

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2004 SPECIAL 301 REPORT

HUNGARY

EXECUTIVE SUMMARY

Special 301 recommendation: IIPA recommends that Hungary be placed on the Special 301 Watch List in 2004. Hungary has made great strides to modernize its copyright legal regime over the past several years, including extensive legislative revisions and amendments to its criminal code, and it is in the process of finalizing the harmonization of its laws in accordance with its accession duties to the EU. However, copyright owners report persistent prosecutorial delays and problems in a market that could otherwise sustain substantial growth.

Overview of key problems: The main problems adversely affecting the copyright industries in Hungary include:

- Continued prosecutorial delays within the courts;
- Low fines and generally weak sentences that fail to provide sufficient deterrence;
- Failure to fully comply with TRIPs Agreement enforcement obligations (such as issuing non-deterrent penalties and the lack of a civil *ex parte* provision);
- Poor border enforcement.

Actions which the government of Hungary should take in 2004: Overall, Hungary needs to improve its enforcement of IPR. In order to do that, at a minimum, the Hungarian Government should work to:

- Streamline the court systems to counter delays, and increase the effectiveness of legal investigations;
- Highlight and promote the importance of IPR issues at the prosecutorial level;
- Impose higher penalties and harsher sentences to deter copyright pirates;
- Strengthen the effectiveness of the border police;
- Ensure complete enforcement of the 2001 Act CVIII on Electronic Commerce and Information Society Services and the relevant new provisions in the Criminal Code to effectively combat Internet piracy through new legislation (further to the amendments made by 2003 Act XCVII in compliance with EU Directive 2000/31/EC);
- Adopt optical media regulations to combat and control optical media production and distribution;
- Launch a joint IPR campaign together with the copyright industries targeted to increase the public awareness of the detrimental effects of CD-R burning, especially in educational institutions (schools, colleges, universities).

HUNGARY
ESTIMATED TRADE LOSSES DUE TO PIRACY
(in millions of U.S. dollars)
and LEVELS OF PIRACY: 1998 – 2003¹

INDUSTRY	2003		2002		2001		2000		1999	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Business Software Applications ²	NA	NA	32.8	45%	21.3	48%	33.3	51%	30.1	52%
Motion Pictures	20.0	30%	18.0	30%	18.0	40%	18.0	40%	22.0	40%
Records & Music	8.0	30%	6.0	30%	4.5	30%	3.0	20%	4.0	20%
Entertainment Software	NA	NA	NA	NA	43.3	90%	9.6	86%	NA	NA
Books	4.0	NA	4.0	NA	4.0	NA	4.0	NA	4.0	NA
TOTALS	32.0+		60.8		91.1		67.9		60.1	

COPYRIGHT PIRACY IN HUNGARY

Piracy remains surprisingly high in Hungary and exacerbates the overall regional piracy problem due to poor border enforcement.

Optical Media Piracy

Hungary continues to be a haven for CD-R piracy—primarily factory produced music CDs (manufactured in and imported from Ukraine) and entertainment software (manufactured in and imported from Russia). Recordable CD (CD-R) pirate materials predominate because of the relatively low prices of CD burners and blank CD-Rs in the Hungarian market. Pirate CDs continue to be illegally imported and smuggled into Hungary from Ukraine, Serbia & Montenegro, and Russia.

Pirate film DVDs, mostly imported from Russia and Ukraine, are another problem, involving primarily pre-release titles sold in flea markets such as Petöfi Hall in Budapest. Locally burned CD-Rs, and DVD-Rs containing audiovisual content, are a persistent problem.

The recording industry reports that there are currently three optical disc plants with a total of 11 lines in Hungary. Two of the three plants are operational (with a total of eight operational lines), and there is a third plant (newly established in 2003) with three lines not yet in operation. The existence of these plants clearly calls for the need to regulate the

¹ The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2004 Special 301 submission, and is available on the IIPA website at <http://www.iipa.com/pdf/2004spec301methodology.pdf>.

² BSA's 2003 piracy statistics were not available as of February 13, 2004, and will be made available in the near future and posted on the IIPA website at <http://www.iipa.com/>. BSA's statistics for 2003 will then be finalized in mid-2004 and also posted on the IIPA website. 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 reflect losses to (a) all software publishers in this country (including U.S. publishers) and (b) losses to local distributors and retailers in this country.

manufacture and distribution of optical discs. In order to regulate the production, distribution, and export of optical media, the Hungarian government must set up plant monitoring procedures to regulate the facilities and equipment where optical discs are manufactured.

