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International Law**
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Russia and Eurasia Committee Legislation Updates and News

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Dear Committee Members:

We are pleased to present to you this edition of the Russia and Eurasia Committee Newsletter.

This edition of the Newsletter starts out with recent legal developments in Russia. First, we discuss Russia's withdrawal from the International Criminal Court. We also discuss disputes in intellectual property and examine a case study on the handling of personal data. On the more commercial side, we note Russia's improved position in the World Bank "Doing Business" ranking. This Newsletter also focuses on key legal developments in Ukraine with respect to corporate criminal liability and intellectual property reform, and in Kazakhstan with respect to a new Code of Ethics for Judges.

We would like to thank our contributors to the current edition: Kateryna Gupalo and Kateryna Oliinyk of Arzinger; Pavel Sadovsky, Olga Tyangaeva, Helen Avakyan, and Irina Kosovskaya of Egorov Puginsky Afanasiev & Partners; and James Dawdy at the UNM School of Law. Our editorial board members, Ann Sultan of Miller & Chevalier Chartered and Amanda Weir also contributed materials to this Newsletter.

We encourage Committee members worldwide to contribute to upcoming editions of the Newsletter!

Sincerely,
Evgeny Krasnov
Michael Skopets
Ann Sultan
Amanda Weir

Russia Withdraws from the ICC

(Amanda Weir)

In November 2016, Russia announced that it was withdrawing from the International Criminal Court (ICC). Although Russia was a signatory to the Rome Statute, which established the ICC, it never ratified the Rome Statute. Russia cited “[national interests](#)” as the reason for the withdrawal, but it is widely believed to be prompted by the ICC’s recent report on Russia’s actions in [Crimea](#) and allegations that Russian forces had committed war crimes in [Syria](#). The announcement caused concern among human rights activists and was criticized by many nations, with the United Kingdom’s Prime Minister calling the decision “[cynical](#).”

The [Rome Statute](#), which established the International Criminal Court, has been ratified by over 120 countries. The ICC has [global jurisdiction](#) over genocide, war crimes, crimes against humanity, and the crime of aggression. However, the ICC’s jurisdiction depends upon the acquiescence of nations and only extends to situations where (1) a crime has been committed by a citizen of a State Party, (2) a crime has occurred in the territory of a State Party, (3) a State recognizes the Court’s jurisdiction, or (4) the United Nations Security Council refers a crime to the [ICC](#).

Although largely symbolic, Russia’s announcement, coupled with the recent withdrawal from the ICC by three (3) [African countries](#), accusations of bias by the ICC, and the notable absence of the United States, India, and China as parties to the Rome Statute, [raises questions](#) about the ICC’s future and its ability to secure the international cooperation necessary to fulfill its mandate.

Selected Resources and Publications:

NBC News: Aliyah Frumin, [Putin and Duterte Want to Bail on the ICC — Here's Why That Matters](#) (2016);

Reuters: John Irish, [France to seek ICC options for war crimes investigation in Aleppo](#) (2016);

The Star: Edith Lederer, [UN committee passes resolution on Crimea, condemning Russian occupation](#) (2016);

IPI Global Observatory: Christian de Vos, [The Politics of Departure: Africa and the International Criminal Court](#), [IPI Global Observatory](#) (2016);

International Criminal Court: [History](#) (2016);

Human Rights Watch: [International Criminal Court](#) (2016);

Belfast Telegraph: [Labour condemns Russia's withdrawal from International Criminal Court](#) (2016);

Human Rights Library, University of Minnesota: ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, 2187 U.N.T.S. 90, entered into force July 1, 2002;

Al Jazeera: [Russia pulls out from International Criminal Court](#) (2016)

New Pretrial Procedure in IP Cases

(Helen Avakyan and Irina Kosovskaya, Egorov Puginsky Afanasiev & Partners)

Currently, a [bill](#) titled “Amendments to Articles 1252 and 1486 of the Russian Civil Code and Articles 4 and 99 of the Russian Arbitrazh Procedure Code” (the “**Bill**”) is pending in the Russian State Duma. The Bill was drafted in pursuance of a directive given by D.A. Medvedev, Russian Prime Minister, and introduced in the Russian State Duma by the Russian Ministry of Justice. The Bill was cleared by the Federal Service for Intellectual Property and the Court for Intellectual Property Rights.

