

# INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

## 2005 SPECIAL 301

### SPECIAL MENTION

#### SPAIN

Continuing high levels of piracy in Spain are adversely affecting the music, entertainment software and filmed entertainment sectors in that country. Factory-produced pirate music CD products as well locally burned CD-Rs and DVD-Rs dominate the street market. Internet piracy is also a major problem, exacerbated by the growth and increased penetration of broadband. Organized crime syndicates have maintained their active role in the production and distribution of pirated materials. Despite good laws, piracy continues to flourish, and there is a great need for improvements in enforcement, and in particular in the courts, which are generally slow, and suffer from the uneven application and lack of understanding of the relevant laws.

**Street piracy and organized crime:** Piracy in Spain exhibits some characteristics that arise frequently in connection with OD piracy — namely the connection with illegal immigration and tobacco smuggling and other organized crime syndicates. These businesses are in the process of evolving, and much of the illegal business now hides behind the “legal” import of blank carriers and/or machinery used for piracy (of illegal origin most of the time) and their further distribution and sale.

Chinese syndicates are increasingly dominating the pirate trade in Spain. The Chinese syndicates are much better organized and financed than their predecessors (primarily from northern and sub-Saharan Africa), and have imposed a price policy (2€/CD), with an aggressive distribution through the use of itinerant sellers in streets and entertainment premises.

Police actions against “mochileros,” who sell out of backpacks, are more difficult than actions against the street “manteros,” who sell from blankets that are relatively fixed in location, and maintain more product. In 2004, the number of street vendors selling pirate optical disc products has continued to grow. There are an estimated 8,000 to 10,000 street vendors, including at least 5,000 mochileros and 3,500 manteros. About half of all street sellers specialize in audiovisual products, usually DVD-Rs of films in recent theatrical release (many titles are available within one week after theatrical release).

These Chinese networks are not only involved in recording CD-R and DVD-R formats, but also directly import pirate CDs manufactured in Taiwanese and Chinese plants. Product consists primarily of international releases, although albums of some important national artists have also been detected.

Many of these street sellers are illegal immigrants controlled by the Chinese gangs. Their illegal status creates additional judicial difficulties because they cannot be automatically deported and can take advantage of procedural delays to disappear, requiring rightholders to file numerous legal procedures with no decisions. (A decision cannot be made if the defendant cannot be located.) This highlights the need to address the organized production sources of the pirate product, not only its distribution. Organized gangs maintain labs and distribution centers in Madrid, Barcelona, Grenada, and possibly in Girona, Tarragona, and

Alicante. Although the explosion in the growth of OD piracy began in mid-2002 in large urban areas, it has also expanded into the suburbs and other remote regions as supply has increased dramatically.

The following steps would be useful to effectively address the growing street vendor piracy problem: stronger criminal penalties; increased *ex officio* police actions against street sales; more actions against labs supplying street vendors; increased police coordination, and the inclusion of IP violations in the list of cases that qualify for "fast hearings."

**Piracy in the music sector:** Estimated trade losses for the music industry in Spain in 2004 were \$90 million—not counting losses associated with Internet piracy for which we offer no specific dollar amount but which undoubtedly exceed those connected to physical piracy. Despite increased enforcement activities, music piracy exceeds 24% (in some cities like Madrid, Seville, Granada or Murcia this percentage has reached between 30% and 40%), probably the highest rate of any developed country in the world, and losses continue to mount.

The situation for the recording industry in Spain is particularly dire, and pirate recordings are sold in the most open and notorious manner. This grave situation has been widely reported in the national media, and the pirates grow bolder and more organized each day. Although the Spanish government has increased its activities, these have not resulted in any reduction in piracy, and the music industry finds itself in a moment of true crisis. Legitimate music stores are closing because of inability to compete with the pirates. It is essential that the government increase its commitment to the fight against piracy, and in particular devote attention to problems in the courts. At present, judicial processes are very slow and cumbersome, and many judges lack an understanding of the gravity of the issues presented, resulting in the inadequate and uneven application of the law.

**Piracy in the entertainment software sector:** The entertainment software industry reports that there were more police actions against retail outlets selling counterfeit and pirated goods in 2004. However, notwithstanding the increase in police activity, pirated video game products remain readily available in the market (particularly in Barcelona, Valencia, and the Canary Islands). The Customs authorities must step up enforcement activity so as to stem the flood of pirated products being imported into the country.

**Piracy in the audiovisual sector:** For the audiovisual industry, which estimates an annual loss of over US\$40 million because of piracy, street sales of pirate optical discs have become the most threatening piracy problem. About half of all street sellers specialize in audiovisual products, usually DVD-Rs of films in recent theatrical release. Camcording is becoming a major concern due to the fact that it is increasingly the favored source for street pirate product. In particular, sound recordings made in local theaters are frequently combined with "camcorded" video obtained in other countries and made available on the Internet. As such, anti-camcording legislation, which would specifically address sound recording as an independent activity, with jail sentences, preferably up to a year or longer for a first offense, and a higher penalty for any subsequent offense, would be useful to help address this problem.

