

# INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

## 2003 SPECIAL 301 REPORT

# CZECH REPUBLIC

## EXECUTIVE SUMMARY

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**Special 301 recommendation:** IIPA recommends that the Czech Republic be added to the Special 301 Watch List this year (it has not appeared on the 301 lists for the last two years). Growing problems with optical media piracy, poor border enforcement, delays in criminal enforcement proceedings and remaining deficiencies in the copyright law justify this recommendation.

**Overview of key problems:** The copyright industries had hoped that the amendments made to the Czech copyright law, criminal code, civil code and the customs code during the 1999-2001 time period would improve on-the-ground enforcement actions by Czech enforcement authorities. Sadly, there has not been a significant improvement in resolving both enforcement problems and legislative gaps. Copyright piracy in the Czech Republic remains at high levels for most of the copyright sectors. Optical media piracy, widespread CD-R burning and Internet piracy pose major threats to the commercial development of a relatively strong copyright market. Optical disc production in the country, from three operating plants and one further plant awaiting commencement of production, could be as high as 200 million discs per year—significantly exceeding local demand (the exact capacity figure is difficult to quantify accurately due to one plant's denial of access to industry representatives). Ineffective border enforcement means that the Czech Republic continues to be a source of, or a transshipment point for, pirate materials. The criminal enforcement apparatus remains so slow (especially at the investigative, prosecutorial and judicial levels) that any deterrent effect is severely weakened.

Positive notes include the Czech Republic's accession to the two WIPO 1996 Internet treaties in 2002 (although further amendments on technological protection measures and rights management information to the 2000 copyright law is needed to ensure full and effective implementation). Also, the business software industry reports that the cooperation with Czech police in 2002 has been extremely fruitful, and that the police have significantly increased their activity in the field of software copyright enforcement. Furthermore, the Czech criminal courts have passed some clearly deterring sentences in software piracy cases. During 2002, the Czech government has also successfully implemented a comprehensive software management system covering all software use under the whole state administration. Estimated trade losses due to copyright piracy in the Czech Republic amounted to at least \$57.6 million in 2002.

**Actions that the Czech government should take in 2003:** To correct the deficiencies in the Czech enforcement and legal regimes, the Czech government should:

- Publicly demonstrate the political will to implement effective IPR law enforcement and follow up as a matter of priority;
- Amend the Copyright Law to effectively implement the WIPO Treaties by strengthening its provisions on technological protection measures and rights management information, and amending other deficiencies which cause the law to be inadequate to combat copyright piracy;

- Adopt optical media regulations to control optical media production and distribution;
- Strengthen border enforcement to stop importation and transshipment of pirated goods, including optical media product;
- Improve the speed of criminal enforcement (at the police investigation, prosecutorial and judicial levels);
- Issue civil *ex parte* orders in a timely manner (now that the legal uncertainty over their availability and their application without advance notice to the target has been resolved);
- Amend the 1996 Broadcast Law to fully protect encrypted satellite signals;
- Improve coordination between the various enforcement bodies (police, customs, prosecutors and the judiciary) so that concrete results in combating piracy is achieved as well as expand their expertise to act against internet piracy. Examples:
  - The Ministry of Interior could issue a directive instructing criminal police and prosecutors to act on *prima facie* cases of piracy within 30 days of receiving a criminal complaint, and for criminal charges to be announced and presented to the public prosecutor for prosecution within 60 days after a raid occurs.
  - A directive could be issued to transfer *prima facie* cases of piracy to state prosecutors immediately upon the announcement of criminal charges, and for a special group of criminal police investigators to be dedicated to the preparation and investigation of copyright cases.
  - Investigation processes could be improved by amending the law to permit tax inspectors to share information on illegal uses discovered in the course of audits with police and affected copyright holders.

**CZECH REPUBLIC**  
**ESTIMATED TRADE LOSSES DUE TO PIRACY**  
*(in millions of U.S. dollars)*  
**and LEVELS OF PIRACY: 1998 - 2002<sup>1</sup>**

INDUSTRY	2002		2001		2000		1999		1998	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Entertainment Software	38.3	89%	54.8	90%	45.0	81%	12.0	NA	NA	NA
Records & Music	7.3	50%	8.4	48%	3.4	35%	60.0	8%	62.0	6%
Motion Pictures	9.0	12%	8.0	10%	8.0	18%	10.0	30%	8.0	35%
Business Software Applications <sup>2</sup>	NA	NA	27.7	43%	36.2	43%	30.2	42%	39.5	49%
Books	3.0	NA	3.0	NA	4.5	NA	4.5	NA	4.0	NA
<b>TOTALS</b>	<b>57.6+</b>		<b>74.2</b>		<b>97.1</b>		<b>116.7</b>		<b>113.5</b>	

<sup>1</sup> The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2003 Special 301 submission, and is available on the IIPA website at [www.iipa.com/pdf/2003spec301methodology.pdf](http://www.iipa.com/pdf/2003spec301methodology.pdf).

<sup>2</sup> BSA's estimated piracy losses and levels for 2002 for the Czech Republic are not available; numbers will be finalized in mid-2003. BSA finalized its 2001 numbers in mid-2002, and those figures are reflected above. BSA's trade loss estimates reported here represent losses due to piracy which affect only U.S. computer software publishers in this country, and differ from BSA's trade loss numbers released separately in its annual global piracy study which reflects losses to (a) all software publishers in this country (including U.S. publishers) and (b) losses to local distributors and retailers in this country.

