

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2008 SPECIAL 301 REPORT

SPECIAL MENTION

BULGARIA

IIPA includes Bulgaria in its Special 301 filing again this year due to continuing concerns regarding high levels of piracy, lack of leadership and coordination by certain Bulgarian government officials, and the need to improve enforcement of existing laws.

PIRACY

During 2007, Internet piracy in Bulgaria reached alarming proportions, no longer a distant second to the longstanding problem of physical (hard goods) piracy. The 2006 trend in Internet piracy of migrating from offering access to illegal content in the free-hosting area towards peer-to-peer (P2P) file sharing continued in 2007. The Cyber Crime Unit of the GDCOC in early 2007 tried to address this P2P threat and issued protocols of warning and instructions to several portals to take down their pirate torrent tracking sections. Two such sites, www.zamunda.bg and www.arenabg.com, did not comply with the police instructions and were raided in March 2007. Criminal proceedings were initiated against the owners of these sites, but neither case has reached the court yet. These enforcement actions triggered a media debate which revealed that some political officials openly challenged both the government's and the creative industries' effort to fight widespread Internet piracy. There is currently little dialogue between the industry and the Internet Service Providers (ISPs) in Bulgaria, despite attempts to establish cooperation made within Council on IP Protection at the Minister of Culture in 2006 and in 2007.

Copyrighted material can still be downloaded from certain accounts hosted on servers managed or controlled by some of the local ISPs, whereas "warez" sites have significantly diminished and the few such sites that have been encountered prove to be hosted on servers located abroad. For the business software sector, end user piracy, particularly in the small and medium enterprises, is still the major threat for the software industry in Bulgaria. In addition to Internet and mobile piracy, the massive burning of copyrighted materials on CD- and DVD-Rs remains a key element of a landscape still dominated by piracy. Indeed, these illegal discs are still easily available, especially in the summer and winter resorts in all major cities, and are allegedly linked with the influence of organized crime elements remains notorious.

One of the main reasons for continued high levels of piracy, however, are the prosecutors and the courts, who in practice consistently fail to treat copyright infringements as serious crimes. Unjustified delays permeate the process, and the whole system lacks transparency. Only recently have senior Bulgarian prosecutors shown a welcomed willingness to improve this situation, but much more needs to be done. During 2006 the interagency council on IPR met regularly and provided a platform for the private sector and the authorities to work together and achieve progress in addressing Bulgaria's various anti-piracy enforcement issues. Alarmingly, this process was interrupted in mid-2007 when a new Deputy Minister of Culture was appointed. Communication with the new Deputy-Minister is formalized and his assessment of the private sector's suggestions and proposals is non-transparent, inconsistent and unpredictable. The industries are concerned about the willingness of officials at the Ministry of Culture to promote effective copyright protection and enforcement.

ENFORCEMENT

Take more actions against Internet piracy. This includes taking actions involving ISPs (Internet Service Providers) and LANs (local area networks) facilitating illegal traffic in copyright materials in the online environment. Increased resources for the Economic Police Section and the Cyber-Crime Unit are needed. The recording and business software industries enjoy constructive and productive relationship with the Cyber Crime Unit of the GDCOC in 2007. The Ministry of Interior and the head of the Cyber Crime Unit in particular, are fully dedicated to

their tasks and excellent partners in the fight against copyright crime, including Internet piracy; the commitment and positive support from the chief of the Cyber Crime Unit deserves special mention. In 2007, for example, the Cyber Crime Unit and the recording industry (led locally by BAMP) organized 13 raids that interrupted the free sharing of 42 terabytes of illegal content that included music, films and software. 50 computer systems and FTP servers were seized and 13 criminal investigations were commenced.

Increase *ex officio* enforcement actions against retail piracy: Such actions should be initiated in the more flagrant markets and street fairs, especially in the Black Sea and other tourist resorts. Unfortunately the ban of street sales of ODs containing copyrighted material is not enforced as the Sofia Mayor's order that provided such a ban was challenged and the court ruled against it.

Improve enforcement the Optical Disc Law: It remains important that manufacturing of discs infringing copyright/neighbouring rights automatically leads to a revocation of the license. Regular plant inspections should be increased and rightholders' experts should be allowed to participate in inspections. Unfortunately, 2007 amendments to the Optical Disc law did not substantially strengthen its enforcement measures (see legal reform discussion, below).

