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## PROTECTION OF THE INTELLECTUAL PROPERTY IN UKRAINE: PROBLEMS AND SOLUTIONS

«The problem of intellectual property protection outside Ukraine» (45.2%). «Unclear legislation of the sphere of technologies, including the employment of Ukrainian abroad» is noted by 43.8% of experts polled by UCEPS.

The problem of the protection of intellectual property is a prerequisite for building a strong foundation for an innovative model of Ukraine's development, modernization of the national economy, and consequently - creating jobs in new industries that could ensure the country's economic growth in the 21st century global economy - an economy based on knowledge. This also concerns the creation of civilized market environments where both the entrepreneurs and the consumers would be safeguarded against unfair competition, particularly unauthorized use of intellectual property and the production of falsified goods. This problem was highlighted in a round table discussion held in Kiev on October 21 and entitled «Problems of Protection of the Intellectual Property in Ukraine». It was organized by the Alexander Lukashenko School of Economics and Political Studies (UCEPS) and involved about 200 representatives of the state management bodies, a number of embassies, patenting and copyright registration agencies, the National Science Academy, non-governmental research organizations and most influential mass media.

**Collective management of copyrights and related rights:**  
The problem was top of the agenda of Prime Minister Anatolii Kinakh's visit to the USA, since Ukraine's continued effort proving its determination to fight copyright piracy was a clear precondition for the postponement of US economic sanctions.

### Global Trends in the Protection of Intellectual Property with relevance to Ukraine

The problem of the protection of intellectual property has come to the fore in the modern world and is not simply a legal or commercial issue. With the global economy's ongoing comprehensive intellectualization, it assumes a political dimension as it concerns economic security and demands a strategic approach. These intellectualization processes have become extremely intense which was unimaginable a decade ago. There are over 4 million active patents in the world; about 700,000 new applications for patents are submitted annually; the sale of licenses for patented items brought \$ 100 billion in 2000, i.e. ten times more than in 1990.

**Regulation of the global intellectual property protection system as a basic formation.** Ukraine must adapt to this system if it intends to evolve as an integral part of the global economy rather than an economy distanced from global social, economic and technological development trends. In recent years Ukraine has considerably stepped up its activity toward integrating with the international structures that regulate intellectual property. It has joined 15 out of the 26 universal conventions and agreements in this field. One of the most important of them is the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). The process of joining a number of international conventions and agreements has not been completed.

**The process of joining regulatory structures of the EU and the Eurasian Patent Organization is very important for the effective protection of intellectual property in Ukraine.** There are also some unresolved problems here: Ukraine's accession to the Eurasian Patent Convention and establishment of relations with the Eurasian Patent Organization is unclear, and the process of joining the Agreement for Domestic Market Harmonization (EU trade marks) are absent. Ukraine's patent agencies, which result in an uncontrollable drain of new technologies abroad, bilateral relations in this area certainly belongs to the USA, the world's technological leader. It is this factor, rather than the threat of US sanctions, that gives a powerful impetus to the development of the intellectual property protection system in Ukraine.

**The protection of enterprises' commercial information and know-how:**  
It should be noted that over the past decade the process of formation of this system has been very intense. Presently, the system of regulatory bodies is in the final stage of formation. The protection of acceptable trademarks is also under development: 37 laws and over 100 normative acts which cover at least 16 objects of copyright in science, technology and culture. Ukraine laws on the protection of the rights of holders of trademarks and the sphere of protection from unfair competition. But the efficiency of the system is low because of tremendously complex problems that require an immediate solution.

### Evaluation of non-material assets:

### Problems in the Protection of Intellectual Property in Ukraine

#### Inventory of intellectual property items:

The actual trends in the sphere of registration and use of intellectual property rights in Ukraine remain controversial and do not prove the effective functioning of the existing protective mechanisms against any violations (i.e. misappropriation of the results of scientific works through copying, etc.). In 2000, 182 - license contracts for use of industrial property items, most of them (233) names of goods in the market are protected by the substances licensed education with trade marks involved alcoholic items and another 7.5% - tobacco items; not a single contract was finalized in agriculture. Alcoholic items also accounted for the greatest number of contracts (55.6%), agriculture, health care. Alcoholic items also accounted for the greatest number of contracts (55.6%), agriculture, health care. Alcoholic items also accounted for the greatest number of contracts (55.6%), agriculture, health care.

