBYTES NEWS NETWORK, Oct. 21, 2003, available at 2003 WL 61569887.

<sup>121</sup> See Douglas Birch, *Video Piracy Is Way of Life in Russia; Creators Don't Share a Kopeck*, HAMILTON SPECTATOR, Dec. 28, 2002, at D07, available at 2002 WL 103956862.

<sup>122</sup> See *id.* Gorbushka was actually closed in 2001, but instead of curtailing piracy, it was reborn under the same name and the partial ownership of Moscow's municipal government. See 2003 SPECIAL 301 RUSSIA, *supra* note 58, at 255. Enforcement, as always, remains sparse and difficult. See *id.*

<sup>123</sup> For example, at Gorbushka, the price for a pirated Microsoft Windows operating system is only \$2, compared to \$90 for a legitimate copy. See Birch, *supra* note 121, at D07. Similarly, a music CD sells for between \$2.50 and \$3, a discount of over \$10 from the regular western price. See *id.*

<sup>124</sup> Inspections of merchandise by Ministry of Interior agents are seen as more of an "annoyance" than a threat to the proliferation of pirated commodities. See *id.*

<sup>125</sup> See *id.*

<sup>126</sup> See Jack Boulware, *Pirates of Kiev*, WIRED MAG., Mar. 2002, available at [http://www.wired.com/wired/archive/10.03/ukraine\\_pr.html](http://www.wired.com/wired/archive/10.03/ukraine_pr.html) (last visited Apr. 12, 2004).

<sup>127</sup> See Reed, *supra* note 10, at P2.

goods, their prices, and the almost nonexistent enforcement of copyright protection.<sup>128</sup>

Piracy may not threaten the local public order to the same extent that it damages international trade revenues for the United States and other countries, but piracy is often the enterprise of organized crime syndicates who resort to violence or threats toward government agents and law enforcement officials.<sup>129</sup> These criminal organizations manufacture and sell media, such as optical discs, that carry software, music, movies, and games in staggering numbers across borders all over the world.<sup>130</sup> Not only are they eluding law enforcement officials—those that do not submit to their threats or bribes—but they also have large financial resources at their disposal.<sup>131</sup> If caught, members of these organizations may be able to afford top legal representation or payment for the fines imposed, making it difficult to deter them from future illegal conduct.<sup>132</sup>

#### *A. Russia's Shortcomings*

According to the IIPA, Russia's 1998 and February 2002 laws, together with the June 2002 regulations for the licensing and supervision of plants that manufacture optical disc products,<sup>133</sup> did not produce the desired results.<sup>134</sup> The IIPA stated that "the size and scope of the optical media problem has doubled in size in the past two years."<sup>135</sup> Moreover, the draft copyright amendments, which only passed a first reading in October 2002, and were up for two more readings in 2003, did not pass.<sup>136</sup> At any rate, the IIPA expressed that the proposed amendments do not provide the level

---

<sup>128</sup> See, e.g., Boulware, *supra* note 126.

<sup>129</sup> Press Release, U.S. State Department, Justice Department Waging Global Campaign Against Hi-Tech Crime – International Cooperation Vital, Justice Official Says (Mar. 14, 2003), available at 2003 WL 2046765 [hereinafter Justice Department Press Release].

<sup>130</sup> See *id.*

<sup>131</sup> See *id.*

<sup>132</sup> See generally *id.*

<sup>133</sup> See *supra* Part I.B.

<sup>134</sup> See 2004 SPECIAL 301 RUSSIA, *supra* note 63, at 202 (stating that effective enforcement is still needed against the illegal optical disc manufacturing plants).

<sup>135</sup> 2003 SPECIAL 301 RUSSIA, *supra* note 58, at 261.

<sup>136</sup> See 2004 SPECIAL 301 RUSSIA, *supra* note 63, at 203 (expressing concern with the delay).

of protection that truly is needed for thwarting intellectual property infringement at the necessary scale and speed, because they do not provide for the consistency required for compatibility with the provisions of the TRIPS Agreement and the WIPO Digital Treaties.<sup>137</sup>

Russia's new Civil Procedure Code, effective February 2003, still needs to be evaluated more fully in practice.<sup>138</sup> It appears that the process needs to be improved, since it is sluggish and inefficient.<sup>139</sup> According to the IIPA, "[a] major contributor to the problem is the lack of experience by the judges who must impose it, and the overall inefficiencies for the court-mandated bailiff system."<sup>140</sup> It is, however, an encouraging step forward that the code now provides for civil *ex parte* searches, which are required by the TRIPS Agreement and "are essential tools for effective enforcement in the software industry."<sup>141</sup>

The July 2002 amendments to the CPC<sup>142</sup> appear to have the effect of limiting, rather than increasing, the number of cases that would be criminally prosecuted. First, because the bulk of the responsibility to investigate and prosecute copyright violations rests with the prosecutor's office alone, the amendments shorten the reach of enforcement by taking that power away from the police, who have more resources in general than the prosecutor's office.<sup>143</sup> The amendments also may lower the priority of copyright infringement cases, depending on the workload of the particular prosecutor's office.<sup>144</sup> Second, the copyright owner must file a formal complaint before the prosecutor can embark on the investigation, which also limits the number of potential cases that enter the legal system.<sup>145</sup>

---

<sup>137</sup> See 2003 SPECIAL 301 RUSSIA, *supra* note 58, at 263.

<sup>138</sup> See 2004 SPECIAL 301 RUSSIA, *supra* note 63, at 204 (stating that the new Civil Procedure Code and the arbitrations procedure regulations have only been tried once in practice since their enactment).

<sup>139</sup> See *id.*

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> See *supra* notes 69–74 and accompanying text.

<sup>143</sup> See 2003 SPECIAL 301 RUSSIA, *supra* note 58, at 264–65.

<sup>144</sup> See *id.* at 265.

<sup>145</sup> See *id.* at 264–65.



Third, the amendments to the Criminal Code<sup>146</sup> address the situations where an unlawful appropriation results in “significant damage” to the author<sup>147</sup> and limit the time of imprisonment to between three and six months.<sup>148</sup> Presently, this law appears to be weaker<sup>149</sup> because the amendments require the copyright owner to suffer a predetermined level of harm to trigger a criminal action, which may reduce the number of cases that would reach the level of criminal proceedings.<sup>150</sup> Fourth, the penalty amounts are now also fixed, and may not be adequate punishment for some infringers, such as members of crime syndicates.<sup>151</sup>

### *B. Ukraine's Shortcomings*

The joint action plan signed by President Kuchma and President Clinton in June 2000<sup>152</sup> falls short of the complete solution that it was intended to provide due to inadequate administration of the plant licenses and deficient product code identification issuance.<sup>153</sup> Moreover, the government does not regularly inspect the plants, nor does the government monitor the plants' operation to ensure that the codes are properly attached to the discs.<sup>154</sup> Although in theory the joint action plan was a great improvement in Ukraine's battle against piracy, in practice it does

---

<sup>146</sup> See *supra* notes 69–74 and accompanying text.

<sup>147</sup> See 2004 SPECIAL 301 RUSSIA, *supra* note 63, at 203.

<sup>148</sup> See A&G INFO. SERV., *supra* note 73.

<sup>149</sup> See 2003 SPECIAL 301 RUSSIA, *supra* note 58, at 264.

