

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2006 SPECIAL 301 REPORT

SPECIAL MENTION

SPAIN

Despite continued high piracy rates in Spain, IIPA's submission requests only that Spain receive "special mention" attention in our Special 301 filing this year. Nevertheless, the piracy situation in Spain has not materially improved for several industries, and the dimension of the problem in Spain reflects a situation more in line with those of countries on the Watch List or even higher.

Overview of Copyright Piracy and Enforcement Problems in Spain

Continuing high levels of piracy in Spain are seriously harming the music, entertainment software and filmed entertainment sectors there. Factory-produced pirate music CD products as well as locally burned CD-Rs and DVD-Rs dominate the street markets. 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 improvement in enforcement, particularly from the courts, which are generally slow, and suffer from the uneven application and lack of understanding of the relevant laws. In 2005, the Spanish government continued to take impressive measures to address ubiquitous street piracy, but these measures have not yet proven to be fully effective and need to be further strengthened. In addition, the Spanish court system – particularly the new commercial courts – are proving to be a bottleneck in civil enforcement efforts. IIPA urges the U.S. government to monitor closely the legal and enforcement situation in Spain.

Internet piracy grew exponentially in 2005, and enforcement remains a big challenge: Internet downloading in Spain is growing rapidly, especially via peer-to-peer (P2P) systems and Internet Relay Chat (IRC) channels. P2P uploading and downloading piracy appears to be growing exponentially. During 2005, the number of home users of broadband Internet services in Spain doubled; today there are more than 4.5 million broadband subscribers. Moreover, the Internet is also used for hard goods distribution; pirates have an additional layer of protection because judges have to authorize special warrants allowing police to search their homes. The lack of a specific enforcement agency tasked with addressing Internet piracy is itself a problem. Specifically identifying an agency to undertake Internet piracy investigations would be useful in more aggressively tackling the country's growing Internet piracy. An example already exists when the Spanish Data Protection Commissioner undertook enforcement responsibility to tackle spam. This appears to have been rather successful and may be a model for how enforcement against Internet piracy could be made more effective.

In August 2005, Spanish police shut down a website that allowed users to download pirated movies, and arrested four men who created the site, www.cvddgo.com. Industry estimates suggest that nearly 11.2 million visitors visited this website from its launch in February

2004 through May 2005. Prosecutions have continued but no verdict has yet been issued. Another Internet case involved the so-called Weblisten case. Weblisten's webpage, which offered downloads prior to payment, was shut down in mid-2005. This was quite an old case, since prosecutions started in 1998. This website's shutdown had an important impact in the press. Three civil actions against websites that allowed users to download pirated music were started in 2005. So far, only one has ended with the shutdown of the site and the obligation to pay compensation for damages to the right holders. The two others are still pending.

Spanish Internet service and hosting providers, far from showing willingness to collaborate in the fight against piracy on the Internet, instead make use of their file sharing and downloading service capabilities to promote their businesses.

Piracy on the streets and the influence of organized crime: Piracy in Spain during 2005 continued to exhibit some characteristics that arise frequently in connection with OD piracy — namely the connection with illegal immigration and tobacco smuggling and other organized criminal activity. These businesses are in the process of evolving. Chinese syndicates are increasingly dominating the pirate trade in Spain; they are much better organized and financed than their predecessors (primarily from northern and sub-Saharan Africa), and have imposed a price policy (2€ per CD), with aggressive distribution through the use of itinerant sellers in streets and entertainment premises. These Chinese networks are not only involved in using CD-R and DVD-R formats, but also directly import pirate CDs manufactured in Taiwanese and Chinese plants (but not DVDs). Product consists primarily of international releases, although albums of some important national artists have also been detected.

The Spanish government should consider extending the application of anti-organized crime laws (such as against money laundering) to intellectual property crimes so as to more effectively target the international syndicates involved in large-scale piracy operations.