#### Protection of rationalization proposals:

The elements which ensure the commercialization of patented achievements remain underdeveloped with the structure of the intellectual property protection system. The royalty and licensing services accounted for a mere 0.04% of Ukrainian exports of services and 1.27% of imports. The protection of folk lore, national handicrafts and knowledge:

The most acute problems in the protection of intellectual property in Ukraine are as follows: protection of software and data bases (according to 65.3% of experts polled by UCEPS), protection from unfair competition (55.6%), protection of trade marks (52.1%), protection of audio and video produce (50.0%).

Experts believe that the creation of an efficient system of the protection of intellectual property is hampered above all by an imperfect national legal system. These include the necessity of ready-made and reliable information for the protection of intellectual property in society, the absence of adequate information on the protection of rights to intellectual property objects and creation of intellectual property with the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), with Article 50 and 51.

**50.0% of respondents in Ukraine consider the protection of intellectual property to be high in the priority of problems in the country's economic development.** The limited solvency of the bulk of Ukrainians is a powerful stimulus for purchasing and using products manufactured piratically. Almost 70% of Ukrainians use falsified products labeled with recognized trade marks (see Diagram 2); only one-fifth of them never buy such products. For almost 40% of Ukrainian consumers the quality of falsified goods is not inferior to the quality of legal goods. For almost 40% of Ukrainian consumers the quality of falsified goods is not inferior to the quality of legal goods. For almost 40% of Ukrainian consumers the quality of falsified goods is not inferior to the quality of legal goods.

The low standards of intellectual property protection in Ukraine result largely from the considerable lack of qualified specialists in this field, which demands a substantial amount of specialized knowledge. Regrettably, it was only in 2000 that this field witnessed some positive changes. But the present capacities of the national educational system are still too low to meet any demand from such experts. In 2000, for instance, only 39 new students came to the Institute of Intellectual Property and Law, with 42 students taking up a second year. At the Kharkiv Institute of Personnel Upgrading in New Branches of Technology under the Kharkiv National University which trains managers in intellectual property, the first graduation totaled a mere 39 people.

And, finally, it should be noted that experts see the main reasons for the low efficiency of the protection of intellectual property of Ukrainian individuals and legal entities abroad in «the lack of state funds for patenting and registering procedures abroad» (54.8% of respondents), «the low level of legal culture in the country» (46.6%), «the absence of a legal system» (46.6%), «the absence of a legal system» (46.6%).

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Regulation of the national intellectual property market, commercial rights to any item of intellectual property;

Legal provisions for the development of franchising - the sale or license of a trade mark under its owner's control;

The transfer of technologies abroad, with foreign companies selectively acquiring Ukrainian technologies, often dirt cheap; legal mechanisms to prevent applications for invention patents to foreign countries bypassing Ukraine's patent agencies, which result in an uncontrollable drain of new technologies abroad;

The protection of enterprises' commercial information and know-how;

The protection of recognized trade marks which do not need registration: Ukrainian laws give no definition of this term, no such list of trade marks;

Protection of labels;

Evaluation of non-material assets;

Inventory of intellectual property items;

The introduction of more efficient protective mechanisms against any violations (i.e. misappropriation of the results of scientific works through fictitious co-authorship; publication by government officials under their own names of results in the materials prepared by their subordinates; reproduction of the results of scientific works without reference to their authors and their unauthorized publication etc.);

Protection of rationalization proposals;

Protection of animal breeds;

Protection of folk lore, national handicrafts and knowledge;

Loopholes in the anti-monopoly legislation which make it possible to use patenting procedures as an instrument of monopolizing markets.

There is the pressing necessity of additional legal rules harmonizing the national legislation on the protection of rights to intellectual property objects and on mechanisms of using them with the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), with Article 50 and Supplement III to the EU-Ukraine Partnership and Cooperation Agreement.