The Czech Republic has bilateral obligations to the U.S. under the 1990 Trade Relations Agreement, the 1991 Bilateral Investment Treaty and its participation in the Generalized System of Preferences (GSP) trade program to provide effective copyright protection and enforcement to U.S. copyright owners.<sup>3</sup> The Czech government's substantive and enforcement obligations under the WTO TRIPS Agreement are also in force. Finally, the European Commission too has identified problems with inadequate copyright enforcement in the Czech Republic, and in order to complete its accession to the European Union in 2004, called on the Czech government to intensify measures to combat piracy and counterfeiting, strengthen border controls, and improve coordination between enforcement bodies.<sup>4</sup>

## **COPYRIGHT PIRACY IN THE CZECH REPUBLIC**

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The Czech market reflects sophisticated and diverse forms of piracy, ranging from hard goods, CD-R burning, Internet piracy, business software piracy among computer and CD-ROM resellers, and the significant growth of optical media piracy adversely affecting all industry sectors.

### **Optical Media Piracy**

**CD-R burning:** CD-R burning of copyrighted materials—ranging from music to entertainment software—in private homes, schools and other educational institutions, and in commercial establishments, has become a major piracy problem in the Czech Republic. The recording industry's enforcement statistics indicate that 80% of the seized pirated music discs were in CD-R format, compared to the 40% share in 2001. In response, the music industry has united to combat commercial outlets (called *vypalovny*, or "burning stations"), which allow consumers to burn their own copies of legitimate CDs.<sup>5</sup> Some stores even permit burning illegal copies of copyrighted materials off the Internet. These stations, which first appeared in 1998, exploited the provision in the copyright law that allows owners to make a back-up copy for their own personal use. The recording industry worked with the local authors' society, OSA, to persuade OSA not to renew the contracts (for 2003) it made with some of these stores. In fact, the local recording industry group IFPI-Czech Republic, OSA and Intergram (a collecting society for performers and producers of phonograms and audiovisual recordings) have agreed that OSA will not issue any further contracts to the *vypalovny* nor will they renew old contracts. Many *vypalovny* never had contracts to begin with, such making the entire scope of CD-burning in storefronts difficult. IFPI-CR estimates that some 7.5 million pirated copies with the music content were made last year in the Czech Republic.

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<sup>3</sup> For the first 11 months of 2002, \$271.4 million worth of Czech goods (or 24.2% of the Czech Republic's total imports to the U.S. from January to November) entered the U.S. under the duty-free GSP code, representing a 17.8% decrease from the same time period in 2001. For details on the Czech Republic's bilateral experience under Special 301, please see Appendices D and E of this 2003 Special 301 submission.

<sup>4</sup> To access the European Commission's October 2002 annual report on EU enlargement and the Czech Republic, go to <http://www.euractiv.com/cgi-bin/cgint.exe/?1100=1&204&OIDN=1504033>.

<sup>5</sup> Pavla Kozakova and Mark Andress, "Czech Music Industry Unites Against CD-Burning Outlets," *Billboard*, October 19, 2002, at 57.

One of the country's plants, Exlmpo, is a significant regional producer and exporter of blank CD-Rs (though it is understood that the plant has not met its royalty obligations for CD-R production with Philips).

The entertainment software industry has similar problems with Internet cafes which allow their customers to burn pirated software downloaded from the Internet, for a fee. Warez sites are now prevalent in the Czech Republic, which only fuels CD-R burning of pirated entertainment software in the country.

**Local overproduction of industrial prerecorded CDs and blank media:** A serious problem in the Czech Republic is the overproduction of optical media (CDs, CD-Rs, DVDs). The manufacturing capacity of the three (3) operating CD plants (one further plant awaits commencement of production) with over 24 production lines could be as high as 200 million discs per year.

The copyright industries have reported that unauthorized product manufactured in the Czech Republic is being exported to other countries including the EU, Poland, and elsewhere in Eastern Europe, upsetting markets in the entire region. The recording industry reports that while the cases involving pirated discs produced by known Czech plants have decreased, the cases involving the discs with large-scale music content in MP3 format (e.g., in Germany, Switzerland, Poland, the U.S.) produced by non-Czech plants, though mastered in the Czech Republic, continue to increase.

**The need for OD regulations:** The Czech government must swiftly take steps to regulate optical disc plants and improve border enforcement to contain the problem. The Czech Republic must set up plant monitoring procedures to regulate the production, distribution, and export of optical media. To be effective, an optical disc plant law must (1) require plants to obtain a business license to commence production; (2) establish a basis for regulators to deny, suspend and revoke the license upon evidence of illegal activity; manufacturing licenses must require the listing of machinery and equipment and the raw materials used in the production of optical discs; (3) require import and export licenses and enable searches of these licensees; (4) require the plants to apply internationally recognized identifiers on the goods and machinery; to keep records of production, clearance of rights, destination of products, use of raw material; to notify changes in the stock of equipment; and to cooperate with the police upon inspection; (5) require plant inspections and in particular, "surprise" plant visits, including means for the rightholder organizations to participate in such plant visits, to obtain evidence and forensic tests, and access the plant's records; and (6) require a comprehensive list of enforcement procedures, remedies, sanctions, powers granted to authorized officers, including the powers to seize equipment and discs during plant visits. The willingness of the plants to participate in these procedures is important, as is the government's willingness to enforcement such regulations.<sup>6</sup>

