

UKRAINE

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

2018 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that Ukraine be retained on the Priority Watch List in 2018.¹

Executive Summary: Ukraine has been on the Priority Watch List since 2015 for long-standing deficiencies in its legal and enforcement regime. In 2013, the U.S. Government designated Ukraine as a Priority Foreign Country (PFC) triggering a year-long investigation of Ukraine's IPR regime as required by section 301 of the Trade Act of 1974 which cites to "acts, policies and practices" deemed "unreasonable and [which] burden or restrict U.S. commerce" including "the denial of adequate and effective protection of intellectual property rights." The U.S. Government identified three critical problems in Ukraine for its PFC designation including the failure to implement "an effective and systemic means to combat widespread online infringement of copyright and related rights" and "the unfair, nontransparent administration of the system for collecting societies." In March 2014, after completing its PFC investigation, the U.S. Government acknowledged 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, the U.S. Government decided to take "no action under Section 301" at that time "[i]n light of the current political situation in Ukraine," and instead placed Ukraine on the Priority Watch List.

The problems that triggered the PFC designation almost five years ago, continue unabated today, and are causing severe economic harm to U.S. copyright rights holders in Ukraine, as well as to Ukrainian rights holders. As a result, on December 27, 2017, by proclamation (citing 502(c)(5) of the Trade Act of 1974 regarding "adequate and effective protection of intellectual property rights"), the President suspended the duty-free treatment accorded certain products from Ukraine under the Generalized System of Preferences (GSP) program. The GSP suspension will become effective on April 26, 2018. Ukraine could avoid this suspension if, in the next few months, it moves decisively to address the long-festering problems of digital piracy and the poor administration of collecting societies.

In the past two years, there have been some positive enforcement actions, most notably the closure of major infringing websites and services. For example, in 2016, a transnational enforcement operation, including Ukrainian authorities, arrested the Ukrainian operator of *kickasstorrents* (*kat.cr*) in Poland. That website, which was one of the largest torrent sites in the world and considered by U.S. criminal enforcement agents as a "lucrative flea market" for "infringing movies, television shows, video games, music and computer software," is currently shut down. Other major sites and services with contacts to Ukraine have also been taken down in recent years, including: *ex.ua*, *torrent.net.ua*, *extratorrent.cc*, *fs.ua* (*fs.to*), and *hdclub.org*.

Last April, USTR's Special 301 Report acknowledged other positive steps taken in Ukraine including the creation of a specialized IP High Court and of a Cyber Police Department within the National Police Department, as well as cooperation by the National Police with FBI and INTERPOL on IP matters. However, the U.S. Government voiced its continuing frustration with Ukraine on the unauthorized collecting societies noting that "little has changed" and that many "rogue collective management organizations continue to operate freely in Ukraine" but holding out hope for legislative reforms. Those reforms never happened in 2017; now, there is renewed hope that the Government of Ukraine will act properly on the collective administration problem in 2018. One proposal that circulated last year would be a step backward if enacted; it would create a single state-run "super" collective management organization and should not be allowed to advance. A way forward is a draft bill (Bill #7466) which, to a large extent, is based on a favorable draft prepared by international experts in 2015.

¹For more details on Ukraine's Special 301 history, see previous years' reports at <https://iipa.org/reports/reports-by-country/>. For the history of Ukraine's Special 301 placement, see <https://iipa.org/files/uploads/2018/02/2018SPEC301HISTORICALCHART.pdf>.



One positive step was the passage of anti-piracy legislation in 2017. The first of two bills is entitled “On State Support of Cinematography” (Law of Ukraine #1977-VIII) and entered into force on April 26, 2017; it amends the Copyright Act, the Criminal Code, the Telecommunications Act, and the 2015 e-Commerce Law. It criminalizes camcording (Article 176 of the Criminal Code), as well as the financing of piratical operations. Camcording is a significant problem in Ukraine; but, the new law has some ambiguities and has not yet been put to use, so it is not yet clear if these problems can be overcome. The Copyright Law amendment did clarify that camcording in theaters is illegal, and it excluded camcording from any “private use” exception. The new law also created detailed procedures and timetables for takedown notices and responses. The notice and takedown provisions apply only to audiovisual works, musical works, sound recordings and computer programs (so e.g., not including literary works, or photographs), and the law has some deficiencies (most immediately, no administrative agency in charge of enforcing it). Separately, a judicial reform bill (Law of Ukraine #2147-VIII) was adopted on October 3, 2017 (in force, December 15, 2017); it included amendments to the Commercial Procedure Code, the Civil Procedure Code and the Administrative Code. The judicial reform bill also importantly established a High Court on Intellectual Property Matters (set to start its work in September 2018) for civil IP cases.