The goal behind this Bill is to expand out-of-court dispute resolution opportunities in the area of intellectual property rights. [According to](#) the Bill’s drafters, it should alleviate conflicts when rights holders defend their infringed intellectual property rights as it would compel them to try and settle their dispute with a potential infringer amicably within a certain period of time before going to court.

Such a mandatory out-of-court procedure is introduced for the following categories of cases:

- disputes over violation of exclusive rights where a rights holder files a claim for damages or for compensation if the parties to a dispute are corporate entities and (or) sole proprietors;
- disputes over the failure to continuously use trademarks for three years after their official registration.

Amendments to Article 4 of the Russian Arbitrazh Procedure Code have been prompted by the need to remove disputes over early termination of trademarks’ legal protection due to their non-use from the list of disputes which are currently not subject to mandatory out-of-court dispute resolution.

In the first category of disputes a claim for damages or for compensation may be filed in the event of full or partial refusal by a potential infringer to pay a claim or his failure to respond to a claim within thirty days of its receipt.

Furthermore, in order to avoid abuse, the Bill provides that, irrespective of whether or not a rights holder files a claim, a court may grant injunctive relief based on his application.

As for disputes over early termination of trademarks’ legal protection due to their non-use, the Bill provides for the following claim procedures in respect of this category of claims.

An interested party who believes that a trademark holder has not used his trademark sends a proposal to the trademark holder to either (1) apply to a federal executive authority in charge of intellectual property to waive a particular trademark, or (2) enter into an agreement with the interested party to dispose in his favor of some or all of the goods the registered trademark identifies.

Such a proposal may be submitted by an interested party only upon the expiry of three years after official registration of a trademark.

Furthermore, a trademark holder will have two months from the delivery of such a proposal to waive a trademark or dispose of his exclusive right to the trademark in the interested party’s favor. Upon the expiry of this two-months’ time, an interested party may file a lawsuit seeking early termination of the trademark’s legal protection due to non-use.

On a separate note, it should be noted that if an interested party fails to file suit within the thirty-day deadline, it must send a new proposal to the trademark holder once three months have passed after the delivery of a previous proposal. Therefore, multiple claims for early termination of legal protection of one and the same trademark may be made.

In conclusion, we note that the trend to make parties to a dispute focus on its potential out-of-court settlement is not new. Courts (in particular, the Russian Supreme Court) have repeatedly drawn attention to the fact that parties to

disputes should not ignore amicable (out-of-court) settlement of disputes arising, in particular, in the area of intellectual property.

However, legal practitioners have a number of concerns about the Bill, primarily, about how it would be applied in practice and whether it would give rise to more problems than it was designed to solve.

Selected Resources and Publications:

The State Duma of the Federal Assembly of the Russian Federation (2016), [“Amendments to Articles 1252 and 1486 of the Russian Civil Code and Articles 4 and 99 of the Russian Arbitrazh Procedure Code”](#)

Intellectual Property Reform in Ukraine: Enhancing Protection and Enforcement of Intellectual Property Rights

(Kateryna Oliinyk, Arzinger)

Protection and enforcement of intellectual property rights (“IPR”) in Ukraine has received significant attention over the last several years, particularly in the context of Ukraine’s inclusion in the Priority Watch List of the United States Trade Representative’s (USTR) “Special 301” Report, as one of the countries in which particular problems exist with respect to protection or enforcement of IPR or market access for persons relying on IPR. Ukraine has been listed on the Priority Watch List every year since 2012 and remains on it in 2016.

Certainly, this fact has likely discouraged foreign companies from investing in Ukraine, which otherwise has significant intellectual potential and is internationally recognized as a prominent source of IT specialists. In 2015, IT was the third largest sector in Ukraine by export volume, reaching \$2.5 billion USD and generating 3% of the country’s GDP.