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<sup>6</sup> As a historical example, in 1998, the largest plant (GZ Lodenice) did agree to cooperate with the International Federation of the Phonographic Industry (IFPI) and adopt SID codes; however, the other then-existing plants (CDC Celakovice, Eximpo Praha, and Fermata CD) did not reach such agreements. IFPI filed criminal complaints against CDC Celakovice in 1998, and the IFPI and the Business Software Alliance (BSA) began an investigation into the activities of a second plant suspected of being involved in large-scale piracy. In October 1998, the police investigation department officially charged the plant manager of CDC with copyright law violations. However, that police investigation department decided it was going to refuse to prosecute the manager and dropped the case entirely; the industries appealed to the district state attorney, who refused to intervene. This example shows a very serious lack of enforcement commitment by the police department. The Czech government and the proper enforcement authorities must reconsider this decision. However, there are no plans to re-open this case. However, there is an outstanding inquiry from the Polish authorities to Czech authorities (first in October 2001 and again in

## Internet Piracy

In 2000, Internet piracy emerged as an issue in the Czech Republic. At that time, the most urgent challenge involved a local terrestrial television signal containing Motion Picture Association (MPA) member company television programs and motion pictures was temporarily streamed over the Internet to computer screens all over the world via an Internet website which purported to be the station's official website. While the transmissions were of a sporadic and indiscriminate nature, they nevertheless constituted blatant copyright and trademark infringements and a breach of territorial limitations of licenses granted by the MPA's member companies to the station. An amicable settlement was ultimately reached among the TV station, the MPA, and the Czech Anti-Piracy Union (CPU). In 2002, MPA's local anti-piracy organization initiated 40 cases against Internet pirates and successfully prosecuted five defendants who offered pirate hard goods over the Internet. In addition, storefronts (like *the vypalovny* described above) also permit consumers to burn CDs using material accessed from the Internet.

The local recording industry reports a significant increase of the infringing files containing illegal music on the Internet in 2002. IFPI CR identified and sent the "Cease & Desist" notices to 128 infringing sites containing 8069 illegal files, which as a result were removed from Internet. Comparing with the 24 removed sites in 2001, the music piracy on Internet increased over 80% in 2002. IFPI CR co-operates successfully with Internet Service Providers (ISPs). However, the co-operation with the police in tackling Internet piracy leaves a lot to be desired and in fact has not proved to be effective. Thus, none of the Internet piracy cases has reached to the courts.

Warez sites for entertainment software products are becoming prevalent in the Czech Republic; the country is also emerging as a locus for pirate crack or warez groups. Internet piracy for entertainment software products is estimated to have grown to 30% over the last year. A lot of the illegal downloading is occurring in unlicensed Internet cafes which, as stated above, also allow their customers to make copies of illegal material found on the Internet. With growing bandwidth and increasing Internet access, unless the country's laws address enforcement in the online environment, Internet piracy is likely to grow even worse.

In February 2002 a Prague District court sentenced an Internet reseller who had illegally copied and distributed BSA member company software to a two-year suspended prison sentence, converted to three and one-half years' probation. The reseller was also made to pay US\$20,000 in damages to rightsholders and a criminal fine of US\$8,330. This is one of the most severe judgments issued by the Czech courts and one of the few cases where a court has ordered payment of high damages to BSA members. Furthermore, in July 2002, the District Court in Rychnov nad Kněžnou convicted an Internet reseller of copyright infringement for illegal distribution of BSA member company software and sentenced the target to one years probation.

### **Piracy continues across all sectors.**

Piracy of entertainment software (including videogame CDs and cartridges, personal computer CDs, and multimedia products) in the Czech Republic continues to be widespread. The Interactive Digital Software Association (IDSA) reports good police cooperation with its

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February 2002) in connection with an investigation into unauthorized production by a Polish plant, with Czech plant involvement. To date, the Poles have not received a response to their request from the Czech authorities.

member companies on raids against retail pirates, but, as with other industries, enforcement is not effective, especially border enforcement, which is almost nonexistent. The major problem confronting IDSA members is CD-R burning (so-called “gold” recordable discs), which accounts for about 80-90% of the pirated entertainment software in the country, largely undertaken by criminal syndicates. Prerecorded silver discs are not as prevalent as they once were. The factory-produced silver discs that do appear on the market are still being imported from Eastern Europe, predominantly Russia, Hungary and the Ukraine. IDSA estimates that the overall value of pirated entertainment software products present in the Czech Republic was \$38.3 million in 2002, with an estimated piracy level of 89%.<sup>7</sup>

The recording industry reports that the most serious cases of music piracy occur mainly in the Western Bohemia and North-Bohemia regions. The most difficult situation is in the districts of Děčín, Teplice, Ústí nad Labem, Most, Chomutov, Karlovy Vary, Sokolov, Tachov, Domažlice and Klatovy. The worst situation of all is in the district of Cheb. The recording industry reports that estimated piracy level due to music piracy has risen over the past three years, up to 50% (in 1999 the level of music piracy in the Czech Republic was only 8%). Trade losses to the legitimate recording industry in 2002 were \$7.3 million. The jump is the result of CD-R materials being produced for the public on a commercial basis and flooding the marketplace. Compared to 2001 the use of CD-Rs for illegal music copying has doubled—80% of all pirated discs seized in 2002 were CD-Rs. Several owners of establishments offering this material have been charged under the criminal law, but none of these cases has reached the courts to date.

Since the 1996 copyright act amendments, the once-problematic CD rental problem diminished as the number of rental shops declined significantly. Unfortunately, most of these rental shops continue the covert illegal rental activities under the name of “Club of Owners.” As a result of the rejection of the case as irrelevant by court two years ago the establishment of such clubs has increased tremendously, and cause significant damage to the legitimate music industry in the Czech Republic.