Additional legal reform is still needed to: (i) broaden the scope of works covered under the new notice and takedown procedures; (ii) eliminate the need for attorneys to file such notices, and to simplify and improve the process, especially if ambiguities in the law make the notice system unworkable; and (iii) add clear third-party liability for website owners and Internet Service Providers (ISPs) to encourage cooperation with rights holders. The Government of Ukraine needs to prioritize the establishment and funding of an agency to administer the new anti-piracy law, including the authority to impose sanctions (fines) for non-compliance. In addition, criminal enforcement, which several industries report worsened in 2017, needs to significantly improve in order to develop a legitimate marketplace for the digital distribution of music, films, television programs, video games, and books online in Ukraine for the benefit of foreign and domestic rights holders, Ukrainian consumers, and the local economy.

PRIORITY ACTIONS REQUESTED IN 2018

IIPA recommends the following priority enforcement actions and legal reforms to the Government of Ukraine in 2018:

Criminal enforcement:

- Focus criminal enforcement, using the newly adopted and existing laws, on: (i) owners and operators of ISPs that host illegal streaming, pay-per-download, peer-to-peer (P2P) and BitTorrent sites, including sites dedicated to pirated music, film, entertainment software and printed materials; and (ii) the principals of collective management organizations (CMOs) operating without legal authorization from rights holders, including foreign rights holders; and (iii) the principals and participants of camcording operations.
- Coordinate key agencies, including the National Police and the General Prosecutors Office and their respective enforcement practices and investigations; significantly increase the number of investigations (i.e., criminal searches) and prosecutions; properly resource enforcement authorities, including the specialized Cyber Police Department within the National Police (which needs a sub-unit dedicated to IP-related crimes); and, establish specialized IPR prosecutors within the General Prosecutors Office.

Legal reforms:

- Fully implement the WIPO Internet Treaties (the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT)).
- Amend the Telecommunications Law and e-Commerce Law to reconcile existing conflicts to provide clear rules of liability for ISPs and other third party providers of online services pertaining to copyright matters.
- Enact the Law “On Collective Management” based on the draft first prepared by international experts in 2015, to require organizations to operate with proper transparency, accountability, and rules of governance. The government also needs to adopt proper accreditation procedures (based on the criterion of the largest

representation of domestic and foreign repertoire in active use) to rationalize the current chaotic situation of numerous competing CMOs.

- Repeal the requirement to manufacture film prints in Ukraine, as well as the other market access barriers that value films for the VAT based on projected royalties and that exempts Ukrainian (or Ukrainian dubbed) films.

COPYRIGHT ENFORCEMENT IN UKRAINE

As technological advances have taken hold in Ukraine, and online services for copyrighted materials have grown considerably in recent years, the IPR legal regime has lagged behind. In 2009, only about 18% of Ukrainians had access to the Internet, now just over 50% of the population has access—according to the International Telecommunications Union (ITU) (December 2017 Report). Ukraine is a key country in the region for effective enforcement of IPR because it exports piracy, especially digital piracy, into both the European Union markets and other countries regionally. For example, *Gostream.is* (formerly *123movies*) was placed on the U.S. Government's list of Notorious Markets in January 2018; it is a cyberlocker offering hundreds of unauthorized popular movies and television content, and is believed to be hosted in Ukraine.

Internet Enforcement: Weak digital enforcement has resulted in an exponential increase in the number of illegal P2P hosting and website-based Internet piracy sites. Legal markets in Ukraine are being harmed by BitTorrent sites (some located in Ukraine) as well as by online streaming sites of music and movies. Some Internet pirates have purposefully moved their servers and operations to Ukraine in the past few years to take advantage of the weaknesses in the law. In 2017, Ukraine ranked third in the world in the number of connections by peers participating in the unauthorized file-sharing of select video game titles on public P2P networks using PCs, retaining its position from 2016. Ukraine is also ranked third in the world for mobile infringement of video games, up from sixth in 2016.

