

# UKRAINE

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

### 2022 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that Ukraine be retained on the Priority Watch List in 2022.<sup>1</sup>

**Executive Summary:** Weak criminal, civil, and administrative enforcement remains the most significant obstacle to the growth of the copyright industries in the Ukraine marketplace. The Government of Ukraine, as part of its effort to promote the rule of law, should address its rampant Internet piracy. Both peer-to-peer (P2P) services and illegal streaming sites hosted in Ukraine are still very serious problems. Some Internet pirates have purposefully moved their servers and operations to Ukraine in the past few years to take advantage of the weaknesses in enforcement and the law itself.

Enforcement is inadequate in Ukraine because: (i) updates to its antiquated legal regime have not provided the tools necessary to properly address online piracy; (ii) it has a lack of resources; and (iii) it has not engaged in coordinated and effective campaigns against large-scale illegal operations. For the recorded music industry, a separate long-standing problem is the failure to ensure stability of the system for the collective management of music rights. Positive steps were taken in the past with the 2019-2020 accreditations of some music-industry collective management organizations (CMOs). However, problems persist given the low levels of user compliance and continued political attacks on the accreditation system, leading to continued uncertainty. The Government of Ukraine should continue to normalize the CMO landscape, including upholding the accreditations that have occurred since 2019. Instead, one act of parliament has proposed to cancel certain accreditations (for authors/publishers' rights CMOs) and one accreditation (of Ukrainian Music Alliance (UMA), for private copy levies) was cancelled by the courts based on a technicality. In addition, non-accredited CMOs, including UACRR (for musical compositions) have continued to operate during the 2019-2022 period without accreditation, perpetuating the long-standing chaos in the market and problems with the rule of law. Overall, it remains regrettable that administrative accreditation of CMOs, which should serve rights holders, is widely exposed to political risks as opposed to being a strictly non-political issue.

In 2021, a series of criminal cases for piracy, including against websites, applications, Internet service providers (ISPs), and cable TV operators may have captured headlines, but had little effect on the situation with piracy in Ukraine. The Government of Ukraine also has engaged in some positive enforcement actions that included the closure of some large infringing websites and services and led to a few criminal convictions. However, no convictions resulted in deterrent sentencing of those found guilty of intellectual property (IP) crimes. Without deterrent sentencing, rampant piracy in Ukraine is likely to continue unabated.

Separately, 2021 saw continued attempts at a major overhaul of the Copyright Law with five separate bills being filed in Parliament, unfortunately, the majority of them without meaningful input from copyright industry stakeholders. The adoption of certain reforms would greatly improve the regulation, protection, and enforcement of copyrighted content in Ukraine. However, three of the five bills presented (in particular, bills 5552-1, 5552-2, and 5552-3) would roll back recent improvements and would not address remaining issues related to the protection and enforcement of copyright in Ukraine, which is why input from copyright industry stakeholders is so vital. Until relevant legislation is enacted that addresses gaps in the law and stabilizes the system at a high level of protection, the situation with piracy in Ukraine remains at the same level without significant changes.

---

<sup>1</sup>For 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/2021/01/2021SPEC301HISTORICALCHART.pdf>.



## **PRIORITY ACTIONS REQUESTED IN 2022**

### **Criminal enforcement:**

- Focus on criminal enforcement, using the newly adopted and existing laws, for: (i) owners and operators of sites dedicated to pirated music, film, entertainment software, and printed materials; and (ii) 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 (and a sub-unit dedicated to IP-related crimes); and establish specialized IP prosecutors within the General Prosecutors Office.