In the face of the negative perceptions of Ukraine’s IPR landscape, the Ukrainian government identified a number of concerns to which it sought to respond with various legislative and other initiatives. These concerns include:

- the unfair and nontransparent administration of the system for “copyright collecting agencies,” the entities that have the authority to license copyrighted works, collect royalties for the use of the copyrighted works, and subsequently distribute the royalties among the copyright holders;
- online copyright infringement and the lack of any provisions for intermediary liability, as well as the lack of notice-and-takedown procedures;
- “patent trolling,” as a consequence of the abuse of the patent system, as local laws make it possible to register, for instance, a toothpick, or disposable metal hanger for clothes, or spare parts for vehicles as industrial designs, or to obtain a utility model patent for a known pesticide composition, just by adding known additives. Such patent trolls then use the customs measures to prevent real manufacturers and fair users to import the products, or they use the utility model patent to circumvent the original manufacturer’s patent protection.
- combating counterfeits and lookalikes of authentic branded products; and
- combating parallel imports (sometimes referred to as “grey market goods”), which refers to cross-border sales of branded goods by traders outside the manufacturer’s distribution system without the manufacturer’s consent. Due to the regime of international exhaustion of rights applied in Ukraine, it is not practically possible to prevent the importation of original branded goods through unauthorized channels. At the same time, this may have a negative economic effect on the marketing of the same goods by local authorized dealers.

One of the most prominent steps by the government to address these issues has been the establishment, within the framework of overall judicial reform, of the Higher Intellectual Property Court within the system of the Ukrainian courts.

The legal community has welcomed this court, expecting it to enhance the level of consideration of IPR disputes in Ukraine. Established in June 2016, the new court is expected to begin to hear cases in the summer of 2017.

On June 1, 2016, the Cabinet of Ministers of Ukraine adopted the Concept of Reform of the System of the Legal Protection of Intellectual Property ("the Reform"). The Reform provides for the transformation of the current three-level IPR system into two levels and the creation of an Intellectual Property Office under the Ukrainian Ministry of Economic Development and Trade. The Reform established a new collective management agency through the transformation of the "Ukrainian Copyright and Related Rights Agency," the state enterprise that is one of several currently active collective management agencies. The respective draft law setting up the new two-level system of IPR authorities and governing the general principles of the legal protection of IPR in Ukraine has been already drafted and is at the stage of public discussion. At the same time, the draft law on the new collective management system has already been brought to the Verkhovna Rada (Ukrainian Parliament), which has to review the draft law and pass the respective law. The draft law is currently criticized by authors and the media industry, as well as the representatives of the European Commission, who seek a more balanced approach to reform in line with international best practices. The law is thus currently under consideration by Verkhovna Rada.

In addition, after more than two years of debates and discussions by representatives of internet service providers and owners of the content, the Ukrainian Ministry of Economic Development and Trade developed a draft law implementing a notice-and-takedown procedure and a "safe harbor" principle similar to those provided in the U.S. Digital Millennium Copyright Act ("DMCA") as workable mechanisms for combating online piracy. The draft law, after several iterations, was included in the Ukrainian legal bill "On the State Support of the Cinematography in Ukraine," which passed two readings in Verkhovna Rada. It was vetoed by the Ukrainian President, but remains under consideration by Verkhovna Rada, which intends to address the President's observations and vote on the amended version of the law within months.

Initially, representatives of Internet service providers objected to implementation of this procedure in the draft law, and it took several years for trademark holders and Internet service providers to reach a consensus on this issue. As the same time, in response to this legislative initiative, one of the largest local Internet platforms that was initially identified as distributing pirated online content announced the termination of its operation and offered to sell its domain name for \$1 billion. The domain's status illustrates that the administrators of this Internet platform do not plan to restart its operation.

Other notable legislative initiatives relate to introduction of changes into Ukrainian law with respect to:

- inventions and utility models, and the introduction of changes into the regime of protection of utility models to avoid abuse of patent rights. Currently, "patent trolls" are able to abuse patents issued in Ukraine without examination as to their substance. Patent trolls register such deficient patents in the customs register of intellectual property rights and then prevent importation of legal products through customs; and
- trademarks, industrial designs, and implementation of post-grant opposition procedures, in accordance with which the national regime of exhaustion of rights will be established.

However, these amendments are only at the stage of initial concepts and draft texts.

Overall, 2017 should be an exciting year in the field of intellectual property in Ukraine, with many stakeholders involved in reforming the law and the IPR systems, seeking to secure a higher level of IPR protection.

How Legislation on Handling Personal Data Will Be Enforced in the Future: LinkedIn Case Study

(Pavel Sadovsky and Olga Tyangaeva, Egorov Puginsky Afanasiev & Partners)

A Russian court published its exceptional [decision](#) and ruled that LinkedIn's activity in Russia was in breach of Russian personal data law. [The court of appeal](#) did not overturn the decision: LinkedIn.com is now blocked in Russia.

