

UKRAINE

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2015 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: In light of recent political developments, the Government of Ukraine clearly has a limited capacity to effect certain legal reforms, and has its priorities elsewhere. Still, IIPA is very disappointed that no progress has been made in the past several years on any of the issues which led to the designation of Ukraine as a Priority Foreign Country (PFC) – wherein the Special 301-mandated U.S. Government investigation found that Ukraine fails to provide adequate and effective protection, and as a result, the U.S. Government maintains its authority to immediately withdraw economic benefits. IIPA recommends that the U.S. Government continue to identify Ukraine as a priority.¹

Executive Summary: On May 1, 2013, Ukraine was designated by the U.S. Government as a PFC, and an investigation was initiated under section 301 of the Trade Act of 1974. Countries are designated a PFC if “acts, policies and practices” are deemed “unreasonable and burden or restrict U.S. commerce” including “the denial of adequate and effective protection of intellectual property rights.” The PFC designation of Ukraine was based specifically on three critical problems in Ukraine’s intellectual property rights (IPR) regime: (1) the failure to implement “an effective and systemic means to combat widespread online infringement of copyright and related rights;” (2) “the unfair, nontransparent administration of the system for collecting societies;” and (3) the “widespread use of infringing software by Ukrainian Government agencies.” On March 13, 2014, the U.S. Government completed its PFC investigation, focusing on the economic harm to U.S. rights holders caused by the three identified problems. It concluded that “certain intellectual property rights (IPR) acts, policies and practices of Ukraine are unreasonable and burden or restrict United States commerce and are thus actionable under section 301(b)” but “[i]n light of the current political situation in Ukraine, the Trade Representative has determined that no action under section 301 is appropriate at this time.” In the Special 301 Report (May 1, 2014), the USTR again noted that certain acts, policies and practices in Ukraine were “actionable” but “that no action under section 301 is appropriate at this time.” Further, the U.S. Government said it “remains committed to addressing the problems that served as the basis for the designation of Ukraine as a PFC, and appreciates Ukraine’s recent outreach and ongoing engagement in exploring how to ameliorate these problems and improve its overall IP regime. The United States looks forward to working with Ukraine on these three issues.”

In short, the IPR problems that resulted in the PFC designation remain wholly unaddressed. The IPR shortcomings continue to cause severe economic harm to U.S. and other copyright rights holders in Ukraine, as well as to Ukrainian and other foreign rights holders. IIPA urges the U.S. Government to work with the Government of Ukraine to address and correct these IPR deficiencies as quickly as possible, as is appropriate under the circumstances. Even with the political limitations of the current Government of Ukraine, IIPA is particularly concerned that the issues related to collective administration remain unaddressed, because the Government of Ukraine could resolve these quickly and with a minimum of effort.

Weak copyright protection has been a longstanding problem in Ukraine, but it substantially worsened in the past several years. Ukraine is a key country in the region for effective enforcement of IPR because it exports piracy, especially digital piracy, into both European Union markets and other countries regionally. For example, there are several notorious websites hosted in Ukraine by Ukrainian Internet Service Providers (ISPs) that, while identified to Ukrainian enforcement officials, continue to act with impunity. In 2010, the Government of Ukraine developed an IPR “Action Plan” in cooperation with the U.S. Government, to combat and target the digital piracy problem, but the plan was never implemented.

¹For more details on Ukraine’s Special 301 history, see previous years’ reports at <http://www.iipa.com/countryreports.html>. For the history of Ukraine’s Special 301 placement, see <http://www.iipa.com/pdf/2015SPEC301HISTORICALCHART.pdf>.



