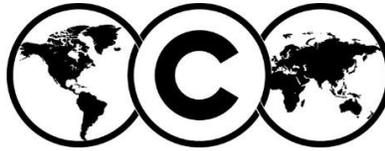


INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE®



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Pre-Hearing Written Comments International Intellectual Property Alliance

Before the Section 301 Committee
Docket: USTR-2013-0023 Ukraine – Section 301 Investigation

September 9, 2013

I. Introduction

The International Intellectual Property Alliance (IIPA) appreciates the opportunity to provide written testimony and to appear at the September 9 public hearing on the Section 301 investigation of Ukraine.

This Section 301 investigation was initiated on May 30, 2013, in accordance with the Trade Act of 1974, as amended. As mandated by Section 302(b)(2) of the Trade Act (19 U.S.C. 2412(b)(2)), the U.S. Trade Representative is authorized to initiate an investigation under Chapter 1 of Title III of the Trade Act (commonly referred to as “Section 301”) with respect to any “act, policy, or practice” that was the basis of the identification of a country as a priority foreign country under section 182 of the Trade Act. The U.S. Trade Representative identified such “acts, policies and practices” pertaining to three discrete copyright issues in the May 30th announcement designating Ukraine as a Priority Foreign Country (PFC) which initiated this Section 301 investigation. As set out in the Federal Register notice regarding the investigation and public hearing, these three issues are:

(1) “the unfair, nontransparent administration of the system for collecting societies, which are responsible for collecting and distributing royalties to U.S. and other rights holders...”

(2) the “widespread use of infringing software by Ukrainian government agencies...” and

(3) the failure of the Government of Ukraine “to implement an effective and systemic means to combat the widespread online infringement of copyright and related rights, including failures 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.” 78 Fed. Reg. 33,886-7 (June 5, 2013).

The IIPA, formed in 1984, is a private sector coalition of seven trade associations representing U.S. copyright-based industries working to improve international protection and

enforcement of copyrighted materials and to open foreign markets closed by piracy and other market access barriers.¹ As such, we focus our testimony on the copyright law and enforcement issues confronting our members in Ukraine, and specifically on how the three issues identified by the U.S. Trade Representative are adversely impacting our members.

A Section 301 investigation is supposed to examine “whether these acts, policies, and practices are actionable under section 301(b) of the Trade Act, and, if so, what action the Trade Representative should take under Section 301(b).” *Id.* at 33,887. Acts, policies, or practices of a foreign country are “actionable under section 301(b) if they are unreasonable and burden or restrict U.S. commerce.” *Id.* Further the Trade Act specifies (in section 301(d)(3)(B)(i)(II)), as set out in the Federal Register notice, “that unreasonable acts, policies, or practices include any act, policy, or practice which denies fair and equitable provision of adequate and effective protection of intellectual property rights, notwithstanding the fact that the foreign country may be in compliance with the specific obligations of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement)...[and may]...also include any act, policy, or practice which denies fair and equitable nondiscriminatory market access opportunities for persons that rely upon intellectual property protection.”² *Id.*

The Federal Register notice (78 Fed. Reg. 33,886 (June 5, 2013)) specifically requested that public witnesses for the July 18 hearing include four elements in their testimony: (i) the “acts, policies and practices” of the Government of Ukraine that are the subject of this investigation; (ii) the “burden” on U.S. commerce and, in our case, specific to the IIPA-represented rightsholders, caused by these acts, policies and practices; (iii) a description of why, in our view, these acts, policies and practices are actionable under Section 301(b); and, (iv) recommended actions for the U.S. Government under Section 301(b). Our testimony incorporates all four of these elements and we include as well, recommended actions by the Government of Ukraine to improve the economic climate for the copyright industries in Ukraine.

II. IIPA Summary of Conclusions and Recommendations

In sum, the “acts, policies and practices” of the Government of Ukraine, relating to the three copyright issues identified, have caused severe economic harm to (i.e., are a “burden” on) IIPA-represented copyright rightsholders in Ukraine (as well as to Ukrainian and other foreign rightsholders) for the reasons detailed below.