### **Legal reforms:**

- Adopt the draft copyright law, especially Bill #5552 or Bill #5552-4 with the changes discussed below and reject competing bills.
- The Criminal Procedure Code should be amended to provide Ukraine's enforcement authorities with *ex officio* authority.
- Amend the Telecommunications Law to provide criminal investigators access to subscriber information in cases of infringement.
- Provide the Ministry of Economy with strong online enforcement authority and resources for more state IP inspectors.
- Amend the Telecommunications Law and E-Commerce Law to reconcile conflicts to provide clear rules of liability for ISPs and other third-party providers of online services that knowingly contribute to infringing activities (and similarly in the Copyright Law as noted below).
- Revise the 2018 Law on Collective Management (CMO Law) to correct 2018 deficiencies (as opposed to worsening the situation as Bill #5572 does), 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) correcting the "cable retransmission" definition, which currently violates international treaty obligations, because it excludes local broadcasts. The 2018 law also repealed an effective enforcement tool that provided pre-established (statutory) damages. The 2018 change should be reversed to allow rights holders to choose between actual or statutory damages.
- Amend the Copyright Law to: (i) fully implement the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT) (collectively the WIPO Internet Treaties), including eliminating the requirement of proof of "intentional" circumvention of technological protection measures (TPMs); (ii) implement no-fault injunctions in Ukrainian law similar to those prescribed under EU law in Article 8(3) of Directive 2001/29/EC; (iii) cover all copyrighted materials under the new notice and takedown procedures; (iv) eliminate the need for attorneys to file such notices (and enforce penalties for non-compliance with such notices); and (v) add clear third-party liability for website owners and ISPs that knowingly contribute to copyright infringing activities.
- Repeal the requirement to manufacture film prints in Ukraine and ensure that amendments to the Media Law are fully consistent with Ukraine's Bilateral Investment Treaty (BIT) obligations.

## **THE COPYRIGHT MARKETPLACE IN UKRAINE**

Despite the flurry of legislative activity with multiple copyright-related bills filed over the recent years, the IP 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. Ukraine is

now home to many advanced coders, hackers, and others engaged in highly technical activities that facilitate cybercrimes and non-compliance with copyright is standard (even the State-funded broadcasters operate without all necessary licensing agreements with recorded music rights holders). The failure of Ukraine to pass relevant laws 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 (EU) and global markets.

**Online Piracy:** The market for licensed materials in Ukraine is being harmed by stream-ripping and cyberlocker sites, illegal P2P hosting sites, especially BitTorrent sites, as well as by online streaming sites of music and movies. Stream-ripping was also a key music piracy threat: *savefrom.net* was the most visited stream-ripping destination with 7.4 million visits in the third quarter of 2021 according to SimilarWeb. *Y2mate* had 1.9 million visits in the same period. The music industry also reports that Russian BitTorrent trackers were particularly widely used: *rutracker.org* had 12 million visits from Ukraine in the third quarter of 2021 and *rutor.info* reported 9.9 million visits. Ukraine was responsible for the second highest number of visits to both of these sites after Russia. Also, *MP3uk.net*, an MP3 download site, reported 5.1 million visits from Ukraine in the third quarter.

The motion picture and television industry reports that at the end of 2021, at least 20 illegal websites are still hosted in Ukraine, including 10 torrent sites (e.g. *torrents.rus.ua*, *trec.to*, *uraltrec.net*, *pb.wtf*, *piratbit.org*, *rus-media.org*, *rutor.in*, *rutracker.in*, and others). The percentage of sites targeted by the Ukrainian Anti-Piracy Association (UAPA) in the fourth quarter of 2021 is as follows: 89% for streaming sites, 10% for torrent sites, and 1% for linking sites. The low percentage of torrent sites removed is due to the lack of clarity concerning what evidence is needed to ascertain copyright infringement on torrent sites. Consequently, courts and prosecutors often fail to see how torrent sites infringe copyright. The National Intellectual Property Office (NIPO) and the Ministry of Economy should be involved in drafting a methodology that is acceptable for all relevant parties. Online piracy is likewise a problem for the publishing industry.<sup>2</sup> In December 2021, an AAP member publisher (in collaboration with several authors) secured a default judgment against the ebook pirate site, “Kiss Library,” a site operated by two Ukrainian nationals and whose domains include *kissly.net*, *libly.net*, and *cheap-library.com*.<sup>3</sup>

Ukraine has several hosting providers, including Virtual Systems LLC and Infium LLC, that are hosting problematic pirate sites. For example, Infium LLC/Infium Ltd (Infium Host) hosts the pirate site *canna.to*, which offers links to unauthorized content, and Virtual Systems LLC was hosting the problematic cyberlocker *dbree.org* for a time. Based on SimilarWeb data, *canna.to* has received over 12.0 million visits globally during the 12 months prior to September 2021.

The video game industry reports that in 2021 (as in 2020 and 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. Ukraine is also ranked second in the world for infringement of video games for the PC platform—in both cases behind only Russia. BitTorrent indexing sites, direct download sites, and user-generated content (UGC) sites are the most prevalent in Ukraine (many hosted in Ukraine) with BitTorrent sites (like *monova.org*) being the most popular source of pirated copies of video games in 2021. Direct download sites are the second most popular—from Ukraine or from Russian-based websites, with traffic from Ukraine increasing even as Russian users are blocked from access in Russia. User-generated content sites remain a problem and the notorious *vk.com* remains highly popular in Ukraine.