One key to addressing digital and hard copy piracy in Ukraine is improved and effective criminal enforcement. Ukraine is obligated to have effective enforcement, including criminal enforcement, in place under its treaty (including WTO/TRIPS) and bilateral commitments. Instead, Ukraine has become a safe haven for criminal syndicates involved in copyright piracy. Neither proper resources nor on-the-ground actions have been dedicated to addressing piracy, and the legal framework has many key deficiencies, all resulting in weak criminal enforcement. Ukraine (along with Russia) is a major source for free and pay-for-download piracy of music and film, and for some of the world's top BitTorrent systems. Ukraine also remains a global hot spot for high-quality illegal camcords of films that are uploaded to top sites and distributed across the Internet. In addition to digital piracy, Ukraine's many open air markets and street stalls remain replete with illegal copies of recorded music, films and entertainment software, and irregular and insufficient border enforcement allows this pirated material to flow freely into and out of Ukraine.

There are administrative, executive and legislative solutions to the IPR problems in Ukraine, including the problems identified in the PFC investigation. Undertaking the recommended actions on each of the identified problems, as set out in detail below, would best accomplish the goal of improving the IPR economic climate for the copyright industries to develop legally in Ukraine, benefiting the local economy, as well as U.S. and other foreign rights holders.

PRIORITY ACTIONS REQUESTED IN 2015

IIPA recommends the following priority enforcement actions and legal reforms to the Government of Ukraine in 2015. These priority recommendations are directly related to the designation of Ukraine as a PFC, and would improve online enforcement and address the failures relating to collecting societies:

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

- Owners of the numerous free and pay-per-download and streaming film and music sites, as well as BitTorrent sites. Criminal enforcement authorities should use existing laws to prosecute operators of sites dedicated to pirated music, film, entertainment software and/or printed materials (including sites relying, in bad faith, on rogue collecting society licenses).
- Principals of the rogue collecting societies that offer illicit "licenses" to both online and physical businesses without authority from rights holders.
- Organized crime syndicates – applying criminal prosecutions and deterrent sentences instead of the standard practice of relying on non-deterrent administrative penalties. Targets should include the syndicates operating websites and peer-to-peer operations, hard-copy distribution centers, camcording operations, and optical disc media production facilities (including CD-burning operations).

Legal reforms focused on:

- Amendments to the Copyright Law, Law on Telecommunications and Code on Administrative Offences, to promote a fair and effective response to online piracy, including: (1) legal incentives for ISPs to cooperate with rights holders to effectively deal with Internet piracy; (2) rules that clarify the illegality of providing services that are intended to promote the infringement of copyright and related rights or that facilitate such infringement (including knowingly and intentionally providing links to infringing content); and (3) injunctive relief and a duty on Internet service providers (ISPs) to provide information to law enforcement agencies and rights holders. In October 2014, international IP experts prepared amendments (an anti-piracy draft law) to properly address the above problems; the October amendments were meant to improve an August 2014 draft law prepared by the State Intellectual Property Service of Ukraine (SIPSU).
- Adopting the Law "On Collective Management" to require relevant organizations for the rights of broadcasting, public performance and other communications to the public, to operate on the basis

of “volume of rights” (and to be consistent with Article 168 of the EU-Ukraine Association Agreement requiring bilateral agreements with foreign organizations to operate transparently and effectively).

- Amendments to the Copyright Law and Criminal Code to make camcording in movie theaters illegal, by excluding such camcording from any “private use” exception, and criminalizing this activity. The Law on Cinematography should also be amended to repeal the requirements of the local production of film prints.

Other issues that should be addressed include:

- **Criminal enforcement**, including prosecutions and deterrent sentencing against owners and operators of open air and street market piracy, especially against the piracy occurring at large outdoor markets and in the streets at or around underground stations, and near local shops and supermarkets.
- Overall effective **criminal enforcement** which requires: (1) coordination by key agencies – including the Ministry of Internal Affairs and General Prosecutors Office; (2) a significant increase in the number of investigations (criminal searches) and prosecutions; (3) additional resources, especially for police enforcement personnel dedicated to IPR crime (the Economic Crime and Cyber Crime police units); and (4) coordination of enforcement practices and investigations of IP-related crimes, including the issuance of guidelines for police officers.
- **Administrative and customs enforcements**, focused on moving aggressively against copyright-infringing cable transmissions and retransmissions, public performances, and TV and radio broadcasting with administrative (and where, applicable, criminal) actions. *Ex officio* authority should be used to improve border controls, especially along the Russian border, focused on railroad traffic.
- **Legal reforms** including:
 - e-Commerce Law amendments, as companion amendments to the Copyright Law, to provide ISP liability consistent with global norms.
 - Copyright Law amendments to ensure that an unauthorized online distribution, communication, or making available is considered an act of infringement, regardless of whether it is undertaken for profit-making purposes or other commercial benefit or advantage.
 - Criminal Code amendments to Article 176 to ensure the availability of criminal remedies against online piracy of all works and sound recordings, as well as remedies against repeat infringers (even if each separate infringement is below the criminal infringement threshold); and to establish in the Criminal Procedure Code clear rules for prosecuting infringers.
 - Abolishing the hologram sticker system (or, at the very least, fixing it so that it cannot be used by infringers to make pirated products appear legitimate) – as required in the 2010 Action Plan.
 - Fully implementing the WIPO digital treaties – in the Copyright Law and Criminal Procedural Code. Ukraine acceded to the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT) in 2002.

COPYRIGHT ENFORCEMENT IN UKRAINE

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

Internet Enforcement: One of the PFC-identified problems in Ukraine impacts all of the copyright industries. It is the failure by the Government of Ukraine to implement an effective and systemic means to combat widespread online infringement. Weak enforcement has resulted in an exponential increase in the number of illegal peer-to-peer hosting and website-based Internet piracy sites, including BitTorrent sites (some of the world's largest), located in Ukraine. In fact, some Internet pirates have purposefully moved their servers and operations to Ukraine to take advantage of the current chaotic situation. Many of these illegal services and sites target audiences throughout Europe and the United States. In 2014, Ukraine was third in the world in terms of the number of connections by peers participating in the unauthorized file sharing of select Entertainment Software Association (ESA) member titles on public P2P networks, up from fourth in 2013, and 20th in 2011.

Ex.ua is one of the most popular download and streaming sites in Ukraine, allowing free streaming and downloading of unauthorized copyrighted content (according to Alexa it is the 16th most visited site in Ukraine). The U.S. Government listed *ex.ua* in 2012 and again in 2013 (in its report released in February 2014), as a "Notorious Market" as a part of the Special 301 Out-of-Cycle review, because of the site's ongoing illegal activity and what the U.S. Government described as its "full range of infringing content." The U.S. Government also noted that the site was back in operation days after enforcement actions in 2012 were halted (and the criminal case dropped) "as a result of political criticism and popular opposition. No further enforcement actions have been taken and the site reportedly continues to monetize infringing content." Some IIPA members report that in 2014, *ex.ua* did respond to some notice and takedown requests. There are hundreds of other pirate sites including torrent sites (which comprise about half of the total illegal sites), hyperlinks, cyberlockers, and streaming sites, such as: *extratorrent.cc* (also on the 2013 "Notorious Markets" list of the U.S. Government) and *sumotorrent.sx*, which offer large quantities of unauthorized downloaded content from the BitTorrent network; *futubox*, hosted in Romania but managed in Ukraine, which offers films and TV programming; and many other sites which offer unauthorized pre-release and recently released music and film materials via storage locker links posted by the administrator and users of the site. The recording industry reports that free and paid download sites (like *newalbumreleases.com* and *jams.to*, both hosted in Ukraine) remain a major source of piracy in Ukraine (some selling whole albums for US\$1) with some ISPs such as "Hosting Solutions Ltd." specifically attracting pirate sites. Hosting Solutions also provides hosting services to other pirate sites including: *torrentbit.net*, *btloft.com*, *bitloft.org*, *torrentz.cd*, *torrentpond.com*, *btmon.com* and *torrentz.wf*. Some of these websites offer incentives such as free giveaways in return for users making monetary "deposits" onto the sites. Few of these sites have suffered any meaningful stoppages of their activities, as demonstrated by the *ex.ua* case. In addition, in 2014, there was not one criminal sanction imposed in Ukraine for Internet piracy (neither against any infringing individual or site operator or administrator). There were 71 criminal digital piracy investigations opened in 2014, compared with 85 in 2013. In 2014, there were 28 pirate sites targeted by anti-piracy organizations which were closed by the police (compared to 16 in 2013), although some were operational again immediately after their "closure."

