

UKRAINE

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2019 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that Ukraine be retained on the Priority Watch List in 2019.¹

Executive Summary: There are two long-standing priorities for the copyright industries in Ukraine: first, is improving the legal and enforcement regime to address widespread online infringement of copyrighted works and sound recordings. Second, is fixing the chaotic collective administration system (and applying the rule of law) to allow licensed music markets, dependent on public performance rights, to develop. In 2018, there was no progress on the online infringement problem—neither substantial legislative changes, nor any significant improvement with deterrent enforcement against large commercial websites or services. In 2018, a collective administration bill was enacted, intending to correct some of the problems of the current system. Unfortunately, the Government of Ukraine and the Rada ignored the objections of experts in the field, as well as Ukrainian, U.S. and other foreign rights holders, and passed a bill that is likely to allow the existing chaotic system to persist and which will not improve the market for music services in Ukraine, without further revision.

Ukraine has been on the Priority Watch List for many years, following its designation in 2013, as a Priority Foreign Country (PFC), which triggered a year-long investigation of Ukraine's IPR regime as required by Section 301 of the Trade Act of 1974. The PFC designation was the result of three critical shortcomings in Ukraine, as described by the U.S. Government: (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. In 2014, after the U.S. Government's investigation acknowledged these shortcomings, in lieu of sanctions, it decided instead to take “no action under Section 301...[i]n light of the current political situation in Ukraine,” and placed Ukraine on the Priority Watch List, even though none of the three identified problems had been properly addressed by the Government of Ukraine.

Now six years later, the problems that triggered the PFC designation persist and are causing severe economic harm to U.S. copyright rights holders in Ukraine, as well as to Ukrainian rights holders. In December 2017, by proclamation (citing 502(c)(5) of the Trade Act of 1974 regarding “adequate and effective protection of intellectual property rights”), the President partially suspended the duty-free treatment accorded certain products from Ukraine under the Generalized System of Preferences (GSP) program; that suspension remains in place, while the problems continue unabated.

In the past few years, there have been some positive enforcement actions, most notably the closure of major infringing websites and services. For example, in 2016, a transnational enforcement operation, including Ukrainian authorities, arrested the Ukrainian operator of *kickasstorrents* (*kat.cr*) in Poland. That website, which was one of the largest torrent sites in the world and considered by U.S. criminal enforcement agents as a “lucrative flea market” for “infringing movies, television shows, video games, music and computer software,” remains shut down. Several other major sites and services with contacts to Ukraine have also been taken down in recent years, including: *ex.ua*, *torrent.net.ua*, *extratorrent.cc*, *fs.ua* (*fs.to*), and *hdclub.org*. There were a few video-on-demand sites, at least one video pirate streaming site (*kinoprostir.com*), and one large music streaming service (*onlainfilm.club*) targeted by the Cyber Police Department in 2018. There were four criminal convictions against pirate site operators in 2017, but only two such criminal convictions in 2018. In the two 2018 convictions, the site operators

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/2019/02/2019SPEC301HISTORICALCHART.pdf>.



were fined 17,000 UAH (US\$612) in each instance, but received no prison time. There are at least four other criminal cases against site operators still pending in the courts.

One positive step (in 2017) was the creation of a specialized IP High Court (although its jurisdiction is only for civil, not criminal, matters), and, a year earlier, of the Cyber Police Department within the National Police of Ukraine. In recent years, there has been cooperation by the National Police with the FBI and INTERPOL on IP matters, as well as with rights holders. Another positive step was the passage of a package of anti-piracy legislation in 2017. The first of two bills that year was 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 which some experts fear may be problematic against camcording activities. In August 2018, the Cyber Police Department began its first investigation into camcording activity at a theater in Kryvyi Rih; a criminal investigation is ongoing.

