

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2007 SPECIAL 301 REPORT

SPAIN

Special 301 Recommendation: IIPA recommends that Spain be placed on the Watch List in 2007.

EXECUTIVE SUMMARY

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 (particularly peer-to-peer (P2P)) is also a major problem, exacerbated by increased penetration of broadband services. A 2006 circular issued by the General Public Prosecutor saying that peer-to-peer downloading is not illegal is a significant setback; according to the Instruction 1/2006, peer-to-peer activities will be considered a civil infringement but not a criminal one. The Spanish Copyright Act allows the reproduction of works for private use of the copier on a non profit basis (provided the copy is not to be used collectively). Consequently, downloaders of illegal files from the Internet cannot be prosecuted in a criminal proceeding because the copies they make are considered private copies. With respect to pirated hard goods, organized crime syndicates have maintained their active role in the production and distribution of pirated materials. With respect to legislation, there remain some flaws in Spain's implementation of EU Directives, and particularly with the issue the liability of intermediaries under the E-Commerce Directive. Furthermore, it is essential that the Spanish Government increase its commitment to the fight against piracy.

PRIORITY ACTIONS IN 2007

Enforcement

- Take concerted actions in well-known markets to combat the widespread street piracy problem, including: (1) more actions against labs supplying street vendors; (2) more *ex officio* police actions against street sales; (3) increased police coordination; and (4) prosecutors pursuing and courts issuing deterrent criminal penalties.
- Identify a single government agency to undertake Internet piracy investigations in order to strongly tackle the country's growing Internet piracy problem.
- Seek a reversal of the Chief Prosecutor's May 2006 official instruction "decriminalizing" peer-to-peer (P2P) downloading.
- Seek additional human resources from the Ministry of Interior for investigation of Internet activity.
- Assign additional human resources for Internet investigation from the Guardia Civil and National Police.
- Encourage the Ministry of Culture to broker an agreement with ISPs allowing private Notice-and-Takedown procedures and a code of conduct.
- Judges and prosecutors should attend seminars to increase their knowledge of intellectual property rights and the impact of piracy and intellectual property courses should be incorporated into law schools' curricula.
- Establish training sessions for criminal and commercial courts dealing with intellectual property issues.
- Improve interagency cooperation on anti-piracy strategies and actions, resulting in more criminal actions, effective prosecutions and deterrent sentencing.

Legislation

- Acknowledge incorrect implementation of the E-Commerce Directive, particularly regarding the creation of limitation of liability for intermediaries, and amend the legislation. Specifically, the Spanish "Law of Information Society Services and Electronic Commerce Law of Information Society Services and Electronic Commerce" (*Ley de Servicios de la Sociedad de la Información y de Comercio Electrónico* ("LSSI") (2002) has improperly implemented the E-Commerce Directive.
- Work with the copyright industry groups in a transparent and cooperative way if comprehensive reform of the Spanish copyright law moves forward in 2007. This would include, for example, ensuring against any weakening of the exclusive right of record producers with respect to rights of communication to the public and of making available. Also, the additional right of remuneration granted both to audiovisual and musical performers for making available to the public adopted in the 2006 copyright law amendments represent an erosion of the value of the exclusive rights of rightsholders that were already granted in accordance with the requirements of the WPPT and WCT, and should be eliminated in future copyright law reform. As agreed in the WPPT, exclusive rights should form the foundation of market based licensing for the delivery of signals.

SPAIN				
Estimated Trade Losses Due to Copyright Piracy				
(in millions of U.S. dollars)				
and Levels of Piracy: 2005-2006 ¹				
INDUSTRY	2006		2005	
	Loss	Level	Loss	Level
Sound recordings & musical compositions ²	25.0	22%	27.0	22%
Entertainment software ³	111.5	48%	135.3	43%
Business software ⁴	501.0	46%	417.0	46%
Motion pictures ⁵	NA	NA	253.0	32%
Books	NA	NA	NA	NA
TOTALS	637.5		832.3	

¹ The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2007 Special 301 submission at www.iipa.com/pdf/2007spec301methodology.pdf. For information on the history of Spain under Special 301 review, see Appendix D at (<http://www.iipa.com/pdf/2007SPEC301USTRHISTORY.pdf>) and Appendix E at (<http://www.iipa.com/pdf/2007SPEC301HISTORICALSUMMARY.pdf>) of this submission.