¹ IIPA’s seven member associations represent over 3,200 U.S. companies producing and distributing materials protected by copyright laws throughout the world—all types of computer software, including operating systems, systems software such as databases and security packages, business applications, and consumer applications such as games, personal finance, and reference software, free software, open source software, and software as a service, entertainment software including interactive games for videogame consoles, handheld devices, personal computers and the Internet, and educational software; motion pictures, television programming, DVDs and home video and digital representations of audiovisual works; music, records, CDs, and audiocassettes; and fiction and non-fiction books, education instructional and assessment materials, and professional and scholarly journals, databases and software in all formats. Members of the IIPA include Association of American Publishers, BSA | The Software Alliance, Entertainment Software Association, Independent Film & Television Alliance, Motion Picture Association of America, National Music Publishers’ Association, and Recording Industry Association of America.

² There are two critical market barriers to access that are not directly a part of the Section 301 investigation, but which are preventing the motion picture industry from freely and fairly conducting business in Ukraine at present and which deserve the attention of the Government of Ukraine. These two 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 Government of Ukraine, by allowing problems to persist pertaining to collecting societies, illegal software in government agencies, and digital piracy have denied adequate and effective protection of intellectual property rights, and have resulted in unfair and inequitable discrimination of market access opportunities, for U.S. rightsholders. The ineffective and inadequate response to date, by the Government of Ukraine, to address these “acts, policies and practices” is, in our view, actionable under Section 301(b) of the Trade Act because of the economic harm to American (and other) rightsholders.

IIPA makes several specific recommendations on actions the Government of Ukraine can take to address these “acts, policies and practices,” that is, to properly and adequately address each of the three copyright issues that are the subject of this Section 301 investigation. The proper solutions require administrative and executive actions by the Government of Ukraine, as well as legislative reforms in some instances.

IIPA also recommends that, unless the Government of Ukraine fully responds to these problems and takes corrective actions to fix them, the U.S. Government should take all appropriate actions and measures permissible under Section 301(b).³ The ultimate goal of IIPA and its members is not to harm trade relations between the U.S. and Ukraine, but to enhance the economic climate and conditions in Ukraine for copyright creators and producers (U.S. and Ukrainian), and to avoid any further escalation of trade tensions between the two governments. In our view, undertaking the recommended actions on the three copyright issues as set out below, will best accomplish this goal.

III. “Acts, Policies and Practices” by the Government of Ukraine, the Burden on U.S. Commerce, and Recommended Actions to Correct These IPR Deficiencies

The U.S. creative industries represent a core sector of the U.S. economy that contributes to a positive balance of trade. It is essential to the continued growth and future competitiveness of these industries and the U.S. economy, that U.S. trading partners provide free and open markets and effective levels of protection to the copyrights on which this trade depends, both for “hard copy” goods and especially for works and recordings in the digital marketplace.

Unfortunately, at present in Ukraine, there are myriad obstacles to adequate and effective copyright protection, ranging from rampant digital copyright piracy to governmental decisions related to the operation of collecting societies that have removed the ability of rightsholders to determine how their rights will be administered. Piracy rates are exceedingly high in Ukraine. In addition, the use of unlicensed software by government ministries is a long-festering systemic problem that the Government of Ukraine has not corrected.

³ One of the additional critical trade “tools” used to combat the problems of a weak IPR regime in developing countries is to enforce the IPR obligations in the Generalized System of Preferences (GSP) program. Separate from the PFC designation and Section 301 investigation, the IIPA filed a petition for consideration, and the U.S. Government is reviewing Ukraine’s eligibility for GSP benefits. According to the intellectual property provisions of the 1974 Trade Act (sections 502(b) and 502(c)), one of the bases for a country’s GSP eligibility is “the extent to which such country is providing adequate and effective protection of intellectual property rights.” 19 U.S.C. § 2462(c)(5). In our view, the Government of Ukraine is not complying with these eligibility requirements because the Ukrainian legal and enforcement regime is inadequate and ineffective in many key areas. In addition, for the reasons stated in this filing and others, Ukraine is not “provid[ing] equitable and reasonable access to [its] markets...” which is also a requirement for GSP eligibility. Unless these issues are addressed, IIPA recommends that Ukraine lose its eligibility for GSP benefits.

Weak copyright protection has been a long-standing problem in Ukraine, but in the past two years the situation has substantially worsened. 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 in the Commonwealth of Independent States (CIS). For example, there are several notorious websites hosted in Ukraine by Ukrainian Internet Service Providers (ISPs) that, while identified to Ukrainian enforcement officials, continue to act with impunity.