CD-R Piracy and Internet Piracy

The Internet provides an effective channel for the marketing and distribution of pirate CD-Rs. The Internet is also being used to market technical equipment for circumventing copyright protection technologies. The 1999 copyright act amendments included strong anti-circumvention provisions, as well as sanctions against signal theft, and if implemented properly, could begin to address these problems. The Hungarian government set up a new police unit to help combat Internet crime, including IPR crimes. This unit, however, is relatively small and understaffed.

On the basis of a 2001 cooperation agreement, the recording, audiovisual and business software industries continue to receive good cooperation from Hungarian Internet service providers (ISPs) who respond to notice requests to take down sites or links hosting illegal content. MAHASZ (the recording industry's anti-piracy organization) reports that, in 2003, it sent a total of 243 cease and desist notices to websites with illegal music files and that 223 of these notices resulted in the removal of the material from the Internet by the ISP.

Business Software Piracy

The predominant concerns for the business software industry are: (1) no effective civil *ex parte* measures to secure evidence of suspected infringements; (2) generally slow criminal and civil proceedings; (3) inadequate sanctions imposed in many cases; and (4) a growing tendency by judges to compute harm (damages) to rightholders at less than the retail value of the products concerned. According to the BSA, the average duration of court proceedings in Hungary is approximately two years for civil and criminal claims. The courts routinely require fact-finding examinations by experts that take two to three months to conduct, even though they are not necessary.

Record and Music Piracy

The recording industry estimates the level of music piracy in Hungary in 2003 was 30% of the market. Trade losses to the music industry in 2003 were \$8 million, the third year of increasing losses. This rise is due to the growth of CD-R piracy in the country, which now reaches as high as 92% of the overall pirate music market. MAHASZ reports that, in 2003, the total number of seized material was 43,000 units, of which 38,000 were CD-Rs. The police conducted 90% of these seizures; customs officials undertook the remaining 10% of seizures.

MAHASZ reports that the local copyright industries (i.e., the record and film producers, performers and authors) are planning to establish a joint anti-piracy organization, beginning operations in May 2004.

Audiovisual Piracy

The import of pirate DVDs from Russia and Ukraine (all Russian-made) is on the increase. Most of these are pre-release titles carried in individuals' luggage that are used to

supply street vendors operating in the largest flea market in Budapest (Petofi Hall). Pirate DVDs have also been found in retail outlets that were not previously known to be pirate and that now offer pirate DVDs to complement to their existing catalogue. Locally burned CD-Rs, and increasingly DVD-Rs, are a persistent problem.

Pirates are increasingly using the Internet to market infringing products. Internet hard copy sales are a growing concern; Hungarian dubbed and subtitled material is offered on web sites located in neighboring countries. Another problem is the downloading of movies from FTP and P2P systems. ASVA, the local motion picture anti-piracy organization, receives good cooperation from the local ISPs, and an agreement signed in May 2002 with the main association of Hungarian ISPs establishing a notice and takedown procedure is working well for the motion picture industry.

Although progress has been made, there is still a high level of pay-TV signal theft through the use of pirate smart cards and cable/satellite decoders. Local television and cable companies regularly transmit titles for which they do not have broadcast or retransmission rights. In some cases, pirate videocassettes are also broadcast, especially by small cable providers owned by local authorities in small villages.

Another concern is the high level of back-to-back copying in small rental/retail shops. They tend to offer sophisticated counterfeit products, and they maintain small amounts of stock on site to make identification and collection of evidence difficult.

Entertainment Software Piracy

The entertainment software industry reports a strong legitimate market for their product in the country's large stores, as well as in music and software stores. The availability of pirated entertainment software products also appears to have declined from weekend market venues, as well as from smaller retail shops in particular market districts. Pirate products are, however, readily available at Petofi Stadium, although they are not sold openly. It is likely that organized criminal enterprises control the supply and distribution of material at the stadium (not unlike the problems encountered at Poland's Warsaw Stadium). At the Petofi Stadium, the modus operandi is for "runners" to deliver the merchandise selected by customers from catalogues provided by the vendors. The order is placed by telephone and promptly delivered 15 to 20 minutes later. The customer is instructed to rendezvous with a "runner" to ensure that enforcement actions do not compromise the vendor/supplier or the location of their goods. Prices range from HUF 1000 to 3000 (approximately US\$5 to US\$15), depending on the game product selected. There is little or no stock on hand available at the stalls in order to avoid seizure of the products in the event a raid is conducted. The piracy rate is around 50%.

Piracy of Books and Journals

The book and journal publishing industry reports that the same problems persist—the unauthorized photocopying of printed materials, and of academic textbooks in particular. The book publishing industry estimates losses of \$4 million in 2003.