² 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.

³ 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.

⁴ BSA's 2006 statistics are preliminary. They represent the U.S. publishers' share of software piracy losses in Spain, and follow the methodology compiled in the Third Annual BSA/IDC Global Software Piracy Study (May 2006), 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. BSA's 2005 piracy statistics were preliminary at the time of IIPA's February 13, 2006 Special 301 filing; the 2005 data was revised and posted on the IIPA website in September 2006 (see <http://www.iipa.com/statistics.html>), and the 2005 revisions (if any) are reflected above.

⁵ MPAA's trade loss estimates and piracy levels for 2006 are not yet available. However, such numbers will become available later in the year and, as for 2005, will be 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 the 2006 loss numbers and piracy levels become available, they will be posted on the IIPA website, <http://www.iipa.com>.

COPYRIGHT PIRACY IN SPAIN

Piracy in Spanish continued to flourish in 2006, with industries reporting no improvement last year. Internet piracy and widespread street piracy contributed to the industries' growing concern about the state of the illicit markets in this country.

Internet piracy widespread: 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. 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. In a stunning blow to Internet anti-piracy efforts, the General Public Prosecutor published an order in May 2006 saying that P2P downloading is not illegal (not subject to criminal prosecution).

Additional resources for Internet investigations must be dedicated by the Spanish Government (see enforcement section, below). The lack of a specific enforcement agency tasked with addressing Internet piracy is a problem; 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). ISPs were still difficult in 2006. They are taking advantage of the law's provision that states that they are only be liable if they receive a court order, as only a court can be a "competent body." Also, 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 2006 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 and Senegalese 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€ per CD), with aggressive distribution through the use of itinerant sellers on the streets and on 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), as well as the majority of counterfeit Nintendo video game products. Product consists primarily of international releases, although albums of some important national artists have also been detected.

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. Significant increases in pirate activity have occurred in Granada, Seville, Oviedo and Gijón.

Overall, the sense in 2006 is that there has been a reduction in the amount of pirate product seized. However, this does not imply a decrease in police efficiency. In fact, 80 organized networks were dismantled in 2006 compared to 72 in 2005.

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.

In 2006, the local police performed much better and more effectively against street sellers (blanket men and vendors in public premises) than in the year prior. Local police and some City Mayors from Cambrils, Castelldefels, Barcelona, Madrid, Tarragona and Albacete started new enforcement efforts against street piracy, outlawing consumers from purchasing pirate product. In Barcelona, both sellers and buyers of illegal CDs and DVDs can be fined by the local police (minimum 125€ to maximum 500€, or US\$162-\$650) and the illegal CDs/DVDs can be seized. Unfortunately, seven judicial decisions issued in Barcelona did not consider street vendor piracy a criminal offence. These cases received significant coverage and created a lot of misunderstanding. Starting in December 2005 and continuing in 2006, Madrid police have requested 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. In November 2006, the City of Madrid local authorities implemented a public campaign in bars, restaurants and entertainment premises against the sale of pirate products.

Piracy of sound recordings and musical compositions: The international recording industry reports that the Spanish authorities undertook 10,516 enforcement actions in 2006 which resulted in the arrest of 2,382 individuals. The rapid growth of Internet piracy has made it the primary problem in Spain (as mentioned above) for the music publishing and recording industries. By the end of 2006, there were 6.5 million broadband lines in Spain, providing services up to 20 MB of traffic. The ISP Telefonica has announced that from March 2007 forward, up to 50 MB broadband service will be available in major cities. The National Music Publisher's Association (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. In addition, 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%. The situation for the recording industry in Spain is dire. Pirate recordings are openly on the streets. 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).