As noted, the U.S. Trade Representative has specifically identified the three copyright shortcomings in areas of “acts, policies and practices” by the Government of Ukraine that are the subject of this Section 301 investigation. We treat each of these issues in the order identified in the Federal Register notice:

1) Collecting Societies

In the music sector, and specifically in connection with broadcasting, public performances and other communications to the public, collecting societies provide an effective and indispensable means for licensing. Under the current scenario in Ukraine there is an unfair and unworkable system in place for collecting societies. The accreditation process is in chaos. There has been the de-accreditation of the society representing the majority of rightsholders resulting in a system which effectively denies a rightsholder the fundamental right to make fair and open decisions about whether to be represented by a particular society. This failed system is preventing the development of the marketplace for legal music services, and resulting in the loss of millions of dollars in legitimate business for music rightsholders in Ukraine. Ironically, while IIPA has long highlighted the problem of rogue societies issuing “licenses” which they lacked authority to grant, rather than addressing this criminality, the Government of Ukraine decided instead to act against the legitimate society representing rightsholders (UMRL), removing their accreditation and launching a new and risky accreditation process that caused tremendous confusion in the Ukrainian marketplace, and which undermines the ability of rightsholders to determine how to license the use of their works.

There is a proposed solution: American and many other music producers and performers have existing fair and transparent societies (UMA/UMRL) that are both already authorized, and which represent a majority of music rightsholders in Ukraine. UMA’s accreditation has never been revoked, but it operates in an environment of uncertainty, and UMRL’s accreditation was unfairly revoked. The Government of Ukraine should promptly reverse UMRL’s revocation order, thereby restoring its accreditation, and should issue an order clarifying the legal authority of UMA and UMRL to engage in licensing without any further action. At some future point, the Government of Ukraine may wish to begin a new accreditation procedure. If the Government of Ukraine determines to do so, it is essential that there be absolute clarity that an authorized society must hold the majority of commercially relevant repertoire as a pre-requisite to conducting business. The current state-owned society, UACRR, does not represent a majority of repertoire, and is instead responsible for much of the unfair and nontransparent practices that persist and must not be rewarded with a state monopoly.

The Government of Ukraine has proposed an alternative suggestion. It would make the to-date unfair and nontransparent collecting society, the state-owned UACRR, as the (only)

collecting society for composers, music publishers, producers and performers, either on a permanent, or perhaps on an interim basis. This not a good solution, either temporarily or permanently, not only because it rewards the wrong society, but also because it will not be supported by either Ukrainian or foreign composers, music publishers, producers and performers. Nor is a new accreditation procedure necessary to allow UMA/UMRL to conduct their business since they were already authorized under previous regulations. Instead, their status simply needs to be reconfirmed, and they need to be able to operate fully.

2) Software Legalization

The second ground for the Section 301 (PFC) investigation is the use by various ministries within the Government of Ukraine (especially the Ministry of Interior, the offices of State Tax Inspection, and the Prosecutor's Office) of unlicensed software and the lack of any systemic means to deal with this situation.

Industry reports indicate that the rate of personal computer (PC) software piracy in Ukraine is well over 80%, with unlicensed software use by government agencies a significant part of the problem. Ukraine's own State Intellectual Property Service (SIPSU) estimates the software piracy rate in Ukrainian state agencies to be 40%; industry sources believe the rate to be significantly higher.

After passing regulations in 2003 and 2004 to ensure the legal use of software in government agencies, the Government of Ukraine has failed to properly finance or implement these measures. For example, in 2011, the Ministry of Education request for centralized funds to purchase legal software in government ministries in the 2012 budget year was denied by the Cabinet of Ministers. The Government of Ukraine has never properly allocated funds to legalize software used by its institutions, ministries or state-owned enterprises. The continued use by state agencies of illegal software sets a poor example for the business sector, where illegal software use (i.e., enterprise end-user piracy) is practically the norm. IIPA has long recommended that the Government of Ukraine allocate to each ministry dedicated funds for software legalization, that it perform software audits, and, that it expeditiously develop and make public an action plan for ongoing software legalization including an organized procurement program that can be properly administered.