Improve prosecutions and strengthen the judiciary: This element highlights the need to improve training for prosecutors, investigative magistrates and judges on copyright and to give priority to IPR infringement cases. As for criminal copyright piracy cases, prosecutors are now more responsive but there still is a lack of expert knowledge of IPR and continued inefficiency at the investigation level. Thanks to the copyright industries' initiative, a small booklet with best practices for prosecutors named "Protection of Intellectual Property under the Criminal Code" was produced, serving as a guideline to prosecutors' offices throughout Bulgaria. This booklet has been financed as part of the project "Intellectual Property Protection" of the Democratic Commission at the U.S. Embassy in Bulgaria and was prepared with participation of the Bulgarian Association of Music Producers (BAMP) and the U.S. Department of Justice.

The Business Software Alliance (BSA) reports that due to the recognized weakness of the Bulgarian judiciary it is very often the case in its software actions that either the supervising prosecutor or the judge on duty (entitled to approve the search and seizure protocols) impede or prevent raids against alleged offenders. In some instances, when the right holder's lead is reported to the supervising prosecutor, the latter refuses--without any reason whatsoever -- to allow the police to conduct the raid and respectively initiate criminal proceedings, and in others this motion is groundlessly delayed. When finally such permission is given, it turns out that due to leak of information material evidence on the offence has been lost or destroyed. It is also the case that judges on duty refuse to approve the police protocols of search and seizure although such actions have been conducted in compliance with the procedural law and duly reported. As a result, the willingness of the police enforcement agencies to take action against software piracy is very often challenged and impeded by the motions on behalf of the judiciary that are wrongful or not justified and as a result such cases are altogether dropped.

The situation concerning Bulgarian judges is difficult to analyze, as the majority of cases have not reached court stage. The random distribution of cases, although considered a major anti-corruption measure, now presents another difficulty to the specialization of judges in IPR. Local copyright sectors served as the driving force for setting up of a working group with experts from the Supreme Cassation Prosecutor's Office for developing unified procedural practices for prosecutors in the investigation and prosecution of IPR related crimes. As mentioned above, the methodology was completed and published in October 2007 and due to this it is still early to evaluate its actual contribution to improving the work of the prosecutors on IPR cases.

Continue to improve border enforcement to halt the importation and exportation of piratical products. Since Bulgaria joined the EU on January 1, 2007, EC Regulation 1383/2003 concerning customs actions against goods suspected of infringing certain intellectual property rights and the measures to be taken against goods found to have infringed such rights is directly implemented in Bulgaria. Nevertheless, the Regulation itself envisions that the simplified procedure for destruction of infringing goods can only be enforced if provided for by local law. Such laws have not yet been adopted and this hampers rightholders from achieving expeditious results.

Take administrative action against all users of recorded music that fail to pay royalties. The sound recording industry reports that piracy is damaging the collective rights management infrastructure: (1) Broadcasting of music: Despite the fact that the law provides labels and performers with broadcasting rights, cable operators and a large number of radio broadcasters still fail to pay for the use of music. The relevant government agencies have failed to exercise appropriate oversight and to intervene. That needs to change. (2) Public performance of music: For the first time, in October-November 2007 the Ministry of Culture and the police, together with representatives of the collecting societies and BAMP, initiated a series of inspections to check businesses regarding public performance of music. However, most public places still fail to respect the Copyright law and do not pay for public performance of recorded music, causing continued large losses for the music sector. Sustained enforcement actions are, therefore, required to stimulate awareness among public performance users (3) Private copying levies: While IIPA Members do not generally believe that private copying levies are the best way of addressing private, non-commercial copying (and it is critical that such levies address no more than such forms of copying), some countries have chosen to implement such levies. Where the law provides for a levy and it thus forms part of the legal and regulatory environment, it is important that the levies are collected and fairly distributed. In Bulgaria, legal and practical obstacles prevent the private copying levy system from functioning properly and deprive right holders of legitimate compensation. In fact, there is currently no collection or distribution of any levies due to legal inefficiency and resistance of manufacturers and importers against paying levies despite a legal obligation to do so. The Copyright law does require producers and importers of blank media to provide information to the relevant collecting societies on the number of blank media produced and/or imported by the respective manufactures/importers but there are no sanctions for such non-compliance, which renders the law totally ineffective. Customs does not provide any assistance in this, and, to date the Ministry of Culture also refuses to assist in this process even though this is officially within its competence.

