

TO: Clients and Friends of the Firm
FR: Frishberg & Partners
RE: CD Piracy

I. Introduction

How does one find the newest releases of the most popular music in CD format? Just take a little trip to your nearest “*perekhod*” (underground crossing) or the infamous Petrovka market. What’s more, the price of these pirated CD’s is, modestly speaking, quite eye-opening: just around \$3.00. The same goes for the most recent computer games as well as professional programs.

On either the “*Radio Rynok*” or “*Petrovka*” market, diligent shoppers may even find music, games or programs that have not yet been officially released in the West. True, the packaging is not up to Western standards, but for those who care more about the contents of the discs than the glitzy covers, these local “*perekhods*” (and public markets) can be mini-goldmines of precious information, worthy of copying over again and again.

For the western guardians of intellectual property rights, on the other hand, Ukraine exemplifies one of the most flourishing intellectual property piracy markets in the world. In fact, according to Joseph S. Papovich, the representative of the Trade Representative Office of the USA on Issues of Services, Investment and Ownership, Ukraine has been the center for piracy production of compact discs, exporting about 70-100 million pirated discs to Europe per year. Apparently, Ukraine has even surpassed its former supplier of pirated discs, Bulgaria, in the production of unlicensed compact discs.

In the summer of 2000, the infamous President Bill Clinton and now-notorious President Kuchma met to discuss future relations between Ukraine and the United States, including the issue of CD piracy. During this meeting, Clinton warned Kuchma of possible sanctions, such as the stiff increase of duties on goods imported from Ukraine to the United States, if piracy is permitted to continue, and offered a US “master plan” for the struggle against piracy. According to this plan, Ukraine would simply have to pass the necessary legislation and then shut down factories producing illegal compact discs. To accommodate his colleague in difficult times, President Kuchma solemnly pledged to actively terminate illegal production on the audio-video market of Ukraine, (which has been said to have an annual value of almost \$40 million).

Since then, various Ukrainian newspapers commented on the legal battle waged against such piracy by the Ukrainian government, which has come under great pressure from other Western intellectual property protection groups (and one extremely large and powerful software architect). In response

to the mounting pressure, the Ukrainian Parliament passed long-awaited changes to the Laws “On Protection of Rights to Inventions and Utility Models,” “On Protection of Rights to Industrial Designs,” “On Protection of Rights to Trade and Service Marks,” “On Protection of Rights to Topography of Integral Micro Schemes,” and “On Protection Rights to Indicating the Origin of Goods.” Additionally, various prophylactic laws and regulations have either already been passed or are in the works.

On January 17, 2002, the Parliament passed Law No. 2953-III “On the Peculiarities of State Regulation of the Activity of Business Entities in Connection with the Production, Export and Import of Discs for Laser Reading Systems” (“Law No. 2953”). Law No. 2953 was supposed to remove all threats of trade sanctions from the United States which would be applied if the Law was not passed or failed to encompass certain provisions. Specifically, the United States government demanded that Law No. 2953 provide for (i) licensing for the production, export and import of compact discs; (ii) licensing for the export and import of disc production equipment; (iii) licensing for polycarbonate; and (iv) licensing for components of disc production equipment.

According to newspaper sources, there were at least five factories that produced compact discs on the territory of Ukraine (3 in Kiev, 1 in Lviv and 1 in Kherson). For a long time, their activities remain unspecified. Many asked: will legal measures alone be enough to curb the growing piracy in Ukraine? Most responded “probably not” for one simple reason: an average citizen cannot afford to spend \$15-20 US Dollars for one compact disc because this amount of money is better spent on the necessities of life. Since the consumer demand for affordable music and computer programs remains at an all-time high, Ukrainian pirates are naturally willing to cater to these demands.

And yet, if the Ukrainian government does not continue to support the protection of American and Western authors’ rights by fighting against piracy, then Ukraine would continue to be excluded from such groups as the World Trade Organization, denied foreign financial aid and/or denied future membership in the European Union. Inevitably, trade sanctions were applied on January 23, 2002 in spite of the passing of Law No. 2953. Some said the sanctions were applied because Law No. 2953 was passed too late, other said that a copy of Law No. 2953 was not timely provided to the American government before the decision on sanctions was rendered. Regardless of how one views the imposition of the trade sanctions (i.e., political bullying or a long time coming), it is clear that Ukraine must continue its struggle against piracy or continue to walk a tight rope over even more threatened sanctions.

With this aim in mind, the President issued Decree No. 85/2002 “On Urgent Measures for Strengthening the Protection of Intellectual Property Rights in the Process of Production, Export, Import and Distribution of Discs for Laser Reading Systems,” dated January 30, 2002 (“Decree No. 85/2002”). Decree No. 85/2002 sets forth various measures for ensuring that intellectual property rights are not violated during the production, export, import and distribution of compact discs. Decree No. 85/2002 orders the Ministry of Education and Science, the Ministry of Internal Affairs,

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