In April 2013, the Government of Ukraine re-iterated the need for licensed software and pledged to allocate 100 million UAH (USD\$12.3 million) for software licensing in state institutions. Unfortunately, the government has not yet disbursed these funds or established an effective mechanism for doing so before these monies revert to the treasury. Even those monies, while a very positive first step, would only address a small fraction of the widespread unlicensed software use within many ministries and state institutions. IIPA urges Ukraine to establish an ongoing, multi-year plan to address software legalization. We are advised that multi-year budget expenditures are not provided for under the present structure, but believe that the Ukraine authorities and the Verkhovna Rada can find a workable solution to ensure this problem is addressed on an ongoing basis. This issue has always been susceptible to quick, inadequate and marginal fixes rather than long-term solutions that address – in a meaningful way – a problem that is both harmful to businesses and detrimental to the effective functioning of the government.

IIPA has repeatedly noted the lack of accountability within the Ukrainian governmental structure to address this problem in a meaningful way. IIPA recommends that the Ministry of Finance be directly engaged in this process, including by obtaining multi-year budgeting and procurement and the necessary government guarantees. Additionally, SIPSU needs to be empowered to implement and enforce a legalization program with appropriate checks and balances, accountable directly to the Council of Ministers, for example. Without such changes, software legalization will receive only sporadic attention and there will be no systemic plan that builds upon the progress that SIP has managed to achieve.

IIPA and its members continue to recommend that this implementation needs to be expedited: to allocate dedicated funds for software legalization sufficient to meet each ministry's software needs with an effective procurement program, and to perform software audits, in order to eliminate the use of unlicensed software in the public sector. IIPA recommends one way to quickly implement a software legalization plan: set aside the appropriate and necessary funds, and make one individual responsible for coordinating implementation (and appointing individuals within each ministry to carry out the plan).

3) Internet Enforcement

The third ground for the Section 301 (PFC) investigation is the failure by the Government of Ukraine to take effective action against Internet piracy, and to implement an effective and systemic means to combat the widespread online infringement of copyright and related rights.

Ukraine is home to a number of notorious pirate websites. In December 2012, ex.ua was listed by the U.S. Government as one of thirty "Notorious Markets" 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." Ex.ua is the most popular cyberlocker and user-generated content website in Ukraine, allowing free streaming and downloading of unauthorized copyrighted content. It is one of the top 10 most popular websites in Ukraine, generating revenue through advertising, without sharing any monies with creators or content owners. Other pirate sites include: extratorrent.com and sumotorrent.com, which both offer large quantities of unauthorized downloaded content from the BitTorrent network, and newalbumreleases.net, which offers unauthorized pre-release and recently released music materials via cyberlocker links (posted by the administrator and users of the site).

An effective legal regime would include instituting transparent and predictable provisions clarifying the existence of liability for parties that promote or induce infringement, as well as more general provisions enhancing accountability and responsibility in the Internet environment. The Government of Ukraine has not introduced legislation to properly address any of these issues.

In short, Ukraine is not providing the legal or enforcement framework necessary to address its serious piracy problem, and which it obligated itself to provide in numerous bilateral commitments to the United States. These commitments include: the 2010 IPR Action Plan; the 2000 Joint Action Plan; and the 1992 Bilateral Trade Agreement. Nor is it complying with its multilateral commitments to establish an adequate and effective IPR enforcement regime to address copyright piracy, including digital piracy. Instead, Ukraine has established itself as a

“safe haven” for copyright pirates, and in particular, for digital piracy. Ukraine is now one of the few countries in the world (along with Russia) with pay-for-download piracy of music and film, and is the source of some of the world’s top BitTorrent sites, with some sites advertising openly on billboards. As a consequence, legitimate online marketplaces cannot develop for copyrighted materials in Ukraine. Ukraine’s rampant online piracy is being exported to other countries, seriously impairing the global digital marketplace. As one example, efforts to address the BitTorrent and free streaming and downloading sites (including www.ex.ua) have, so far, neither resulted in a suspension of services, (in fact, in the ex.ua case, the site is back in operation and the criminal case was closed), nor in a single Internet criminal case being brought to the court in 2012 or in 2013.

