

UKRAINE

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

2020 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that Ukraine be retained on the Priority Watch List in 2020.¹

Executive Summary: There are two long-standing problems thwarting the growth of the copyright industries in the Ukraine marketplace. The first is very weak criminal enforcement—the result of an antiquated legal regime that cannot properly address online piracy, a lack of resources, and the absence of coordinated and effective campaigns against large-scale illegal operations. The second concerns collective management of music rights. Positive steps were taken in 2019 to address collective management through the accreditation of music-industry and artist supported collective management organizations (CMOs). The Government of Ukraine should be encouraged to continue on its path to normalize the CMO landscape, including taking actions against rogue collecting societies. Additionally, a major revision of the Copyright Law is underway, but the latest draft of the law has not yet been made public. There is much within the Ukrainian copyright system that needs modernization, so a major copyright revision is welcomed if it will lead to significant improvements to allow the film, book, video game and music markets to develop online as they have in neighboring countries. Amendments to the Customs Code were enacted in October 2019 with provisions aimed at improving copyright and trademark protections at the border.

In 2019, as in recent years, there were positive enforcement actions, including the closing of some large infringing websites and services offering unauthorized movies, television shows, video games, and music. There have also been a handful of criminal convictions—although none of these cases resulted in the deterrent sentencing of those found guilty of IPR crimes. IIPA continues to recommend more sustained actions, including deterrent sentencing, with a focus on the major commercial scale operations, and a nationally coordinated plan to address a problem that is significantly worse in Ukraine than in most other countries. The Government of Ukraine has taken other positive steps. Three years ago, it established a specialized IP court—although its jurisdiction is only for civil, not criminal, matters, and the court has not yet commenced operations. A year earlier, the Government of Ukraine established the Cyber Police Department within the National Police of Ukraine. A third positive step was the enactment of a package of anti-piracy legislation in 2017. Included in that package of laws was a clear requirement for Internet Service Providers (ISPs) to respond to notice and takedowns, although the procedures and timetables for takedown notices and responses are unduly complex. Despite these changes, the copyright industries report that there are no effective remedies to enforce the required responses to infringement by ISPs, and no incentives to cooperate because there is also no existing third party liability in the current law. As a result, the 2017 law has not had much impact on ISPs who mostly ignore notices even of clearly infringing material, and who otherwise use their broad liability exemption in the Telecommunications Law to avoid cooperating with rights holders. The Government of Ukraine needs to appoint an adequate number of state IP inspectors to ensure ISP compliance with the law, including the imposition of sanctions (e.g., monetary fines) for non-compliance.

PRIORITY ACTIONS REQUESTED IN 2020

Criminal enforcement:

- Focus criminal enforcement, using the newly adopted and existing laws, on: (i) owners and operators of 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 CMOs operating without legal

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/2020/02/2020SPEC301HISTORICALCHART.pdf>.



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 (and similarly in the Copyright Law as noted below).
- Revise the 2018 Law On Collective Management (CMO Law)—to correct the 2018 deficiencies, including: (i) fixing the rules used to calculate revenue-based tariffs for collective licensing organizations (including the treatment of “expenses”); (ii) adopting rules to identify current and future rates; and (iii) limiting the scope of extended collective licensing and the role of collective licensing organizations. In addition, the “cable retransmission” definition in the bill is a violation of international treaty obligations because it excludes local broadcasts. The 2018 law also repealed an effective enforcement tool providing an award of pre-established (statutory) damages. Statutory damages should be restored into the law, allowing rights holders to choose between seeking actual or statutory damages. A draft CMO bill (Bill No. 2255) would address many of these issues, but also includes some provisions in need of further revision, such as onerous database and record-keeping provisions that should not be adopted.
- Amend the Copyright Law to: (i) broaden the scope of works covered under the new notice and takedown procedures (to cover all copyrighted material); (ii) eliminate the need for attorneys to file such notices, to simplify and improve the process (and enforce the law applying penalties for non-compliance with such notices—currently, there is no agency to enforce the law); and (iii) add clear third-party liability for website owners and ISPs to encourage cooperation with rights holders (and to ensure that compliance with notice and takedown alone is not sufficient to avoid liability for those engaged in inducing or encouraging infringement).
- 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 exempt Ukrainian (or Ukrainian dubbed) films.