LAW REFORM

The Optical Discs Act: The law regarding the manufacture and trade in optical discs, which the industries worked hard to pass and implement, still contains deficiencies. Efforts to strengthen the law were undertaken last year, and on October 19, 2007, amendments to the OD law entered into effect. Unfortunately, the new amendments failed in their main purpose to ban street sales of optical disc media with copyrighted material. Surprisingly, the newly appointed Deputy Minister of Culture opposed the creative industries' proposal during the sessions of the Parliamentary Committee on Economic Matters and the provision was dropped. Another loophole in these most recent amendments is that they do not provide for increased powers of the state control bodies in conducting surprise inspections and seizing documents, samples, raw materials, manufacturing equipment, or matrices. Such powers are essential for the purpose of establishing evidence related to alleged infringements. The law still does not allow right holders and their organizations and representatives to participate in the inspections. In general, the amendments could be described as superficial without bringing about any real improvement in enforcement. The recording industry continues to believe that amendments to the Optical Disc Law are necessary to enable regular plant visits by rights holder representatives, thus ensuring enhanced transparency in the OD manufacturing process. For the moment, the lack of a legal basis for participation of private sector experts prevents recording industry representatives from visiting any plants that do not wish to cooperate voluntarily and, as a result, puts into question the transparency of the optical discs production process.¹

The industries continue to insist on a codified ban of street sales, which would ensure the necessary legal ground for local authorities to intervene. Otherwise any local attempt to ban the street sales will be subject to administrative action and will likely fail to be implemented in practice.

Draft amendments to the Bulgarian Copyright Act: A major legislative concern for the recording industry in 2007 is related to a draft bill to amend Article 40 of the Bulgarian Copyright Act, which deals with collective rights management. The initiative for this draft was taken without any consultation with the right holders

¹ Representatives of the recording industry visited and collected information on six out of the nine functioning optical plants in Bulgaria [TOT 2002 Ltd., East European Authoring and Encoding Center, Silver First Ltd., Starsound Ltd., Media Sys Ltd., CHSL Ltd.] and took samples of their products. Optical Storage Plc. terminated its activity and sold out its two lines to Silver First Ltd. – Plovdiv. Media Plant is temporarily closed due to legal issues. Two plants refused to grant access to the private sector – “Crystal Tone 2” and “Euro Silver Group” (note: these are owned by the same person).

concerned. The procedure of its preparation has from the outset been secretive and non-transparent. The draft appears to impose very strict controls on the collecting societies, in favor of various media organizations and their users. The Draft, if adopted without changes, would introduce far-reaching and unwarranted state control over the collecting societies. Considering the less than exemplary state of IPR protection in Bulgaria, any copyright amendment that openly favors users to the detriment of right holders, would seriously endanger and jeopardize an already very fragile collective management capacity. If adopted in the version proposed by the broadcasters, the Bill would send collective management in Bulgaria back to square one. Together with the collecting societies, BAMP managed to be admitted to participate in the legislative process and is now trying to block, or at least reduce, any possible harm that the Draft may cause to the collective management system in Bulgaria.

Hotel Tourism Act: Since the beginning of 2007, the industries and the collecting societies insist on amendments to the Tourism Act that would guarantee better enforcement related to the public performance, in particular in Hotels. In 2008, these amendments will stay as a priority on this industry's legislative agenda.

Customs: As mentioned above, the adequate implementation of Regulation 1383/2003/EEC would enhance customs control on illegal copyright-related traffic. This is aimed at obtaining a speedy and practical enforcement that would enable Bulgarian customs to implement the summary procedure for destruction of confiscated illegal goods within 10 days after the seizure (as required per Article 11 of the Regulation). Customs authorities have declared their willingness to cooperate and to prepare the needed piece of domestic legislation in 2008.

EU Enforcement Directive: In early 2006, Bulgaria implemented the EU Enforcement Directive 2004/48/EC into its copyright laws and other laws. In 2007, BSA started a test civil case against a hard disk loader. Unfortunately, due to the lengthy civil proceedings this case has not yet been considered on the merits and it is still early to evaluate the level of implementation and enforcement of these provisions in practice.

