

TO: Clients and Friends of the Firm
FR: Frishberg & Partners
RE: The Copyright Law: The Fight Against Piracy

I. Introduction

The United States actually began to impose all of the trade sanctions it has long threatened on Ukraine due to its inactivity against CD piracy. First, on August 24, 2001, it did suspend the duty-free status of certain Ukrainian products exported to the United States under the General System of Preferences program for transitional countries. Fortunately, the Ukrainian Parliament passed the long overdue amendments to the Law “On Copyrights and Related Rights,” signed by the President on July 11, 2001, which came into effect on August 16, 2001 upon its official publication (hereinafter the Law of Ukraine No. 3792-XII “On Copyrights and Related Rights,” dated December 23, 1993 (as lastly amended on November 20, 2003), will be referred to as the “Law”).

Shortly thereafter, on September 7, 2001, the Cabinet of Ministers of Ukraine issued Decree No. 1149, which approved the procedure for “using and exercising control over the observance of rights to objects of intellectual property in the process of production, export and import of discs for laser decoding systems.” Importantly, Decree No. 1149 also set forth the procedure for obtaining licenses to produce compact disc matrixes and compact discs containing copyrighted materials with the permission of the relevant copyright holder(s). Additionally, Decree No. 1149 initially introduced the SID-code, a special code to be placed on all compact discs, which identifies each disc’s producer (a list of which is held by the customs authorities).

Finally, on January 17, 2002, Law No. 2953-III “On the Peculiarities of the Production, Export and Import of Discs for Laser Reading Systems” (“Law No. 2953”) was passed by the Parliament thereby rendering Decree No. 1149 ineffective. Law No. 2953 introduced new licensing procedures, SID-codification of produced discs, serious penalties and criminal liability, and an increase in the cost of compact discs. This last step was supposed to assure a delay in the application of sanctions on Ukraine by the United States.

Nevertheless, trade sanctions were applied on January 23, 2002, and not without controversy. These trade sanctions affected Ukraine’s metallurgical, chemical and light production industries the most. More legislation was passed in vain, exemplified by Presidential 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.

In addition to the Law, which for the first time provides for physical inspections of CD producing companies, Law No. 2953 empowers the Ministry of Education and Sciences to carry out planned or unplanned inspections of CD production facilities with special enforcement agencies in search of violations of copyrights and related rights by CD producing companies. Combined with the passage of Law No. 2953 and Decree No. 85/2002, which confusingly failed to help avoid trade sanctions, Ukraine has actually taken significant legal steps to battle its infamous pirates. Although it is impossible to assess whether the Law, Law No. 2953 and Decree No. 85/2002 will remain satisfactory to the United States, it is apparent that Ukraine is feeling the pressure of the potential sanctions and is trying to mitigate its well-deserved reputation as one of the piracy capitals of the world.

In this light, the discussion below focuses on the major amendments and additions to the Law, as well as their effect on the effort to curb CD piracy in Ukraine.

II. The Law

A. Overview

As a starting point, the Law applies to all copyrights and related rights, which arise after August 16, 2001, with three major exceptions. First, the terms for the protection of copyrights and related rights (now 70 years) apply in all cases if the original 50-year enforcement term of copyrights following the death of the author or the 50-year enforcement term of related rights did not expire prior to the enactment of the Law. Second, the Law applies to performers and phonograms, which were created or first published prior to the enactment of the Law, if 50 years following the first recording or publication has not yet expired.

Third, objects of copyrights and related rights, which were created or first published prior to the enactment of the Law, and which are subject to an international agreement to which Ukraine is a party and which was ratified by the Ukrainian Parliament, are protected under the Law if, prior to the date the Law came into force, the said objects have not entered the public domain in their country of origin due to expiration of their protection term in such country. Finally, the Law calls for the complete and strict enforcement of Article 18 of the Bern Convention on protection of literary and artistic works in Ukraine.

A first glance at the Law reveals an extended list of definitions, including a distinction between phonographs and video cassettes, a definition of contraband copies distributed in violation of copyrights and related rights, and various expansions of definitions in the old law or clarifications of such definitions. The Law also includes databases within the definition of “computer programs”

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