As noted, the taking down of major pirate websites including *ex.ua* and *fs.us* (*fs.to*)—two of the largest and most popular pirate sites in Ukraine—has been a step in the right direction in Ukraine. For years, *ex.ua* had been one of the most popular sites in Ukraine, allowing free streaming and downloading of unauthorized copyrighted content, and it was on the U.S. Government's list of Notorious Markets for years. One report is that *ex.ua* has resurfaced as a cyberlocker at *fex.net* and is a source of infringing material there. Another site, initially linked to Ukraine, that had been on the Notorious Markets list since 2013, and which was disrupting markets in India, Pakistan, and China among many other territories, was *extratorrent.cc* (*extratorrent.com*). It was removed from the U.S. Government's Notorious Markets list in January 2018 after its "operators announced in May 2017 that they were shutting down *Extratorrent* and its mirror sites."

There are many remaining pirate websites in Ukraine, and many of these are in English directed to Western markets, including streaming sites, torrent sites, cyberlockers, and linking sites such as: *mbxclusive*, *leakedearly*, *hiphoidream*, *purplinks*, and *musicfire*. Additionally, there are a number of sites offering unlicensed pay for download musical recordings, including *mp3caprice.com*, which claims to have copyright licenses from the rogue collecting society AVTOR. The motion picture industry notes these sites as being particularly problematic: *kinofilms.tv*, P2P and tracker sites, such as *oday.kiev.ua*, *yify-torrent.org* hosted with *infium*, and *wtv.to* hosted with *cw/protect*.

One major initiative that has been undertaken in cooperation with Ukraine's four major media groups, the largest television channels, and rights holders, has been to monitor advertising of well-known brands on pirate sites. The Ukrainian Anti-Piracy Association (UAPA) has started to monitor these sites and to notify major brands that are advertised on these sites to get the brands to pull their advertisements; UAPA is also sending similar notices to the advertising agencies. After a September 2017 conference that included many of these parties working cooperatively, a list of pirate websites was created for the brands and advertising agencies to readily identify sites to avoid (*blacklists.org.ua*); rights holders report that the initiative has, so far, yielded positive results.

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 fully implemented.

The U.S. Government noted in its 2013 designation of Ukraine as a PFC that the Ukraine IPR regime failed “to institute transparent and predictable provisions on intermediary liability and liability for third parties that facilitate piracy; to introduce limitations on such liability for ISPs; and to enforce takedown notices for infringing online content.” In fact, not only is there no clear third party liability that could incentivize cooperation between rights holders and ISPs, but the current Law on Telecommunications (Article 40, paragraph 4 on the “responsibility of operators”) bluntly states that ISPs “do not bear responsibility for the content of the information transmitted through their networks.” Instead of creating incentives for ISPs to take action and cooperate with rights holders, the current law in Ukraine is premised on prescribing actions for rights holders to request, that ISPs have no obligation or legal incentives to comply with. Article 38 states that ISPs can only disable end-users from the Internet, or block access to (i.e., takedown) infringing websites, with a court order. In the past, the Internet Association of Ukraine (IAU), representing the ISPs, has taken the position that rights holders need to go after illegal websites directly, without ISP assistance or cooperation, citing this statutory language. The 2017 amendments to the Telecommunications Act will only require defined “websites” and “hosting providers” to respond to proper takedown notices, but to otherwise retain their immunity from liability (so, the 2017 amendments did not revise Articles 38 or 40).

Many of the websites offering pirated copyright materials are thriving in part because of the support of local ISPs (there are hundreds of ISPs in Ukraine and hundreds of sites offering pirated content). This is particularly true in eastern Ukraine. Until the passage of the 2017 package of anti-piracy laws, the copyright industries had, for years, sought private agreements (with governmental assistance) with ISPs to establish effective mechanisms to takedown illegal websites and slow illegal P2P traffic. In the absence of legislation on liability, these voluntary efforts generally did not succeed, although, some ISPs did delete links to infringing content upon request. For the past several years, conferences and meetings were organized to try to get ISPs, broadcasters, advertisers and rights holders (via UAPA) together to cooperatively agree on procedures to respond to takedown notices and to take effective action against unauthorized sites. Until the new laws were adopted in 2017, UAPA and the Motion Picture Association of America (MPAA) reported that about one in five takedown requests in Ukraine resulted in action (since there were no laws mandating compliance). Other industries report that, without a Memorandum of Understanding, and with laws essentially granting immunity from liability, the Ukrainian ISPs have not, to date, cooperated with rights holders.