<sup>150</sup> See 2004 SPECIAL 301 RUSSIA, *supra* note 63, at 203. The IIPA states:

The November 2003 amendments . . . define “significant damage” as a fixed threshold rather than scaled to the minimum daily wages. The fixed thresholds are as follows: 50,000 for the lowest level criminal violation (about US\$1750), and 250,000 rubles for the most serious criminal violation (about US\$8800). This means that any activity below US\$1750 cannot be treated as a criminal matter. The amendments unfortunately weakened the provisions pertaining to aggravated (i.e., organized crime) activities.

*Id.*

<sup>151</sup> See *id.*

<sup>152</sup> See *supra* notes 77–78 and accompanying text.

<sup>153</sup> See 2003 SPECIAL 301 UKRAINE, *supra* note 77, at 3–4 (outlining four major problems with the enforcement of the plant licensing plan and illustrating a totally deficient use of Ukraine's criminal enforcement procedures when, in 2002, the General Prosecutor's Office closed an eight-month investigation against illegal optical disc factory operators due to “lack of sufficient evidence of any violations of the law”).

<sup>154</sup> See *id.* at 4.

not fulfill the objectives due to poor enforcement<sup>155</sup> and inadequate use of administrative remedies to stop businesses from using unlicensed software and other pirated products.<sup>156</sup>

The myriad of other intellectual property laws that the Ukrainian government passed or amended in recent years also fail to provide adequate protection. The Hologram Sticker Law, which was put into practice in January 2001,<sup>157</sup> does not provide the copyright protection necessary to thwart the unlawful duplication of optical media because it is prone to fraudulent issuance of the stickers to illicit distributors while simultaneously delaying market entry to the legal products.<sup>158</sup> Further, the law does not target exports and manufacturers, the main sources of illegitimate materials in the Ukraine.<sup>159</sup> The 2001 Copyright Law amendments contain problematic provisions that give the government control over copyright regulations instead of allowing private organizations to manage the rights to their products.<sup>160</sup> Based on these provisions, the Ukrainian Council of Ministers imposed new flat tariffs for sound recording broadcasts instead of giving the sound recording producers and other private entities the flexibility to reach deals on the fees.<sup>161</sup> The Optical Disc Law, enacted in January 2002,<sup>162</sup> does not regulate adequately the international product identification codes and other components of the manufacturing process.<sup>163</sup> In addition, it does not require regular or surprise inspections, limits access to pertinent plant operation

---

<sup>155</sup> See generally *id.* at 3–4.

<sup>156</sup> See 2004 SPECIAL 301 UKRAINE, *supra* note 84, at 18.

<sup>157</sup> See 2003 SPECIAL 301 UKRAINE, *supra* note 77, at 4–5.

<sup>158</sup> See *id.* at 5. The IIPA further stated:

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.

2004 SPECIAL 301 UKRAINE, *supra* note 84, at 13.

<sup>159</sup> See 2003 SPECIAL 301 UKRAINE, *supra* note 77, at 5.

<sup>160</sup> In particular, this includes article 43.3 of the Copyright Law. See *id.* at 14; 2004 SPECIAL 301 UKRAINE, *supra* note 84, at 17.

<sup>161</sup> See 2003 SPECIAL 301 UKRAINE, *supra* note 77, at 14.

<sup>162</sup> See *supra* notes 85–89 and accompanying text.

<sup>163</sup> See 2003 SPECIAL 301 UKRAINE, *supra* note 77, at 5–6.

2004]      *ENDING SOFTWARE PIRACY IN EASTERN EUROPE*      1029

information, does not address seizure of infringing products and equipment, and leaves gaps in the licensing procedures.<sup>164</sup>

The criminal law reforms also fall short of a complete solution due to a higher standard of harm that requires “substantial material damage” to be caused by the piracy.<sup>165</sup> The May 2003 amendments to Ukraine’s criminal code, which became effective in January 2004, provide for high fines and imprisonment or correctional labor for copyright infringement, but there is little hope for a full deterrent effect because of the high threshold necessary to trigger prosecution.<sup>166</sup> Additionally, it is very difficult to calculate the amount of damage in infringement cases and thus, it is difficult to determine whether it qualifies as substantial material damage.<sup>167</sup> The Ukrainian criminal code also lacks deterrent criminal sanctions for acts of piracy<sup>168</sup> and does not give the police clear authority to instigate criminal cases for intellectual property law violations.<sup>169</sup> As with the Russian CPC,<sup>170</sup> Ukraine’s criminal laws require that a victim of the copyright infringement file a complaint to bring about the investigation, which “acts as a bottleneck to successful enforcement.”<sup>171</sup>

The amendments to the Customs Code that went into effect on January 1, 2004 limit the applicability of sanctions to infringement on a commercial scale, thus reducing the scope of enforceability.<sup>172</sup> It is yet to be seen if the Customs Code will provide in practice for

---

<sup>164</sup> *See id.* at 6.

<sup>165</sup> 2004 SPECIAL 301 UKRAINE, *supra* note 84, at 17.

<sup>166</sup> *See id.* The “substantial material damage” mark is now met when the damage caused “equals or exceeds 200 minimum tax-free incomes.” *Id.* To qualify as a crime, the harm produced by the copyright violation must pass an amount equivalent to \$2,306, compared to \$637 before January 2004. *See id.* The IIPA criticized this elevated standard as “an unwarranted threshold for copyright piracy.” *Id.*

<sup>167</sup> *See id.*

<sup>168</sup> *See id.* at 17–18.

<sup>169</sup> *See id.* at 18 (urging the Ukrainian leadership to provide for clear mandates of police *ex officio* powers in this area).

<sup>170</sup> *See supra* note 145 and accompanying text.

<sup>171</sup> 2004 SPECIAL 301 UKRAINE, *supra* note 84, at 18.

<sup>172</sup> *See id.*

1030 *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.* [Vol. 14:1005

the confiscation of illegal items and increased scrutiny into the materials that cross the Ukrainian borders.<sup>173</sup>

### *C. Current International Efforts*

The international community is frequently witness to persistent efforts in the fight against software piracy and other types of copyright infringement from several international intellectual property organizations that work closely with the governments of the United States and other countries.

#### 1. Non-Governmental Organizations

One such international organization is the Business Software Alliance (“BSA”), which was established in 1988 and operates in more than sixty countries.<sup>174</sup> The BSA represents leading software manufacturers from all around the world, and conducts consumer education programs to promote, among other things, awareness for copyright protection.<sup>175</sup> Since its inception, the BSA has advanced the enforcement of intellectual property rights internationally, with the aim of curbing software piracy.<sup>176</sup> To this end, it maintains global hotlines for callers to report questionable software utilization and joins forces with local law enforcement officials to uphold copyright protection.<sup>177</sup> Aside from the creation of awareness and education programs, the BSA conducts independent surveys<sup>178</sup> to highlight international piracy activity and resulting

---

<sup>173</sup> See 2003 SPECIAL 301 UKRAINE, *supra* note 77, at 15 (emphasizing that this is a requirement of the TRIPS Agreement).

<sup>174</sup> See BSA, *About BSA*, at <http://www.bsa.org/usa/about> (last visited Apr. 12, 2004).

<sup>175</sup> BSA’s motto is “Promoting a safe and legal digital world.” BSA, *USA Home Page*, at <http://www.bsa.org/usa> (last visited Apr. 12, 2004) [hereinafter BSA, *USA Home Page*]; see also Internet Pub. Libr., at <http://www.ipl.org/div/aon/browse/com23.00.00> (last visited Apr. 12, 2004) (providing short descriptions of several intellectual property groups).