A roadmap for improved enforcement against digital (and hard copy) piracy was agreed to in the U.S.-Ukraine Action Plan of 2010 – with very specific steps set out to effectively combat Internet piracy. The "plan" was actually a formal summary of commitments made by the Government of Ukraine (to the U.S. Government). It has never been implemented.

In many cities and towns outside Kiev – especially where Internet bandwidth is relatively slow – a problem exists with so-called "LAN" (Local Area Networks) sites. These are high-speed FTP sites that store massive amounts of content, most of it consisting of infringing movies, music and video games. Local users can get access to these LAN networks by paying a fee and can then download as much content as they wish; there are no constraints or

bandwidth limitations (as users might encounter when visiting infringing sites abroad). In 2014 there were only two criminal cases brought against LAN operators (compared with six in 2013).

In addition to infringing hosted content available for download, other common types of Internet piracy are: mail order – with orders placed online and products delivered by mail; sales of fake certificates of authenticity; and, the distribution of “cracked” product keys through locally hosted web-sites (especially of online entertainment software).

The U.S. Government noted in its 2013 designation of Ukraine as a PFC that the Ukraine IPR regime failed “to institute transparent and predictable provisions on intermediary liability and liability for third parties that facilitate piracy; to introduce limitations on such liability for Internet Service Providers (ISPs); and to enforce takedown notices for infringing online content.” In fact, not only is there no clear third party liability that could incentivize cooperation between rights holders and ISPs, but the current Law on Telecommunications (Article 40, paragraph 4 on the “responsibility of operators”) bluntly states that ISPs “do not bear responsibility for the content of the information transmitted through their networks.” Article 38 states that ISPs can only disable end-users from the Internet, or block access to (i.e., takedown) infringing websites, with a court order. In the past, the ISP association (IAU) – citing this statutory language – has taken the position that rights holders need to go after illegal websites directly, without ISP assistance or cooperation.

Many of the websites offering pirated copyright materials are thriving in part because of the support of local ISPs (there are hundreds of ISPs in Ukraine and well over 100 sites offering pirated content). The copyright industries have, for years, been seeking private agreements (with governmental assistance) with ISPs to establish effective mechanisms to take down illegal websites and slow illegal peer-to-peer traffic, and some ISPs will delete links upon request. The anti-piracy organization UAPA and the Motion Picture Association of America (MPAA) report about a 20% response rate to notice and takedown requests (there are no laws mandating compliance). In 2014, UAPA issued 1,119 takedown notices to ISPs and cease and desist letters to site operators in Ukraine.

The 2014 draft law would institute notice and takedown provisions (and in a positive note, allow rights holders to do so directly, as is the international standard, without the need for a state authority or court), and would require that material taken down “stay down.” Prior drafts had problems with inefficient notice processes and timeframes, but these appear to have been improved or corrected in the current draft. Also recommended for inclusion in any new law are two critical reforms for effective digital enforcement: (1) third party (ISP) liability consistent with global norms; and (2) the ability of rights holders or enforcement authorities to collect information about suspected infringing website owners.

Currently, the Criminal Procedure Code does not grant police *ex officio* authority (although some government officials claimed otherwise); so the police are unable to instigate criminal operations against online piracy unless a rights holder first files a claim for damages. When criminal investigations are undertaken, police efforts are often stymied by a lack of cooperation from ISPs, which often refuse to provide available information on their infringing users. Amendments to the Law on Telecommunications, which would have assisted the police in conducting Internet crime investigations by providing subscriber information, have been proposed in recent years, but not enacted. The copyright industries report that the lack of clear prosecutorial and judicial procedures for Internet-related cases is a bar to effective enforcement, with existing procedures too complicated to be used effectively. IIPA continues to recommend the adoption of guidelines and more effective procedures for police, prosecutors and judges for these crimes. In 2012, a special police cyber crime unit was created (with IP officers from the Economic Police) for the purpose of combating Internet crimes.