Now, the 2017 law mandates responses by ISPs and hosting sites to properly submitted takedown notices from rights holders. The 2017 law requires that such notices must come from attorney’s for rights holders to hosting providers, and mandates that the hosting provider notify the alleged unauthorized user (website) within 48 hours, and then act within 24 hours to take down the content; it also provides for put-back provisions. The law also addresses repeat infringement problems, holding services liable if the same content re-appears twice within a three-month period. In addition, the 2017 law requires website owners and hosting providers to have contact information on their sites, and to participate with the whois database, and, it provides certain safe harbors if hosting providers properly comply with the law. Still, even with the 2017 amendments, the Telecommunications Law explicitly stipulates that these site and service operators have no responsibility for the content on their websites (even with knowledge it is infringing), except to respond to proper takedown notices. In 2017, UAPA issued 2,758 takedown notices and cease and desist letters to site operators and hosting providers, including 28 notices sent based on the 2017 law (Article 52-1 of the Copyright Law).

The new notice and takedown procedures will need to be properly implemented. In 2016, the Government of Ukraine abolished the State Intellectual Property Service of Ukraine (SIPSU) for poor governance and transparency problems. In addition, all of the state IP inspectors who had worked for SIPSU were fired. In 2017, as a result of a package of governmental reforms and funding issues, no new agency was assigned to replace SIPSU’s copyright enforcement authority. Thus, while SIPSU was a problem for rights holders for its governance issues, there is no

agency in place to fill the gap making it all but impossible to effectively use the new anti-piracy law. This does not bode well for better enforcement.

In addition, and more importantly, even as websites and hosting services have been taken down, and some advertisements have been taken off of unauthorized sites and services, criminal enforcement against the owners and operators of these websites or hosting services, has rarely been successful (or even seriously pursued). Further complicating enforcement, is a lack of resources by enforcement authorities (and, some large piratical operations have been set up in the eastern part of the country engaged in conflict, and out of reach of the Ukrainian police).

There were 18 criminal digital piracy investigations opened in 2017, compared to 55 in 2016 (and 31 in 2015). In addition, 45 pirate sites were closed by the police or site owners (compared to 78 in 2016 and 61 in 2015), although some were operational almost immediately after their closure.

The motion picture industry reported only two criminal verdicts in 2017 for online piracy: one against a streaming site (*live-films.in.ua* and *kinozal.tech*) in which the operators received a three-year sentence, with an additional year of probation; and another against another streaming site (*filmscop.tv*) with the same verdict.

Thus, more criminal enforcement will have to be undertaken if the problems in Ukraine are going to improve. Currently, the Criminal Procedure Code does not grant police *ex officio* authority, so the police are unable to initiate 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 criminal 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, the Cyber Police Department was established within the National Police Department for the purpose of combating Internet crimes. In 2016, 30 investigators were recruited to join this unit; that number was raised to 200 investigators in 2017 (but the number, if any, dedicated to IP-related crimes is unclear). The formation of this unit was good news, but, to date, it has focused on non-IP related online crimes. Recently, a new dedicated sub-unit was formed to focus on IPR offenses (not general cybercrimes); that too is good news. Now it needs proper staffing and resources (e.g., computer equipment). All of these problems combined with a 2015 re-organization of the police nationwide, have left the police short of the resources they need to be effective.

For civil enforcement, it is hoped that the new High Court for IPR offenses, to be set-up by September 2018, will itself have the expertise to try IPR cases, and will also develop guidelines for judges in other courts. One reason for the new court is to avoid the current problem of defendants forum shopping for courts with little experience, and which, as a result, treat IPR offenses leniently. The new High Court needs to be properly staffed with qualified IP-trained jurists and resourced.

Collecting Societies: The current collective administrative system in Ukraine, with 18 competing collecting societies, is chaotic, and will not be corrected until a new law on collective administration is enacted and the accreditation procedures are fixed. Many of these CMOs grant inexpensive licenses to users of copyrighted material to “clear” their obligation to pay private copy levies, public performance licenses, or licenses for online music services. The unfair and nontransparent administration of rights was cited as a reason for the designation of Ukraine as a Priority Foreign Country. Unfortunately, none of the 2017 legal reforms addressed the collective administration problems, and this failure to act is the principal reason behind the Presidential proclamation in late December 2017 to remove Ukraine’s GSP benefits.