The anti-piracy laws also provide a clear requirement for ISPs to respond to notice and takedowns, which, to date, have often been ignored because ISPs have a broad liability exemption in the Telecommunications Law. The new laws create detailed procedures and timetables for takedown notices and responses. However, the notice and takedown provisions apply only to audiovisual works, musical works, sound recordings and computer programs (so e.g., not including literary works, or photographs), and the law has other deficiencies (most immediately, no administrative agency to enforce it). Separately, a judicial reform bill (Law of Ukraine #2147-VIII, in force on December 15, 2017) included amendments to the Commercial Procedure Code, the Civil Procedure Code and the Administrative Code. That bill established a High Court on Intellectual Property Matters for civil cases. Plans to start its operations in September 2018 were delayed into 2019 (judges, with proper qualifications, are still being appointed to the court).

There was one minor legislative change (Law of Ukraine #2514-VIII, in force in September 2018), which changed existing law, and was intended 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 change in 2018 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 in combatting piracy for years, and this minor change will not improve the situation; instead, the mandatory sticker system should be repealed.

There are a number of additional legal reforms still needed to allow the marketplace to develop for the digital distribution of music, films, television programs, video games, and books online in Ukraine for the benefit of foreign and domestic rights holders, Ukrainian consumers, and the local economy. Additionally, the Government of Ukraine needs to prioritize the establishment and funding of an agency to administer the new anti-piracy law, including the authority to impose sanctions (fines) for non-compliance with notice and takedown and other provisions in the law. Last, criminal enforcement, which several industries report has worsened in the past two years, needs to improve significantly.

PRIORITY ACTIONS REQUESTED IN 2019

IIPA recommends the following priority enforcement actions and legal reforms to the Government of Ukraine in 2019, in addition to those already noted:

Criminal enforcement:

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

Legal reforms:

- Fully implement the WIPO Internet Treaties (the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT)).
- Amend the Telecommunications Law and e-Commerce Law to reconcile existing conflicts to provide clear rules of liability for ISPs and other third party providers of online services pertaining to copyright matters.
- Revise the 2018 Law On Collective Management (CMO Law)—currently just starting to be implemented—to correct the 2018 deficiencies, including: (i) fixing the rules used to calculate revenue-based tariffs for collective licensing organizations; (ii) adopting rules to identify current and future rates; (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 new 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).
- Amend the Copyright Law to: (i) broaden the scope of works covered under the new notice and takedown procedures; (ii) eliminate the need for attorneys to file such notices, 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 Internet Service Providers (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). There has been little cooperation by ISPs with rights holders to date.
- 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.

COPYRIGHT ENFORCEMENT 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. Only ten years ago (2009), fewer than one-fifth of the population in Ukraine had access to the Internet according to the International Telecommunications Union (ITU). Today, 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 failures in Ukraine to modernize its laws, and to engage in effective and deterrent enforcement means that it is a major exporter of piracy, especially digital piracy, into both the European Union markets and other countries regionally.

Internet Enforcement: Weak digital enforcement has resulted in an exponential increase in the number of illegal P2P hosting and website-based Internet piracy sites. Legal markets in Ukraine are harmed by BitTorrent sites (some located in Ukraine) as well as by online streaming sites of music and movies. Some Internet pirates have

purposefully moved their servers and operations to Ukraine in the past few years to take advantage of the weaknesses in the law. In 2018, Ukraine ranked third in the world in the number of connections by peers participating in the unauthorized file-sharing of select video game titles on public P2P networks, retaining its position from 2017. Ukraine is also ranked third in the world for infringement of video games for the PC platform.

One bright spot (in 2016) in Ukraine was the takedowns of several major pirate websites including *ex.ua* and *fs.us (fs.to)*—two of the largest and most popular pirate sites in Ukraine. For years before that, *ex.ua* had been one of the most popular sites in Ukraine, allowing free streaming and downloading of unauthorized copyrighted content, and it was repeatedly on the U.S. Government's list of Notorious Markets. However, *ex.ua* has resurfaced as a cyberlocker at *fex.net*, and there are some reports that infringing material is now on that site. Another site, initially linked to Ukraine, that had been on the Notorious Markets list since 2013, and which was disrupting markets in India, Pakistan, and China among many other territories, was *extratorrent.cc (extratorrent.com)*. It was removed from the U.S. Government's Notorious Markets list in January 2018 after its operators announced in May 2017 that they were "shutting down *Extratorrent* and its mirror sites." While the main domain is no longer available, unfortunately, the site is still available via proxy sites.