**Online Enforcement:** In recent years, the Government of Ukraine has taken some positive steps to improve Internet enforcement. Five years ago, the Government of Ukraine established the Cyber Police Department within the National Police of Ukraine. The Cyber Police was active in taking down pirate websites in the past but remains underfunded. Most of the Cyber Police activities have been directed at motion picture and music sites. The motion picture industry reported that police actions have resulted in some illegal sites moving out of Ukraine, but that as of

<sup>2</sup>Physical piracy of literary content continues to be a problem in the Ukraine, with the pirated material entering the market from Russia. See <https://en.interfax.com.ua/news/press-conference/780809.html>.

<sup>3</sup>See <https://www.authorsguild.org/industry-advocacy/u-s-district-court-grants-win-to-plaintiffs-in-kiss-library-ebook-piracy-suit/>.

early 2021, at least 20 illegal websites were still being hosted from Ukraine. The number of hosted sites in Ukraine has significantly decreased from 355 in 2017 to 20 in 2021.

NIPO was formed in 2019 within the Ministry of Economy (previously the Ministry for Economic Development, Trade, and Agriculture (MEDTA)), but without the proper resources to start operations. In June 2020, Ukraine enacted a new law (Bill No. 2255) to consolidate IP functions, including registrations, within NIPO, but the law did not vest copyright enforcement authority with the agency. The Government of Ukraine needs to provide the Ministry of Economy with strong online enforcement authority. In October 2020, a bill was introduced (Bill No. 4246) to amend the Administrative Offences Code to give clear authority to the Ministry of Economy IP inspectors to issue monetary fines against website owners and ISPs (including for non-compliance with the notice and takedown system per Articles 164-17 and 164-18). The bill was later withdrawn. In 2019, the Ministry of Economy appointed seven officials in the IP Department to serve as IP inspectors, but many more state IP inspectors are needed, along with the statutory enforcement powers, to be effective. The 2017 anti-piracy package also established a High Court on IP Matters for civil cases. It was supposed to start operations in late 2018, but the court is still not in operation. Once operational, it is hoped that the High Court will develop guidelines for judges in other courts to properly handle IP matters and to avoid forum shopping to lenient courts.

In 2010, the Government of Ukraine developed an intellectual property rights (IPR) “Action Plan” in cooperation with the U.S. government to combat and target the digital piracy problem. Over a decade later, key provisions of the 2010 Action Plan still have not been addressed, including: ISP liability and effective administrative remedies. Instead, the 2017 anti-piracy package of laws only partially addressed online piracy by adopting formal notice and takedown provisions; but this alone is not effective enforcement. More recently, in Bill # 5552-4, the government has indicated its intention to align Ukraine’s laws with key aspects of the EU system and adopting these standards would represent a big improvement. Many of the websites offering pirated copyright materials are thriving, in part, because of the support of local ISPs that have no incentive to cooperate with rights holders. The copyright industries report that, without consequences under the law or a Memorandum of Understanding (MOU), ISPs will not cooperate because the laws essentially grant them total immunity.

**Criminal Enforcement:** In 2021, as in previous years, enforcement actions in criminal cases mainly targeted administrators of pirate websites and applications. The cases in 2021 are solely related to infringement of audiovisual works, mainly local television channels and their content. The founder and administrator of the site *kinomob.com* was convicted under Article 176, part 3 of the Criminal Code of Ukraine (infringement of copyright and related rights) and was fined in the amount of 34,000 UAH (US\$1,200). The court also convicted a resident who administered an unnamed site of a criminal offense under Part 1, Article 176 of the Criminal Code of Ukraine (infringement of copyright and related rights) and imposed a fine of 8,500 UAH (US\$323). (Article 176 also allows for imprisonment for up to two years in certain cases). In August 2021, Ukrainian cyber police arrested the creator and administrator of a mobile application, *HDVideoBox*, for Android, which provided access to pirated movies. As of October 2021, a pre-trial investigation is ongoing, and no decision has been made. The defendant could be imprisoned for up to six years.