IIPA and its members have long advocated for improved enforcement against digital (and hard copy) piracy, including by the full implementation of the U.S.-Ukraine Action Plan of 2010. The 2010 IPR Action Plan was developed by agreement of the two governments – first, by a formal document presented by the U.S. Government in October 2010, and approved and signed by the Government of Ukraine in February 2011 (the plan is “effective” October 2010). The “plan” was actually a formal summary of obligations made by the Government of Ukraine over the past several years, especially targeting digital piracy. Unfortunately, to date, the Government of Ukraine has failed to implement the Action Plan (or prior plans). As a result of the failure to act, illicit peer-to-peer hosting and illegal websites have grown rapidly in Ukraine in the past few years. IIPA continues to recommend stepped-up criminal, administrative and civil enforcement, as well as reforms to Ukrainian laws (detailed in other IIPA filings)⁴ to effectively address digital piracy.

The Government of Ukraine has not proposed or introduced any legislation to address intermediary liability and liability for third parties that facilitate piracy. It has attempted, wrongly, to address only one piece of the required complete architecture for Internet enforcement, namely a notice and takedown regime. Without the other major parts, including intermediary and third party liability, the notice and takedown proposal will not be effective in reducing infringement or deterring commercial operators from engaging in practices designed to provide access to infringing materials. Even worse, the notice and takedown proposal is flawed – it is missing key elements, so that even if it were adopted, it would not work. The proposal (draft law) was introduced on June 1, 2013 and is entitled: a law “regarding the protection of copyright and related rights on the Internet.” If enacted, the draft law would create a highly

⁴ In other filings, IIPA has recommended enforcement actions and legal reforms, many of which overlap the recommendations in this filing on the three identified issues in the Section 301 investigation. The key enforcement actions that IIPA and its members recommend the Government of Ukraine focus on are: (1) criminally prosecuting the owners of the numerous pay-per-download and BitTorrent sites; (2) criminally prosecuting the principals of the rogue collecting societies that offer “licenses” to both online and physical businesses, that they do not have the authority to grant; (3) immediately taking down illegal websites; (4) systematically taking enforcement actions against open air and street market piracy occurring at large outdoor markets and in the streets (at or around underground stations, and near local shops and supermarkets), and including long-term closures of illegal businesses, plus the use of search warrants against “closed” premises and warehouses; (5) taking immediate actions to prevent the sale of pirated entertainment software products bearing illegitimate holograms at retail chains; (6) targeting organized criminal syndicates, applying criminal prosecutions and deterrent sentences (to date, the Government has instead relied heavily on non-deterrent administrative penalties); (7) targeting corporate end-user piracy of software with an emphasis on large-scale infringers (rather than targeting small companies and individuals); (8) stopping and prosecuting camcording piracy; (9) targeting infringers of cable transmissions and retransmissions, public performances, and unauthorized TV and radio broadcasts; and (10) properly implementing the Customs Code amendments, in force since February 2007, which provided customs officers with *ex officio* authority.

bureaucratic set of procedures (dependent on SIPSU administration), that would be time-consuming and costly just to take down infringing materials. It is our view that this legislation would create impediments rather than progress in the fight against Internet piracy, and that the draft bill should be withdrawn from consideration.

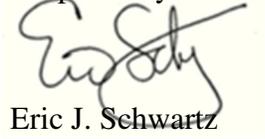
There is one digital piracy enforcement action that deserves special mention. IIPA members appreciate that a multi-national effort to stop the operations of demonoid.me is ongoing, including actions undertaken in August 2012 by Ukraine enforcement officials against a server located in Ukraine. IIPA and its members are closely following the progress of the criminal case in Mexico, Ukraine and Panama, and hope that a proper criminal investigation will commence and proceed accordingly – although almost one year later, no such criminal case has commenced. While the actions that began a year ago in Mexico, and are now proceeding in Ukraine are a positive step, this is but one of many illegal Internet distribution services in Ukraine that should be addressed—most notably, ex.ua. To be clear, Ukraine is not providing “adequate and effective” protection or enforcement with regard to digital piracy and this is causing significant harm to the copyright creators and industries represented by the IIPA.

IV. Conclusion

In sum, the denial of fair and transparent collecting societies, the pervasive use of illegal software in government agencies, and the overall absence of effective laws or enforcement directed at digital piracy is denying fair and equitable treatment for U.S. rightsholders and adequate and effective protection of intellectual property rights in Ukraine.

IIPA recommends that the Section 301 investigation conclude with this finding, and that the U.S. Government should apply all of the available trade remedies unless or until the Government of Ukraine properly addresses these problems as outlined in the U.S. Government PFC announcement, and the harm caused to U.S. rightsholders as set out in this, and other, IIPA filings.

Respectfully submitted,



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