THE COPYRIGHT MARKETPLACE IN UKRAINE

The IPR legal regime in Ukraine has lagged far behind the rapid growth of technological advances as access to mobile devices, and the demand for online services for copyrighted materials, have grown considerably in recent years. According to the International Telecommunications Union (ITU), a decade ago fewer than one-fifth of the population in Ukraine had access to the Internet whereas in 2020, not only is access widespread, but Ukraine is home to many advanced coders, hackers and others engaged in highly technical activities that facilitate cybercrimes. The failure of Ukraine to modernize its law and engage in effective and deterrent enforcement means that legitimate markets cannot develop, and the country remains a major exporter of piracy into both the European Union markets and other countries regionally.

Internet Enforcement: The market for licensed materials in Ukraine is being harmed by illegal P2P hosting sites, especially BitTorrent sites (some located in Ukraine), as well as by online streaming sites of music and movies. The video game industry reports that BitTorrent indexing sites, direct download sites and user-generated content (UGC) sites are the most prevalent in Ukraine, with BitTorrent sites being the most popular source of pirated copies of video games in 2019 and direct download sites the second most popular. Piracy on mobile apps has become much more widespread in recent years. In 2019, Ukraine ranked second 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, up from third in 2018. Ukraine is also ranked second in the world for infringement of video games for the PC platform. The music industry reports that they are being harmed by popular BitTorrent indexing sites such as *rutracker.org*, cyberlockers such as *Turbobit.net*, and stream-ripping sites such as *savefrom.net*.

Since its establishment in 2016, the Cyber Police have been active in taking down pirate websites, including streaming, cyberlocker and BitTorrent sites. In 2016, two of the largest and most popular pirate sites in Ukraine—*ex.ua* and *fs.us (fs.to)*—were taken down. Unfortunately, *ex.ua* (for years on the U.S. Government's Notorious Markets list) has resurfaced as a cyberlocker at *fex.net*, and there are some reports of infringing material on that site. According to the copyright industries, sites continue to be taken down by a combination of police action and rights holders actions: in 2017, a total of 45 sites were taken down; in 2018 it was 74 sites; in 2019, it was 173 sites, with the vast majority being streaming sites (154 sites), and the remainder being cyberlocker and BitTorrent sites. Almost all of these sites are Russian language sites, so the sites were blocked in Ukraine (by ISPs), as part of the ban on Russian-based web services initiated by the Government of Ukraine in May 2017. The motion picture industry notes that some infringing sites have used hosting services in Ukraine, such as *yify-torrent.org* and *mejortorrent.org*.

The 2017 package of anti-piracy laws, as noted, created detailed procedures and timetables for takedown notices and responses and other measures meant to assist with civil, but not criminal, enforcement against online piracy. But, the 2017 laws are limited. First, the notice and takedown provisions apply only to audiovisual works, musical works, sound recordings and computer programs, but do not apply to literary works or photographs. Additionally, the law does not provide sufficient deterrent sanctions for non-compliance (there are fines, but not at deterrent levels). Since the Government of Ukraine abolished the State Intellectual Property Service of Ukraine (SIPSU) in 2016, including all of the state IP inspectors at SIPSU, there is no IP enforcement agency in place. A new National Intellectual Property Office (NIPO) within the Ministry for Economic Development, Trade and Agriculture (MEDTA) was formed last year, but without effective enforcement authority or resources; a draft law (Bill No. 2255) is under consideration to consolidate enforcement and other IPR issues within NIPO. In March 2019, MEDTA appointed seven officials in the Intellectual Property Department to serve as IP inspectors in accordance with the Administrative Offences Code (to impose fines for non-compliance with takedown notices or for filing false notices – Articles 164-17 and 164-18), but many more state IP inspectors are needed. The other part of the 2017 anti-piracy package included a judicial reform bill (Law of Ukraine #2147-VIII, in force in 2017) which amended the Commercial Procedure Code, the Civil Procedure Code and the Administrative Offences Code. That bill established a High Court on Intellectual Property Matters for civil cases. The initial plan was to start operations in late 2018, but even after 2019, the court is still not in operation because judges, with proper qualifications, have not yet been appointed to the court. Once operational, it is hoped that the High Court would be properly staffed and resourced and develop guidelines for judges in other courts, to avoid the current problem of defendants who forum shop for courts with little IP experience (and who, as a result, treat IPR offenses leniently).