Moreover, in 2021, the Ukrainian courts issued four convictions against pirate site operators, including the operator of the streaming website *kinomob.com*. Two resulted in fines, and another two with a sentence of, respectively, five years in prison and one year probation. In 2021, there also were three convictions for illegal distribution of TV channels. Based on actions against infringing sites hosted in or operated from Ukraine, 62 pirate sites were closed in 2021, 62 in 2020, and 173 in 2019 including *HDVideoBox*, which is an application that illegally streams movies and TV shows. The website of *HDVideoBox* has more than one million users, one of the biggest in Ukraine. The investigation against the operator of *HDVideoBox* is pending.

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 (that refuse to

provide information on infringers). 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. The numbers above demonstrate that more must be done. IIPA continues to recommend the adoption of guidelines and more effective procedures for police, prosecutors, and judges for these crimes.

It has been long recommended that the Government of Ukraine create a separate IP unit within the General Prosecutor's 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 IP crimes, with representation from the Ministry of Interior (i.e., the National Police and Cyber Police), prosecutors, judges, the Ministry of Economy representatives, the State Fiscal Service, and other relevant agencies.

The number of actions presented above is only a small percentage of sites and operators engaged in piracy in Ukraine. Even in the cases that resulted in conviction, the sentences are minimal and have no deterrent value or effect. The lack of deterrent sentencing is a lingering problem for both digital and hard copy piracy. The current (January 1, 2022) threshold for criminal prosecution is 24,810 UAH (US\$910) per Article 176 of the Criminal Code. The main concern with the threshold is that it is not accompanied by a unified approach on how to calculate a valuation of seized copyright material, so the threshold acts as a bar to criminal enforcement. This concern is particularly true for online piracy matters (where an official methodology is especially needed). Additionally, enforcement officials have applied the threshold on a per-rights holder basis, which means that when illegal material is seized, if the material of each rights holder does not exceed the threshold, a criminal case cannot 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- 1). Also, the maximum fines for infringement are low—51,100 UAH (US\$1,873)—and thus, not deterrents to subsequent piracy from the defendants who receive them or to other infringers.

Additional criminal procedural problems include: (1) denying the use of rights holder experts (Article 242-6 of the Criminal Procedure Code mandates experts to calculate damages, and there is a scarcity of state experts); (2) delays and case dismissals in pre-trial investigations; (3) the lack of presumptions that rights holders are the infringed (harmed) party; (4) the absence of judicial guidelines to improve IP case proficiency and sentencing; (5) a procedural hurdle requiring a court's permission before an investigator or prosecutor can offer forensic evidence; and (6) 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, which is inconsistent with Article 242-6.

Provisions exist in the Criminal Code (Article 28) for prosecuting organized groups or criminal organizations, including for IP offenses, but these provisions have been under-utilized by prosecutors. Other lingering enforcement problems are: (1) burdensome proof of ownership requirements 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 that parties in all cases be represented by local counsel (no more *pro se* or power of attorney representations).

**Collective Management:** CMOs 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 management regime allows CMOs to operate with full transparency and accountability, and with 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.

In 2019, MEDTA began to implement the 2018 law and accreditations of all CMOs in all fields of activities followed in 2019-2021. 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 UMA accredited to represent performers and producers of sound recordings (and videograms) for public broadcasting and private copying levies, but not including cable retransmissions; 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 in 2019 to collect for: (i) resale royalty rights for works of fine art; and (ii) the reprographic reproduction for literary works. In December 2020, the accreditation commission accredited CMOs for musical works (musical compositions)—OKUASAP (public performances) and A&P (broadcasting). This last round of accreditations were finalized by the Ministry of Economy in September 2021. However, objections and strong resistance (political and legal) from opponents of reform have continued, resulting in Parliament passing Bill #5572, which (if signed into law) would cancel the latest round of CMO accreditations (public performance and broadcasting of musical works). Moreover, accreditation of UMA (for private copy levies) has been cancelled by a court decision based on a technicality, even though the fault was procedural and was made by the Ministry and not the CMO concerned.

The results of the 2019-2020 CMO accreditation process should be maintained. However, as illustrated by the adoption of Bill #5572 in Parliament, which cancels accreditation of the CMOs appointed to collect for authors and music publishers, the system is widely open to political risk and is not stable. If Bill #5572 is signed into law, that would mean the serious roll-back of the CMO reform in Ukraine and create a dangerous precedent for all future accreditations. Moreover, certain groups of users (broadcasters, including state-funded ones, and consumer electronics importers) continue to resist making the required payments to accredited CMOs and one non-paying importer has managed to obtain cancellation of a CMO accreditation by the courts based on a technicality and even though the CMO was not at any fault.