The Czech Republic’s failure to provide protection for pre-existing sound recordings until December 2000 (even though obligated to do so since 1996 under the TRIPS Agreement) resulted in a huge production of back-catalog repertoire that was exported for years into other countries in the region. The law permitted a two-year sell-off period of back-catalog inventory. This means that this back-catalog repertoire lingered as a problem for a number of years and was a significant hindrance to effective enforcement until the material is finally removed from the marketplace. The sell-off period terminated on November 30, 2002.

The audiovisual industry indicates that its main piracy problem facing the Czech Republic is pirate optical discs. VCDs, DVDs, and home-burned CD-ROMs can be found throughout the country at street markets, retail stores, and on the Internet. The Motion Picture Association of America (MPAA) reports that this demand for optical discs is fueled not only by the new technology, but also by the availability of pre-release titles. Titles such as *Harry Potter*, *Lord of the Rings*, and *Spiderman* were available on optical discs days before their theatrical premieres. CPU seized over 46,000 home burned CD-Rs containing movies in 2002. This is a dramatic increase from the 533 pirate optical discs seized in 2001. It is estimated that the optical disc piracy rate is now 15%. The Czech Republic is also experiencing pirate DVDs for

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<sup>7</sup> IDSA has revised its methodology for deriving the value of pirate videogame products in-country. This methodological refinement explains the decrease in the value of pirated videogames between 2001 and 2002.

the first time. These discs are being imported from the Far East and Russia. Traditional videocassette piracy, involving high quality copies, continues to exist in the country, although it is no longer a growing problem (at approximately 8% piracy level). The most popular method of distribution of pirate product is still street markets, which are located throughout the country. In addition, flea markets along the German border continue to cause problems for the surrounding countries. These markets, run by Sino-Vietnamese gangs, are difficult to control and the limited police action to date is not supported by effective prosecutions or deterrent sentences. Statistics show that the sentences being imposed in 2002 are less than the sentences imposed for similar crimes in 2000. The Internet also continues to grow as pirates use networks, chatrooms, and auction sites to distribute their illegal product. Cable and television piracy is also a problem that is seriously impeding the pay-TV market. The most significant problem is the number of cable operators who retransmit foreign (especially German) satellite and terrestrial broadcast signals. Ambiguities in Czech legislation complicate the situation. Pirate smart cards and decoders, used mainly by private citizens, continue to damage the pay television industry. Public performance piracy in video theaters that do not use legitimate products is still a problem. Clubs, video cafes, and long haul buses contribute to the problem. Annual losses to the U.S. motion picture industry due to audiovisual piracy in the Czech Republic were estimated to be approximately \$9 million in 2002 with an overall audiovisual piracy rate of 12%.

End-user piracy, the use of unlicensed software especially in corporate sector, remained a major challenge for the software industry in 2002. In light of this BSA highly commends the Czech government for issuing a comprehensive software asset management decree in 2000 and working on its implementation in 2002. The BSA also encourages the government in its efforts to ensure the completion of the requirements arising from this decree. In relation to HDL cases (Hard Disk Loading is the term for computer resellers installing unlicensed software onto computers being sold) the Czech police tend to limit their investigations only to one test purchased computer. They are not willing to broaden their investigations to past illegal distribution of the unlicensed by inspecting the relevant accounting materials and contacting the customers of the target. This attitude completely fails to realize the true scope of illegal activities surrounding a Hard Disk Loader (HDL) reseller. BSA's estimated annual losses and piracy levels of business software in the Czech Republic are not yet available.

The book publishing industry continues to report that unauthorized copying and piratical translations into English of college textbooks, as well as scientific, technical and medical publications, is a problem in the Czech Republic. Estimated trade losses due to book piracy were \$3.0 million in 2002.

## **COPYRIGHT ENFORCEMENT**

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Despite recent legislative amendments to various enforcement-related laws, the Czech Republic's enforcement regime remains incompatible with its TRIPS enforcement obligations due to: the failure to impose sufficiently deterrent criminal penalties in commercial piracy cases; lengthy delays in bringing and completing both criminal and civil infringement cases; the lack of availability of deterrent civil damages; and ineffective border measures. The copyright industries have made concerted efforts through their anti-piracy groups to develop better cooperation with the police, with some success. However, beyond raids and seizures, cases often languish, and there is an especially large backlog of cases. The failure of the judiciary to properly apply deterrent penalties has allowed piracy to remain widespread, thus harming the development of legitimate markets for the copyright sectors. Border enforcement also is weak and is ineffective in intercepting transshipments of piratical products.

Cooperation between the music industry (and other groups) and customs must be improved. Despite successes based on good cooperation at the local level, the Central Customs Board has shown itself less than responsive to the approaches from industry. For example, the recent approach of the local IFPI-CR vis-à-vis the Central Customs Board to enquire about the movements of Bulgarian plant equipment associated with pirate production proved to be fruitless. Remarkably, in contrast with the fact that IFPI local industry groups in two other countries had established from their respective customs authorities the movement of the Bulgarian equipment to the Czech Republic, the Czech music industry group was unable to get any co-operation from customs.

BSA believes that overall in 2002 the enforcement program did better both on the level of statistical data (number of judgments, raids etc.) and also on the level of the necessary move to more complicated cases (in 2002, BSA conducted, together with police, the biggest police raid in the Czech Republic ever). On the basis of this it seems to BSA that criminal enforcement bodies are able and prepared to deal with more sophisticated cases than in previous years.