The 2017 amended law mandates responses by access providers and hosting sites to properly submitted takedown notices from rights holders. The law is unduly complex and it requires that such notices must come from attorneys 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 law requires website owners and hosting providers to have contact information on their sites, to participate with the Whois database, and provides certain safe harbors if hosting providers properly comply with the law. However, even with many positive provisions, the law has no deterrent enforcement mechanism to compel compliance with the mandates by ISPs (even with knowledge of infringing material on their sites). Rights holders cannot commence civil actions against infringing sites nor can they seek orders to block sites (currently, there is no site-blocking mechanism in Ukraine at all). Rights holders can only send takedown notices under the 2017 laws. In 2019, UAPA issued 2,610 takedown notices, and cease and desist letters, to site operators and hosting providers, including 22 notices sent based on the 2017 law (Article 52-1 of the

Copyright Law). Ukraine should adopt high standard remedies that support today's creative-industry business models, including remedies that effectively respond to current challenges and reflect international best practices.

One key missing tool for effective online enforcement is clear third party liability for ISPs in Ukraine. No such laws exist at present, and in contrast, 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." Further, 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. Citing this statutory language, the Internet Association of Ukraine (IAU), representing the ISPs, takes the position that rights holders need to go after illegal website operators directly, without ISP assistance or cooperation. The 2017 antipiracy package of amendments (which included amendments to the Telecommunications Law, but not Articles 38 or 40) only requires defined "websites" and "hosting providers" to respond to proper takedown notices, but allows them to otherwise retain their immunity from liability. Without a legal obligation to do so, the ISPs will not cooperate as recent actions have shown. Prior commitments by the Government of Ukraine to provide specific and effective steps for online enforcement—including specific actions required in a U.S.-Ukraine Action Plan of 2010—have largely been ignored.

Many of the websites offering pirated copyright materials are thus thriving in part because of the support of local ISPs. This is particularly true in eastern Ukraine where several large piratical operations have started operations, now outside of any enforcement jurisdiction (two music piracy cases have been suspended for this reason). Before the new laws were adopted in 2017 (mandating compliance), UAPA and the Motion Picture Association (MPA) reported that about one in five takedown requests in Ukraine resulted in action. Other industries report that, without a Memorandum of Understanding (MOU), ISPs will not cooperate because the laws essentially grant total immunity, and there were no MOUs agreed to in 2019.

One major initiative of the past two years, 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. In 2018, UAPA 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 multi-stakeholder conferences (in 2017, 2018 and 2019), a list of pirate websites was created for the brands and advertising agencies to identify easily sites to avoid (*blacklists.org.ua*). Rights holders report that the initiative has, so far, yielded positive results.

Criminal Enforcement: While there have been sites taken down by the Cyber Police, there have been no effective criminal enforcement actions taken against the owners and operators of these websites or hosting services. Criminal enforcement against commercial scale actors is rarely pursued and even more rarely successful (or even seriously pursued). It was reported that in 2019 the Cyber Police commenced 41 criminal cases for illegal online activity (and two for camcording activity). Despite a total of 43 cases commencing, only three resulted in criminal convictions in 2019. The motion picture industry reported there were 42 criminal digital piracy investigations opened in 2018, compared to 18 in 2017 (55 in 2016 and 31 in 2015). In addition, 45 pirate sites were closed by the police or site owners (the same number in 2017, but down from the 78 in 2016 and 61 in 2015). The recording industry reported one major ongoing investigation against a large site operator, but the status of the case is unclear. In 2019, the motion picture industry reported two criminal cases against those creating illegal websites with audiovisual material with identical fines of 17,000 UAH (US\$710) imposed. One acquittal was successfully appealed, and a new criminal case commenced. There were additionally four criminal cases for illegal broadcasts of Ukrainian TV channels online in 2019. The court imposed a fine of 3,400 UAH (US\$142) in three cases, including against two individuals who supplied the equipment used for illegal disseminations; in the fourth case involving illegal set-top boxes, the defendant was acquitted.

Thus, more criminal enforcement against online infringement 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 criminal 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.