<sup>176</sup> See BSA, *USA Home Page*, *supra* note 176; see also Shannon, *supra* note 1 (“The BSA is pushing a campaign of public awareness, technical solutions and, particularly in Europe, legal action to fight piracy.”).

<sup>177</sup> See BSA, *BSA Fact Sheet*, at <http://www.bsa.org/usa/press/Fact-Sheets.cfm> (last visited Apr. 12, 2004) [hereinafter BSA, *BSA Fact Sheet*].

<sup>178</sup> The surveys are conducted by International Planning and Research Corporation (“IPR”), an independent research company commissioned by the BSA. See generally IPR, *Overview*, at <http://www.iprnet.com> (last visited Apr. 12, 2004). IPR’s latest survey

2004]      *ENDING SOFTWARE PIRACY IN EASTERN EUROPE*      1031

economic losses, and it conducts what it calls “sweeps” in various countries, part of its annual International Sweeps Week.<sup>179</sup> These sweeps are collections of information relating to the number and dollar amount of year-to-date enforcement action recoveries across the globe.<sup>180</sup> According to the BSA, its “enforcement program has been instrumental in bringing thousands of organizations into software compliance with software copyright compliance, closing down pirate Internet sites, stopping the illegal sale of pirated software through Internet auction sites and pirated software retail outlets, and seizing illegal CD presses.”<sup>181</sup> The BSA has members located in offices around the globe who monitor local activity and work to persuade politicians and law enforcement officials to crack down on the illegal trade of pirated software.<sup>182</sup> The BSA does not have offices or hotlines in Russia or Ukraine.<sup>183</sup>

Another example of international assistance comes from the Software & Information Industry Association (“SIIA”), which represents the 1999 merger of the Software Publishers Association’s (“SPA”) with the Information Industry Association.<sup>184</sup> The SIIA seeks out copyright infringement and software piracy through the employment of private investigators

---

assessed market activity for several business software applications in six major world regions. *See generally id.*; *see also* Press Release, BSA, Four Out of Every Ten Software Programs Are Pirated Worldwide (June 10, 2002) [hereinafter Pirated Programs Press Release], at <http://www.bsa.org/usa/press/newsreleases//2002-06-10.1129.phtml> (last visited Apr. 12, 2004).

<sup>179</sup> *See* BSA, *Sweeps Week*, at <http://global.bsa.org/usa/research/sweeps2002> (last visited Apr. 12, 2004) [hereinafter BSA, *Sweeps Week*]. International Sweeps Week for 2003 was from June 10 to 17. *See id.*

<sup>180</sup> *See* Pirated Programs Press Release, *supra* note 178. The numbers for 2003 are estimated at over \$10.5 million dollars in enforcement actions recoveries. *See also* BSA, *Sweeps Week*, *supra* note 179.

<sup>181</sup> BSA, *BSA Fact Sheet*, *supra* note 177.

<sup>182</sup> BSA United States is located in Washington, D.C., BSA Europe in London, and BSA Asia in Singapore. *See* BSA, About BSA, *BSA Offices & Hotlines*, at <http://www.bsa.org/usa/about/BSA-Offices-and-Hotlines.cfm> (last visited Apr. 14, 2004).

<sup>183</sup> Aside from the three offices listed in note 182, the BSA Web site lists international hotlines in Central and Eastern Europe in Croatia, Czech Republic, Estonia, Hungary, Poland, Romania, Serbia and Montenegro, and Slovenia. *See id.*

<sup>184</sup> *See* Paula J. Hane, *The SPA-IIA Merger Is Now Official*, INFO. TODAY, Feb. 1999, available at <http://www.infotoday.com/newsbreaks/nb0125-1.htm> (last visited Apr. 12, 2004); *see also generally* Software & Info. Indus. Ass’n [SIIA], at <http://www.spa.org/default.asp> (last visited Apr. 12, 2004); Internet Pub. Libr., *supra* note 175.

and collaboration with local law enforcement.<sup>185</sup> Through its anti-piracy program, the SIIA identifies allegedly infringing organizations for audits.<sup>186</sup> When the SIIA discovers copyright violations, it requires that the infringing entity destroy the illegal software, purchase a legal replacement, and pay a fine.<sup>187</sup> On the international scale, the SIIA collaborates with governments to “deter pirate software manufacturing through title verification programs.”<sup>188</sup> The SIIA also reaches software pirates who are unlikely to be prosecuted for criminal copyright infringement—thus, addressing the needs of smaller businesses, who may lack the resources to proceed on their own—and claims that its efforts helped slow piracy activity.<sup>189</sup>

A parallel effort comes from the IIPA,<sup>190</sup> which, through an annual detailed report, summarizes the status of global piracy as it impacts the United States and makes recommendations to the U.S. Trade Representative (“USTR”) concerning the infringing countries that deserve special attention.<sup>191</sup> For instance, to prepare the report presented on February 13, 2004, the IIPA surveyed and categorized fifty-six countries according to their estimated levels of piracy, trade losses caused to U.S. exports, and efforts to reduce

---

<sup>185</sup> See Richard Raysman & Peter Brown, *How to Avert or Survive a Software Audit*, ACCT. FOR LAWS., May 13, 2003, at 3; SIIA, *SIIA Anti-Piracy Authorization*, at <http://www.spa.org/piracy/policy/anti-piracyauthorization.asp> (last visited Apr. 12, 2004) [hereinafter SIIA, *SIIA Anti-Piracy Authorization*].

<sup>186</sup> SIIA, *SIIA Anti-Piracy Authorization*, *supra* note 185.

<sup>187</sup> See Raysman & Brown, *supra* note 185, at 3; SIIA, *SIIA Anti-Piracy Authorization*, *supra* note 185.

<sup>188</sup> SIIA, *SIIA Anti-Piracy Authorization*, *supra* note 185.

<sup>189</sup> Cf. Hope Viner Samborn, ‘May I See Your License?’: *With Business Piracy on the Rise, Software Police Are on the Trail*, 87 A.B.A. J. 74 (Apr. 2001) (discussing the anti-piracy efforts of the SIIA and the BSA, and stating that “[c]riminal penalties . . . can run as high as \$250,000 per offense and up to five years in prison, but these are rarely brought for pirated software. Instead, they are reserved for blatant copying for profit . . .”).

<sup>190</sup> See generally IIPA, at <http://www.iipa.com> (last visited Apr. 12, 2004). The IIPA is a private organization formed in 1984 to raise awareness and improve global copyright protection on behalf of the U.S. copyright-based industries. See IIPA, *About IIPA, Description of the IIPA*, at <http://www.iipa.com/aboutiipa.html> (last visited Mar. 29, 2004). The IIPA’s membership consists of trade associations which represent American companies that manufacture and trade copyrighted materials (including computer software) on the global markets. See *id.*

<sup>191</sup> See generally 2004 Special 301 Cover Letter, *supra* note 35.