New proposed legislation (Bill No.4537) to change the CMO accreditation requirements, as well as eliminate almost all private copying levies, should be decisively rejected by the Parliament of Ukraine. This bill proposes a significantly reduced list of physical media that would be subject to the levy, which compensates rights holders for the private copying of their works and recordings. Furthermore, the bill removes all recording equipment from the list of objects that are subject to private copying levies, thereby significantly reducing rights holders' compensation. The bill also proposes new criteria for the accreditation of CMOs, thereby making them dependent on specific providers of business software for data processing and distribution.

**Camcording:** The 2017 package of anti-piracy reforms included the bill “On State Support of Cinematography,” which criminalized camcording (Article 176 of the Criminal Code), as well as the activities of 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. However, even with the new law and a reduction in camcording in Ukraine, camcording of motion pictures in theaters and the quick transfer of these illegal copies on the Internet remains a problem for the motion picture industry. From January to September 2021, two illicit audio or video recordings of MPA member films were traced to Ukrainian theaters,<sup>4</sup> down from 8 in 2020 or 36 in 2019. While UAPA has had successful engagements (including staff trainings) with theater owners on this issue, lower numbers can in part be attributed to COVID-19 related cinema closures. Camcording activities are mostly undertaken by criminal syndicates operating in Ukraine and Russia moving quickly between the two countries.

---

<sup>4</sup>The 2020-2021 camcording statistics are anomalous given the extensive theater closures in Ukraine (and worldwide) due to the COVID-19 pandemic and delays in theatrical releases of motion pictures.

Theatrical piracy is also a problem in Ukraine, especially in small theatres where films are screened without a license (a violation of the Administrative Offences Code, Article 164-6). Screening copies of films without a State Certificate has a significant negative influence on the legal market. In 2020, 40 theaters were investigated by law enforcement agencies for screening prints without a license, 28 theaters were shut down, and 5 theaters were sanctioned. In 2021, law enforcement agencies investigated 15 theaters for illegal screening of films, all of which have been shut down, and nine theaters were sanctioned based on the Administrative and Criminal Codes.

**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 by regional and nationwide broadcasters. Many Ukrainian cable operators continue to transmit audiovisual programming without licenses. Also, there are three court verdicts against cable operators that transmitted TV channels without authorization in the period from January to September 2021 in comparison to four verdicts in 2020 and three in 2019. The Government of Ukraine should take actions to ensure that state-funded enterprises pay for the copyrighted content they broadcast. Enforcement authorities should shut down unlicensed operations and use enforcement measures against the operators of these systems. Beginning in January 2020, 23 national television channels started to encrypt their satellite signals, which improved protections. In the music industry, radio broadcasters have refused to pay new (increased) tariffs for the use of music, and state-funded broadcasters in Ukraine are still not paying licensing fees for their use of recorded music.

**Administrative Enforcement:** Administrative courts should be empowered to hear infringement cases even in the absence of the infringer. Moreover, the Government of Ukraine should correct procedures that introduce unnecessary delays and impose unreasonable deadlines, which lead to case dismissals. One major enforcement hurdle in the Administrative Offences Code (Article 51-2) is the requirement to prove intent of the infringer. While intent is sometimes relevant in criminal proceedings, it 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, Ukraine has 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 actions, 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 rights 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 of concern is the treatment of seized infringing materials. The Customs Code (Article 401) provides that goods failing to clear customs because of alleged IP infringements may be seized and destroyed by Customs authorities without a court order (i.e., an expedited destruction). In practice, customs officials apply this procedure only in cases where rights holders notify officials about alleged infringing material. The destruction is then undertaken at the rights holders' expense, and it releases the infringer of any administrative liability, and thus any deterrence from repeating its infringing activities. The 2019 amendments to the Customs Code (Law No. 202-IX) were aimed at bringing the Ukrainian code closer to European Union customs standards and practices, including for the destruction of infringing goods (but further improvements to simplify procedures are still needed). The 2019 amendments broadened the scope of authority against counterfeit and pirated goods to improve enforcement and provided tax authorities with broader *ex officio* enforcement authority.