Adequate resources for criminal enforcement remain a problem. While the overall number of Cyber Police has risen (at the end of 2019 there were 1,600 officers), the number of investigators dedicated to IP-related crimes remains unclear. The Cyber Police have, unfortunately, focused on non-IP related online crimes to date, and their actions are limited by a lack of resources. A dedicated sub-unit was formed to focus on IPR offenses (not general cybercrimes); that too was good news. However, the copyright industries report that these units have not been properly staffed or resourced with proper 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.

It has been long-recommended 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. Once properly resourced, the sub-unit should be tasked with enforcement actions against owners and operators of infringing websites and services without political interference. Another recommendation is for the Government of Ukraine to form a specialized interagency working group of experts to address IPR crimes with representation from the Ministry of Interior (i.e., the National Police and Cyber Police), prosecutors, judges, MEDTA representatives, the State Fiscal Service, and other relevant agencies.

The lack of 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 (as of January 1, 2020) is 21,020 UAH (US\$857). 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). The requirement of “material composition of a crime” (causing significant material damage) should be repealed from the Criminal Code (Article 176, part 1). Also, the maximum fines for infringement are low—51,100 UAH (US\$2,136)—and thus, not deterrents.

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 and IPR crimes in general; (3) delays and case dismissals in pre-trial investigations 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. A recent troubling problem for online enforcement has been a “requirement” that rights holders provide proof of actual damages before cases can proceed. Until recently, indirect evidence was accepted by prosecutors. In addition, prosecutors demand disclosure of business confidential licenses (as examples of damages) in enforcement actions.

Provisions exist in the Criminal Code (Article 28) for prosecuting organized groups or criminal organizations, including for IPR offenses, but these provisions have been under-utilized by prosecutors. Other lingering enforcement

problems are: (1) burdensome required proof of ownership in criminal (and civil) cases, including a complete chain of title; (2) the absence in the Criminal Code of clear provisions for the confiscation and destruction of infringing goods, including the materials and equipment used for manufacturing; and (3) the requirement (since 2017) that parties in all cases be represented by local counsel (no more *pro se* or power of attorney representations).

Collecting Societies: Collecting societies in the music sector, specifically in connection with broadcasting, public performances, as well as certain other communications to the public (e.g., certain cable retransmissions), can provide cost effective services to both rights holders and users for licensing, collecting, and paying remuneration. A proper collective administration regime allows CMOs to operate with full transparency and accountability, and fair and balanced governance. It also provides for proper accreditation procedures based on the criterion of the largest representation of domestic and foreign repertoire in active use.

The 2018 CMO Law was intended as a starting point for proper accreditation of CMOs. In 2019, the Ministry of Economy started to implement the law and commenced the process of accreditation of legal CMOs, even over objections and strong resistance (political and legal) from opponents of reforms. After the first accreditation round, the process was halted by the courts, and the Ministry of Economy had to re-launch the process. Three industry and artist-supported organizations were accredited in 2019: (1) the Ukrainian League of Copyright and Related Rights (ULASP), accredited to represent performers and producers of sound recordings (and videograms) for public performances; (2) the Ukrainian Music Alliance (UMA) accredited to represent performers and producers of sound recordings (and videograms) for public broadcasting, but not including cable retransmissions (but including private copying levies); and (3) the Coalition of Audiovisual and Music Rights to license cable retransmissions of copyrighted and neighboring rights works. The All-Ukrainian Agency on Authors Rights was also accredited to collect for: (i) resale royalty rights for works of fine art; and (ii) the reprographic reproduction for literary works. CMOs still need to be accredited for the collection of royalties for public performances, including broadcasting, of musical works (musical compositions); it is expected that this CMO accreditation will be undertaken in 2020. Along with the proper accreditations, the Government of Ukraine also needs to take actions against any remaining rogue societies, including prosecuting those engaged in criminal and fraudulent activities relating to CMOs. Otherwise, while legal CMOs are being properly established, the problem of the rogue CMOs will persist.