The problem of the former USSR's «intellectual heritage» remains unsolved. According to the Chief Adviser for the Verkhovna Rada Science and Education Committee Hennadiy Androshchuk, after the USSR's collapse Russia kept 500,000 active invention copyright certificates marked «For Restricted Use» that had never been published and could be made patents. According to expert estimates, about a quarter of them (125,000) belong to Ukrainian inventors. There is not even a list of these inventions in Ukraine, let alone their specifications. The same is true of the classified copyright certificates of the former USSR (also about 500,000). Some of them have been made patents of the Russian Federation. This situation may create difficulties for Ukrainian enterprises when they venture to enter the international hi-tech markets.

The participants in the round table discussion offered various opinions on the problem of scientific intellectual property. It was proposed, in particular, to introduce rules protecting scientific ideas and the contents of scientific theories. However, Chairman of the Verkhovna Rada Science and Education Committee L. Hlukhivsky insisted on the unacceptability of such an approach: it is the form, and not the content of a scientific work, he said, that needs to be protected - an internationally recognized rule in the regulation of copyright.

In spite of intensified law enforcement activities to protect intellectual property rights, the general level of criminality in this field remains high. This gives grounds for accusing Ukraine of low standards of intellectual property security. The International Intellectual Property Alliance has placed Ukraine first in a list of 58 countries with low standards of intellectual property security. Especially concerning audio-video, software and pharmaceutical products. According to the International Federation of the Phonographic Industry (IFPI), Ukraine is the European leader in piracy, with 95% of the market's total volume. Another international organization - the Business Software Alliance listed Ukraine in its latest «Report on Piracy» among the ten top software pirate countries where (together with other CIS member countries), with its 89% piracy index, it shares the third fourth place with Indonesia after Vietnam and China, ahead of Russia.

According to the Ukrainian Association of International Pharmaceutical Manufacturers (AIPM), the Pharmacological Expert Center under the Health Ministry, while registering medical preparations, ignores the patent warrants of inventions and samples, no examination of the patent expertise of the preparations which are submitted to registration is conducted. It leads to breaches of patent rights in original medical preparations. As a result, leading pharmaceutical companies may refuse to supply new preparations to Ukraine's market.

It should be noted, however, that a number of participants in the discussion doubted the objectivity of these figures. For example, MP B. Bezpaly argued that such levels of piracy «haven't been proven».

Even with this very high relative level of piracy, Ukraine is not amongst the leaders in terms of its absolute volume. Consequently, the impending US sanctions or the complications Ukraine is having in the context of its negotiations on membership in the WTO have no sufficient grounds, if equal criteria are applied to all countries, including China and Russia. Ukraine is well below the top ten countries that have the highest volumes of pirated audio production. And the losses sustained by software manufacturers because of Ukrainian piracy barely reached \$ 29.7 million in 2000, while the world's total amounted to \$ 11.75 billion. These figures testify that even though the problems of protection of intellectual property are very serious in Ukraine, it is hardly reasonable to regard Ukraine as a country whose piratical activity inflicts heavy damages on the legal producers.

The analysis of the fight against violations in the field of intellectual property in Ukraine proves that although the level of violations remains high, the protective activities have been intensified lately.

The figures provided by the Interior Ministry show that every second out of 12,000 enterprises that were checked Ukraine-wide over the nine months of 2001 violated the established rules of edition and circulation of intellectual property items. The Ministry filed 221 criminal cases, 63 of them involving copyright piracy, whereas only 19 such cases were uncovered throughout 2000. Over 4,200 trespassers were fined, 16 «underground» factories engaged in the manufacture and circulation of counterfeit products were closed down. 257,000 videocassettes, 235,000 audiocassettes and 217,000 compact discs were confiscated (709,000 total) worth UAH 7.8 million [\$ 1.5 million].

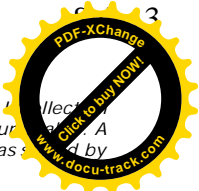
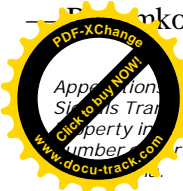
Possible Solutions to the Existing Problems,

The Insurance of International Legal Conditions

It is desirable to complete, by the end of 2002, the adoption of the legislative acts (including amendments and supplements to the active laws) that would bring national legislation to conformity with the TRIPS requirements - one of the key preconditions for Ukraine's membership in the WTO.

Simultaneously, it is advisable to complement the active Program of Ukraine's Integration with the European Union in what concerns the specification of the institutional and financial resources necessary for measures to protect intellectual property.