Collecting Societies: The unfair, nontransparent administration of the system for the collective administration of rights was cited as a reason for the designation of Ukraine as a Priority Foreign Country. Collecting societies in the music sector, specifically in connection with broadcasting, public performances and other communications to the public, can provide an effective and indispensable means for licensing. Currently, the

accreditation process in Ukraine for collecting societies is in chaos. After years of mismanagement by the Government of Ukraine, a 2013 court order invalidated the entire existing accreditation procedure. The court rescinded an executive order that had vested authority to implement the accreditation of collecting societies in the State Intellectual Property Service of Ukraine (SIPSU) (formerly known as the State Department of Intellectual Property (SDIP)). SIPSU, which has a new director as of December 2014, is currently part of the Ministry of Economic Development and Trade (after a 2013 re-organization which moved the IPR portfolio from the Ministry of Education and Science). The 2013 court decision put SIPSU's authority to accredit authorized collecting societies on hold. The current situation has prevented the development of the marketplace for legal music services, resulting in the loss of millions of dollars in legitimate business for music rights holders in Ukraine.

The main criterion for accreditation should be to accredit the organization based on a majority of national and international repertoire represented. The accreditation process should reflect commercial realities and be based on the society that represents the "majority of commercially relevant rights holders," as IIPA and other organizations have long suggested. Under IIPA's proposed solution, the current accreditation system would be re-constituted, and societies would be granted operational licenses based on their representation of a majority of commercially relevant rights holders, and if they undertake their operations in a transparent matter. That would avoid the old system of providing favorable treatment to the undemocratic, non-representative, non-transparent collecting societies, that also have internal government influences, and which have unfortunately been allowed to operate.

Two legitimate organizations – the Ukrainian Music Alliance (UMA) (broadcasting) and the Ukrainian Music Rights League (UMRL) (public performances) – represent over 80% of the domestic and international repertoire for music. They were both registered by SDIP (SIPSU) under the prior regulations, although their status as the only accredited organizations in their respective areas was revoked by SIPSU in 2012 despite their fair and transparent operations, and despite support from local and international rights holders. A new accreditation process was announced, and then overturned by an administrative court decision in January 2014 – leaving everything at a standstill. And worse, in the vacuum, rogue collecting societies continue to operate and prosper in the chaotic market. Reconfirming UMA and UMRL as accredited registered rights management organizations (in their respective areas) would greatly improve the situation for producers and performers.

While the law in Ukraine provides for remuneration rights for the broadcasting or other public performances of musical works and sound recordings, it is estimated that over 90% of the broadcast and public performance market places are unlicensed. This problem has been significantly worsened because the Government of Ukraine has not undertaken proper actions against organizations which purport to grant "licenses" for which they do not have rights.

In 2013 and 2014, the General Prosecutors Office (GPO) and SIPSU undertook investigations into the activities of the collecting societies (both those supported by rights holders and the rogue societies). These investigations confirmed violations of the relevant regulations. SIPSU was provided copies of the reports, but to date, has not taken action against these societies. Urgent action is needed to bring order to the licensing environment. SIPSU's first priority should be to stop all activities of the collecting societies created in violation of the current copyright law and regulations on collective management.

Last, IIPA continues to recommend amending the procedure for authorizing a collecting society for private copying levies. The current regulation (order #503 from 2003) did not specify that there should be a single organization for this type of activity. As in the other areas, this has led non-representative collecting societies (like VAAP) to seek authorization and collect this type of revenues alongside UMA, a rights holder supported organization. In 2013 VAAP applied for authorization and was rightly denied it in a decision later confirmed by one court. Despite that, in December 2014 VAAP re-applied and was accredited by SIPSU as an authorized collecting society for private copying levies. This has added to the chaos of collective management in Ukraine. The 2014 decision by SIPSU violates Ukrainian law requiring a society to have at least two years' experience in collecting and distributing

royalties; in fact, in 2013 VAAP collected a total of US\$1,400 and did not distribute those monies. SIPSU should immediately revoke the authorization of VAAP.