In 2002, the new Act on Czech Trade Inspection came fully into effect, which allows Trade Inspection to confiscate all goods that infringe upon intellectual property rights. As a result the regional inspectorates in České Budějovice, Ústí nad Labem, Karlovy Vary and Plzeň carried out several efficient raids.

One way for the Czech government to address wide-scale problems was the establishment (in 1996) of an inter-ministerial task force, chaired by the Ministry of Industry and Trade. The copyright industries' experience to date has been that the task force has not devoted sufficient attention to implementation of existing laws to realize significant and deterrent action against commercial pirates. IIPA reiterates its longstanding request for a Czech government directive to get the task force to operate effectively. IIPA had suggested years ago that such a directive, to implement proper enforcement, would require regular meetings and reporting on cases by the task force, as well as an opening up of task force proceedings to the private sector. By all accounts, the task force as currently configured remains ineffective.

## **Raids and Results with the Czech Police**

The recording industry reports that its principal enforcement complaint is the inability and unwillingness of police investigators (not the criminal police) and state attorneys (the prosecutors) to thoroughly investigate in depth major criminal cases brought to them by the criminal police. For example, in one case in July 2000, over 21 million Czech crowns' worth (\$700,000) of material was seized, but there has been no disposition of the defendants in that case. In the past year, there were other successes for the recording industry.

Despite the difficulties with investigating the major criminal cases in depth, the local recording industry reports the improvement of co-operation with the police. However, the police in the busiest illegal music production and distribution spots, Western Bohemia and Cheb, remain uncooperative, where police started the internal investigation upon IFPI CR request.

IFPI continues to report large-scale seizures of illegal material, almost all of it in the form of CDs (about 80% of this total is now recordable CDs). Customs officers, trade inspectors and police, together with IFPI employees, initiated 763 criminal cases in 2002 involving pirated sound recordings, including 128 cases involving the Internet. The total number of seized illegal music products was 372,304 units (295,046 CD-Rs, 73,762 CDs, 2441 pirate audiocassettes



and 1,055 pirate DVDs) with a total value of over \$4 million (not including the 128 Internet piracy cases). Criminal actions were initiated against 257 people. As an example of the scope of piracy, some 20,000 pirated CDs worth US\$193,000 were destroyed at the 12<sup>th</sup> INVEX Fair on international information and communication technology in Brno (southern Moravia) in October 2002. In one large-scale anti-piracy action in July 2002 in the Western Bohemian town of Cheb, a task force of police, trade inspection officers and custom inspectors seized some 70,000 pirate CDs and 13,000 pirate DVDs. On December 17, 2002, customs and police investigators seized around 13,000 discs (mainly CD-Rs) and an unidentified number of DVDs and VHSs from the warehouse in Vojtanov, a town in Western Bohemia. As with most of the pirate trading of optical discs on the Czech border, this case involves organized crime elements involving the Vietnamese nationals. The potential defendant in this case will be the mayor of the town, as he is the owner of the warehouse. The case is pending, as the mayor is on holiday in Vietnam.

BSA concludes that police cooperation remained good in 2002 and was much improved over activities in 2001. In May 2002, the Czech police and BSA carried out a joint awareness campaign and sent out 350,000 letters to businesses, informing them of the legal risks related to unlicensed software use. These letters were generally well received and generated over 1500 responses from end-users requesting for information on legal software use and management of software licenses. In November 2002, the police carried out the largest ever police raid in the Czech Republic against a well-known Czech producer of machinery with approximately 500 employees. The raid took two days to complete and involved search of 67 computers. Police officers from at least three different regions took part in this raid in cooperation with experts from the Czech Police Institute of Criminology under the supervision of the Czech Police Presidium.

IDSA member companies are getting good cooperation from the police, who have been very sympathetic to the industry's anti-piracy efforts. However, most of the criminal actions have been against small operations. Law enforcement officers have been reluctant to pursue the bigger operators, claiming that there are no such targets as the prevalent form of piracy in the country is CD-R burning, usually run by small operations anyway.

The Motion Picture Association (MPA) reports that the local anti-piracy group CPU has good cooperation with the police in most cases. It has, however, proved difficult to secure cooperation with certain police departments, especially in western Bohemia. Cooperation with prosecutors and judges has also improved in recent years. In 2002, the CPU, police and customs conducted 509 investigations, 220 raids, and seized over 13,000 pirate videocassettes, 46,000 pirate CD-ROMs, and almost 1,000 pirate DVDs.

## **Delays with the Prosecutors and with the Criminal Courts**

The 2000 amendments to the criminal procedure code require that police investigations must be commenced within either a two- or three-month window, depending on the alleged crime. Furthermore, the entire investigation must be completed within a period of six months (there is a possibility that these deadlines can be extended). The amendments also provide that a party may submit its own expert opinion in lieu of an official expert opinion, provided the party's expert opinion complies with certain formal requirements set out by law. The average length of time for a decision before a criminal court of first instance has been between one to three years, with a second-level decision taking an additional year. Unfortunately, due to the possibility of extending the statutory investigation deadline, the average time of closing the case is around 2-3 years.

The merger in January 2002 between the Office of Investigations and the Czech Criminal Police to create the Office of Police Investigation was purportedly designed to cut down on excess bureaucracy and streamline efficiency in the investigation of crimes like copyright piracy. Unfortunately, despite a four-month transition period, there was confusion relating to the manner in which the legislative changes should have been implemented in the day-to-day work of the two former bodies and there still appears to be little improvement in speed of investigations.