In 2018, there was no significant site blocking or takedown activity against large commercial sites, and there remain many such websites in Ukraine. Many of these are in English directed to Western markets, including streaming sites, torrent sites, cyberlockers, and linking sites such as: *rnbxclusive*, *leakedearly*, *hiphopisdream*, *purplinks*, and *musicfire*. Additionally, there are a number of sites offering unlicensed pay for download musical recordings, including *mp3caprice.com*, which claims to have copyright licenses from the rogue collecting society AVTOR. The motion picture industry notes that some infringing sites have used hosting services in Ukraine, such as *yify-torrent.org* and *mejortorrent.org*. The entertainment software industry is particularly concerned about popular sites, hosted in Ukraine including *btidig.com* and *piratebit.ru*. *Vk.com (vKontake)* is blocked in Ukraine at the ISP level, as part of the ban on Russian-based web services that was initiated in May 2017.

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

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

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

only require defined “websites” and “hosting providers” to respond to proper takedown notices, but to otherwise retain their immunity from liability (so, the 2017 amendments did not revise Articles 38 or 40).

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

The 2017 amended law mandates responses by access providers and hosting sites to properly submitted takedown notices from rights holders. The law 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, and to participate with the Whois database, and, it provides certain safe harbors if hosting providers properly comply with the law. Still, even with the 2017 amendments, the Telecommunications Law explicitly stipulates that these site and service operators have no responsibility for the content on their websites (even with knowledge it is infringing), except to respond to proper takedown notices. In 2018, UAPA issued 3,093 takedown notices, and cease and desist letters, to site operators and hosting providers, including 17 notices sent based on the 2017 law (Article 52-1 of the Copyright Law).

The new notice and takedown procedures still need to be properly enforced. In 2016, the Government of Ukraine abolished the State Intellectual Property Service of Ukraine (SIPSU) for poor governance and transparency problems. In addition, all of the state IP inspectors who had worked for SIPSU were fired. As the result of recent governmental reforms and funding issues, no new agency has yet been assigned to replace SIPSU's copyright enforcement authority. Thus, while SIPSU was a problem for rights holders for its governance issues, there is no agency in place to fill the gap, making it all but impossible to effectively use the new anti-piracy law.

In addition, and more importantly, even as websites and hosting services have been taken down, and some advertisements have been taken off of unauthorized sites and services, criminal enforcement against the owners and operators of these websites or hosting services, has rarely been successful (or even seriously pursued). Rights holders are not able to commence civil actions against infringing websites or to block sites, they can only send takedown notices under the new procedures. Further complicating enforcement is a lack of resources by enforcement authorities. Additionally, some large piratical operations have been set up in the eastern part of the country engaged in conflict, and are thus out of reach of the Ukrainian police.

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 on one major ongoing investigation against a large site operator.

As noted, the motion picture industry reported only two criminal verdicts in 2018 for online piracy directed at site operators (there were four cases in 2017). In one case, against a streaming site (*tsv.net.ua*) the operators received no prison sentence, but were fined 17,000 UAH (US\$612) in Kharkiv City. In the other case, the same fine was imposed against the operator of *world-na.com* in Lviv. There are four other criminal cases pending against pirate site operators in the courts in Ukraine.

Thus, more criminal enforcement will have to be undertaken if the problems in Ukraine are going to improve. Currently, the Criminal Procedure Code does not grant police *ex officio* authority, so the police are unable to initiate criminal operations against online piracy unless a rights holder first files a claim for damages. When criminal investigations are undertaken, police efforts are often stymied by a lack of cooperation from ISPs, which often refuse to provide available information on their infringing users. Amendments to the Law on Telecommunications, which would have assisted the police in conducting Internet criminal investigations by providing subscriber information, have been proposed in recent years, but not enacted. The copyright industries report that the lack of clear prosecutorial and judicial procedures for Internet-related cases is a bar to effective enforcement, with existing procedures too complicated to be used effectively. IIPA continues to recommend the adoption of guidelines and more effective procedures for police, prosecutors, and judges for these crimes.