## **LEGAL REFORMS**

In 2001, Ukraine acceded to the WIPO Internet Treaties. 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 regarding TPMs, by requiring proof of “intentional” circumvention, which is a major impediment to protection. 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, the 2015 E-Commerce Law, the Criminal Code, the Commercial Procedure Code, the Civil Procedure Code, and the Administrative Offences Code. The 2017 legislation aimed at improving copyright enforcement online was a good first step to address online piracy. However, significant additional amendments have been under consideration and are necessary to modernize the Ukrainian IP regime, including for full WIPO Internet Treaty implementation.

**Copyright Law:** The enactment of a package of anti-piracy legislation in 2017 included a clear requirement for ISPs to respond to takedown notices, although the procedures and timetables for takedown notices and responses are unduly complex. The copyright industries report that currently no effective remedies exist to enforce ISPs’ required responses to infringement, and no incentives are in place for ISPs to cooperate because the current law has no explicit third-party liability. IIPA additionally recommends that the Government of Ukraine appoint more state IP inspectors to ensure ISP compliance with the law, including the imposition of sanctions like monetary fines for non-compliance.

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 take down the material; there is also a put-back provision (unless the rights holder commences infringement litigation within 10 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 can be liable. The new laws have no provisions for “blocking” infringing websites, only for taking down infringing materials from sites.

Numerous concerns with the new procedures include that: (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 down material, 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 notice and takedown procedures so that all copyrighted works are covered (it currently excludes literary works and photographs).

However, important shortcomings should be addressed. Some, but not all, are addressed in one of the new current draft bills. Improvements needed in the law include: (1) clearly defining temporary copies; (2) revising Article 52 to provide licensees of foreign music companies equal treatment as local rights holders; (3) making the non-payment of music rights royalties and of private copying levies an infringement of copyright and/or related rights; (4) adding statutory damages or a system of enhanced damages to adequately compensate rights holders and deter further infringement (the 2018 CMO legislation removed 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. Important changes for the music industry include: (i) adding exclusive rights for phonogram producers and performers for broadcasting, public performances, and cable retransmissions; (ii) adding definitions of rights compatible with the WPPT; (iii) extending the term of protection for producers and performers from 50 to 70 years; and (iv) including that a non-payment to an accredited CMO is a copyright or related rights violation.

The copyright law reform process is ongoing and became more complicated in 2021, due to five different



bills being introduced to Parliament, all of which propose reform to the current Copyright Law. Two of these bills (Bill #5552 and Bill #5552-4) should be taken as the basis of further drafting work and be reconciled to form a single draft of the copyright reform bill. The others should be rejected.

Bill #5552-4 contains several welcome provisions, including an increase of the term of protection for sound recordings to 70 years (Article 48) and the improvement of certain provisions in the CMO Law of Ukraine № 2415-VIII of 15 May 2018 "On Efficient Management of Property Rights of Right Holders in the Sphere of Copyright and/or Related Rights" (the "CMO Law"). The government also showed intention to adopt Article 17 of the EU Directive on Copyright in the Digital Single Market (Directive 2019/790) ("DSM Directive"), which is welcome, although further engagement on the drafting of this provision is needed to achieve a good outcome. However, Bill #5552-4 would need to be amended to incorporate certain key elements, which could be achieved by merging this Bill with Bill #5552. The notable sections that require further improvements in Bill #5552-4 are outlined below:

- The provision setting out that the remuneration rates (for private copying levies) approved by the Cabinet of Ministers of Ukraine in accordance with the Law of Ukraine "On Copyright and Related Rights" shall be applied until the determination of final tariffs, without which, users will have little incentive to negotiate a suitable tariff with accredited CMOs.
- It should be stipulated that the Ministry has a maximum time limit of 40 days in which to finalize decisions made by the relevant CMO accreditation committee to avoid the delay that happened in 2020, when it took the Ministry more than 9 months and two court cases to sign the accreditation orders.
- Key definitions should be brought in line with Ukraine's international obligations. Clarification is required to ensure that the making available right (interactive granting of public access as defined in Article 1) is defined in accordance with the WPPT definition and EU law, under the EU-UA Deep and Comprehensive Free Trade Agreement (DCFTA). At present, the definition refers to granting access to the "general public," which is not a criterion present in or compatible with WPPT. It should also be noted that the proposed definition of "cable retransmission" has been brought in line with international standards but needs certain technical improvements.
- New exceptions for hyperlinking (Article 41) should be removed. In an apparent attempt to codify certain judgments of the Court of Justice of the European Union (CJEU), the draft Copyright Bill proposes an exception for hyperlinking in certain circumstances (where the linking is not done with the aim of obtaining profit or with the awareness of the illegal nature of the actions of posting a hyperlink). However, important aspects of the CJEU case law have been overlooked and the drafting of the provision is unclear and at times contradictory, resulting in an overly broad exception that is open to abuse (for example, it is not clear what would happen in circumstances where TPMs are circumvented to provide the link). As such, these provisions should be removed.
- Failure to grant phonogram producers exclusive rights for broadcasting and public performance.
- Failure to improve provisions on tariff setting, which is necessary to improve the current situation of "tariff negotiation stalemates" that allow users to delay the approval of tariffs indefinitely.
- Enforcement remedies should be improved to ensure they are adequate and achieve the goals of the DCFTA and to ensure that enforcement remedies are adequate to deter copyright infringements and unlawful uses of copyright works. The Bill should:
  - increase the minimum compensation available for copyright infringement and remove the cap on compensation (Article 57 in the Bill #5552-4). The minimum and maximum amounts currently proposed are incredibly low and would, in effect, mean that the majority of court cases would involve damages of "two living wages" (two subsistence minimums), i.e., 163 euros, thereby removing an important deterrent against copyright infringement. Instead, the minimum amount should be 10 subsistence minimums, i.e., 815 euros;
  - include a provision specifying that non-payment of remuneration to an accredited CMO is a violation of copyright / related rights;
  - remove the confusing and detrimental addition to the bill at Article 57 that suggests "[t]he amount of compensation shall be effective, proportionate and deterrent and shall be applied in such a way as to avoid the creation of obstacles for the legitimate activity and to ensure protection from abuse."

Compensation for infringements cannot, by definition, be an obstacle to legitimate, non-infringing activity; and

- provide a clear provision ensuring that accredited CMOs have the right to bring legal actions to protect the rights of the right holders that have authorized the CMO to do so, including by way of a general authorization in the CMO membership agreement or mandate to bring legal actions.
- Over-broad and complex liability privileges should be simplified to ensure that they are effective, do not promote digital piracy, and apply only to particular service providers (hosting, caching, and mere conduit) who are passive and neutral intermediaries that do not contribute to infringing activities. We welcome the positive proposals in Section VI, Final Provisions of the Bill, which would clarify *inter alia* that the liability privileges in the Law of Ukraine “On E-commerce” apply only in respect of the “technical, automatic and passive” functions of the eligible services. Notwithstanding this positive provision, equivalent and additional clarifications should be included in Articles 57 to 59 of the Copyright Law which also deal with liability limitations. In particular, the draft copyright Bill should be amended further to:
  - clearly define the activities eligible for liability privileges (i.e., caching, hosting and mere conduit activities only). At present, it seems that where infringements are taking place online, a right holder must follow a convoluted, burdensome, and lengthy notice and action procedure, irrespective of the nature of the service on which the infringement is taking place, i.e., in respect of any type of online service. This poses a serious obstacle to effective online enforcement and goes far beyond the ordinary scope of liability privileges, including those in EU law; and
  - introduce measures demonstrated effective in preventing or restraining infringement.
- The increased term of protection for sound recordings should be retained (Article 48). We commend the Ukrainian Government’s decision to propose the increase of the term of protection of sound recordings to the international standard of 70 years in original Bill #5552 and 5552-4, which will support the development of the industry and the creation of new jobs in Ukraine.

The other proposed copyright reform bills (i.e. Bills #5552-1, #5552-2, and #5552-3) should be rejected on the grounds that they contain a number of common problematic provisions, including, among other deficiencies, that they:

- define “reproduction” in a way that would exclude a broad range of electronic devices from private copying levies;
- define the term “cable retransmission” in a way that excludes foreign programs from payment of remuneration;
- seek to overturn the CMO accreditations; and
- fail to extend the term of protection for sound recordings from 50 to 70 years.