Collecting societies in the music sector, specifically in connection with broadcasting, public performances and certain other communications to the public, can provide cost effective services to both rights holders and users for licensing, collecting, and paying remunerations. After years of mismanagement by the Government of Ukraine, a 2013 court order invalidated the existing accreditation procedure for CMOs licensing broadcasting and public performances for musical recordings. The court rescinded an executive order that had vested authority to implement the accreditation of collecting societies in SIPSU (formerly known as the State Department of Intellectual Property (SDIP)). After SIPSU was dissolved, in May 2017, some of its IP portfolio was moved to the Ministry of Economic Development and Trade (after a re-organization which moved the IPR portfolio from the Ministry of Education and Science). The 2013 court decision held that SIPSU had no authority to accredit authorized (registered) collecting societies. The current chaos has prevented the development of the marketplace for legal music services, resulting in the loss of millions of dollars in legitimate business for music rights holders in Ukraine. In addition, pirate websites contain music and audiovisual material, claimed to be “licensed” from the rogue collecting societies.

The main criterion for accreditation should be to accredit the organization based on a majority of national and international repertoire represented, and the organization should be owned and managed by rights holders. The accreditation process should reflect commercial realities and be based on the society that represents the majority of national and international repertoire in actual use, as IIPA and other organizations have long suggested. The organization should be owned and governed by rights holders because of their direct economic interests in having a well-functioning collective management organization (CMO) and it should operate based on mandates from local rights holders as well as foreign rights holders either directly or through sister societies. IIPA's proposed solution is the enactment of a new Law “On Collective Management” consistent with the 2015 draft worked on by U.S., E.U. and WIPO experts (and consistent with all the major international rights holders organizations). The latest bill (broadly) based on the 2015 draft is Bill #7466.

Under a proper CMO law, the current accreditation system would be reconstituted, and societies would be granted operational licenses provided they meet statutory criteria. Further, no more than one society representing the majority of commercially used rights and repertoire (in each sector or category of rights and rights holders) would be appointed as the (CMO) benefiting from an extended collective license. This would prevent accreditation to a society that had a nominally high volume of repertoire (when in fact, most of the repertoire is never actually performed or otherwise used), and avoid favorable treatment to undemocratic, non-representative and non-transparent collecting societies, which, with their internal governmental influences, have, unfortunately, been allowed to operate.

While the law in Ukraine provides for remuneration rights for the broadcasting or other public performances of musical works and sound recordings, it is estimated that over half of the broadcast and public performance market places are unlicensed. This problem has been significantly worsened because the Government of Ukraine has not undertaken proper actions against organizations created in violation of the Copyright Law. These societies claim to have the power to license on behalf of all rights holders based on an interpretation of current law, despite having no international mandate. This has led to parallel licensing, unfair competition, and legal and commercial uncertainty. A 2016 “moratorium” on regulations halted the registration of any new societies, but did not solve the problem.

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

Criminal Enforcement: As highlighted already, one key to improve enforcement, especially against online piracy is to properly form a sub-unit dedicated to IPR crimes within the Cyber Police Department within the National Police Department of Ukraine, and to properly train, staff, and resource it. And, the unit must be allowed to engage in

enforcement actions against owners and operators of infringing websites and services without political interference. In November 2017, a State Bureau of Investigation was formed in the General Prosecutors Office. This bureau is an independent body with very limited authority against whom it can carry on investigations (e.g., state officials and judges), and most online piracy operations are outside of the scope of its authority. It is recommended, instead, that the Government of Ukraine create a separate IPR unit within the General Prosecutors Office to focus on criminal prosecutions against online piracy operations, and that the unit be properly staffed and trained.

The lack of effective criminal prosecutions and deterrent sentencing is a lingering problem in Ukraine for both digital and hard copy piracy. In 2005, the Criminal Code (Article 176) was amended to lower the threshold for criminal prosecution. The current threshold is 17,620 UAH (or US\$618). The main concern with the threshold is that there is no unified approach on how to calculate a valuation of the copyright material in question, so the threshold acts as a bar to criminal enforcement, resulting in rights holders having to use less effective administrative actions instead. This is particularly true for online piracy matters, where the valuation of damages (by law enforcement agents, prosecutors and the courts) is too difficult to calculate absent an official methodology, and prevents the initiation of criminal investigations and prosecutions. Additionally, enforcement officials have applied the threshold on a per-rights holder basis, which means that when illegal material is seized and the material for every rights holder does not exceed the threshold, a criminal case does not proceed (the losses cannot be combined).