To combat Internet crimes, a Cyber Police Department was established within the National Police Department. In 2016, 30 investigators were recruited to join this unit; that number was raised 410 staff in 2018 (but the number, if any, dedicated to IP-related crimes is unclear). The formation of this unit was good news, but it has focused on non-IP related online crimes to date, and its actions are limited by a lack of resources. With many infringement cases having a Ukrainian nexus, the unit would certainly benefit from an increase in resources and training to address IP issues. In addition, 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 (e.g., 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.

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

Collecting Societies: 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 is intended to resolve longstanding issues, but it has not yet been implemented, and leaves many questions regarding the accreditation of qualifying CMOs. There are currently operating licenses for 18 competing collecting societies, but these licenses are due to expire under the new law. Unfortunately, the CMO Law has many flaws, including: (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 how to accredit CMOs especially 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 current system, CMOs grant inexpensive licenses to users of copyrighted material to “clear” their obligation to pay private copy levies, public performance licenses, or licenses for online music services. These longstanding problems were one reason for the designation of Ukraine as a Priority Foreign Country, and the Presidential

proclamation in December 2017 to remove Ukraine's GSP benefits. Instead of a growing marketplace as in other countries in Europe, the current chaos has prevented the development of the marketplace for legal music services, and it allows pirate websites to flourish claiming they are "licensed" from the rogue collecting societies.

If the accreditation is carried out properly, no more than one society representing the majority of commercially used rights and repertoire (in each sector or category of rights and rights holders) would be appointed as the CMO managing the rights under the extended collective licensing and mandatory collective management regime. Under the CMO Law the qualifying criteria for accreditation are: (1) representation of a significant number of Ukrainian resident rights holders whose rights are actually being exploited in Ukraine; and (2) agreements with corresponding foreign CMOs and rights holders of the repertoire actually used in Ukraine. One factor is the quantitative indicator of use of repertoire in Ukraine (so, properly based on actual use, including frequency of broadcasts on national TV and radio, plus a consideration of the territorial reach of the broadcast). The frequency of broadcast would be based on annual actual data provided to the accrediting agency.

Fair application of these criteria and the production of usage reports accurately reflecting the actual usage of musical works and recordings is critical to the success of the accreditation process. If incorrect data is provided in cue sheets or usage reports and/or other criteria are incorrectly interpreted or applied, the process will lead to accrediting non-representative and potentially rogue CMOs. For this reason, rights holders are very concerned that user groups will be on the accreditation committee, representing a clear conflict of interest, since users want the lowest possible license fees (and some have infiltrated their "own" CMOs).

The CMO Law transitional provisions have set the registration date for existing CMOs at April 23, 2019 (but extended collective licenses will be at a future date to be announced by the Ministry of Economic Development and Trade (MEDT)). The concerns regarding extended collective licenses and mandatory collective management are many, and the accreditation process is unclear (an expected announcement in December 2018 by MEDT was extended into January 2019). Also unclear is the accreditation of a CMO for the administration of private copying levies and cable retransmissions (neither of which are set to start until September 2019). Overall, the current regulations and implementation are unclear, and are moving very slowly, further delaying the possibility for proper payments of rights holders for the use of their works and recordings in Ukraine. In addition, the problem of allowing rogue CMOs to continue to operate is not merely an IP problem, but indicative of larger rule of law issues where cybercriminals and large illegal syndicates can disrupt other businesses and governmental operations.