**Recommendations:** These three suggestions reflect previous IIPA recommendations. First, the Ministry of Interior should issue a directive instructing criminal police and prosecutors to act on *prima facie* cases of piracy within 30 days of receiving a criminal complaint, and for criminal charges to be announced and presented to the public prosecutor for prosecution within 60 days after the occurrence of a raid. Second, IIPA continues to recommend a directive to transfer *prima facie* cases of piracy to state prosecutors immediately upon the announcement of criminal charges, and for a special group of criminal police investigators to be dedicated to the preparation and investigation of copyright cases. Third, it is further recommended that the Czech Republic improve the investigation process by amending its law to permit tax inspectors to share information on illegal uses discovered in the course of audits with police and affected copyright holders.

During 2002, some industries, notably the motion picture, business software and entertainment software industries, reported continually improving cooperation with prosecutors and judges in moving current cases forward. But the backlog remains and, more significantly, copyright holders face problems and certain obstacles in cases involving large companies suspected of piracy. The recording industry reports that the improvement in prosecutors' and judges' work is not a general development, but occurs sporadically on case-by-case basis.

The Business Software Alliance (BSA) reports that the overall speed of criminal and civil enforcement still remains a problem despite a more than 60 judgments and criminal orders issued by Czech courts in relation to illegal software end-user and counterfeiting cases to date. BSA reports that in the initial stages of enforcement, delays are caused by slow police investigations and post-raid "expert reports" which should be issued before a criminal accusation can be issued against a suspect under Czech law. Although small- and medium-sized companies get regularly investigated by the police for software piracy, there has been a noticeable lack of investigations targeting larger companies in recent years. However, BSA reports that this situation has been slightly improving. For example a well-known Czech manufacturer of machinery was raided in November 2002 and this case clearly represents one of largest raids in the history of BSA's Czech enforcement program. Unfortunately, expert reports continue to delay investigations as they often take months to get finalized and by that time cases have often become stale. BSA reports, however, that there still were encouraging developments in the number of formal criminal accusations filed by prosecutors: In 2002, 28 criminal lawsuits were filed against illegal end-users. Police and prosecutors are getting more proactive in conducting raids and filing criminal accusations against both reseller and end-user infringers, according to BSA. The BSA hopes that the new amendments to the code of civil procedure allowing a party to submit its own expert opinion to substitute for the official expert opinion will be implemented as a regular practice during 2003 as this should result in a much more efficient procedure.

BSA has observed that following the preparation of expert reports Czech prosecutors are now filing a growing number of accusations; this is a very encouraging development. Prosecutors in Prague and Ostrava have been particularly diligent. This, in turn, has led to a number of criminal judgments for software infringement. BSA was aware of at least 11 criminal

judgments for software infringement in 2002, with some of the most severe judgments ever issued by the Czech courts, including an illegal software reseller sentenced to two years in prison, suspended to three and a half years probation and another sentenced to 20 months suspended imprisonment, with probation for three years.

MPA reports that CPU's cooperation with prosecutors and judges also improved in recent years. The prosecutors and judges have been willing to attend CPU trainings and appear to be eager to adapt to the challenges presented by Internet pirates. The lack of deterrent sentencing continues to be a frustrating issue and there does not appear to be an improvement in the time it takes for a case to be completed. These continuous delays are well known to the pirates and therefore the filing of a criminal case has little impact.

IFPI also reports that in addition to slow prosecution and judiciary, the imprisonment sentences are routinely converted to the conditional imprisonments. In general, the imposed penalties are at the lowest level, reaching the maximum of 100,000 – 150,000 Czech korunas (\$3,500 – 5,100)

## **Criminal Sentencing Not Deterrent**

There was some improvement in 2002 in the enforcement situation in the Czech Republic. In some instances, larger fines have been imposed, and the implement on piracy (PCs and CD-burners) have been confiscated. Although criminal sentences were routinely converted into suspended sentences as in previous years, such suspended sentences were of a slightly more deterrent character in 2002. The recording industry reports that there were only two imprisonment sentences in music piracy cases in 2002. CPU conducted a survey of their cases in 2002 and found that the defendants are currently receiving more lenient sentences than were being imposed in 2000. BSA also notes that criminal fines continue to be low. Increased use of criminal sentences that are not later routinely converted into suspended sentences would contribute to improving the enforcement situation in the Czech Republic.

## **Civil Cases and *Ex Parte* Search Orders**

The Czech government has clarified that *ex parte* searches are available to right holders when it amended its Civil Procedure Code, effective January 1, 2001. Only in 2002, it's the first *ex parte* search application by BSA was accepted. The Court of Appeal finally clarified that a civil *ex parte* searches can be granted by the Czech courts without prior notification to the target. Already before this ruling, it was clear that searches could be conducted, but it was unclear whether suspects would be given advance notices of these searches (advance notice obviously often leads to destruction of evidence difficulties in conducting an effective search). BSA will continue to monitor how courts throughout the country apply this ruling and if this interpretation of Czech law will be broadly accepted.

BSA reports that the average length of time for a decision before a civil court has been in the range of one to three years, with a second-level decision taking an additional six months to a year. The most time consuming are larger end-user cases involving hearing of several witness.

## **Inadequate Border Enforcement**

The Czech border remains porous, with pirated optical media products exiting the country. However, after the adoption of the new Czech "anti-counterfeiting" law in September

2002, which replaced the useless 1999 law on anti-piracy border measures,<sup>8</sup> the anti-piracy activities of the local customs officials have improved. In light of the significant export and transshipment of illegal products from and through the Czech Republic, it is crucial that the Czech government guarantee the effective enforcement of the new law. The successes of repeat actions on retail piracy in border market towns, which are ready suppliers of pirated goods to the Czech Republic's neighbors, are noted and encouraged. There remains a need to provide more training and resources to aid the country's customs personnel in addressing the cross-border movement of pirate products.