There are other criminal procedural problems as well, including: (1) rules regarding the use of expert evidence (denying the use of rights holder experts); (2) non-deterrent sentences for repeat offenders; (3) delays and case dismissals that can be fixed with changes to the Criminal Code or Criminal Procedure Code (Article 242-6 requires an expert to calculate damages caused by a crime – and there is a scarcity of these experts); (4) the lack of presumptions that rights holders are the infringed (harmed) party to commence a criminal proceeding; (5) the lack of guidelines for judges on sentencing and developing expertise in IPR cases; and (6) a 2017 amendment (Article 242 of the Criminal Procedure Code) creating a procedural hurdle by requiring a court's permission before an investigator or prosecutor can offer forensic evidence.

Provisions exist in the Ukrainian Criminal Code (e.g., Article 28) for prosecuting organized groups or criminal organizations, including for IPR offenses, but these provisions have been under-utilized by prosecutors. Other (related) lingering enforcement problems: (1) the required proof of ownership in criminal and civil cases, including a complete chain of title, and the denial of standing to licensees, especially of foreign record companies; (2) the confiscation and destruction of infringing goods, as well as materials and equipment used for their manufacturing is not clearly a part of the Criminal Code sanctions; (3) the requirement that parties in all cases – beginning in 2017 – be represented by local counsel (no more *pro se* or power of attorney representations).

Other Key Enforcement Issues: The copyright industries continue to report persistent problems with the administration of the hologram stickering system (adopted in 2000). The holograms stickering system should be repealed.

The camcording of motion pictures in theaters and the quick transfer of these illegal copies on the Internet remains a major problem for the motion picture industry; it is mostly undertaken by criminal syndicates operating in Ukraine and Russia. As a consequence, illicit camcording shifts quickly between the two countries, resulting in hard copy and Internet piracy. The 2017 Cinematography Law entered into force on April 26, 2017, so it is too early to tell if it will be effective. As noted, it amends Article 176 of the Criminal Code to criminalize camcording. But, there are definitional and other ambiguities in this law, so it is not yet clear if the law will actually be effective, as intended.

Between 2011 and early 2017, over 130 camcords (including audio only and video only recordings) have been sourced from Ukraine. In 2017, through October, there were at least seven videos sourced from Ukraine; in 2016 there were 13 illicit video recordings. Theatrical piracy is also a problem in Ukraine, especially a small theaters which screen pirate prints without a license which is a violation of the Administrative Code (Article 164-6). The 2017 amendments added definitions in the law for “camcording” and made it a clearly subject to criminal penalties. In

2017, there were 13 arrests for (and interdictions, where theater or security personnel stopped the activity of) camcording in theaters. In 2017, 10 theaters were ordered to close operations, and criminal cases against four theater owners were commenced (warning letters were sent to six other theaters).

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

Broadcast and cable television piracy continues to be a major problem for the motion picture and recording industries—both with regard to regional and nationwide broadcasts.

Administrative and Customs Enforcements: The Administrative Code (Article 164-17) includes fines for infringing websites that do not respond to takedown notices regarding infringing materials (as well as fines for unfounded claims for blocking content). But, the administrative agency in charge of enforcement was dissolved, and no new authority has yet been established.

The Government of Ukraine should also increase the number of administrative enforcement actions by moving aggressively against copyright-infringing cable transmissions and retransmissions, public performances, and TV and radio broadcasting with administrative (as well as, where applicable, criminal) actions. Administrative fines for physical piracy (street piracy, retail stores, etc.) are low: most fines are from US\$40 to a maximum of US\$400. In addition, *ex officio* authority should be used to improve border controls, especially along the Russian border.

COMPLIANCE WITH EXISTING OBLIGATIONS TO THE UNITED STATES

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

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

In 2010, the Government of Ukraine developed an IPR “Action Plan” in cooperation with the U.S. Government, to combat and target the digital piracy problem, but the plan was never completely implemented. For example, addressing the problems of ISP liability, notice and takedown, administrative remedies, and fixing or eliminating the hologram sticker program, are all covered in the 2010 Action Plan, and have not been fully and properly addressed by the Government of Ukraine. The 2017 Act does address some of these issues, with formal notice and takedown provisions and timetables, and penalties for noncompliance.

LEGAL REFORMS

As noted, two major pieces of legislation—Law of Ukraine #1977-VIII (cinematograph law) and Law of Ukraine #2147-VIII (procedural amendments)—were enacted in 2017. These resulted in amendments to the Copyright Law, the Telecommunications Law (and the 2015 e-Commerce Law), the Criminal Code, the Commercial Procedure Code, the Civil Procedure Code and the Administrative Code. IIPA recommends additional legal reforms in Ukraine, in addition to full WIPO Internet Treaty implementation.