2004]      *ENDING SOFTWARE PIRACY IN EASTERN EUROPE*      1033

the problem.<sup>192</sup> In 2003, Ukraine stood alone at the top of the priority list as the “Priority Foreign Country,” and Russia was listed among the “Priority Watch List” countries.<sup>193</sup> In 2004, Ukraine is joined by Pakistan as priority foreign countries, and Russia remains in the same spot as in 2003, as a priority watch list country.<sup>194</sup> The IIPA uses these surveys and estimates to persuade the USTR to pay special attention to the countries identified as the worst infringers, and in some cases to institute or extend economic sanctions against them.<sup>195</sup>

## 2. Governmental Action

The U.S. government also has been active in addressing concerns over international piracy activity. The U.S. Justice Department joined forces with the U.S. Customs Service for an Internet piracy investigation called Operation Buccaneer that required the cooperation of several other countries.<sup>196</sup> Aided by the contributions of authorities from Australia, Finland, Norway, Sweden, and the United Kingdom,<sup>197</sup> Operation Buccaneer resulted in the conviction of twenty individuals and the indictment of Hew Griffiths, the alleged co-leader of Drink or Die, “one of the oldest organized software piracy groups,” founded in Russia in 1993.<sup>198</sup> In the three years prior to December 2001, when law enforcement officials dismantled the group, the Justice Department estimates that Drink or Die replicated and distributed “more than \$50 million

---

<sup>192</sup> *See id.* The IIPA placed forty-one countries on its Special 301 list and mentioned fifteen others that deserve attention. *See id.* at 19. In 2003, there was a total of sixty-three countries, with fifty-six on the Special 301 list and seven flagged for consideration. *See* Submission from Eric H. Smith, President, IIPA, to Joseph Papovich, Assistant U.S. Trade Representative 13 (Feb. 14, 2003) [hereinafter 2003 Special 301 Cover Letter], available at [http://www.iipa.com/special301\\_TOCs/2003\\_SPEC301\\_TOC.html](http://www.iipa.com/special301_TOCs/2003_SPEC301_TOC.html) (last visited Apr. 12, 2004).

<sup>193</sup> *See* 2003 Special 301 Cover Letter, *supra* note 192, at 14.

<sup>194</sup> *See* 2004 Special 301 Cover Letter, *supra* note 35, at 18.

<sup>195</sup> *See generally id.*

<sup>196</sup> *See* Justice Department Press Release, *supra* note 129.

<sup>197</sup> *See id.*

<sup>198</sup> *See* Dow Jones News Service, *Alleged Leader of Software Piracy Group Indicted*, Mar. 12, 2003 (on file with *Fordham Intellectual Property, Media & Entertainment Law Journal*); Agence France-Presse, *Australian Indicted in US in Software Piracy Scheme*, Mar. 13, 2003, available at 2003 WL 2750806.

1034 *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.* [Vol. 14:1005

worth of pirated software, movies, games and music.”<sup>199</sup> On March 11, 2003, a federal grand jury indicted Griffiths of two counts of copyright infringement,<sup>200</sup> and the U.S. government is currently seeking Griffiths’ extradition from Australia.<sup>201</sup> John J. Malcolm, Deputy Assistant Attorney General for the Criminal Division at the U.S. Department of Justice, stated before the House Committee on the Judiciary, Subcommittee on Courts, the Internet, and Intellectual Property, on March 13, 2003 that

[a]s a result of Operation Buccaneer, . . . twenty U.S. defendants have been convicted of felony copyright offenses, [and nine] defendants have received prison sentences of between 33 to 46 months, the longest sentences ever imposed for Internet copyright piracy. . . . In both its scope and outcome, Operation Buccaneer is the most significant Internet piracy case ever brought, and it has sent a strong deterrent message which continues to resonate throughout the copyright piracy community.<sup>202</sup>

Malcolm is the supervisor of the Criminal Division’s Computer Crime and Intellectual Property Section, “a highly specialized team of over thirty-five lawyers who focus exclusively on computer and intellectual property crime.”<sup>203</sup> Ten of these attorneys solely concentrate on the intellectual property program and are working to find and prosecute individuals engaged in piracy, in the United States and abroad.<sup>204</sup>

### III. PROPOSED SOLUTIONS: A PRACTICAL DEFINITION AND HANDS-ON APPROACH

Russia’s and Ukraine’s consistent failure to implement a comprehensive and effective system of copyright protection

---

<sup>199</sup> Dow Jones News Service, *supra* note 198.

<sup>200</sup> *See id.*

<sup>201</sup> *See id.*; *see also* Simon Hayes, *Appeal Push for Extradition*, Australian IT, at <http://australianit.news.com.au/articles/0,7204,9197460%5e15319%5e%5enbv%5e15306,00.html> (Apr. 6, 2004).

<sup>202</sup> Justice Department Press Release, *supra* note 129.

<sup>203</sup> *Id.*

<sup>204</sup> *See id.*



2004]      *ENDING SOFTWARE PIRACY IN EASTERN EUROPE*      1035

indicates that the current approach—that of their national governments and the international community alike—is not suitable to solve the piracy problem.<sup>205</sup> International support remains crucial, but the focus needs to change. Russia, Ukraine, and other Eastern European countries with high software piracy rates first need to have a better understanding of software piracy. In other words, their governments need a clear idea of what it is that they need to fight against, and only then should they consider how to do so.<sup>206</sup> Effective enforcement can only come if it is based on a clear understanding of what the unlawful behavior entails.

#### *A. International Assistance*

An international scope is essential for a viable solution because piracy is a global act.<sup>207</sup> In March 2002, John J. Malcolm stated before the U.S. Congress,<sup>208</sup> as paraphrased by a State Department press release, that “[i]nternational cooperation is critical to stop the growing activities of organized criminal groups engaged in intellectual property theft and copyright piracy.”<sup>209</sup> It is clear that one country cannot impose punishment on another’s constituents, especially when the act may even be sanctioned in the infringer’s nation.<sup>210</sup> Perfect examples are Russia and Ukraine, whose governments are aware that piracy is a global problem, but have not yet provided the legal infrastructure necessary for a drastic reduction and even have lessened the penalties in a few circumstances.<sup>211</sup> The United States identified the problem areas and repeatedly demanded that significant action be taken to reduce

---

<sup>205</sup> See generally *supra* Parts II.A–.B.

<sup>206</sup> See generally Marc D. Goodman & Susan W. Brenner, *The Emerging Consensus on Criminal Conduct in Cyberspace*, 10 INT’L J. L. & INFO. TECH. 139, 170–72 (2002) (exposing the efforts of Europe’s Committee of Experts on Crime in Cyber-Space to identify illegal behavior and encourage international collaboration).

<sup>207</sup> See IREX Conference, *supra* note 42, at 2.

<sup>208</sup> See *supra* notes 202–04 and accompanying text.

<sup>209</sup> Justice Department Press Release, *supra* note 129.

<sup>210</sup> See generally *supra* notes 38–40 and accompanying text.

<sup>211</sup> See generally *supra* Parts II.A–.B; see also Agence France-Presse, *Piracy Cost US Industries 9.2 Billion in 2002: Report* (Feb. 14, 2003), available at 2003 WL 2731524.

piracy.<sup>212</sup> The difficulty, however, is not that these countries are unwilling to comply, but that their governments lack knowledge on the issues, as they barely have a history of intellectual property rights and protection.<sup>213</sup> In this case, the solution must come from an international legal network that will work hand-in-hand with Russia, Ukraine, and other Eastern European nations to educate their governments and citizens about intellectual property rights and the kinds of activities that infringe on these rights.<sup>214</sup> In other words, the objective should be to create a positive international atmosphere, where—with the help of those who have achieved stable systems of copyright protection—Russia, Ukraine, and others can transform their own intellectual property legal infrastructures into systems that will provide the same level of protection as that of the Western nations. The ultimate goal is to have in place an internationally recognized intellectual property legal system so that no matter where the infringement occurs, the applicable law is known and understood.<sup>215</sup> In such a system, legal uniformity and compatibility are extremely important and can be achieved only by the Russia's and Ukraine's gradual integration into the international system of intellectual property laws, with clear goals and deadlines to guide their progress.<sup>216</sup>

### *B. A Definition*

A first and essential step in this integration is to create an internationally supported definition of software piracy on which

---

<sup>212</sup> See, e.g., 2004 Special 301 Cover Letter, *supra* note 35 (analyzing problems of international piracy and urging the U.S. government to continue acting against the problem).