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 2005, the number of street vendors selling optical disc products fell, with estimates that the number of “manteros” decreased around 40% and “mochileros” around 30%. There are an estimated 8,000 to 10,000 street vendors, including at least 5,000 mochileros, but a steadily decreasing number of manteros. As police action improves against manteros, the preferred distribution system becomes the mochilero. 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). 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 right holders to file numerous legal procedures with no decisions. (A decision cannot be made if the defendant cannot be located.) This problem highlights the need to address the organized production sources of pirate product, not only its distribution. Organized gangs maintain labs and distribution centers in Madrid, Barcelona, Grenada, and reportedly in Girona, Tarragona, and Alicante.

The following steps would be useful to address the street vendor piracy problem:

- (1) stronger criminal penalties;
- (2) increased *ex officio* police actions against street sales;
- (3) more actions against labs supplying street vendors;
- (4) increased police coordination, and
- (5) the inclusion of IP violations in the list of cases that qualify for "fast hearings."

In fact, Spain's largest cities, Madrid and Barcelona, recently started new enforcement efforts against street piracy. Starting in January 2006, not only sellers but also buyers of illegal CDs can be fined by the Local Police in Barcelona (minimum 125 € – maximum 500 €) and the illegal CDs can be seized. Starting in December 2005, Madrid Local Police will request the personal details of the buyers of illegal CDs on the streets and transmit them to the Courts in order to call them eventually as witnesses in criminal hearings. The illegal CDs already bought by the client can be seized with the rest of illegal material.

Music and record piracy: The international recording industry reports that Spain has the worst CD-R problem in Western Europe, and piracy of DVD music videos is also very high. Spain and Italy are the only two European countries that are featured in IFPI's world's top ten legitimate markets that have piracy levels above 20%.¹ The situation for the recording industry in Spain is dire. Pirate recordings are openly on the streets. In 2005, there was a slight but progressive decrease in recordable formats, that is, CD-R and DVD-R, although the impact of this type of piracy is still alarming. This slight decrease is due mainly to the efficiency of police enforcement agencies which intensified their efforts and, therefore, results. This improvement was due in part to the positive changes in the Criminal Code and Criminal Procedure Code that took effect in October 2004, such that piracy rates for physical copies of sound recordings decreased slightly in 2005. The recording industry's fight against "mochileros," and other illegal street sellers, is now easier because the police can now proceed *ex officio* (without a previous complaint of right holders).

Importantly, the rapid growth of Internet piracy has made it the primary problem in Spain (as mentioned above) for the music publishing and recording industries. For example, NMPA indicates that its Spanish colleagues, SGAE (the collecting society, la Sociedad General de Autores y Editores, the General Society of Authors and Publishers of Spain), also report that widespread Internet-based piracy in Spain is undercutting the legitimate market for music publishers and their royalty collections. Like other industry groups, SGAE has been involved in anti-piracy activities involving unauthorized music on the Internet and in the streets and work under the Plan Integral.

With respect to enforcement, the recording industry reports that, between January and December 2005, some 13,224 police actions were conducted, 2,922 people arrested and an accumulated figure of 4.4 million optical discs have been seized, as well as 3,015 CD-R and DVD-R burners, thousands of inlay cards and jewel boxes. One raid example demonstrated the seriousness of the problem: in late October 2005, in what has been the largest operation against music and film piracy ever undertaken in Spain, police arrested 69 individuals in Madrid allegedly involved in the illegal production, storage and retail distribution of music and film discs. The police broke up a syndicate believed to be responsible for releasing over one million pirate music and film discs every month into the Spanish market. In follow-up actions, Spanish police raided more premises in the suburbs of Madrid, resulting in six more arrests, the seizure of another 50 CD drives and 150,000 discs. During the first raid, 69 people, all Chinese nationals, were arrested. Large amounts of illegal material were seized by the authorities, including over 60,000 recorded CD-Rs, almost 50,000 DVD-Rs and over 130,000 inlay cards, as well as over 200 CD drives and four industrial color copying machines, along with stolen passports. The music included both local Spanish artists and well-known international titles. Some of the films seized had not yet been legally distributed. Over 200 police officers from Madrid, Alicante, Burgos, Salamanca, Malaga, Orense, Valencia and the cities of Getafe and Puertollano took