Criminal Enforcement: One significant shortcoming in the Ukraine enforcement regime that cuts across all the copyright industries, and impacts digital and hard-copy piracy, has been the absence of effective criminal prosecutions and deterrent sentencing.

Amendments made in 2005 to the Criminal Code (Article 176) lowered the high threshold for criminal prosecution. The current threshold is 12,180 UAH (or US\$772), which concerns some of the copyright industries because it is still too high and thus a bar to criminal enforcement, resulting in rights holders using less effective administrative actions instead. This is particularly true for online piracy matters, where the valuation of damages (by law enforcement agents, prosecutors and the courts) is too difficult to calculate absent an official methodology, and prevents the initiation of criminal investigations and prosecutions. Additionally, enforcement officials have applied the threshold on a per-rights holder basis, which means that when illegal material is seized, if the material for each rights holder does not exceed the threshold, the criminal case does not proceed. There are other procedural problems as well, including: (1) rules regarding the use of expert evidence (denying the use of rights holder experts); (2) non-deterrent sentences for repeat offenders; (3) delays and case dismissals that can be fixed with changes to the Criminal Code or Criminal Procedure Code; and (4) the lack of guidelines for judges on sentencing and developing expertise in IPR cases (IIPA recommends that the highest specialized court in civil and criminal cases issue guidelines for judges in this regard). Provisions do exist in the Ukrainian Criminal Code (e.g., Article 28) for prosecuting organized groups or criminal organizations, including for IPR offenses, but these provisions have been under-utilized by prosecutors. One lingering enforcement problem in criminal and civil cases is the required proof of ownership, including a complete chain of title, and the denial of standing to licensees, especially of foreign record companies.

Enforcement efforts are further hampered by a lack of resources. The Government of Ukraine established a specialized unit for intellectual property rights crimes within the Economic Crime Division in the Ministry of the Interior, but there are fewer than 100 officers serving in that division for the entire country, too few to conduct effective actions sufficient to deter piracy. A Cyber Crime Unit was also created within the Ministry of the Interior; in 2011, it commenced its work on IPR (including copyright) enforcement; in 2012, a new unit was formed to focus on cyber crimes. More and better resources should be dedicated exclusively to copyright and related rights violations, and officers should be provided with effective training (including IT skills), equipment, and high-speed broadband connections (IIPA members have helped train these officials in the past, and continue to be willing to do so). The current number of state IP inspectors in SIPSU empowered to combat various IPR infringements throughout the 25 regions of Ukraine is inadequate.

Other Key Enforcement Issues: Two outdoor markets were designated as “Notorious Markets” by the U.S. Government in its 2013 report (released in February 2014) for their large-scale piratical operations. They are: the Petrovka Market in Kiev (also designated in 2012), which houses “as many as 300 stands” selling pirate and counterfeit material; and the “7-Kilometer” open market in Odessa “with more than 5,000 stalls serving over 100,000 customers per day,” according to the U.S. Government report. There are many other markets throughout Ukraine selling hard copy pirated material. A total of 24 hard goods raids were undertaken by the police in 2014, down from 54 in 2013.

The camcording of motion pictures and the quick transfer of these illegal copies on the Internet remains a major problem for the motion picture industry; it is mostly undertaken by criminal syndicates operating in Ukraine and Russia. As a consequence, illicit camcording shifts quickly between the two countries, resulting in hard copy and Internet piracy. Illicit camcords sourced from Ukraine are quickly uploaded to the Internet and burned to optical discs for distribution. In 2014, at least 12 illicit video recordings were sourced from Ukrainian theaters, up from two in 2012. The number of audio recordings sourced from Ukrainian theaters increased from 31 in 2013 to 51 in 2014.