<sup>213</sup> See *supra* note 31 and accompanying text.

<sup>214</sup> For example, the Convention on Cyber-Crime, submitted to the European Committee on Crime Problems in May 2001, contains a list of unlawful activities, which include the “illegal interception of and/or interference with computer data, illegal access to and/or interference with computer systems, and the misuse of devices to commit any of these offenses.” Goodman & Brenner, *supra* note 206, at 171–72. The parties to the convention are expected to use this list to classify criminal behavior within their national legislation. See *id.*

<sup>215</sup> See, e.g., Berne Convention, *supra* note 19.

<sup>216</sup> The TRIPS Agreement, for instance, provides for transitional arrangements for countries moving away from centrally-planned economies. See TRIPS Agreement, *supra* note 17, art. 65.

governments can base a legal infrastructure.<sup>217</sup> This definition must be simple and clear to be internationally applicable, and should be comprised of several easily identifiable parts.<sup>218</sup> There can be no assumptions about the level of experience and knowledge of the individuals who will use this definition since they may fit into more than one generation and likely will have very different educational and professional backgrounds.<sup>219</sup> Moreover, having a simple definition leaves hardly any room for excuses for overlooking basic terms.

### 1. Structure of the Proposed Definition

The first part of this international definition should contain a list of actions that constitute software piracy. This part of the definition serves an awareness-raising purpose for those who may not be entirely clear about the specific activities that constitute piracy.<sup>220</sup> An example of such a definition, albeit a very rudimentary and general one, may help illustrate the idea. The first part could read:

Software piracy represents the unauthorized duplication and distribution of any copyright-protected computer code and programs.

The second part should list technologies that currently can be pirated, such as various types of software, and the media on which they exist, such as CDs, DVDs, CD-ROMs, or computer hard drives.<sup>221</sup> This part serves an identification purpose for the items themselves and may even provide a good visual idea of the materials in question. For example:

---

<sup>217</sup> See generally Goodman & Brenner, *supra* note 206, at 141 (emphasizing the importance of having well-defined laws for effective enforcement to take place).

<sup>218</sup> See generally *id.* at 141–42.

<sup>219</sup> These individuals may be ministers and other legislators, industry specialists, members of trade groups, or academic representatives.

<sup>220</sup> Cf. Goodman & Brenner, *supra* note 206, at 171–72 (listing several types of unlawful activities that are considered cybercrime); see also *supra* note 214.

<sup>221</sup> See, e.g., Weir, *supra* note 17 (discussing the pirated goods available at Moscow's Gorbushka market, including "[c]opies of Microsoft's Windows XP," "[a]n MP3 disk with everything the Beatles ever recorded," and "[a] crisp video knock-off of the new Lord of the Rings movie").

The computer code and programs in question consist of operating systems, business and other types of applications, games, databases, music, films, still images, algorithms, communication protocols, and code libraries. Copyrighted computer code and programs may be available on the Internet, on compact discs (CDs), digital video discs (DVDs)—together referred to as optical discs—portable organizers (PDAs),<sup>222</sup> zip drives, hard drives—whether portable or fixed inside the computer—and other devices or mediums capable of storing electronic data.

The third part of the definition should enumerate the possible avenues and methods used to pirate the goods, such as optical disc manufacturing plants and the equipment contained within or on the Internet.<sup>223</sup> This is the most technical aspect and perhaps the most difficult to pinpoint. On the other hand, seeking help from those with engineering skills would enable the definition to provide an outline of practicable industrial methods, which is crucial to its applicability. An example of the third part could be:

The computer code and programs might be distributed unlawfully through the same media listed above and through postings on the Internet. Blank media can be imprinted with the pirated computer code by some optical disc manufacturing plants, which use their facilities for the mass production of new copies.

The fourth part should provide the limiting factors in the creation of the laws. For instance, the definition must include what level of piracy amounts to commercial activity,<sup>224</sup> which could be

---

<sup>222</sup> A personal digital assistant (“PDA”) is a hand-held computer that functions as a digital organizer. *See generally* Handango, *History of the Personal Digital Assistant*, at <http://www.handango.com/PDAHISTORY.jsp?siteId=1> (last visited Apr. 12, 2004). PDAs are gradually able to store larger amounts of data and perform more functions, such as wireless communications. *See generally id.*

<sup>223</sup> *See, e.g.*, 2003 SPECIAL 301 RUSSIA, *supra* note 58, at 249 (“By far the greatest threat to the copyright sector in Russia is the manufacturing, distribution, and sale of pirated optical media products . . . from Russia’s growing number of unregulated optical disc plants.”).

<sup>224</sup> *Cf.* 2004 SPECIAL 301 UKRAINE, *supra* note 84, at 18 (“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.”).

determined by looking at production statistics, volume of sales, or other indicators. This is not to say that only commercial activity is punishable, but the extent of the punishment for the student who burns CDs on one computer to sell to his or her classmates, for instance, should differ from the punishment applicable to members of organized crime syndicates who flood the market with the counterfeit products. For example:

Unauthorized possession of more than three copies of the same copyrighted computer software is considered a minor civil offense. Unauthorized possession of more than three hundred copies of the same copyrighted computer software is a criminal offense.

The fifth and final part of the definition should contain a description of the kinds of harm usually suffered by the rights holder. Not all piracy victims are multinational corporations or large international organizations.<sup>225</sup> Smaller, local enterprises suffer just as much as the large ones but may not be classified as “victims” because they are less visible in the market.<sup>226</sup> Where large amounts of losses are attributable to infringement on their products, they, too, will come forward and demand a resolution,<sup>227</sup> but they may not have the resources to provide the evidence that will convince the administration to pursue an investigation on their behalf. Having a basic outline of the harmful effects of piracy from this definition may provide some of the needed corroboration. This sample definition illustrates the required level of harm:

To compel the State to investigate a claim of computer software piracy, the petitioner must (1) have evidence of illicit copies being circulated on the market and (2) show that the alleged infringement resulted in economic loss.

---

<sup>225</sup> See, e.g., Hall, *supra* note 6 (discussing one executive’s battle against the piracy of his company’s trade secrets).

<sup>226</sup> See *id.*

<sup>227</sup> See *id.*

## 2. Sample Definitions With International Reach

The suggested examples for each part of the definition are by no means comprehensive, but they provide some of the basic elements for the proposed text. International organizations frequently use definitions—some even simpler, others more complex—to educate governments and improve legal systems. For instance, in the area of cybercrime, the Select Committee of Experts on Computer-Related Crime of the Council of Europe adopted Recommendation 89(9), which contains a “minimum list” of actions that might be considered such criminal activity.<sup>228</sup> A parallel effort comes from the Organization for Economic Cooperation and Development’s (“OECD”) <sup>229</sup> Guidelines for the Security of Information Systems, which offer the basic framework for advancing public and private information security.<sup>230</sup> OECD’s guidelines go further than the definition of software piracy proposed in this Note,<sup>231</sup> but its purpose remains the same: the spotlight is on the creation of a basic set of principles that provide the standards for future legislative action.<sup>232</sup>

An analogy can be made to the environmental field, where international organizations are trying to expand the conservation of natural areas. The International Union for the Conservation of Nature (“IUCN”)<sup>233</sup> has a definition of “protected areas” that is

---

<sup>228</sup> Recommendation 89(9) was adopted in September 1989. *See* Goodman & Brenner, *supra* note 206, at 165–66; *see also* United Nations Crime & Justice Info. Network, *International Review of Criminal Policy – United Nations Manual on the Prevention and Control of Computer-Related Crime*, available at <http://www.uncjin.org/Documents/EighthCongress.html> (last visited Apr. 12, 2004).