Entertainment software piracy: 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, less than 10% are licensed. Hard goods piracy of video game software is now predominantly domestically burned products, available through street vendors. Importation of counterfeit cartridge games from Asia also continues to be a significant problem in the country, with several seizures in 2006 identifying China as the source country. The exponential growth of Internet piracy is also of great concern to the entertainment software industry. The Entertainment Software

Association (ESA) reports that Spain, along with Italy and France, is consistently among the top five countries in which infringing activity occurring online (particularly through P2P networks) is persistently high. In addition, the ISPs in Spain are generally non-responsive to the notices of infringement sent to them by the ESA. The industry would also encourage the Spanish government to finally implement the EU Copyright Directive, a process which is long over due. Adequate implementation would provide for prohibitions against circumvention of the technological measures employed by rights holders to protect their works. The ESA estimates that the value of pirated videogame product in the Spanish marketplace was \$111.48 million in 2006, with a 48% piracy rate.

Audiovisual piracy: The Motion Picture Association (MPA) reports that in 2006, piracy worsened, as Internet file exchanges and street sales are causing significant damage to the industry. Piracy is becoming more locally-based, from organized OD production and distribution to local internet link sites for P2P exchange. In fact, it appears that even exchanged P2P movies are now produced locally via camcording in Spanish theaters. Street vendor piracy, which seemed to decrease at the beginning of 2006 due to special measures driven by government and local authorities, increased during the summer, likely due to illegal immigration. With respect to internet piracy, MPA reports that 132 million movies were downloaded on Spanish P2P services in the 12 months of June 2005 to June 2006. During this same time frame, 41 million DVD-Rs were sold by street vendors. An unforeseen effect of Spain's rampant street vendor piracy is that it sends the message to consumers that downloading is also okay. In 2006, 750 video stores closed, including 105 from a major U.S. retail chain. 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 Spain's source piracy problem.

Business software piracy: The Business Software Alliance (BSA) reports several sources of piracy in Spain. Widespread piracy keeps companies (end-users) using unlicensed software; resellers distribute illegal software on the streets; and the Internet continues to present challenges. Nearly all the big and major companies in Spain have policies to implement a reasonable legal use of software, with only some under-licensing problems. However, piracy at SMEs has stayed at high levels, supported by the high level of piracy in the distribution channel (it is estimated that about 40% of software distributors in Spain are involved in illegal distribution of software). Conscious of this situation, the Ministry of Industry has reached to an agreement with BSA (together with AETIC, the major local IT industry association), in order to implement a specific plan to fight against piracy in the illegal distribution channel, agreement to be implemented during 2007. BSA's anti-piracy campaign involving end user companies using illegal software are pursued through civil *inaudita altera parte* searches or through cease and desist letters, where the objective is to obtain compensation of damages caused and legalization the use of software. Reseller infringement cases are referred to the police for investigation and enforcement, and internet cases are pursued through cease and desist letters in nearly all cases.

COPYRIGHT ENFORCEMENT IN SPAIN

The Ministry most responsible for setting enforcement priorities, the Ministry of Justice, is also directly charged with implementing the EC Enforcement Directive, whereas the Ministry of Culture is responsible for implementation of the EU Copyright Directive. 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 (see further discussion, below), and it was responsible for the implementation of the EU Copyright Directive, which has now been implemented. The Spanish court system, particularly the new commercial courts, still needs improvement.