[Russian Federal Law No. 242-FZ as of 1 September 2015](#) requires all companies to process personal data pertaining to Russian citizens primarily using databases located in the Russian Federation. LinkedIn was accused of breaching the requirements of the law and citizens' rights to privacy. The domain names and index pages of the site linkedin.com and its network address on the Internet were added to the register of personal data rights violators.

Foreign companies cannot be held administratively liable or fined under Russian law. However, their activity on the Internet could be restricted if their business is aimed at the Russian market. The company may have a Russian version of its website, use the domain names .ru and .рф, deliver goods to Russia, provide an option to pay in rubles and, most importantly, process the personal data of Russian citizens.

Each year, Roskomnadzor (the Russian supervisory authority for telecommunications, information technology, and the media) conducts audits of various entities, in accordance with a schedule. For 2016 there is a checklist of 136 companies. Usually, the companies on the list are involved in the media or banking sectors; it rarely includes other businesses. In 2016 Roskomnadzor conducted 981 checks, 24% of which were unscheduled. The total amount of the imposed fines was more than 4.8 million rubles. But even if a company is not mentioned on the checklist, it may still be subject to an unscheduled inspection.

During regular monitoring or checks conducted at the request of citizens, Roskomnadzor may monitor violations using public resources. Roskomnadzor checks whether the company sent the authority an official notification about the processing of personal data. Roskomnadzor has the right to request information regarding compliance with the law. If no response is received or if the response is unclear, Roskomnadzor could initiate a claim to protect the public's rights and will represent the public's interests in court.

The LinkedIn Corporation was the first large foreign corporation found liable under the Law. It was not included on the list of companies for which checks were planned in 2016. The checklist applies to Russian entities or the affiliates and representative offices of international companies. Thus, *no foreign company that processes the personal data of Russian citizens can be sure in advance that there will not be an inspection of its activity*. In addition, the Russian authorities' new risk-based policy means that it is not possible to predict how many audits will take place within specific companies or sectors.

Selected Resources and Publications:

Moscow City Court, Court of Appeal, [Case No. 33-38783/2016](#) (Russian)

Consultant (2016), [Russian Federal Law No. 242-FZ as of 1 September 2015](#)

Tagansky District Court of Moscow, [Case No. 02-3491/2016](#) (Russian)

Recent Developments in Corporate Criminal Liability in Ukraine

(Kateryna Gupalo, Arzinger)

Before discussing the most recent developments in the corporate criminal liability in Ukraine it should be noted that legal entities cannot be qualified as perpetrators under the Ukrainian criminal law. Although Ukrainian legislation does not provide for criminal liability for legal entities in a classical sense, just a couple of years ago, criminal legal measures were introduced for legal entities. Such measures include fines, seizure of property and winding up. Criminal legal measures may be applied to a legal entity if an authorized person commits crimes listed in the Criminal Code of Ukraine on its behalf or in its interests. This includes, for instance, corruption crimes and crimes threatening national security.

The court practice on criminal legal measures was still developing when 2016 brought new developments having direct implications for legal entities. In particular, the Parliament of Ukraine introduced a concept of special confiscation, which is a court-ordered enforced non-reimbursable seizure of money, valuables or any other property by the state.

Special confiscation is applied if money, valuables or any other property have been 1) received as a result of a crime and/or as crime proceeds; 2) intended (used) to induce a person to commit a crime, to finance and/or to support a crime with material means, or as a remuneration for a crime; 3) a target of a crime, except such being returned to the owner (lawful holder), and if no such person can be determined – become state property; 4) selected, produced, adjusted or used as a means or instrument of crime, except if returned to its owner (lawful holder) who did not know or could not have known that it had been used for criminal purposes.

The essential distinction between “special” and “usual” confiscation is that special confiscation extends to third parties' property and not just property owned by persons under criminal investigation. Such risks arise, in particular, if a third party has acquired property subject to special confiscation from a charged/indicted person free of charge, at a market or at an above-market price and has known or should and could have known that such property would qualify under one of the categories above.

A decision on special confiscation is a part of a court verdict. However, in order to ensure safe-keeping of the property until a court verdict is passed, it is possible to arrest such property for the period of a pretrial investigation.