<sup>229</sup> The Organisation for Economic Co-operation and Development (“OECD”) identifies potential global problems, gathers information on these emerging matters, and suggests courses of action for governments and other multinational organizations. *See* OECD, *About OECD*, at [http://www.oecd.org/about/0,2337,en\\_2649\\_201185\\_1\\_1\\_1\\_1\\_1,-00.html](http://www.oecd.org/about/0,2337,en_2649_201185_1_1_1_1_1,-00.html) (last visited Apr. 12, 2004). Currently, membership consists of thirty member countries that share in the effort toward national and global responsibilities and corporate good governance. *See id.*

<sup>230</sup> *See* Goodman & Brenner, *supra* note 206, at 167.

<sup>231</sup> The guidelines include “laws, codes of conduct, technical measures, management and user practices, and public education provision.” *Id.*

<sup>232</sup> *See id.*

<sup>233</sup> IUCN has the status of Observer at the General Assembly of the United Nations and its membership comprises approximately one thousand organizations, which include government agencies and non-governmental associations. *See* Int’l Union for the

2004]      *ENDING SOFTWARE PIRACY IN EASTERN EUROPE*      1041

much simpler than what is proposed above for software piracy,<sup>234</sup> yet it still is able to draw the necessary attention of local governments and international associations to maintain and enlarge protected areas.<sup>235</sup> This illustrates that, despite a tough uphill battle that involves altering local sensitivities to economic sustenance, progress is possible through a straightforward approach that aims to restore the balance between immediate human needs and longer-term global solutions.<sup>236</sup> It also illustrates that the definition does not need to include every possible aspect of the subject that it addresses; since its objective is to generally illustrate an ideal law for local governments, it is better left too broad than too narrow.

Indeed, one potential problem with this proposal is that new technology is constantly developing.<sup>237</sup> It is quite likely that in the near future, some new recording device that facilitates piracy will appear on the market.<sup>238</sup> The description of such a device would not be part of the definition, and for a time, it could be ignored by

---

Conservation of Nature [IUCN], *About IUCN*, at <http://www.iucn.org/about/index.htm> (last visited Apr. 12, 2004). IUCN's mission is "to influence, encourage and assist societies throughout the world to conserve the integrity and diversity of nature and to ensure that any use of natural resources is equitable and ecologically sustainable." *Id.*

<sup>234</sup> The IUCN defines a protected area as "an area of land and/or sea especially dedicated to the protection and maintenance of biological diversity, and of natural and associated cultural resources, and managed through legal or other effective means." IUCN, World Commission on Protected Areas, *About Protected Areas*, at <http://www.iucn.org/themes/wcpa/wcpa/protectedareas.htm> (last visited Apr. 12, 2004).

<sup>235</sup> See, e.g., IUCN, World Commission on Protected Areas, *Greater St Lucia Wetland Park WH Site Sees Historic Return of Cheetah and Hosts Unique Meeting Between Scientists and Community Leaders*, at <http://www.iucn.org/themes/wcpa/wheritage/news.htm#cheetah> (Sept. 2003).

<sup>236</sup> See generally *id.* (emphasizing the success of a unique type of meeting between international scientists and local community leaders, aimed "[at protecting] biodiversity while using nature for sustainable forms of development").

<sup>237</sup> See, e.g., Inst. of Electrical & Electronics Eng'rs, *Timeline of Computing History*, at <http://www.computer.org/computer/timeline> (last visited Apr. 12, 2004).

<sup>238</sup> For example, the advent of the computer diskette, originally created by IBM in 1967, facilitated the transfer of computer code from one computer to another. See Gary Brown, *How Floppy Disk Drives Work*, HowStuffWorks, at <http://computer.howstuffworks.com/floppy-disk-drive1.htm> (last visited Apr. 12, 2004). About two decades later, data storage largely moved from diskettes to optical disks, which have become the preferred method of software distribution. See generally Marshall Brain, *How CDs Work*, HowStuffWorks, at <http://entertainment.howstuffworks.com/cd.htm> (last visited Apr. 12, 2004).

legislators and law enforcement. The drafting of the definition should not be stalled, however, in light of such possibilities. First, new technology always will exist and nothing will get done if the drafters choose to wait indefinitely. And second, the example proposed above does address future technology that can record and store electronic information.<sup>239</sup>

### C. *New Laws*

It is essential that this definition remain simple and address only the basic elements of piracy, since the goal is to have a test that the governments of Russia, Ukraine, and all participant nations can understand and implement. It should be emphasized that achieving this deceptively simple result in itself would be a tremendous accomplishment for the international intellectual property community.<sup>240</sup> Thus, in anticipation of potential misunderstandings and deadlocks, the basic terms of the definition must always remain clear to all of the participating representatives. This definition will give legislators the substance of the anti-piracy laws, and all that they will have to do is incorporate its elements in the laws that they create or amend.<sup>241</sup> Given the definition's simplicity, assimilating its components should prove much easier than agreeing on them.<sup>242</sup> The nations that adopt the standards of this definition in their legal systems still will have the flexibility to tailor laws according to their countries' legal frameworks provided that those basic elements remain present.

One alternative is to create an entirely new set of computer software anti-piracy laws, based directly on the definition. The advantage of this approach is that each country will have a simpler,

---

<sup>239</sup> See *supra* Part III.B.2.

<sup>240</sup> For example, the countries surveyed by the OECD regarding the proliferation of cybercrime expressed difficulties in implementing adequate legislation due to differences in national laws and enforcement methods. See Goodman & Brenner, *supra* note 206, at 170.

<sup>241</sup> See, e.g., Paul Meller, *Proposed EU Copyright Law Assailed – Microsoft and Other Firms Say Criminal Provisions Go Too Far*, INT'L HERALD TRIB., Oct. 18, 2003, at 11 (expressing the frustration of a member of the European Parliament on getting the fifteen European Union member countries to agree on a new, albeit controversial, copyright law), available at 2003 WL 64830205.

<sup>242</sup> See *id.*



and therefore more internationally supported, legal system that can be amended accordingly. Because of the global nature of the rights and the type of infringement involved, however, amendments should be internationally endorsed where possible. It would be devastating for all who labored over the creation of this piracy definition and its adoption in several legal systems to be faced with a restricted version of it in one or more countries.<sup>243</sup> That would create the same imbalance that exists today and it would defeat the purpose of the new system completely. Another problem with the creation of a completely new legal system is the likely conflict with the older anti-piracy laws.<sup>244</sup> Russia, Ukraine, and the other participating countries will have to either amend or completely discard such pre-existing laws to avoid any conflicts and confusion. This may not be such a difficult task, however, since their laws on piracy—especially those that address *software* piracy—are relatively new and in most cases, not very well developed.<sup>245</sup>

The other alternative is to keep the anti-piracy laws that already exist, but amend them to incorporate the elements of the definition. Depending on the complexity of the country's existing anti-piracy legislation, this may amount to a less daunting task than creating an entirely new system. In such a case, however, the international community may become more involved in the amendment process to prevent the omission of the definition's standards—an interference that may frustrate the Eastern European government in question and stall the process.