¹ IFPI, Commercial Piracy Fact Sheet on Spain 2005, at <http://www.ifpi.org/site-content/press/20050623b.html>.

part in the raids, with support from right holders associations including local recording industry group Pro-Musicae, and enforcement officials from the industry (IFPI).²

Furthermore, Operation Madrid Plus 2005 was a campaign initiated last October which aimed at strengthening the fight against music piracy in the region of Madrid during the Christmas season, when this criminal activity intensifies. After the publication of IFPI's annual report on music piracy, where Spain appeared as being one of the countries with higher piracy growth rates in Europe, people in charge of different enforcement agencies and the Customs Department of the Tax Agency decided to intensify their anti-piracy activities and improve coordination by designing and implementing this operation in the Region of Madrid. During the last quarter of 2005, the agencies involved in the operation took actions which resulted in the dismantling of 20 organized crime networks devoted to piracy. Operation Madrid Plus 2005 has placed the region of Madrid at the forefront of the fight against music piracy in Spain.

It is essential that the Spanish 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.

Entertainment software piracy: The entertainment software industry reports that there were more police actions against retail outlets selling counterfeit and pirated goods in 2005. However, notwithstanding the increase in police activity, pirated video game products remain readily available in the market, whether on the street or at flea market-type venues. Internet café piracy continues to be a problem; of the 2,500 cafés, only 10% are licensed. Both local CD-R burning, as well as imports of pirated video games on optical disc from Asia, remain problematic for the industry. For the imported counterfeits and pirated discs, some of the "finishing work" (i.e., printing of covers or packaging) does occur in country. Internet piracy is also of great concern to the entertainment software industry, including the new form of piracy of mobile games. Pirated copies of mobile games can now be downloaded from the Internet onto handsets or stored on memory cards for use with mobile devices. The Entertainment Software Association (ESA) estimates that the value of pirated videogame product in the Spanish marketplace was \$135.3 million in 2005, with a 43% piracy rate.

Entertainment software companies also noted good cooperation from the Customs authorities in 2005, with Customs participating in a training seminar provided by the companies. However, Customs authorities must continue to step up enforcement activity so as to stem the flood of pirated products being imported into the country. Investigations should also be carried out against the intended consignees of the infringing products, in addition to interdicting pirated products at the border. More training for Customs officers is necessary to build on their success at stopping infringing product at the borders. Nintendo of America (NOA) noted that, in 2005, they had better success than 2004, though piracy remains prevalent, with the number of product seizures increasing by 30%. In 2004, the company had 50 police seizures and 7 customs seizures, while in 2005, these numbers increased significantly, with 87 police seizures and 20 customs seizures. Several cases also resulted in successful court outcomes, with the imposition of jail time and significant penalties. While NOA is pleased with the increased enforcement efforts, there remains much room for improvement,

² IFPI Press Release, October 28, 2005 at <http://www.ifpi.org/site-content/press/20051028.html>.

Audiovisual piracy: For the audiovisual industry, 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. Often, sound recordings made in local theaters are 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 very useful to help address this problem. For 2005, MPA’s methodology for calculating estimated piracy losses and piracy levels changed, and includes estimated losses and levels due to Internet piracy. This new methodology more accurately evaluates the market harm caused by audiovisual piracy in Spain (compared to prior methodologies). For 2005, MPA reports that preliminary estimated losses in Spain due to audiovisual piracy (including both hard goods and Internet) were \$253 million, and the estimated piracy level was 32%.

Business software piracy: The business software community reports excellent cooperation with Spanish authorities, which has contributed to a slow but steady decline in the software piracy rate over the past several years. Continuing to lower business software piracy rates in Spain could improve the local economy.³

³ BSA and International Data Corporation (IDC) released a new study on December 8, 2005, which illustrates global economic gains from reducing software piracy. This report, Expanding the Frontiers of Our Digital Future: Reducing Software Piracy to Accelerate Global IT Benefits, using 2004 data, found the following: a 10-point drop in Spain’s piracy rate (from 43% to 33%) could add \$3.2 billion to its economy, create 4,000 new jobs, and increase local industry sales by more than \$2.4 billion. For the Spanish government, the cumulative effect of all this growth could mean an additional \$531 million in tax revenues. See <http://www.bsa.org/idcstudy/pdfs/Spain.pdf>.