Police actions: The industry groups report good relations with the Spanish police authorities. Some enforcement authorities are taking effective action (but with limited resources and with little political support from higher political authorities. For example, in addition to the Internet raid (mentioned above) and the good local work by Municipal authorities, the Federal Police did take action against organized OD crime in 2006. Here are three examples: (1) Operación Autobus in January 2006: National police arrested 43 individuals in four cities in a coordinated raid. All of the persons arrested were members of an organized gang which distributed pirate optical discs throughout the country. Police seized 36 burners, 56,000 Euros in cash (US\$72,800) and documents indicating the organized nature of the operation in these and other cities. (2) Operación Cabeza in Madrid: Police arrested four people and seized 99 DVD- and CD-burners and more than 3,000 discs prerecorded with music and movies. (3) Operación Mikado in Madrid: Police arrested seven Chinese persons and dismantled an important gang, seizing 68 burners and 37,000 optical discs in five different flats in Madrid. An ESA member company reports that in 2006 the police/civil guard conducted 21 raids against vendors of pirated video game software. The recording industry also reports that it took 10,516 raids in 2006, resulting in seizures of 17,310 CDs, 1.8 million CD-Rs, and 46,322 blank DVD-Rs.

BSA reports that its work in 2006 with the police forces continued at a fluid level. Ordinarily, the police request support of the BSA in order to file criminal complaints that speed up the granting of raids by courts, and also request industry support in technical experts and other support for the organization of the raids. During 2006, BSA has conducted the following actions: four raids against end user companies; 261 cease and desist letters to end user companies; 71 cases referred to the police for investigation of alleged infringement activities by illegal distributors; 15 cease-and-desist letters to Internet infringers; and 10 judgments have been awarded against business software copyright infringers.

Internet piracy enforcement: In April 2006, Spanish police arrested fifteen operators of seventeen separate websites dedicated to the unauthorized exchange of movies, music and videogames via E-mule or BitTorrent. This raid was based on several investigation initiated by the film industry's group (FAP) and was the first such police action ever taken in Spain. These websites received over 615 million visits prior to the raids and the operators grossed over 900,000 Euros (US\$1.17 million) annually (from associated advertising, such as virtual casinos and pornography, controlled by the website operators). Of the fifteen arrested, all were charged with criminal copyright violations and five have been charged with additional charges involving false registrations, fraud and obstruction of justice.

Given the growth of Internet piracy and the havoc it heaps on the legitimate copyright industries, much more work must be done, especially with criminal enforcement, to combat this problem. Here are four suggestions:

- Seek a reversal of the Chief Prosecutor's official instruction "decriminalizing" P2P downloading. A May 2006 "circular" setting out the Attorney General's position for many areas of IP law, said (1) P2P is not a prosecutable offense because it is not a "commercial gain" (note: the standard should be "material" gain) and (2) a download for private use is a private copy exception to the law.
- Encourage the Ministry of Culture to broker an agreement with ISPs allowing private Notice-and-Takedown procedures and a code of conduct.
- Seek additional human resources from the Ministry of Interior for investigation of Internet activity (at present, only four police officers from the National Police and three from the Guardia Civil are assigned to prosecute internet cases in all of Spain; authorities have imposed a ceiling on the number of cases that each of four associations with an anti-piracy

function (FAP, EGEDA, AGEDI, Promusicae) can submit for prosecution to two per association every six months).

- Seek assignment of additional human resources for Internet investigation from the Guardia Civil and the National Police.

Civil actions and the commercial court: BSA reports that in addition to its criminal cases, the civil actions in Spain worked at an acceptable level during 2006. The Commercial Courts, which were granted jurisdiction in 2005 for enforcement on intellectual property in the civil arena, are proving to act reasonably quickly in the granting of *inaudita altera parte* search order, taking only days or weeks since the search warrant request is filed before the court. However, BSA does report several problems when working with the commercial courts:

- a) Raids granted based on anonymous information: Before the commercial courts were empowered to handle intellectual property issues, civil courts had no problems in granting raids based on anonymous information. Nowadays, some commercial jurisdictions (Madrid and Barcelona) do not accept anonymous information to grant a raid, while all other commercial courts in Spain have no problems in granting raids on the basis of anonymous information. This is making it more difficult for the software industries to pursue actions in the two major markets in Spain
- b) High bonds: All raids are granted under the condition of bonds being posted. Although amounts requested as bonds are reasonable (between US\$2,300 to \$4,500), in some cases the bonds requested are so costly (€120,000 – approximately US\$150,000 – in one instance) as to make it impossible to bring the case.
- c) Calculation of damages: The definition given by the law to the damages to be awarded as result of piracy activities might result confusing and, in some aspects, play against copyright owners' interests. Although nearly all piracy cases against business software award retail value as compensation of damages (a good result), an important case on business software piracy, now at discussion before the Supreme Court, might result on damages based lowered down by a wrongful application of the criteria given by the law to award damages.