COPYRIGHT ENFORCEMENT IN HUNGARY

Criminal Enforcement

The ongoing high levels of piracy in Hungary are the result of ineffective criminal enforcement by Hungarian authorities, even though many of the industries report generally good police cooperation. For example, the BSA reports very good police cooperation in conducting raids and seizing infringing product. As a general rule, police take action upon request by the rightholders, but the police have also increased the number of *ex officio* actions in copyright cases as permitted by Article 2 of the Criminal Procedure Law (Basic Principles of Criminal Procedure). BSA reports that in 2003, there were 32 *ex officio* cases handled by the police, although all were directed against small targets. The entertainment software industry also reports good police cooperation. While cases continue to be brought directly by ESA member companies, there have also been several cases initiated by the police. ASVA, the anti-piracy program affiliated with MPA, continues to receive excellent cooperation from the police, who have conducted numerous enforcement actions throughout Hungary.

There are some procedural problems with raids. Searches of suspects' homes are based on "probable cause" and are undertaken according to a very stringent standard requiring testimony from witnesses and documentation establishing that business activity is being carried out on the premises. Evidence of pirate product and duplication equipment has proven insufficient to commence raids in the past (with pirates claiming successfully that such material was for "personal use"). Furthermore, there have been reports of police "tip-offs" in some of the smaller communities.

Prosecutorial and Judicial Delays, No Deterrent Penalties

Prosecutorial delays, and the failure to impose deterrent penalties for those few criminal cases that do reach the judgment stage, are serious problems.

BSA reports 33 criminal law suits against end users in 2003. However, the software industry continues to find that cases take approximately one year on average to reach an initial court hearing, with an additional delay of about a year for cases on appeal. As an example, one BSA end user case, involving a substantial number of illegal products came to sentencing at the end of November 2003, even though the case was initiated at the end of June 2001. The software industry reports that prosecutions reaching final judgment generally resulted in probation and small fines, which do not deter piracy. The average sentence was between two and 12 months suspended, with major targets receiving sentences of up to two years suspended. The software industry reported no fine above US\$1,000; in fact, criminal fines ordered by courts generally remain below US\$500 in cases involving software piracy. For example, in one BSA end user case the target was found guilty of 233 separate counts of use of infringing software products. The harm done was estimated to be approximately US\$24,000 to the BSA members (i.e., excluding non-BSA software), but the final sentence involved a fine of only US\$314. BSA noted some progress in 2003. January 2003 was the first time an end-user pirate received a prison sentence for copyright infringement in the absence of any other crime, as well as the required payment of full damages of approximately US\$16,000 prior to the sentencing. More sentences like this would certainly demonstrate that the Hungarian courts are serious about imposing deterrent sanctions.

The entertainment software industry reports that its member companies also experience long delays in the judicial process. Several "current" cases date back to mid-2001 and remain pending. Though sentences and fines imposed have been largely nominal, entertainment software companies have seen some improvement recently. Hungarian courts should be encouraged to continue to impose deterrent sentences.

Despite generally good cooperation from the police, the audiovisual industry reports that Hungarian prosecutors and judges remain reluctant to treat copyright infringements as serious crimes. Securing adequate prosecution and deterrent sentencing from the courts has been difficult. Despite the modern laws providing for tougher penalties (up to eight years imprisonment for video piracy and two years for signal theft), prosecutorial indifference remains a major impediment to combating piracy.

Border Enforcement

Hungary adopted customs legislation in 1997 in order to meet its TRIPS obligations (Decree No. 128/1997). However, the copyright industries remain concerned about its effective enforcement in practice because of the ease with which pirated products pass through Hungary.

Customs authorities have difficulty distinguishing between legal and illegal products; improvements must be made to the quality and efficiency of Hungarian border controls and checks. Since 1997, a governmental decree (No. 128/1997) has been in place to regulate IP related imports by persons without proper licenses. To avoid importation of illegal products, a sole distributor must make an application to the National Customs Authority for a license. However, this appears to have had no significant impact in stopping the illegal importation of IP related products. The Hungarian government must improve border enforcement and impede the flow of pirate products across its borders.

Civil Enforcement

The government has taken steps to try to resolve the issue of effective civil *ex parte* search orders. The 1999 Copyright Act amendments did not introduce new civil *ex parte* provisions because the Hungarian authorities at the time insisted that such provisions already existed in the civil code. These provisions are set out at Articles 207-209 of the Civil Procedure Act, and permit the procurement of "preliminary evidence" before the commencement of an action. These provisions did not prove effective following test cases because of procedural complications. An amendment to the copyright act, effective December 12, 2003, permits the courts to order temporary measures to be undertaken, including search orders and seizures, within 15 days after an injured party makes a petition for such measures. For copyright matters, if an injured party establishes sufficient plausibility of the evidence, the courts may, at this party's request, compel the other party to present any documents or other material evidence in their possession to the court or make an inspection order (Articles 95 (5)-(7)).