Amendments to the Copyright Law and the Criminal Code are necessary to effectively enforce against illicit camcording.

All of these copyright industries continue to report persistent problems with the administration of the current hologram sticker system which was adopted in 2000. Some legal plants producing CDs and DVDs have been able to obtain unauthorized holograms which are then sold, without authorization, in Ukraine. In addition, optical disc piracy (especially of CD-Rs and DVDs), still persists; there was no information on any raids against optical disc plants in 2014 (there was one such raid in 2013). Broadcast television piracy continues to be a major problem for the motion picture and recording industries – both with regard to regional and nationwide broadcasts.

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

In the 2012 Customs Code, Customs officials were granted *ex officio* authority to properly conduct enforcement investigations. Using this *ex officio* authority, customs officials can seize illegal material at the border without a court order. Unfortunately, customs authorities within the (new) State Fiscal Service are not sufficiently engaged in enforcement measures, and thus are under-utilizing their authority, with the exception of some minor seizures by customs authorities of illegally produced CDs and other pirated materials; cooperation with right holders could be improved as well.

LEGAL REFORMS

Copyright Law: Various proposals to amend the Copyright Law have been introduced in recent years. Bill #6523 (later, Bill #0902) was introduced in the Verkhovna Rada in 2010 and passed its first reading in February 2011, but was never enacted into law.

Separately, amendments to the Copyright Law, the Law on Telecommunications, and the Code on Administrative Offences, intended to improve digital piracy enforcement, were proposed in 2013 (revised numerous times), and again in August 2014 – the latter contained significant improvements from earlier drafts. These 2014 amendments would provide for mandatory notice and takedown provisions, replacing the current voluntary system. However, as noted above (in the Internet Enforcement section), these amendments, however much improved, would address only one piece of the complete architecture required for Internet enforcement, namely a notice and takedown regime, and lack third party liability and other reforms. The proposed notice and takedown provisions still need further refinement as proposed in the package of improvements offered by international experts in October 2014. To be effective, notice and takedown should not (as earlier drafts of the bill proposed) create a highly bureaucratic set of procedures to render efforts to take down infringing materials time-consuming, costly or unworkable; nor should they provide broad exclusions from liability. Rather they should incorporate third party liability under generally accepted standards (including provisions to reasonably gather and retain evidence). New efforts are underway (including discussions in January 2015) to draft IPR legislation.

Other deficiencies in the Copyright Law remain, including: the need to more clearly define temporary copies, to impose damages, and to exclude camcording from the scope of the private copy exception. Three other amendments to the Copyright Law which were contained in the old Bill #0902 should be adopted: (1) revising Article 52 to provide licensees of foreign music companies equal treatment as local right holders; (2) making either the non-payment of music rights royalties or of private copying levies an infringement of copyright and/or related rights; and (3) adding statutory damages and/or a system of enhanced damages in order to adequately compensate right holders and deter further infringement (Article 52 – to double actual damages).

Anti-Camcord Legislation (Copyright Law amendments): The illicit recording of a movie in a theater remains the single most prolific source of movie piracy in Ukraine, which is why an amendment to the Copyright Law is needed. The Copyright Law reform proposals (Bill #6523 and Bill #0902) included an anti-camcording amendment

that would have specifically excluded camcording in movie theaters from the scope of the Copyright Law's private copy exception. The law, if enacted, would have prohibited the reproduction of audiovisual works during their exhibition in theatres and at other premises intended for public consumption; it should be enacted.

Law on Collective Management: New regulations to govern the activities of Ukrainian collective management organizations are needed to improve the current chaotic situation, and to restore public trust and basic business practices for the administration of public performance rights and the broadcast markets. IIPA recommends the completion of a new draft Law on Collective Management, and that any such law incorporate the recommendations of European Union and U.S. experts in the music industry.

E-commerce Law: There is a draft E-commerce Law currently being considered by the Verkhovna Rada for a first reading. Before its final adoption, the draft should be amended to include third party liability provisions under generally accepted standards as set out in the U.S. Government's designation of Ukraine as a PFC (and, consistent with the Association Agreement with the European Union).