Criminal Enforcement: As highlighted already, one key to improve enforcement, especially against online piracy is to properly form a sub-unit dedicated to IPR crimes within the Cyber Police Department within the National Police Department of Ukraine, and to properly train, staff, and resource it. Additionally, the unit must be allowed to engage in enforcement actions against owners and operators of infringing websites and services without political interference. In November 2017, a State Bureau of Investigation was formed in the General Prosecutors Office. This bureau is an independent body with very limited authority against whom it can carry on investigations (e.g., state officials and judges), and most online piracy operations are outside of the scope of its authority. It is recommended, instead, that the Government of Ukraine create a separate IPR unit within the General Prosecutors Office to focus on criminal prosecutions against online piracy operations, and that the unit be properly staffed and trained; no progress was made on this recommendation in 2018.

The lack of effective criminal prosecutions and deterrent sentencing is a lingering problem in Ukraine for both digital and hard copy piracy. In 2005, the Criminal Code (Article 176) was amended to lower the threshold for criminal prosecution. The current threshold (as of January 1, 2019) is 19,210 UAH (or US\$689). The main concern with the threshold is that there is no unified approach on how to calculate a valuation of the copyright material in question, so the threshold acts as a bar to criminal enforcement, resulting in rights holders having to use less effective administrative actions instead. This is particularly true for online piracy matters, where the valuation of damages (by law enforcement agents, prosecutors and the courts) is too difficult to calculate absent an official methodology, and prevents the initiation of criminal investigations and prosecutions. Additionally, enforcement

officials have applied the threshold on a per-rights holder basis, which means that when illegal material is seized and the material for every rights holder does not exceed the threshold, a criminal case does not proceed (the losses cannot be combined).

There are other criminal procedural problems as well, including: (1) rules regarding the use of expert evidence (denying the use of rights holder experts); (2) non-deterrent sentences for repeat offenders; (3) delays and case dismissals 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 Ukrainian Criminal Code (e.g., Article 28) for prosecuting organized groups or criminal organizations, including for IPR offenses, but these provisions have been under-utilized by prosecutors. Other (related) lingering enforcement problems: (1) the required proof of ownership in criminal and civil cases, including a complete chain of title; (2) the confiscation and destruction of infringing goods, as well as materials and equipment used for their manufacturing is not clearly a part of the Criminal Code sanctions; (3) the requirement that parties in all cases—beginning in 2017—be represented by local counsel (no more *pro se* or power of attorney representations).

Other Key Enforcement Issues: The camcording of motion pictures in theaters and the quick transfer of these illegal copies on the Internet remains a major problem for the motion picture industry; it is mostly undertaken by criminal syndicates operating in Ukraine and Russia. As a consequence, illicit camcording shifts quickly between the two countries, resulting in hard copy and Internet piracy. The 2017 Cinematography Law (in force in April 2017) amended Article 176 of the Criminal Code to criminalize camcording. But, as noted, there are definitional and other ambiguities in this law, and it has not, to date, been properly utilized by enforcement authorities.

Between 2011 and 2018, over 160 camcords (including audio only and video only recordings) have been sourced from Ukraine. In 2018, there were at least four MPA-member company videos sourced from Ukraine (there were six in 2017 and 13 in 2016), and another four audio-only camcords sourced from Ukraine.

Theatrical piracy is also a problem in Ukraine, especially a small theaters which screen pirate prints without a license which is a violation of the Administrative Code (Article 164-6). In 2018, there were no cases commenced using Article 164-6 (in 2017, there were 13 arrests). During 2018, there were 171 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 (there were four such cases in 2017). However, the Government of Ukraine has said that implementation of the new camcording law will be a priority in 2019.

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

Broadcast and Cable Television Piracy: 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-owned 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.

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

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

COMPLIANCE WITH EXISTING OBLIGATIONS TO THE UNITED STATES

Ukraine is a member of the Berne Convention, the Geneva Phonograms Convention, and the WTO (TRIPS) Agreement, 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, but the plan was never completely implemented. For example, addressing the problems of ISP liability, notice and takedown, administrative remedies, and fixing or eliminating the hologram sticker program, are all covered in the 2010 Action Plan, and have not been fully and properly addressed by the Government of Ukraine. The 2017 Act did address some of these issues, with formal notice and takedown provisions and timetables, and penalties for noncompliance.