It is advisable to study the expediency of joining a number of international conventions and agreements, including the 1891 Madrid Agreement for the Repression of False or Deceptive Indications of Source on (in the edition of the Stockholm Act of 1967); the 1958 Lisbon Agreement for the Protection of



Origin and their International Registration; the 1974 Brussels Convention Relating to the Distribution of Programme-Carrying Signals Transmitted by Satellite; the 1989 Treaty on the International Registration of Audiovisual Works (FRT); the 1989 Washington Treaty on Intellectual Property in Respect of Integrated Circuits; the 1994 Eurasian Patent Convention (EAPC). By the way, the latter triggered a heated debate at the round table. Participants were categorically against the ratification of the EAPC, including the representatives of patenting agencies whose opinion was:

It is also important to study the expediency of drafting the long-term (five-year) program of cooperation with the European Patent Agency and the Agency for the Harmonization of the Domestic Market (EU trade marks). A complex of long-term measures should be developed toward adapting the national patent system to the parameters of the European patent system and the European trade mark system.

On the basis of active participation in the work conducted by the International Intellectual Property Organization in the protection of intellectual property on the Internet, biotechnologies, folk lore, traditional knowledge, relevant amendments will have to be made to the Development Program of the State Protection of Intellectual Property in Ukraine for 2001-2004 toward drafting new standardizing acts in these fields.

Also, the list of Ukrainian legislative acts that need to be adapted to the EU legislation should be compatible with EU documents on the issues of intellectual property protection in an information society, on the Internet.

#### Ensuring the Development of the National Legal Field

The top priority in this area is to accelerate the adoption of Volume IV «Intellectual Property» of the new Civil Code of Ukraine, to remove the discrepancies between normative acts on issues of intellectual property.

It is almost too late to adopt a law on the establishment of the Patent Court of Ukraine as a body of special competence authorized to settle disputes in the sphere of intellectual property by administrative procedures, including the issues of protection against unfair competition related to intellectual property rights.

Experts support the idea of amending the Law on the Protection of Rights to Inventions and Applicable Models and to the Criminal Code on what concerns criminal liability for submitting applications for inventions to foreign countries bypassing the national patent agency.

On the other hand, the active Regulations for the Registration and Movement Across Ukraine's Border of Merchandise Containing Items of Intellectual Property should be amended, the active registration procedures should be simplified and the registration fee should be reduced to the real cost of registration or its prolongation (at present, the sum ranges between \$100 and \$400).

It is advisable to have new bills drafted by the end of 2002 on: the protection of commercial secrets, including know-how, the legal protection of rationalization proposals; the transfer of technologies (including the patenting of inventions abroad, the transfer of technologies by individuals who go abroad); on evaluation of intellectual property; also the working out of a copyright evaluation methodology. It should be added that during the round table discussion First Deputy Chairman of the State Department of Intellectual Property V. Zharov insisted on adopting a special legislative act on inventions made by employees within their professional duties. He also spoke on returning to the issue of protection of authors of scientific discoveries in the framework of drafting the new Civil Code of Ukraine.

#### Organization of Management and Development of the Infrastructure in the Sphere of Intellectual Property Protection

It is important here to ensure an adequate level of coordination among the activities of ministries and departments by way of holding sessions of the Interdepartmental Committee for Protection of Rights to Intellectual Property Objects on a regular basis as well as to form structural subdivisions of ministries and departments in charge of copyright affairs.

At the same time, emphasis should be placed on introducing modern technologies of management of intellectual property protection. It could be facilitated by the creation of a centralized computer data bank of names of companies registered in Ukraine's territory, by the introduction of advanced information technologies, particularly a public patent library. According to the Chief of the Intellectual Property Department, N. Paladyi, his department is working intensively on the creation of an Internet stock exchange which will provide, among other things, access to data bases on inventions.

It is necessary to expand the network of regional organizations that render a wide range of services in protection of intellectual property with the participation of the All-Ukraine Association of Patent Experts and the Association of Ukrainian Inventors. If necessary, they could collaborate with regional affiliates of the Chamber of Commerce. It is also necessary to work out measures to harmonize national statistics with international standards.