SPAIN Estimated Trade Losses Due to Copyright Piracy (in millions of U.S. dollars) and Levels of Piracy: 2004-2005 ⁴				
INDUSTRY	2005		2004	
	Loss	Level	Loss	Level
Records & Music ⁵	27.0	22%	90.0	24%
Business Software ⁶	388.0	44%	346.0	43%
Motion Pictures ⁷	253.0	32%	40.0	25%
Entertainment Software ⁸	135.3	43%	103.6	46%
Books	NA	NA	NA	NA
TOTALS	803.3+		579.6	

The “Integral Plan” of the Spanish Government

Several ministries continued to be directly involved in anti-piracy efforts in 2005. The Ministry most responsible for setting enforcement priorities, the Ministry of Justice, is also directly charged with implementing the EC Copyright and Enforcement Directives, while the Ministry of Culture was responsible for the implementation of the Copyright Directive, which is now in Congress. The Ministry of Interior coordinates actions of the Guardia Civil and Police, crucial for action against street sales. The Ministry of Culture seeks to establish overall coordination between the different ministries to protect intellectual property.

In late December 2004, the Ministry of Culture released its “Integral Plan” to protect intellectual property for public comment. At that time, the industries felt that the “Integral Plan” needed a much stronger enforcement component to accompany its primary analysis and awareness focus. In April 2005, the Spanish Government unveiled its integrated anti-piracy plan, which aimed to coordinate 11 ministries with police, local and regional governments, and the judiciary. It included measures in the areas of prevention, cooperation, training and public awareness. The Plan also included an analysis of the Spanish intellectual property enforcement legislation, seeking any loopholes in order to close them and help the Police and Courts to fight against these illegal activities.

⁴ The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA’s 2005 Special 301 submission at www.iipa.com/pdf/2006spec301methodology.pdf.

⁵ The recording industry clarifies that the 2004 data reflects estimated losses to the entire recording industry in Spain. The 2005 data reflects estimated for U.S. repertoire only. The industry’s overall 2005 loss estimates in Spain, for both U.S. and international repertoire approach \$75 million, reflecting both a contracting market and a drop in value, which entails a drop in estimated losses from the prior year of 2004.

⁶ BSA’s 2005 statistics are preliminary. They represent the U.S. publishers’ share of software piracy losses in Spain, and follow the methodology compiled in the Second Annual BSA/IDC Global Software Piracy Study (May 2005), available at <http://www.bsa.org/globalstudy/>. These figures cover, in addition to business applications software, computer applications such as operating systems, consumer applications such as PC gaming, personal finance, and reference software.

⁷ MPAA’s trade losses and piracy levels for 2005 are available for a limited number of countries and are based on a methodology that analyzes physical or “hard” goods and Internet piracy. For a description of the new methodology, please see Appendix B of this report. As loss numbers and piracy levels become available for additional countries at a later time, they will be posted on the IIPA website, www.iipa.com.

⁸ ESA’s reported dollar figures reflect the value of pirate product present in the marketplace as distinguished from definitive industry “losses.” The methodology used by the ESA is further described in Appendix B of this report.

The Plan's implementation has been extremely slow and has been more focused on public relations than on enforcement. Although the plan offers a wide general structure regarding the different aspects of preventing and fighting piracy, its implementation during 2005 has been almost inexistent in practice, except for the awareness campaign already mentioned and two meetings also hosted and coordinated by the Ministry of Culture between the cultural industries and the Internet Service Providers (ISP) aimed at trying to reach a self-regulation complementary to the national legislation in matter of intellectual property. As an example of the slowness and lack of efficacy of the Plan, the Permanent Commission, the plan's basic body of coordination and impulse, has not yet been created, and therefore no measures have been possibly implemented.