Copyright Law: Now that the 2017 laws amended the Copyright Law (and other laws) to institute formal notice and takedown provisions, the procedures and penalties for noncompliance, need to be properly implemented. The 2017 amendments establish a notice and takedown regime, without the need for a state authority or court. Under the changes to the Copyright Law, a takedown notice must contain specific information and be sent by a licensed lawyer to the hosting provider (ISP); it is deemed to be received when it is sent. The notice triggers specific timetables: 48 hours for the hosting provider to notify the website, and 24 hours to takedown the material; there is also a put-back provision (unless the rights holder commences infringement litigation within ten days). A rights holder can alternatively go directly to the ISP if an owner of an infringing website is not identifiable (i.e., not in the whois database). If the website does not take down the material, the ISP has to do so. The ISP retains its immunity (safe harbor) from any (i.e., not just monetary) liability if it complies. The new law includes a “repeat infringer” provision, so that if the same material reappears twice within a three-month period on the same website or webpage, the owners of the site or page can be held liable. There are no provisions in the new laws for “blocking” infringing websites, only for taking down infringing materials from sites.

There are numerous concerns with the new procedures: (1) they are burdensome—requiring ownership information, instead of a statement or affirmation of ownership; (2) notices must come from an attorney, and with an electronic signature; (3) a website owner can refuse action merely by claiming a “right” to use the work and the only remedy is for a rights holder to commence infringement litigation; (4) it only requires the hosting provider notify a webpage owner (which could be an uploader) to take material down, rather than acting to do so; (5) many of the definitions (“websites” and “webpages”) are unclear and appear to be inconsistent with international norms. In addition, to these burdensome procedures (and once an enforcement agency is established to administer the law), the Copyright Law needs to be amended to broaden the scope of works covered under the new notice and takedown procedures (and to improve those procedures), so that all copyrighted and related rights works are covered.

The bill also includes amendments to the e-Commerce Law enacted in September 2015 somewhat limiting the overbroad exemption from liability for ISPs and hosting service providers, which exceeded international norms. Under the 2017 changes, a provider of online services now can be held liable for copyright infringement if they do not comply with the notice and takedown rules. But, the definition of which services are covered is not clear. It is presumed to cover ISPs, but it is unclear whether a website that is hosting third party content (i.e., “webpages”) are covered; and, the new law has not yet been tested in the courts. Since civil litigation is the only avenue for rights holders for noncompliance with the notice and takedown requests, there needs to be a clear basis for liability for sites and services online, and it should be broad third-party liability (not just related to responses to takedown notices) applicable to website owners and Internet Service Providers (ISPs). Providing clear third party (ISP) liability is critical to effective enforcement and cooperation with rights holders, and can be done in a manner under generally accepted standards applicable to parties who “induce” infringement, and including provisions to reasonably gather and retain evidence. Additionally, the new law did not establish a duty to provide information to law enforcement agencies and rights holders, which should be added.

Other deficiencies in the Copyright Law require: (1) clearly defining temporary copies; (2) revising Article 52 to provide licensees of foreign music companies equal treatment as local right holders; (3) making either the non-payment of music rights royalties or of private copying levies an infringement of copyright and/or related rights; (4) adding statutory damages and/or a system of enhanced damages in order to adequately compensate right holders and deter further infringement (Article 52—to double actual damages); and (5) ensuring that an unauthorized online distribution, communication, or making available is considered an act of infringement, regardless of whether it is undertaken for profit-making purposes or other commercial benefit or advantage.

Law on Collective Management: New law and subsequent regulations to govern the activities of Ukrainian collective management organizations are needed to improve the current situation, and to restore public trust and basic business practices for the administration of public performance rights and the broadcast markets. IIPA recommends the completion and enactment of a long-delayed draft Law on Collective Management, and that any such law incorporate the 2015 recommendations of European Union and U.S. experts in the music industry first

drafted by the experts in 2015, including for provisions pertaining to extended collective management (for broadcasting, public performances, cable retransmissions and private copying levies). Collective administration should be based on transparency, good governance (established and controlled by rights holders), and on the basis of the volume of rights in active legal use in Ukraine. As noted, it appears that these principles have been incorporated in the January 2018 draft bill (Bill #7466), based in large measure on the 2015 experts' draft.

e-Commerce Law: An e-Commerce Law was adopted in September 2015, and then amended in 2017. As noted, the 2015 law included broad ISP liability "safe harbors" which are not consistent with international norms and far exceed U.S. law (as well as the Association Agreement with the European Union). After the 2017 amendment, the only "liability" of ISPs is to comply with takedown notices. The law should be amended to provide for clear third party liability (in this law and in the Copyright Act), consistent with international norms as well as U.S. and E.U. laws.