It is worth noting that, despite the constant monitoring by the international community and ongoing collaboration with Russia's and Ukraine's legislative efforts,<sup>246</sup> this should not be seen as a process that is intrusive or as a process that may disturb the legal balance in the country. This course of action is clearly voluntary

---

<sup>243</sup> For example, Russia and Ukraine's copyright laws remain inadequate, despite repeated efforts to improve them. *See generally supra* Parts II.A–B.

<sup>244</sup> *See generally id.*

<sup>245</sup> *See id.*

<sup>246</sup> For a discussion of pressure from the WTO, see *supra* notes 104–10 and accompanying text. For a discussion of efforts made by the BSA, see *supra* notes 175–83 and accompanying text.

and it is understandable that anti-piracy legislation may not be the top priority of Eastern Europe's legislative reforms.<sup>247</sup> Moreover, since Russia, Ukraine, and other countries are seeking admission to the WTO but their failure to comply with the TRIPS Agreement keeps them from becoming members,<sup>248</sup> this solution offers them a way to show serious interest in drastically reducing piracy, which may be recognized as a solid first step toward admission.<sup>249</sup>

#### *D. Enforcement of the New Laws*

The second, and perhaps final, step toward WTO membership should be efficient enforcement based on the new laws.<sup>250</sup> Through the new uniform anti-piracy legislation, each country's law enforcement bodies should be able to create a comprehensive plan of action and have a clear idea about the types of activity that they need to investigate.<sup>251</sup> Here, too, an internationally agreed-upon system of enforcement should exist.<sup>252</sup> Uniformity is necessary because of the international nature of piracy, and established standards would provide more solid ground for local governments to prosecute such acts.<sup>253</sup> At the same time, piracy can be monitored more effectively by the international community.<sup>254</sup> Enforcement does not necessarily have to relate only to punishment—it can encompass information gathering, monitoring, and education of the public.<sup>255</sup> For example, in his testimony before the U.S. Congress, Department of Justice Deputy Assistant Attorney General John G. Malcolm pointed out the value of “a ‘groundbreaking and highly successful’ public education

---

<sup>247</sup> See generally Stephen Holmes, *No Quick Fix*, UNESCO COURIER, June 7, 2001 (analyzing the failure of Western-led legal reform in the former Soviet bloc), available at [http://www.unesco.org/courier/1999\\_11/uk/dossier/txt11.htm](http://www.unesco.org/courier/1999_11/uk/dossier/txt11.htm) (last visited Apr. 12, 2004).

<sup>248</sup> See *supra* notes 16–17 and accompanying text.

<sup>249</sup> See *supra* notes 17, 44 and accompanying text.

<sup>250</sup> See *supra* notes 16–17 and accompanying text; see also *supra* notes 104–10 and accompanying text.

<sup>251</sup> See Goodman & Brenner, *supra* note 206, at 171–72.

<sup>252</sup> See *supra* Part III.A.

<sup>253</sup> See *supra* notes 19–20 and accompanying text; see also Shannon, *supra* note 1 (stating that the BSA is working toward “harmoniz[ing] the laws against piracy” in its efforts to strengthen anti-piracy legislation in Europe).

<sup>254</sup> See *id.*

<sup>255</sup> See, for example, BSA's broad approach to enforcement, *supra* Part II.C.1.

2004]      *ENDING SOFTWARE PIRACY IN EASTERN EUROPE*      1045

campaign to disseminate a message about the risks of copyright violation.”<sup>256</sup> The focus of any enforcement actions ideally would be equally divided between efforts to halt ongoing piracy and to prevent future acts of piracy through education programs and progressive strategies.

The ideal, overall result would be a working system like that of the United States or any other country with an already-developed intellectual property system for protection and enforcement.<sup>257</sup> Because other countries sometimes look at the American system as a model for their own intellectual property protection laws,<sup>258</sup> however, and recognize that North America consistently has held the lowest piracy rates since the TRIPS Agreement,<sup>259</sup> the United States should play a significant role in building Eastern Europe’s new anti-piracy legislation and overseeing some of the enforcement. Given the difficulty of a uniform implementation of cross-border standards, however, it is essential that the efforts remain international in nature and solicit the input from as many countries as possible. In addition, other European nations should be included because they are more compatible with Russia and Ukraine culturally, and perhaps even legally, as well as being physically closer than the United States. This would facilitate some aspects of enforcement.

---

<sup>256</sup> Justice Department Press Release, *supra* note 129.

<sup>257</sup> See *supra* notes 22–25 and accompanying text.

<sup>258</sup> For example, computer software is now protectable by copyright in some European countries, as it has been in the United States. See generally Europa – The European Union Online, *Legal Protection: Computer Programmes*, at <http://europa.eu.int/scadplus/leg/en/lvb/l26027.htm> (last updated Feb. 27, 2001) (detailing the provisions of Council Directive 91/250/EEC, signed on May 14, 1991, and amended by Council Directive 93/98/EEC on Oct. 29, 1993, which implements legal protection for computer programs); see also Found. for Info. Pol’y Res., *Implementing the European Union Copyright Directive* (2001), at <http://www.fipr.org/copyright/eucd.html> (offering links and the text to the May 22, 2001 Directive 2001/29/EC of the European Parliament and of the Council) (last visited Apr. 12, 2004). Directive 2001/29/EC frequently has been criticized as comparable and even in some cases even more restrictive than the United States’ Digital Millennium Copyright Act (“DMCA”). See, e.g., Campaign for Digital Rts., *European Union Copyright Directive*, at <http://ukcdr.org/issues/eucd> (providing links to material relating to the Directive and the DMCA, including criticism of both) (last visited Apr. 12, 2004).

<sup>259</sup> See 2003 BSA PIRACY STUDY, *supra* note 1, at 6.

*E. Patience and Flexibility*

Having, at least theoretically, outlined the ideal enforcement of the new anti-piracy laws proposed, it is important to recognize that enforcement perhaps will be the most contested issue in the fight for adequate copyright protection in Eastern Europe. It would be naïve to think that Russia, Ukraine, and any other countries in the region will open their doors for the international community and allow it to step in and dictate how they should enforce their own laws. As the discussion has illustrated thus far, it is much easier to pass laws than to enforce them, even when they are created by local governments.<sup>260</sup> Going back to the underlying concepts of the proposed definition, it cannot be overemphasized how important it is to implement a flexible approach for each country to adapt to the new regime.<sup>261</sup> This will not be a quick process, unfortunately, but there is more at stake here than pure enforcement. Eastern Europe, more than a decade later, is still fighting the ghosts of communism, so it cannot be expected to adjust to cutting-edge, anti-piracy legislation and enforcement overnight.<sup>262</sup> Instead, the focus should rest on gradual improvement and recognition of accomplishments, no matter how small. This is especially important for both Russia's and Ukraine's smooth transition into their future places as members of the WTO.

*F. A Practical Approach*

To help sustain this international effort of integration, local governments and international organizations such as the BSA and the SIIA should increase cooperation with foreign companies that operate in Russia and Ukraine. This type of arrangement proved very successful in other parts of the world because it drastically

---

<sup>260</sup> See, e.g., 2004 SPECIAL 301 UKRAINE, *supra* note 84, at 14–16.