However, the extraordinary work of Enforcement Agencies and Customs (Tax Agency) has to be highlighted, although it does not derive from the implementation of the Government's plan but more likely to the sensitivity and professionalism of enforcement agencies. On December 19, 2005, Spain launched its first national anti-piracy campaign (eight months after the initiative was announced). The Ministry of Culture is spending €1 million (US\$1.2 million) on the "Defend your culture from piracy" media campaign, covering the holiday gift-buying season.

Though the Spanish government is increasing its efforts to combat piracy, these efforts have not been entirely effective, in part due to a lack of coordination among the various law enforcement agencies tasked with IP enforcement functions. Anti-piracy actions are undertaken by the Customs inspectors, the National Police, the Civil Guard, and regional police units, as well as local police in cities, towns and villages. Coordination and information sharing among these various enforcement agencies would make anti-piracy enforcement more effective, and would be helpful in addressing the involvement of international criminal syndicates involved in piracy operations.

In 2006, the main objective should be a common strategy in the field of Internet piracy. To that end, the copyright industries expect to count on the support of the Spanish Government.

Copyright and Related Legislation

Local rights holders are working very hard to seek improvements in two pending bills which seek to implement Spain's EU obligations. 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." 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.

Late Implementation of the EU Copyright Directive: Despite positive changes made 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. One reason for the difficulties with Internet enforcement lies with the Spanish government's failure to implement the

EU Copyright Directive by the December 22, 2002 deadline.⁹ The EU Commission instituted an infringement proceeding against Spain in July 2005 for its non-implementation of the EU Copyright Directive.¹⁰

Spain developed draft legislation in December 2004. In July 2005, the Council of Ministers approved the bill and submitted it to Parliament, where it was published on August 26, 2005 (as Bill No. 121/000044). The deadline for amendments to the Culture Committee was mid-October 2005. Parliament is not expected to take any action until the first quarter of 2006. In addition to the problems resulting from the delay, the music industry is concerned about the proposed legislation, and in particular that the exclusive right of public communication that the phonogram producers have traditionally enjoyed in Spain might be excluded in the new law. This deletion would greatly prejudice the ability for record producers to negotiate their rights in broadcasting and receive fair commercial value. The industries are particularly upset over the proposal to allow private copying and are lobbying very strongly against its inclusion.

Improper Implementation of the EU E-Commerce Directive: The Spanish "Law of Information Society Services and Electronic Commerce" (*Ley de Servicios de la Sociedad de la Información y de Comercio Electrónico* ("LSSI")) that entered into force on October 12, 2002 has improperly implemented the E-Commerce Directive.¹¹ Spanish Law creates a limitation of liability for Internet Service Providers (ISPs) in that it fails to correctively implement the constructive knowledge standard and imputes liability only on the basis of "effective knowledge." Parliament is not expected to take any action until the first quarter of 2006. The current bill is the *Ley de Servicios de la Sociedad de la Información (LSSI)*. The key problem is that it does not require ISPs to respond to any take-down request that is not accompanied by a Court Order.

EU Enforcement Directive: The EU Enforcement Directive¹² is currently being discussed in Spanish Parliament. The implementing law is likely to be passed in the first quarter of 2006. The music industry has proposed a number of amendments to the draft legislation, including improved rules on evidence such as allowing samples of a shipment as a means of proof, a meaningful right to information, deterrent damages, legal standing of anti-piracy associations and presumption of holders of related rights. Effective implementation of the Enforcement Directive is especially important, as it should facilitate enforcement efforts, particularly in the digital environment. However, concerns exist that this law might not have a great impact on Spanish enforcement legislation, because Spain already has reasonably good enforcement legislation (both civil and criminal). The problem, as outlined above, is that the anti-piracy campaigns have not had positive results leading to lower levels of piracy. The draft does not correctly implement the right to information.

⁹ The 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.

¹⁰ See EU Press Release, July 13, 2005 at <http://europa.eu.int/rapid/pressReleasesAction.do?reference=IP/05/921&type=HTML&aged=0&language=EN&guiLanguage=en>.

¹¹ The 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.

¹² The Directive 2004/48/CE on the Enforcement of Intellectual Property Rights (the "EU Enforcement Directive").