A new draft CMO law was prepared for the Rada (Bill No. 2255), but not adopted in 2019, to address some of the shortcomings of the 2018 CMO law. The draft law contains improvements, but also has some troubling provisions that should be corrected before enactment. The shortcomings in the 2018 law that will hopefully be corrected in the new law are: (i) problems regarding royalty rate calculations; (ii) no transitional provisions for the application of tariff rates until new rates are set; (iii) a definition of “cable retransmission” that excludes all local broadcasts; (iv) unclear provisions on so-called “second tier” (additional accredited organizations) where a primary CMO exists; (v) troublesome extended collective licensing provisions (allowing CMO collections without rights holder authorization); and (vi) problems with the calculation of damages in copyright cases. Under the old system, CMOs would 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. These longstanding problems were one reason for the designation of Ukraine as a Priority Foreign Country (PFC) and the Presidential proclamation in December 2017 to remove Ukraine’s Generalized System of Preferences (GSP) benefits.²

Proper accreditation should mean that no more than one society representing the majority of commercially used rights and repertoire (in each sector or category of rights and rights holders) be appointed as the CMO managing the rights under the extended collective licensing and mandatory collective management regime. The 2019 CMO legislation (Bill No. 2255) would make three major changes to the 2018 law intended to improve accreditation and the operations of CMOs: (1) a governmental agency, NIPO, would govern accreditations, not the 2018-created Accreditation Commission; (2) it would correct overlapping CMO jurisdiction (deleting references to “additional

²The 2013 PFC designation was made for three reasons: (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) concerns with prevalent government ministry use of unlicensed computer software.

accredited CMOs”); and (3) it would address (but not fully correct) problems with royalty calculations. The legislation also has several problematic provisions pertaining to the management, exercise and control of a CMO—including who can establish a CMO, mandates for government-run registration of works, and onerous record-keeping and database requirements. In sum, IIPA welcomes the progress that has been made by the Government of Ukraine on these issues, and encourages the government to support the properly accredited CMOs.

Camcording: The 2017 package of anti-piracy reforms included the bill “On State Support of Cinematography” (Law of Ukraine #1977-VIII), which entered into force on April 26, 2017. It amended the Copyright Act, the Criminal Code, the Telecommunications Law, and the 2015 e-Commerce Law. Those resulting changes included criminalizing camcording (Article 176 of the Criminal Code), as well as criminalizing those who finance piratical operations. The new law clarifies that camcording in theaters is illegal for any purpose if done without authorization from the rights holder. Although there are no exceptions in the camcording law, the Copyright Law does include a general undefined “private use” exception that some experts fear may be problematic against camcording activities. In June 2019, the first camcording sentence under the new law—a fine—was imposed. However, even with the new law, 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. These activities are mostly undertaken by criminal syndicates operating in Ukraine and Russia moving quickly between the two countries.

Between 2011 and 2019, over 197 camcords (including audio only and video only recordings) were sourced from Ukraine. In 2019, there were at least three MPA-member company videos sourced from Ukraine (there were four in 2018, six in 2017 and 13 in 2016). During 2019, there were 197 camcording events identified by the motion picture industry, with 18 theaters ordered to close operations. Unfortunately, there were no criminal cases commenced against theater owners. Theatrical piracy is also a problem in Ukraine, especially in small theaters which screen pirate prints without a license—a violation of the Administrative Offences Code (Article 164-6). In 2019, there were no cases commenced using Article 164-6, compared with 13 arrests in 2017.

Broadcast and Cable Television Piracy: Piracy of content by broadcast and cable television systems, including by the state-owned radio and television networks, continues to be a major problem for the motion picture and recording industries—both with regard to regional and nationwide broadcasts. There are a large number of Ukrainian cable operators that continue to transmit audiovisual programming without licenses. The Government of Ukraine should take actions ensure that its state-funded enterprises pay for the copyrighted content that they broadcast. Enforcement authorities should shut down these operations and use enforcement measures against the operators of these systems. Unlike in 2018 (when 35 cable operators were cited), there were no actions taken in 2019, but starting in January 2020, 23 national television channels started to encrypt their satellite signals, which should improve protections.

Administrative Enforcement: 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 Offences Code (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. The Administrative Offences 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). However, as noted, there are an insufficient number of state IP inspectors to enforce these (or other) IP violations.

The Government of Ukraine should 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.