However, as international experience shows, it is impossible to create an efficient system of intellectual property protection on the basis of governmental structures only. Therefore it is important that the owners of the intellectual product (individuals and legal entities) and creative unions step up the process of creating non-governmental organizations, and that the strongest of them consider joining relevant international organizations.

And, finally, it is necessary to settle the issues of the former USSR's «intellectual heritage».

#### Protection of Rights of Owners and Consumers Against Unfair Competition

In this area it is advisable to give relevant powers to the State Committee for Standardization, Metrology and Certification in order to effectively protect consumers against unfair competition involving unlawful use of trade marks and other items of intellectual property. At the same time, as it was stressed by the First Deputy Chairman of the Antimonopoly Committee, A. Melnychenko, the responsibility for fighting unfair competition should not be dispersed amongst numerous departments. Therefore, the competence of the Standardization Committee should not go beyond protection of consumers' rights and should not restrict the functions of the Antimonopoly Committee.

It is also necessary to improve coordination among executive bodies of authority, including law enforcement bodies, toward creating a comprehensive system ensuring observance of the legislation on intellectual property protection.

#### Improving Economic Levers of Intellectual Property Protection

This issue needs the closest attention, since it predetermines the scale and steady level of violations of intellectual property rights. Without solving it (as it is tied very closely to incomes and real wages in the country) and with reliance on punitive measures only, the only way out will be what was aphoristically described by N. Kotygorenko (the Chief of the Law Department at the Ukrainian National Committee of the International Chamber of Commerce): «to buy cheap Chinese steel and grate all windows». One can't but agree with her opinion that most Ukrainians will simply be unable to afford licensed products. Therefore, the problem will require technical and financial aid to fix it.

There should be a system of economic (tax, credit, insurance) incentives for commercialization of patented scientific and engineering innovations. In particular, there is a pressing need of establishing an Assistance Fund for Patenting of Ukrainian Inventions Abroad to be partly financed by the State Budget within the appropriations for protection of intellectual property.

The State Budget should also provide adequate funding of the protective infrastructure, its modernization and its equipment with up-to-date information technologies.

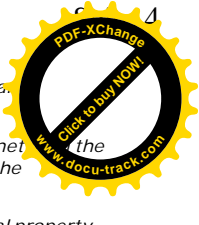
In the context of this category of problems, the Head of the Center of Intellectual Property and Transfer of Technologies at the National Science Academy Yuriy Kapitsa made a reasonable remark about the unresolved issue of the procedures and effective regulation of remuneration to authors of scientific inventions, because now «it is unprofitable to invent anything in this country».

#### Education and Shaping of Public Conscience

There is an urgent need to conduct an enlightenment campaign through out Ukrainian mass media aimed at developing legal culture among Ukrainians, teaching them to respect intellectual property; and obtaining fundamental knowledge of the rights of owners of intellectual products; and the mechanisms of their protection, including protection abroad.

In the framework of the Concept for Reformation of the Ukrainian Educational System it is desirable to introduce special courses (faculties) of the fundamentals of intellectual property in the curricula of high and higher schools. This, however, is rather problematic since, according to Chief of the Economic Security Department at the National Security and Defense Council

Varnally,



In general, we should be a system of organization of education, training and upgrading of specialists in the field of intellectual property, scientific and methodological supporting this process.

and finally an effective solution could be the introduction of a ramified system of training specialists in the field of intellectual property via the Internet on the experience of the World Intellectual Property Organization (WIPO). It is also important to study the possibility of a wider employment of the capacities of the WIPO World Academy for training highly qualified specialists.

UCEPS experts believe that the implementation of the above proposals will facilitate the development and qualitative improvement of the intellectual property protection system in Ukraine, and the acceleration of economic development and raising of the country's international image.

school curricula don't even have elementary economics courses. The drafting of Volume IV of the Civil Code of Ukraine revealed serious contradictions between the document and the rules of the current laws and ratified agreements on issues of intellectual property. The removal of these contradictions considerably delayed the Draft's preparation. Because of an unstable environment for invention and rationalization activities caused mainly by the aggravated technical and financial conditions in the innovation sphere, the number of inventors has decreased by almost a third since 1995, and the number of new industrial models has dropped twofold. The number of copyright transfer contracts involving items of industrial property remains insignificant.

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