Criminal Code and Criminal Procedure Code: In addition to the criminal threshold, IIPA additionally recommends amending Article 176 of the Criminal Code to clearly apply to all forms of piracy (i.e., on the Internet), not only (as it clearly does now) to hard-copy piracy. Any amendment to the Criminal Code should also ensure that repeat copyright infringements (within twelve months) would automatically lead to a criminal, and not solely an administrative, prosecution. Last, relevant criminal sanctions should be included in the code for intentional infringements related to the obligation to pay music rights royalties.

Ukrainian criminal procedures require rights holders to file complaints to initiate actions, which acts as a bottleneck to successful enforcement; 2012 amendments made it a requirement also for the initiation of police actions against optical disc producers, lab operators, disc distributors and sellers. Police should be granted (and should use) the authority to initiate intellectual property criminal cases and investigations for submission to the court. It should also be clear that the police have the authority to seize all copyright products and equipment, for use at trial (they currently only do so in software cases).

WIPO Digital Treaties: In 2001, Ukraine acceded to the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonogram Treaty (WPPT), which entered into force in 2002. The Copyright Law of 2001 included amendments intended to implement these treaties. Unfortunately, the amendments fell short of complete and effective implementation of the treaty obligations, especially with regard to technological protection measures, by requiring proof of "intentional" circumvention, which is a major impediment to protection.

Administrative Remedies: Administrative remedies (as required by the 2010 Action Plan) do exist but they are not being used effectively to remove the business licenses of infringing retail stores, kiosks and other smaller scale pirates. Further amendments have been proposed, but never adopted, to increase the maximum fines, which IIPA continues to recommend. Administrative courts should be able to hear infringement cases even in the absence of the infringer, and procedures that introduce unnecessary delays and impose unreasonable deadlines, leading to unnecessary case dismissals, should be corrected. One major enforcement hurdle in the Administrative Code of Ukraine (Article 51.2) is the requirement to prove intent of the infringer; intent, while relevant in criminal proceedings, has no relevance in administrative sanctions, and should be deleted from the code.

Customs Code: The Customs Code of Ukraine provides clear *ex officio* authority (Article 257) to customs officials. The Customs Code was further revised in 2012. While some administrative improvements were made in recent years, IIPA recommends the abolition of the customs registration system altogether because it is an unnecessary maze of regulations which interferes with effective border enforcement for some industries.

Market Access: There are two serious barriers to market access confronting IIPA members, and in particular, the motion picture industry. These barriers are: (1) an obligation to manufacture film prints and digital

encryption keys in Ukraine; and (2) customs valuation rules that assess valuation on projected royalties, rather than on the underlying carrier medium.

The compulsory manufacturing requirement is included in the Law of Cinematography (amended in 2010) requiring the production of film prints locally for the issuance of a state distribution certificate. The required local production rule was reiterated by the State Film Agency, and entered into force in 2012.

In addition, in 2009, Ukrainian customs authorities declared new customs valuation rules. Rather than assessing duties on the underlying carrier medium, the new rules assess valuations based on projected royalties. To further complicate matters, Ukrainian customs officials stated that the new ruling would be retroactive (three years), and would be enforced with serious penalties for valuations based on the carrier medium rather than royalties. Contrary to rumors that these rules might be reversed, in May 2012 a new Customs Code was adopted which affirmed the duties on royalties for both theatrical and home entertainment imports. These valuation procedures are governed by CMU Resolution No. 446.

GENERALIZED SYSTEM OF PREFERENCES (GSP)

IIPA filed a petition in 2011 to have Ukraine's Generalized System of Preferences (GSP) benefits suspended or withdrawn. Given the current IPR circumstances (and assuming the GSP program is re-authorized in 2015), IIPA recommends that the U.S. Government accept the IIPA petition and move to suspend or withdraw Ukraine's benefits, if there is no progress by the Government of Ukraine to properly address the problems identified in its IPR regime.