BSA will be proposing to the Ministry of Justice that a training session for commercial courts be held in 2006 in order to address the above issues.

Border enforcement: Entertainment software companies also noted good cooperation from the Customs authorities in 2006. There were five seizure actions by the Customs authorities in 2006; but enforcement activity must continue to be stepped up 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.

Government coordination needs improvement: Simply put, the Spanish government needs to improve its national anti-piracy strategy by improving its implementation. Only the Ministry of Culture is acting against piracy. The other Ministries involved in the Governmental anti-piracy plan are reluctant to apply effective measures, with the local police and some federal police units being exceptions. The working group created with copyright holders and the ISPs did not reach an agreement, and the Ministry of Industry does not want to amend the LSSI law.

Lack of agency coordination: Though the Spanish Government has indeed been 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.

“Plan Integral”: In April 2005, the Spanish Government unveiled its integrated anti-piracy plan, which aimed to coordinate eleven 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 the courts to fight against these illegal activities. Unfortunately, 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 2006 has been almost inexistent in practice, The Ministry of Culture’s working group with the cultural industries and the Internet Service Providers (ISP) which aimed to reach an agreement on self-regulation failed and the Ministry of Industry has refused to amend the Internet law. 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, although now created, has not adopted any measures yet.

National Campaign: 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\$1.3 million) on the “Defend your culture from piracy” media campaign, covering the holiday gift-buying season. In December 2006, the Ministry of Culture launched the second part of the “Defend your culture” campaign in the mass media, this time with a direct message that piracy is clearly illegal.

During 2006, the music, recording and film industries, including some in cooperation with some collecting societies, organized seminars for Spanish police, judges and public prosecutors. In contrast, the Government held only several such enforcement seminars, where far more are needed urgently.

COPYRIGHT LAW REFORM IN SPAIN

For years, the copyright industries, led by local rightsholders’ groups, have been working very hard to seek improvements in proposed legislation to implement the Spain’s EU obligations. As an overarching matter, legislation should be 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 expeditious remedies to prevent infringements and remedies which constitute a deterrent to further infringements.” Unfortunately, Spanish implementation of these directives has been unsatisfactory.

Possible work in 2007: Reports indicate that Spain might consider comprehensive revisions of its copyright law in 2007. In addition to the problems identified in the implementation of the EU Directive (below), two additional points are in order. First, it is imperative that the government work with the copyright industry groups in a transparent and cooperative way if comprehensive reform of Spanish copyright laws moves forward in 2007. For example, this would include ensuring against any weakening of the exclusive right of record producers with respect to rights of communication to the public and of making available. Second, the additional right of remuneration granted both to audiovisual and musical performers for making available to the public adopted in the 2006 copyright law amendments represent an erosion of the value of the exclusive rights of rightholders that were already granted in accordance with the requirements of the WPPT and WCT, and should be

eliminated in future copyright law reform. As agreed in the WPPT, exclusive rights should form the foundation of market based licensing for the delivery of signals.

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 still 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.⁶ The EU Commission instituted an infringement proceeding against Spain in July 2005 for its non-implementation of the EU Copyright Directive,⁷ and sent a reasoned opinion to Spain in April 2006. Finally, on July 7, 2006, the Spanish Congress approved Act 23/2006 which amended the law to implement the Copyright Directive.