<sup>261</sup> See, e.g., WIPO, *Plan for WIPO Program*, *supra* note 18 (“Every country should be encouraged to develop an IP culture appropriate to its needs . . .”).

<sup>262</sup> Cf. Weir, *supra* note 17 (“Post-Soviet Russia has found unexpected ways to use its vast army of under-employed skilled workers and the factory floorspace of the near-bankrupt military-industrial complexes. It is fast becoming one of the world's havens for techno-buccaneers, who are flooding Russia—and global markets—with quick and cheap illicit copies of the newest computer programs, most popular music and latest movies.”).

2004]      *ENDING SOFTWARE PIRACY IN EASTERN EUROPE*      1047

reduced software piracy while it increased business opportunities and revenues for the information technology industry.<sup>263</sup>

### 1. Everyone Wins

Close collaboration between local governments, international organizations, and foreign companies is especially advantageous where the foreign companies hire local talent for their operations. For instance, sales representatives, due to their presence in the area, can investigate piracy leads. This may not be possible for every type of piracy-prone industry, but for those companies that can extend their operations in Eastern Europe, it would be a beneficial choice. For example, one can imagine an American computer software manufacturer opening a satellite office in Kiev and hiring a Ukrainian staff. The company would benefit from its presence in Kiev because it would be closer to the alleged infringement, and in return, the company's presence may stimulate the local economy and job market. This way, native workers benefit from new employment opportunities and training, while the foreign company benefits from potentially cheaper labor and better information about the entities engaging in software piracy. The foreign company will likely enjoy greater loyalty from its local employees if it pays them better wages than what they would otherwise get from native employers or from selling pirated products. It is easy to envision a situation where, in addition to higher salaries, a foreign company is in a better position to fight against violations of its copyrights by offering bonuses, such as monetary incentives, free trips to more exotic parts of the world, or other such attractive awards, to those employees who help on this front. A desirable side-effect in this type of situation occurs when a company's satellite operations compete with the software pirates for the same market. Here, the reduction of piracy would result in a reduction in competition for the employer and higher commissions or bonuses for the employees.

The Middle East drastically cut down on its piracy rate since 1994 as a result of strong copyright laws and effective

---

<sup>263</sup> See generally *infra* notes 264–69.

1048 *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.* [Vol. 14:1005

enforcement.<sup>264</sup> Pure legislative measures are, however, not the only source of success.<sup>265</sup> Jawad Al-Redha, Co-Chairman of the Middle East Business Software Alliance, gives credit to the international information technology (“IT”) industry, which provided much of the muscle needed to reduce piracy.<sup>266</sup> Following the release of the BSA’s Eighth Annual Global Software Piracy Study,<sup>267</sup> Al-Redha stated that

[t]his significant decrease in software piracy has been the result of the joint efforts of the government authorities in the Middle East and the IT industry who came together as one to combat the menace which has been threatening the economic development and progress both globally and in the region . . . .<sup>268</sup>

Encouraged by this successful campaign against software piracy, more software manufacturers are now setting up operations in the Middle East, bringing in “huge investments” and further stimulating the local economy.<sup>269</sup>

## 2. Collaboration With Local Law Enforcement

Aside from finding means to ensure loyalty from its employees, foreign companies in Eastern European countries should work closely with local law enforcement and legal representatives in order to construct a more complete picture of the infringement activity. This will not only lead to better enforcement, but it also will provide a learning opportunity in intellectual property protection and anti-piracy action for the local citizens and the host country’s government. Thus, having the foreign company—the victim itself—provide this kind of help achieves three major objectives: (1) it accomplishes more investigative and guarding work; (2) it pressures local law

---

<sup>264</sup> See Antoine Khammar, *BSA Annual Study: UAE Tops the List in the Region with a Fifty Point Drop in Piracy from 86% to 36%*, BEIRUT TIMES, June 5, 2003, available at <http://www.beiruttimes.com/news/June1.phtml>.

<sup>265</sup> See *id.*

<sup>266</sup> See *id.*

<sup>267</sup> See 2003 BSA PIRACY STUDY, *supra* note 1.

<sup>268</sup> Khammar, *supra* note 264.

<sup>269</sup> See *id.*

2004]      *ENDING SOFTWARE PIRACY IN EASTERN EUROPE*      1049

enforcement and other officials to take steps to resolve the situation; and (3), it presents a range of economic benefits, such as new jobs and enhancements to the local market economy through the use of local resources (such as food, living arrangements, and purchasing local goods). These benefits ideally would occur while anti-piracy operations are simultaneously providing invaluable precedent of successful business relations with the particular government and a solid endorsement for other foreign companies to operate in Eastern European countries.

In the Middle Eastern example above, the IT companies who contributed to the reduction in piracy did so by joining forces with the local authorities.<sup>270</sup> Similar collaborative efforts in the region also come from the Arab Anti-Piracy Alliance (“AAA”), which operates in the United Arab Emirates, Saudi Arabia, and Kuwait.<sup>271</sup> This organization, an affiliate of the Motion Picture Association, hired retired law enforcement officers with a “cumulative 100 years of enforcement experiences against hard core crime” to fight against piracy.<sup>272</sup> The AAA also trained hundreds of law enforcement officials to fight copyright infringement successfully and created a network of contacts with branches of the local governments, international organizations, and the U.S. Department of State.<sup>273</sup> All these collaborative efforts clearly help; the Middle East region is at the top of the BSA list with the largest reduction in software piracy in the last decade.<sup>274</sup>

At this stage, at least before they further enhance their copyright laws,<sup>275</sup> Russia, Ukraine, and other Eastern European nations do not need to create an association like the AAA. These countries may be able draw the same level of success simply from encouraging foreign companies who operate there to provide the awareness and training necessary to find and stop copyright infringers. The emphasis is on the cooperation between local and

---

<sup>270</sup> *See id.*

<sup>271</sup> Malapitan, *supra* note 9.

<sup>272</sup> *Id.*

<sup>273</sup> *See id.*

<sup>274</sup> *See* 2003 BSA PIRACY STUDY, *supra* note 1, at 4.

<sup>275</sup> The Middle East, and especially the United Arab Emirates, which recorded the largest drop in piracy, has strong intellectual property laws and effective enforcement. *See* Khammar, *supra* note 264.

1050 *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.* [Vol. 14:1005

foreign entities because it is the only way that one side can learn from the other and adequately enforce anti-piracy laws.

#### CONCLUSION

The greatest victories toward an efficient anti-piracy body of law in Russia, Ukraine, and the rest of Eastern Europe can be achieved only through international cooperation and support from countries whose legal systems have recognized intellectual property rights for decades. Presently, protection of intellectual property is too novel a concept for Eastern Europe, which is also plagued by a proliferation of organized crime syndicates and ongoing economic hardships. In light of these difficulties, the efforts put forth by these countries are nothing but commendable, but as this Note exposed, their anti-piracy laws remain largely undeveloped. This is why a viable solution must begin with a simple definition of software piracy that any decisionmaker is able to understand and implement. Once the definition is formulated, new or amended legislation should replace or supplement national laws, with continued support from the nations who have achieved greater success in the fight against software piracy. Once these new laws are in place, each country will be able to gradually but diligently enforce them, leading to a steady decline in software piracy and other kinds of copyright infringement. Finally, in light of the successful implementation of this new anti-piracy regime, the WTO may lift its membership barriers for Russia, Ukraine, and any other Eastern European countries that seek admission.