## ENFORCEMENT TAKEN BY THE COPYRIGHT INDUSTRIES IN THE CZECH REPUBLIC

### Criminal Enforcement Actions: 2002

CRIMINAL ACTIONS	MOTION PICTURES	BUSINESS APPLICATIONS SOFTWARE	SOUND RECORDINGS
Number of raids conducted	220	32	635
By police		32	192
By customs		-	83
By trade inspection	94/120	137	360 (no offenders caught)
Number of cases commenced / administrative	143	24	635
Number of defendants convicted (including guilty pleas)	8	-	199
Acquittals and dismissals	165/19	88	
Number of cases pending		14	118
Total number of cases resulting in jail time		14	
Suspended prison terms		7	
Maximum 6 months		3	8
Over 6 months		4	30
Over 1 year		14	10
Total suspended prison terms		-	48
Public works		-	10
Prison terms served (not suspended)		-	
Maximum 6 months		-	
Over 6 months		-	2
Over 1 year		4	
Total prison terms served (not suspended)		1	2
Number of cases resulting in criminal fines		1	17
Up to \$1,000		2	
\$1,000 to \$5,000		US\$20,724	
Over \$5,000	220	32	
Total amount of fines levied		32	700,000 CZK (~US\$24,000)

<sup>8</sup> Act No. 191/1999 Coll. (Customs Act) of July 29, 1999 on Measures Concerning Entry, Export and Re-Export of Goods Infringing Certain Intellectual Property Rights and Amending Some Other Acts, effective November 1, 1999.

## Civil Copyright Infringement Actions: 2002

CIVIL ACTIONS	BUSINESS APPLICATIONS SOFTWARE
Number of civil raids conducted	2
Post search actions	
Cases pending	2
Cases dropped	
Cases settled or adjudicated	
Value of loss as determined by rightholder (\$USD)	
Settlement/judgment amount (\$USD)	

## COPYRIGHT LAW AND RELATED ISSUES

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In 2002, the Czech Republic acceded to both the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonogram Treaty (WPPT), being one of the 30 countries which put both treaties into force. This accession is to be commended. However, existing provisions in the copyright law must be revised to fully implement the WCT and WPPT, especially by strengthening its provisions on technological protection measures and rights management information. A summary of recent legislative changes and requests for amendments follow.

### The 2000 Copyright Act Needs Refinement

The 1965 Czech Copyright Act (Law No. 35/1965) was amended numerous times in the 1990s. In April 2002, the new law entitled "Copyright, Rights Related to Copyright and on the Amendment of Certain Laws" was promulgated as Law No. 121/2000 Coll. of 7 April 2000. Amendments to other laws were also made in the 1999-2000 time frame in order to enhance enforcement measures. For example, amendments made to the customs law which granted customs officials broader *ex officio* authority to seize suspected important amendments in 1999 were infringing copies of intellectual property, including copyrighted material, and providing heavy fines of up to 20 million Crowns (U.S.\$ 691,455) for importing or exporting pirate product (Act No. 191/1999 Coll.). Amendments in 2000 were adopted to the Copyright Protection Act (effective September 1, 2000), giving the Czech Trade Inspection Bureau authority to fight copyright and trademark infringements (and providing fines for violators of up to 2 million Crowns (US\$69,155).

The 2000 Copyright Act entered into effect on December 1, 2000. These 2000 amendments corrected a severe legal shortcoming (and TRIPS violation) by providing a guarantee of protection for pre-existing sound recordings (and works). Other amendments aimed at complying, in part, with the new WIPO treaties, that is, the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonogram Treaty (WPPT). While the Czech government insists its law is now fully compatible with TRIPS and the European Union Directives, there are a variety of shortcomings in the 1999 copyright law (as amended), which require renewed attention.<sup>9</sup> For example:

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<sup>9</sup> Similar IIPA summaries of the deficiencies in the Czech copyright law have appeared in IIPA's 2001 and 2002 Special 301 submissions.

- Certain aspects concerning the circumvention of technological protection measures should be modified at the earliest possible opportunity. Proper and full implementation should include a prohibition on the manufacture, importation, sale, distribution, or other trafficking in devices or services that are aimed at circumventing technological protection measures, as well as outlawing acts of circumvention.
  - In particular, a new provision on the requirement to prove “economic gain” as an element of demonstrating a violation of the anti-circumvention provisions (Article 43) must be deleted. This is because experience has demonstrated, unfortunately, that there are countless parties who would devise and publish ways to circumvent technological measures employed to protect copyrighted materials without seeking any economic gain, and the existence, or absence, of economic gain is irrelevant to the interests of copyright holders whose works may be exposed. Unless this provision is revised, Internet piracy activities resulting in millions of dollars of losses that are not for such economic gain may go unpunished, and the Czech Republic will not be in compliance with WCT Article 11 and WPPT Article 18.
  - In the area of technological protection the technology applied and the means of their defeat change constantly. Therefore, the list of prohibited activities should include an opening clause such as “or otherwise traffics” or “or otherwise makes available” to be inserted between the terms “disseminates” and “utilizes” in Article 43.
  - Furthermore in Article 43, “technical devices” should be interpreted broadly, consistent with the WIPO treaties (WCT Article 11 and WPPT Article 18). That is, all technical devices should be protected against circumvention so long as they “restrict acts, in respect of their works, which are not authorized by the authors [or rights holders] concerned or permitted by law.” For example, the technological protection provisions should not be interpreted as being tied to an “infringement of copyright” thus requiring proof of such infringement; to do this could significantly diminish the effectiveness of these provisions.
  - There is also the need to ensure that a legal regime exists that creates legal incentives for ISPs to promptly remove infringing materials, and penalties for failure to do so, such that copyright owners can expeditiously address copyright infringement on-line in as effective manner as possible.
- In addition, rights holders need to be able to protect so-called “copyright management information” that is attached to or accompanies a work or sound recording, including protection against the alteration, removal or falsification of this information. The 2000 amendments did add rights management information provisions (Article 44). However, the definition of rights management information does not cover information about the author or any other rights holder as prescribed in WCT Article 12.2 and WPPT Article 19.2. Nonetheless, although Article 44 does not explicitly mention that rights management information includes information on the author or other rights holder, it is believed such as interpretation would be taken by a Czech court given the language in the provision.