Improper Implementation of the EU E-Commerce Directive: The Spanish "Law of Information Society Services and Electronic Commerce Law of Information Society Services and Electronic Commerce" (*Ley de Servicios de la Sociedad de la Información y de Comercio Electrónico* ("LSSI")) which entered into force in October 2002 has improperly implemented the E-Commerce Directive.⁸ Spanish Law creates a limitation of liability for Internet Service Providers (ISPs) in that it fails to correctly implement the constructive knowledge standard and imputes liability only on the basis of "effective knowledge." In addition, another serious problem with Spain's implementation is that its law does not require ISPs to respond to any take-down request that is not accompanied by a Court Order. The Spanish implementation appears to say in Section 16 of the LSSI that ISPs can only be liable if they receive a court order, as only a court can be a "competent body" within the meaning of that section. ISPs have interpreted the implementation to say that this applies to taking action in relation to illegal P2P traffic (suspension or termination of users' accounts), on the basis that they can not suspend or terminate accounts without a court order to do so. The Spanish Government presented a self-regulation initiative for ISPs and intellectual property rights' associations, but after one year no agreement has been reached, so the aim has not been achieved and the negotiation terminated.

In September 2006, the Spanish Ministry of Industry, Tourism and Trade prepared draft amendments to the E-Commerce legislation. (This initiative is part of "plan 2006-2010", the information society development plan, which was adopted by the Spanish Government in November 2005.) In its explanatory memorandum, the Ministry states that the purpose of these amendments is *inter alia* to amend or suppress "excessive" or "unnecessary" obligations. As discussed above, the current Spanish e-commerce legislation fails to implement correctly the EU E-commerce directive by creating a limitation of liability for intermediaries that goes beyond that permitted by the Directive. The draft amendments proposed by the Ministry do not seek address this problem but rather seem to further limit any possibility to effectively fight on-line piracy. For instance, the Ministry proposes the following: to delete the provisions on data retention (Article 12); to delete the requirement on those providing online services to register domain names (Article 9); and make a number of drafting changes (in particular to Article 11 which refers to the duty of cooperation of ISPs) which would -- at the very least -- create legal uncertainty. The only positive point is that the draft (Article 11.2) refers to the possibility to prevent access from Spain to a specific service/to specific content provided from a non-EU State when the competent authorities have asked the removal/interruption of such

⁶ 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. Adequate implementation of the Copyright Directive should provide for protection against circumvention of technologies used by right holders to protect their copyrighted works.

⁷ 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>.

⁸ 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.

content/service. Industry understands that the Ministry is still working on a draft and is open to new proposals. It will likely take several months before the Ministry presents a draft to the Government. Once approved by Government, the draft will be sent to the Parliament.

Poor implementation of the EU Enforcement Directive: Effective implementation of the EU Enforcement Directive⁹ is especially important, as it should facilitate enforcement efforts, particularly in the digital environment. However, that appears not to be the case in Spain. Unfortunately, a serious problem in the Spanish implementation involves the “right of information” afforded in Article 8 of the Directive; this right allows rightsholders to identify infringers and obtain information about violations. This right is supposed to extend to Internet service providers and to allow rightsholders to obtain an order requiring the disclosure of the identity of an ISP's customer, where it appears the customer has been committing infringements. This is a critical tool in internet piracy enforcement. However, industry colleagues report that this right in the Spanish law appears to suffer from two defects. First, it is limited to commercial infringements. Second, it may not extend to non-infringing ISPs. The only persons who can be made subject to an order for provision of information are: (1) the suspected infringer; (2) anyone who for commercial purposes [sic] has used the infringing services or been found in possession of the infringing goods; and (3) anyone indicated by the preceding two respondents. Apart from referring to commercial “purposes,” rather than “commercial scale” (a major problem in itself), the Spanish formulation misses a fundamental principle of the Directive, which is that intermediaries who are acting on a commercial scale are liable to provide information on their customers (whether the latter are acting on a commercial scale or not). Furthermore, the right of information is not conditioned on a commercial activity by the infringer.

⁹ The Directive 2004/48/CE on the Enforcement of Intellectual Property Rights (the “EU Enforcement Directive”).