BSA has three end user cases ongoing in the civil courts, and it filed fourteen end user civil claims in 2003. BSA also reports 21 end user criminal judgments, and settlements in 12 cases with end users during 2003.

CRIMINAL COPYRIGHT ENFORCEMENT STATISTICS In HUNGARY: 2003			
ACTIONS	MOTION PICTURES	BUSINESS APPLICATIONS SOFTWARE	SOUND RECORDINGS
Number of Raids conducted	452	14	320
Led by Police		14	295
Led by Customs			25
Number of cases commenced	250	105	247
Number of defendants convicted (including guilty pleas)	304	25	270
Acquittals and Dismissals	52	49	60
Number of Cases Pending	208	237	176
Total number of cases resulting in jail time	0	0	5
Suspended Prison Terms	2	0	2
Maximum 6 months	1		1
Over 6 months	1		1
Over 1 year			
Total Suspended Prison Terms			10 months
Prison Terms Served (not suspended)		0	3
Maximum 6 months			2
Over 6 months			1
Over 1 year			
Total Prison Terms Served (not suspended)		0	16 months
Number of cases resulting in criminal fines	2	17	110
Up to \$1,000	2	15	110
\$1,000 to \$5,000	-		-
Over \$5,000	-		-
Total amount of fines levied	NA	US\$6,336	US\$25,000

LEGAL REFORM AND RELATED ISSUES

Copyright Law

Hungary has brought its copyright act (1999) in line with the laws of the European Union and specifically with the Copyright Directive (2001/29/EC). Amendments in Act CII of 2003 update almost all of the Hungarian patent regulations, which will come to force on May 1, 2004, when Hungary becomes a member of the EU; these patent regulations are harmonised with EU law.

However, despite these changes and progress made in earlier amendments to the copyright act, certain issues remain problematic. The Hungarian Government should correct the following deficiencies in its copyright legal regime:

- Civil *ex parte* search procedures must be clearly available and working as a practical matter for Hungary to meet its TRIPS obligations (Article 50). The December 2003 provisions need to be tested, and must prove as reliable and effective as officials have claimed them to be, otherwise further amendments to the law and/or its implementation in the copyright act will be needed to establish an effective and streamlined process.

- At present, cumbersome and unnecessary requirements for proving ownership of rights are imposed upon rightsholders. This burden of proof requirement enables defendants to delay judicial proceedings, and in some cases escape justice, even when it is clear from the outset that the plaintiff owns the copyright or neighboring rights in question. Hungary should introduce into its laws a clear presumption of ownership for rightsholders.
- The copyright act currently does not have provisions for the calculation of damages; the act only refers to general civil law rules on damages that do not help to adequately compensate copyright owners or producers of sound recordings for IPR infringements.
- The scope and reach of obligatory collective management is too broad. Article 27 denies rightsholders in certain literary and musical works the ability to determine the proper exercise of their exclusive rights on an individual basis, instead obligating them to submit to collective management—all in violation of Article 9 of the Berne Convention (the right of reproduction) and therefore the TRIPS Agreement, as well as Article 8 of the WIPO Copyright Treaty (the right of communication to the public). Article 27 must be amended to allow copyright owners to “opt out” of the collective management scheme, in the manner provided for other works in Article 91(2) of the Copyright Act.
- The copyright law also requires the obligatory collective management of all exclusive public performance rights in musical works under Articles 25(1) and 25(3). These provisions conflict with the Berne Convention (Article 11(1)(i)), TRIPS, and the WIPO Copyright Treaty. Articles 25(1) and 25(3) must also be amended to allow copyright owners to “opt out” of the collective management scheme, in the manner provided for other works in Article 91(2) of the Copyright Act.
- TRIPs-required amendments to the customs and criminal codes to improve border enforcement have not been adopted and should be a priority for the government.

Optical Media Regulations

The Hungarian government should craft and issue optical media regulations to better regulate the manufacture of optical disc products—especially now that there are three plants in Hungary. The global copyright community is in agreement on the key elements of an effective optical disc law that include the licensing of facilities (and equipment) where discs are manufactured along with the export and import of materials used. Additionally, manufacturers should be obliged to use codes to identify genuine product, and to register for certification to be genuine duplicators, and to keep accurate records. Authorities in turn should have the right to inspect facilities and seize products and equipment where appropriate, with the power to penalize offenders under threat of revocation of license, fines, or the closure of the plant. The copyright industries look forward to working with Hungarian authorities to draft, implement and enforce such comprehensive optical disc regulations.