**Spanish government actions:** Several ministries are directly involved in anti-piracy efforts. The Ministry most responsible for setting enforcement priorities, the Ministry of Justice, is also directly charged with implementing the EC Copyright and Enforcement Directives. The Ministry of Interior coordinates actions of the Guardia Civil and Police, crucial for action against street

sales. The Ministry of Culture is seeking to establish overall coordination between the different ministries to protect intellectual property.

Of particular interest is a draft “Integral Plan” to protect intellectual property released by the Ministry of Culture for comment in late December 2004. This “Integral Plan” needs a much stronger enforcement component to accompany its primary analysis and awareness focus. The government, particularly the Ministry of Justice, has agreed to seek enforcement specifics for the plan and has set up working meetings with industry for that purpose. A final plan, with analysis/awareness, legislation and enforcement elements, should be finalized early in the second quarter of 2005.

The Ministry of the Interior has undertaken a significant amount of police work against street sales, and in recent meetings with the Minister of Justice indicated that it is now much more open to taking effective action.

FAP (the local anti-piracy organization of the film industry) has presented to the Ministries of Culture and Justice a response to the draft “Integral Plan,” supporting it and also requesting that it include more specific enforcement goals (i.e., a specific reference to police action, something the plan recognizes but generally dismisses as insufficient), implementation of the Copyright and Enforcement Directives, an effective implementation of the proposed “Internet Law” which should establish liability for ISPs, the development of rapid trial proceedings for street sales cases—specifically reducing the forensic burden currently imposed on rightholders—and government participation or diffusion on government media of the current industry led anti-piracy public awareness campaigns. Effective implementation of the Enforcement Directive is especially important, as it should facilitate enforcement efforts particularly in the digital environment. All these efforts should be monitored closely to ensure an outcome that facilitates enforcement efforts.

Despite positive changes in the Criminal Code and Criminal Procedures Code that took effect in October 2004, the Spanish government has failed to implement the EU Copyright Directive and has improperly implemented the E-Commerce Directive. (The Spanish draft creates a limitation of liability for Internet Service Providers [ISPs] that goes beyond that permitted by the Directive). The new commission to be established by the Ministry of Culture wants to set a goal of approximately one to one and a half years from now to analyze and propose legislative changes. This is simply too long.

**Enforcement against Internet piracy is a big challenge:** Rightholders contemplating legal action against Internet pirates in Spain face difficulties in identifying infringers due to restrictions imposed by Spanish data protection laws. Rightholders cannot generally obtain from ISPs, via a civil procedure, the identity of an infringing end user upon communication to the ISP of an IP address. Such information may, however, be obtained via a criminal prosecution.

The Internet is still used for hard goods distribution, as it gives pirates an additional layer of protection because judges have to authorize special warrants allowing police to search their homes. Moreover, Internet downloading is growing rapidly, especially via peer-to-peer (P2P) systems and Internet Relay Chat (IRC) channels. As with street sales of discs, P2P downloading piracy appears to be growing exponentially.

One reason for these difficulties with Internet enforcement in large part lies with the Spanish government’s failure to implement the EU Copyright Directive by the December 22,

2002 deadline.<sup>1</sup> The draft Spanish implementation legislation, proposed in December is expected to improve this subject. The Parliament is not expected to pass any legislation to implement this Directive until March 2005. Furthermore, the draft Spanish legislation on the E-Commerce Directive<sup>2</sup> creates a limitation of liability for Internet Service Providers (ISPs) that goes beyond that permitted by that Directive. Local rights holders are working very hard to seek improvements to these two bills, and IIPA members are extremely interested in ensuring that the bills are adopted in ways that are consistent with the WCT and WPPT—in particular with those Treaties' obligation to: “ensure that enforcement procedures are available under their law so as to permit effective action against any act of infringement covered by this Treaty [including of course the right of making available], including expeditious remedies to prevent infringements and remedies which constitute a deterrent to further infringements.”

IIPA urges the U.S. government to monitor closely the legal and enforcement situation in Spain. The Spanish government has taken impressive measures to address ubiquitous street piracy, but these measures have not yet proven to be fully effective and need to be further strengthened. The record industry in Spain finds itself in a struggle for survival. In addition, the U.S. government should work with the Government of Spain to ensure that legislation is adopted that implements the requirements of TRIPS and the WIPO Treaties to provide an effective deterrent to online offenses.

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<sup>1</sup> The EC Directive 2001/29/EC on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society (the “EU Copyright Directive”) came into force on June 22, 2001, and was to have been implemented by Member States by December 22, 2002.

<sup>2</sup> The EC Directive 2000/31/EC on Certain Legal Aspects of Information Society Services, in Particular Electronic Commerce, in the Internal Market (the “EU E-Commerce Directive”) came into force on June 8, 2000, and was to have been implemented by Member States by January 17, 2002.