LEGAL REFORMS

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

Copyright Law: The Copyright Law and related laws were amended in 2017, as discussed above, but the laws still need to be properly implemented. The 2017 amendments established a notice and takedown regime, without the need for a state authority or court. 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 (safe harbor) 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 held liable. There are no provisions in the new laws for “blocking” infringing websites, only for taking down infringing materials from sites.

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

The bill also 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 they do not comply with the notice and takedown rules. But, the definition of which services are covered is not clear. It is presumed to cover ISPs, but it is unclear whether a website that is hosting third party content (i.e., “webpages”) are covered; and, the new law has not yet been tested in the courts. Since civil litigation is the only avenue for rights holders for noncompliance with the notice and takedown requests, there needs to be a clear basis for liability for sites and services online, and it should be 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 to effective enforcement and cooperation with rights holders, and can be done in a manner under generally accepted standards applicable to parties who “induce” infringement, and including obligations on service providers to reasonably gather and retain evidence. Additionally, the new law did not establish a duty to provide information to law enforcement agencies and rights holders, which should be added.

Other deficiencies in the Copyright Law require: (1) clearly defining temporary copies; (2) revising Article 52 to provide licensees of foreign music companies equal treatment as local right holders; (3) making either the non-payment of music rights royalties or of private copying levies an infringement of copyright and/or related rights; (4) adding statutory damages and/or a system of enhanced damages in order to adequately compensate right holders and deter further infringement (Article 52—to double actual damages)—the CMO legislation in 2018 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.

Law on Collective Management: After the passage of the 2018 law, further amendments and subsequent regulations, as already note, are needed to properly govern the activities of Ukrainian collective management organizations to improve the current situation, and to restore public trust and basic business practices for the administration of public performance rights and the broadcast markets.

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

Criminal Code and Criminal Procedure Code: In 2017, as part of the package of amendments, Article 176 was changed so that there are criminal remedies against online piracy of all works and sound recordings (the old law only applied to hard copy piracy), and it added sanctions for camcording. The codes should be amended to

provide: (1) remedies against repeat infringers (within 12 months) that would automatically lead to criminal, not solely, administrative prosecution (and, even if each separate infringement is below the criminal infringement threshold); (2) clear rules in the Criminal Procedure Code for prosecuting infringers, and remedies for intentional infringements related to the obligation to pay music rights royalties.

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

Administrative Remedies: Administrative courts should be empowered to hear infringement cases even in the absence of the infringer, and procedures that introduce unnecessary delays and impose unreasonable deadlines, leading to unnecessary case dismissals, should be corrected. One major enforcement hurdle in the Administrative Code of Ukraine (Article 51.2) is the requirement to prove intent of the infringer; intent, while relevant in criminal proceedings, has no relevance in administrative sanctions, and should be deleted from the Code.

Administrative Code amendments were also adopted in 2017 adding 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 they are not being used effectively to remove the business licenses of infringing retail stores, kiosks, and other smaller scale pirates. Further amendments have been proposed, but never adopted, to increase the maximum fines, which IIPA continues to recommend.

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

MARKET ACCESS ISSUES

The Government of Ukraine continues to maintain onerous market access barriers. Two of these barriers are: (1) an obligation to manufacture film prints and digital encryption keys in Ukraine; and (2) customs valuation rules that assess valuation on projected royalties, rather than on the underlying carrier medium.

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. To further complicate matters, Ukrainian Customs officials stated that the new ruling would be retroactive (three years), and would be enforced with serious penalties for valuations based on the carrier medium rather than royalties. In 2012, the government revised the Customs Code and affirmed the duties on royalties for both theatrical and home entertainment imports. These valuation procedures are governed by CMU Resolution No. 446 (which is still in force), and even after Supreme Court rulings calling these customs valuations into question.

Unfortunately, no changes to the customs valuation, or to the manufacturing of prints requirement, were made in the Cinematography Law amendments enacted in 2017.

GENERALIZED SYSTEM OF PREFERENCES (GSP)

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