Criminal Code and Criminal Procedure Code: In 2017, as part of the package of amendments, Article 176 was changed so that there are criminal remedies against online piracy of all works and sound recordings (the old law only applied to hard copy piracy), and it added sanctions for camcording. The codes should be amended to provide: (1) remedies against repeat infringers (within 12 months) that would automatically lead to criminal, not solely, administrative prosecution (and, even if each separate infringement is below the criminal infringement threshold); (2) clear rules in the Criminal Procedure Code for prosecuting infringers, and remedies for intentional infringements related to the obligation to pay music rights royalties.

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

Administrative Remedies: Administrative courts should be empowered 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.

In 2017, there were changes to the Administrative Code adopting new remedies: (1) Article 164-17 for failing to properly respond to takedown procedures for infringements by ISPs and websites; (2) Article 164-18 for "knowingly providing false information" for takedown notices; and (3) provisions pertaining to administrative violations of the new procedures (but, as noted, the authority to do this was vested in SIPSU which was closed down).

For physical piracy, administrative remedies exist but they are not being used effectively to remove the business licenses of infringing retail stores, kiosks, and other smaller scale pirates. Further amendments have been proposed, but never adopted, to increase the maximum fines, which IIPA continues to recommend.

Customs Code: The Customs Code of Ukraine has included some administrative improvements in recent years. IIPA continues to recommend the abolition of the customs registration system altogether because it is an unnecessary maze of regulations which interferes with effective border enforcement, especially for some industries. Another matter that has been a concern is the treatment of seized infringing materials. The Customs Code (Article 401) provides that goods failing to clear customs because of alleged IPR infringements, may be seized and destroyed by Customs authorities without a court order (i.e., an expedited destruction). But in practice, this procedure is applied only in cases where rights holders notify Customs officials about alleged infringing material; the destruction is then undertaken at the rights holder's expense and in doing so, releases the infringer of any administrative liability, and thus any deterrence from repeating their infringing actions.

MARKET ACCESS ISSUES

The Government of Ukraine continues to maintain onerous market access barriers. Two of these barriers are: (1) an obligation to manufacture film prints and digital encryption keys in Ukraine; and (2) customs valuation rules that assess valuation on projected royalties, rather than on the underlying carrier medium. In December 2015, the Government of Ukraine adopted a law on VAT that discriminates against foreign films. It applies to the distribution, theatrical exhibition, and other public performances of films. In July 2017, the law went into force: it suspends the VAT “temporarily”—until January 1, 2023—on the exhibition and distribution of domestic films or foreign films dubbed into the state language, if the dubbing is done in Ukraine.

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

In addition, several years ago, Ukrainian Customs authorities declared new customs valuation rules. Rather than assessing duties on the underlying carrier medium, the new rules assess valuations based on projected royalties. To further complicate matters, Ukrainian Customs officials stated that the new ruling would be retroactive (three years), and would be enforced with serious penalties for valuations based on the carrier medium rather than royalties. Contrary to rumors that these rules might be reversed, in May 2012, the government revised the Customs Code and affirmed the duties on royalties for both theatrical and home entertainment imports. These valuation procedures are governed by CMU Resolution No. 446 (which is still in force). Unfortunately, no changes to this valuation (or to the manufacturing of prints requirement) were made in the Cinematography Law enacted in 2017.

GENERALIZED SYSTEM OF PREFERENCES (GSP)

IIPA filed a petition in 2011 to have Ukraine’s Generalized System of Preferences (GSP) benefits suspended or withdrawn. On December 27, 2017 (82 FR 61413) the President used his authority—citing 502(c)(5) of the Trade Act of 1974 regarding Ukraine’s denial of “adequate and effective protection of intellectual property rights”—to announce a suspension of the duty-free treatment accorded certain articles (products) from Ukraine under the GSP program. Unless Ukraine makes substantial progress on its IPR regime, the GSP suspension will go into force on April 26, 2018.