Customs Enforcement: 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 Customs Service are not sufficiently engaged in enforcement measures and under utilize their authority. Cooperation with right holders could be improved as well. IIPA continues to recommend the abolition of the customs registration system altogether because it impedes effective border enforcement. 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). 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 its infringing actions. The 2019 amendments to the Customs Code (Law No. 202-IX) enacted on October 17, 2019 are aimed at bringing the Ukrainian Customs Code closer to the European Union customs standards and practices, including for the destruction of infringing goods. The amendments broadened the scope of counterfeit and pirated goods to improve enforcement, and provided the tax authorities with broader *ex officio* enforcement authority.

Hologram Stickers: In 2018, Law of Ukraine #2514-VIII, amended existing law to improve the licensing of audiovisual works, sound recordings and software, and included sanctions for the removal of rights holder authenticity marks from copies of such works and recordings. The 2018 law was an amendment to the ongoing use and administration of the hologram sticker system (adopted in 2000). It requires authorities to publish lists of those businesses that have to apply these stickers. However, the hologram sticker law has been an ineffective means of guaranteeing the authenticity of products, and combatting piracy for years. This minor change will not improve the situation; instead, the mandatory sticker system should be repealed.

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, and in 2001, it 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. A decade later, key provisions of the 2010 Action Plan still have not been addressed including: ISP liability, effective administrative remedies, and fixing or eliminating the hologram sticker program. The 2017 anti-piracy package of laws only partially addresses online piracy problems by adopting formal notice and takedown provisions; but this alone is not effective enforcement.

LEGAL REFORMS

The two 2017 laws—Law of Ukraine #1977-VIII (Cinematography Law) and Law of Ukraine #2147-VIII (procedural amendments) amended 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 Offences Code. Significant additional amendments, some now under consideration in a new 2019 draft, are needed to modernize the Ukraine IP regime, including for full WIPO Internet Treaty implementation.

Copyright Law: The Copyright Law is undergoing major review to move beyond the 2017 amendments. The 2017 amendments established a notice and takedown regime. Under the 2017 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 from any (i.e., not just monetary) liability if it complies. The 2017 law included 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 could 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 a digital 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) they only require the hosting provider notify a webpage owner (which could be an uploader) to take material down, rather than acting to do so; and (5) many of the definitions (“websites” and “webpages”) are unclear and appear to be inconsistent with international norms. In addition to these burdensome procedures, the Copyright Law needs to be amended to broaden the scope of works covered under the new notice and takedown procedures so that all copyrighted and related rights works are covered.

The bill also included 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 it does not comply with the notice and takedown rules. However, 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”) is covered; the 2017 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 clear third-party liability (that extends beyond merely responding to takedown notices) is applicable to website owners and Internet Service Providers (ISPs). Providing clear third party (ISP) liability is critical for 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 obligations on service providers to reasonably gather and retain evidence. The e-Commerce law should also be amended accordingly. Additionally, the 2017 law did not establish a duty to provide information to law enforcement agencies and rights holders, which should be provided.

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 rights 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 rights holders and deter further infringement (Article 52—to double actual damages)—the 2018 CMO legislation removed the pre-established damages provisions from the law; 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. The new Copyright Law should include: (i) exclusive rights for phonogram producers and performers for broadcasting, public performances and cable retransmissions; (ii) extended term for producers and performers from 50 to 70 years; and (iii) penalties for (treating as infringement) the non-payment of royalties by accredited CMOs and permitting CMOs to represent rights holders in court.

Criminal Code and Criminal Procedure Code: The 2017 package of amendments included a change to Article 176 to apply criminal remedies to 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 further 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); and (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. 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: The 2017 package of amendments also added the following remedies: (1) Article 164-17 provides administrative remedies for failure to properly respond to takedown procedures for infringements by ISPs and websites; (2) Article 164-18 provides sanctions for “knowingly providing false information” for takedown notices; and (3) there are 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 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.

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 (neither is a problem for Ukrainian licensees of foreign films); 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. The Law on Cinematography should be amended to repeal this requirement of local production of film prints.

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. 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. In 2012, the government revised the Customs Code and affirmed the duties on royalties for both theatrical and home entertainment imports. These valuations are governed by CMU Resolution No. 446, even though a Supreme Court ruling questioned the validity of these customs valuations.

GENERALIZED SYSTEM OF PREFERENCES (GSP)

IIPA filed a petition in 2011 to have Ukraine’s 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. That partial suspension of GSP benefits entered into force on April 26, 2018 and remains in place, although some benefits were restored in October 2019.