The instrument of special confiscation might still be amended. Several bills have been submitted to the Parliament to allow special confiscation even before the end of criminal proceedings. Nevertheless, these bills have not yet been passed due to a huge public outcry and fears of misuse on the part of the law enforcement authorities.

Kazakhstan adopts new Code of Ethics for Judges

(James H. Dawdy, University of New Mexico School of Law)

On November 21st, the 7th Congress of Judges of the Republic of Kazakhstan [adopted a new code of ethics](#), revising and replacing the previous code adopted in 2009. The revised code was developed with [input from](#) the Venice Commission of the Council of Europe, and contains new provisions addressing religious activities of judges, communication with mass media, participation in political parties, public appearances, and acceptance of gifts by judges and their family members. Some of the new provisions in the code, particularly concerning contact with mass media, were [influenced by](#) the Russian Federation's Code of Judicial Ethics and bring the Kazakh code into closer agreement with its Russian counterpart.

Perhaps the most important changes to the Code of Judicial Ethics are provisions on participation in political and religious activities. The [previous code](#) strictly barred judges from advocating for or being a member of any political party. However, Article 6 of the [new code](#) softens the language regarding political party affiliation, stating only that it is incompatible with judicial activities and that judges should refrain from speaking publicly in support of political parties

or participating in party activities. The code does note that this provision is not to be construed as limiting the freedom of expression of judges on political or public matters.

Article 7 introduces restraints on participation in religious activities. The new code recognizes the rights of judges to religious freedom, to participate in religious services, and to visit places of worship, but it also directs judges not to promote their beliefs or display religious symbols. Although Kazakhstan is a majority-Muslim country, the encroachment of Islamic fundamentalism into Central Asian states has long been of concern to the Kazakh government, and thus is likely the motivation for the provisions introduced in Article 7.

In addition, Article 10 of the new code contains specific wording that judges should avoid public events and places that could harm their reputation, clarifying some of the language in the previous version of the code that only generally advised judges to follow high standards of morality and professional conduct. Article 12 of the code also addresses the responsibilities of judges with regards to their family relationships, requiring judges to support parents and disabled relatives, and provide for the education of minor children. While the new code does not contain specific guidelines regarding financial conflicts of interest, Article 12 cautions judges to be aware of the financial interests of family members.

The revisions to the code of ethics come against a backdrop of [low public confidence](#) in the judicial system. [Corruption remains a problem at all levels of the Kazakhstani government](#), and while the new code is more comprehensive than the previous version, it remains to be seen whether the judiciary will robustly enforce the ethical standards the code lays out.

Selected Resources and Publications:

[Kazakhstan adopts new Code of Judicial Conduct](#) (inform.kz)

[Text of the new Code of Judicial Ethics](#) (Russian)

[On the eve of the VII Congress of the Republic of Kazakhstan judges](#) (A. Sarsenbayev, Judge of the Supreme Court of the Republic of Kazakhstan)

[OPINION ON THE DRAFT CODE OF JUDICIAL ETHICS](#) Adopted by the Venice Commission at its 107th Plenary Session (Venice, 10-11 June 2016)

[Code of Judicial Ethics](#) (approved by the V Congress of Judges of the Republic of Kazakhstan dated November 18, 2009)

[Kazakhstan Corruption Report](#)

[Transparency International Report on Corruption in Kazakhstan](#)

Market Insights

[Russia advances in Doing Business rankings: World Bank](#)

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We appreciate your comments and suggestions regarding the contents of this Newsletter.

If you would like to contribute or have any questions, please feel free to contact editorial board members:

[Evgeny Krasnov](#), [Michael Skopets](#), [Ann Sultan](#), and [Amanda Weir](#)

The Russia and Eurasia Committee unites ABA members around the world who are interested in the countries of the Eurasian region: Armenia, Azerbaijan, Belarus, Georgia, Kazakhstan, Kyrgyzstan, Moldova, Russia, Tajikistan, Turkmenistan, Ukraine, and Uzbekistan.

The Committee focuses on issues relevant to the region and, through its activities, promotes dialogue and cooperation between legal professionals in business, academic, non-profit, and government spheres.

The Committee's current particular emphasis has been on legal issues relating to Russia and U.S.-Russian relations. However, the Committee welcomes a broad range of projects and members.

Co-Chairs:

[Pamela Egan](#)

[Anastasia Kovalevskaya](#)

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For more information, including access to the Committee's publications and other resources, please visit the Committee's [website](#).