On August 25, 2021, the Department of Intellectual Property Development under the Ministry of Economy proposed to supplement Article 137 of the Code of Commercial Procedure of Ukraine about injunctive relief in cases about copyright infringement with the following measure: “to prohibit a person whose services are used by the defendant in order to violate intellectual property rights, to provide the defendant services used by him in violation of intellectual property rights or creating the threat of violation.” This measure is an improvement for enforcement efforts in Ukraine. This procedure would allow cancellation of domain registration and hosting support of the infringing site, but it should be made clear that this provision would also allow for the blocking of illegal sites by an Internet access provider. As injunctive relief, it works during the process. An injunction may remain in effect permanently under a court decision. Introducing no-fault injunctive relief in Ukraine could alleviate the piracy issue because it allows a rights holder to seek a legal order, subject to due process, from an online intermediary that can prevent its service from being used for unlawful purposes. The remedy does not interfere with the legitimate business of online intermediaries, and they can select which enforcement measures to implement provided they are effective and proportionate.

The current Law on Telecommunications (Article 40, paragraph 4 on the “responsibility of operators”) explicitly states that ISPs “do not bear responsibility for the content of the information transmitted through their

networks.” Further, Article 38 states that ISPs can disable end-users from the Internet or take down infringing websites, only 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 amendments to the Copyright Law (as well as amendments to the Telecommunications Law, but not Articles 38 or 40) require only defined “websites” and “hosting providers” to respond to proper takedown notices or be subject to copyright infringement. This only somewhat limits the overbroad exemption from liability for ISPs and hosting service providers, so many ignore takedown notices. The law is presumed to cover ISPs, but it is unclear whether a website that is hosting third-party content (i.e., a “webpage”) is covered, and 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, the law in Ukraine needs a clear basis for secondary liability (under vicarious, contributory, and inducement theories of law) for sites and services online, and this clear third-party liability should be applicable to website owners and ISPs and extend beyond merely responding to takedown notices. Providing clear third-party liability is critical for effective enforcement and cooperation with rights holders. Under generally accepted standards, such liability should be applicable to parties who “induce” infringement and include 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.

**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 applied only to hard copy piracy), and, as noted, 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 IP criminal cases. It should also be clear that the police have the authority to seize all copyright products and equipment for use at trial (they currently do so only in software cases).

**Administrative Remedies:** The 2017 package of amendments added administrative remedies, including: (1) Article 164-17 remedies for failure to properly respond to takedown procedures; and (2) Article 164-18 sanctions for “knowingly providing false information” for takedown notices.

## **MARKET ACCESS ISSUES**

**Compulsory Manufacturing of Film Prints:** Ukrainian law requires film prints to be manufactured locally as a prerequisite to the issuance of a state distribution certificate. This requirement to make and transfer prints to the State Film Agency (*Derzhkino*) to get a distribution certificate applies only to owners of television rights and home video rights—as an obligation to provide film copies for audiovisual works created on different media. For theatrical distributors, the obligation is to provide an option to the Ukrainian licensee to obtain a dubbed film copy. The Law on Cinematography should be amended to repeal these requirements.

**Local Language Requirement (Dubbing/Quotas/VAT):** Another trade barrier is a 2019 law (that entered into force on July 16, 2021) to mandate that foreign films distributed in Ukraine on home entertainment, broadcast television, and video-on-demand (VOD), must be dubbed or voiced in the state language. It exempts theatrical exhibitions that can screen films in their “original” language accompanied by Ukrainian subtitles. The law includes

quotas on foreign film screens (a 10% maximum per theater per month). Last, the law applies a VAT that discriminates against imported foreign films. It applies to the distribution, theatrical exhibition, and other public performances of films. Although the VAT provision went into force in 2017, it was suspended “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. As an incentive to dub in the Ukrainian language, there is a 50% discount on the state distribution certificate fee for films dubbed, voiced, or sub-titled in Ukrainian.

**Draft Law of Ukraine on Media No. 2693-D (Draft Media Law):** The Rada is considering a bill that would require non-linear services to obtain state certificates for each title prior to distribution, as well as a mandatory registration requirement for both linear and non-linear services. It is imperative that any media legislation is consistent with Ukraine’s international obligations, including those obligations under the U.S.-Ukraine Bilateral Investment Treaty and the Council of European Convention on Transfrontier Television.

**Draft Law on Dubbing No. 5772:** This draft bill would mandate that 75 percent of the films offered by a VOD service, which were produced and/or distributed for the first time after July 16, 2021, in Ukraine, must be dubbed in Ukrainian. This bill would be highly burdensome and impractical for foreign VOD providers who offer an array of content from around the world and limit consumer choice.

## **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. 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.