- The provisions on the collective administration of the rental right (that is, rental levies applied to video shops) found in Article 96 should be implemented in such a way as not to interfere with rights that may have been cleared at the source of production.
- The law contains many problematic restrictions on the ability of audiovisual producers to efficiently exploit and distribute works in the Czech Republic.
- Also, the law fails to differentiate between analog and digital private copying; the private copying exception should not extend to digital copying of works or sound recordings. Nor should any private copying exception (or any other exemption) interfere with the ability of rights holders to protect their works and sound recordings using technological protection measures.
- Currently, one of the main obstacles to effective enforcement is created by cumbersome and unnecessary requirements of proof of rights ownership imposed upon the rights holders. The cumbersome burden of proof as to the ownership and subsistence of copyright and neighboring rights enables defendants to delay judicial proceedings, and in some cases even escape justice, even when it is clear from the outset that the plaintiff owns the copyright or neighboring rights in question. This issue has become particularly problematic now that hundreds of thousands of different infringing optical discs (CDs, CD-ROMs, VCDs, DVDs) are regularly seized during raids. The Czech Republic should introduce a presumption of ownership for phonogram producers.

IIPA and its members may have additional views regarding legal reform once the Czech government initiates copyright reform efforts.

## Criminal and Civil Codes Reforms in 2000

**Criminal code:** Criminal code amendments were adopted in 2000, which increased the maximum possible penalties for copyright infringements to five years of imprisonment and a fine of 5 million Crowns (US\$172,820). The copyright industries had hoped that these amendments would speed up the resolution of criminal proceedings and reduce the court backlog of cases in 2002, when the changes first become effective. Unfortunately, as a matter of practice, these amendments have not yet had the desired effect. The recording industry's experience is that the imposed penalties are at the lowest level, reaching the maximum of 100,000 – 150,000 Czech korunas (\$3,500 – \$5,100).

**Civil code and *ex parte* search orders:** In 2000, amendments to the Code of Civil Procedure were finally adopted to make *ex parte* search applications less difficult to obtain, and as a result, the provisions—on-paper—complied with Czech's TRIPS Article 50 obligations. Prior to this change, Czech officials contended that the Code of Civil Procedure (Act No. 99/1963) permitted a rightsholder to obtain a civil *ex parte* search order.<sup>10</sup> Under the amended civil code, rightsholders are permitted to cause a search for securing evidence without the presence of an adverse party. Although the amendments became effective at the beginning of 2001, it has taken almost two years for the Czech courts to confirm the full extent of the civil *ex*

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<sup>10</sup> The software industry did test the civil code provisions prior to their amendments and achieved very mixed results. BSA reported that in one instance, the procedure required a Czech court to take two months to determine the viability of an application, and the industry was confronted with extremely onerous documentary requirements before a court would consider granting an application.

*parte* authority. BSA obtained its first civil *ex parte* search order in 2002; the Court of Appeals clarified that a civil *ex parte* search can be granted by the Czech courts without prior notification to the target.

## **Broadcast Law 1996**

In addition to the copyright law changes noted, provisions are needed to protect encrypted signals. The amended Broadcast Law that went into effect on January 1, 1996 did not provide such protection. These provisions are necessary because of the threats posed to television markets by pirate smart cards and decoders; the law needs to prohibit the production, distribution, possession and use of unauthorized decoding devices. Also, MPAA reports that the Telecommunication Law contains only general provisions relating to piracy and does not adequately address the issue of smart card piracy. The Czech government has indicated for the past several years that the appropriate provisions would be added either to the media or the telecommunications law, but that has not transpired. The provisions must also fully protect conditional access (as provided for in Article 43 with the suggested revisions noted earlier) and new digital technologies, as well as address the significant collective (community) antenna problem that exists in many Czech cities. The telecommunication laws must provide that broadcast and cable licenses will only be granted and maintained subject to compliance with these and other copyright provisions.

## **Government Software Management**

The Czech government, with the support and cooperation of the Business Software Alliance, has issued a resolution on the software asset management procedures in government offices. The resolution is comprehensive and contains practical and detailed rules on the government software use, rules regarding the training of government employees, and rules on implementation of the resolution, including deadlines for full compliance with the resolution. This resolution, effective January 1, 2002, is one of the most comprehensive in Europe. BSA highly commends the government for its efforts on working towards efficient software asset management. BSA also now encourages the Czech government to focus on monitoring the implementation process, not only to comply with the law but to make the most out of its investment in information technology.