The Data Retention Directive implementation: Recently Bulgaria adopted the Act on Electronic Communications ('AEC'). Chapter 15 of this law contains provisions on security of electronic communications and on the relevant protection of user's data. The act transposes the EU Data Retention Directive and stipulates that, because of national security concerns and the detection of crimes, some categories of data have to be retained by the providers of public electronic communications networks and/or services. Further to Article 251(2) of AEC, a joint Ordinance by the Ministry of Interior and the State Agency for Information Technology and Communications has to be adopted and enter into force as of March 15, 2009. A draft is ready and presented for public discussion. The problem in relation to this is that all content-related data are per definition excluded from the scope of application of the Ordinance. At the same time, the lack of relevant information on copyright infringements in the online environment presents a constant obstacle to the investigation of Internet IPR crimes. The lack of relevant material and a procedural legal framework that would involve ISPs in IPR protection, and the deficiency of adequate data collecting that would evidence the committed Internet crime and disclose the copyright violators' identity, present serious problems. These issues need to be urgently addressed and resolved satisfactorily before ultimate adoption.

The Radio and TV Act: The last amendment of the Radio and TV Act (in late 2005) provided for obligatory contracts with the collecting societies as part of the license/registration package of any broadcaster to be presented to the Council of Electronic Media (CEM). These provisions were finally implemented in 2007. Now, CEM has to inform the Ministry of Culture on the results of its inspection. Unfortunately, CEM lacks the competence to monitor the implementation of the relevant copyright obligations by the broadcasters, let alone the right to impose sanctions in cases of infringement. A new Draft to supplement the Radio and TV Act is under preparation in order to establish legislative harmony with the Act on Electronic Communications. Additional amendments that would involve CEM in copyright enforcement monitoring and to provide for better IPR protection in the broadcasting environment should be adopted in order to make this piece of legislation truly effective.

Criminal Code (2006): One of the main legislative achievements in 2006 was the amendment to the Criminal Code criminalizing the storage (holding in possession) of "tangible materials containing copyrighted material. The creative industries' hope and expectation that this amendment would bring a chain of enforcement actions against wholesalers of pirate ODs ending in court unfortunately were not realized. Sadly, another year has passed and the local industries report that, to the best of their knowledge, not a single verdict has been issued in any copyright case.

COORDINATION / GOVERNMENT LEADERSHIP / PUBLIC AWARENESS

The Council: It is particularly important to continue coordination between private sector and law enforcement authorities through the Council on IP Protection at the Ministry of Culture, created in January 2006. The Council is a major partner in the area of enforcement, being the most important interagency coordination body and a facilitator for dialogue with the private sector. The Council on IP Protection reopened its sessions in October 2007 headed by the new Deputy Minister. The latter declared his willingness to further develop the IPR-related interagency cooperation and identified IPR protection as a priority. In November 2007, the Council reviewed the 2007 enforcement data and set out the parameters of an Action Plan for the first half of 2008. BAMP made proposals for legislative amendments that would encourage effective border control, stimulate ISP cooperation against illegal content sharing, and guarantee better copyright protection in both the audiovisual sector and in the public performance environment. Due to the short period of activity of the Council under its new leadership, it is premature to assess its effectiveness. However, there are some disturbing symptoms that betray a negative approach of the administration to the music sector and a lack of willingness to communicate with the industries. The collective management societies suffer from the same deficit of trust and support. This situation should be closely monitored.

Industry cooperation: To provide formal assistance to the Ministry of Interior's (Moi) enforcement agencies, at the end of 2004 BSA and IFPI signed a Memorandum of Understanding and Cooperation with the Moi. This Memorandum was followed by implementing a joint strategy to fight Internet piracy. In 2007, two addendums to the Memorandum, one with the National Police Directorate (Economic Police) on the PDC program, and the other with the GDCOC, provided for the donation of technical equipment and assistance in the investigation of software and cyber crimes, among other issues. It is still early to evaluate the impact of these memoranda.

Public Awareness: It is important for the Bulgarian government to support country-wide pro-copyright education and anti-piracy awareness campaigns. In 2007, the Public Awareness Campaign of the Ministry of Culture terminated in March with presentations in cinemas, Internet banners and a photo exhibition "Gallery of Portraits in Favor of Intellectual Property." The Bulgarian government allocated a sum of 30,000 BGN to assure a follow-up of the campaign focusing on media communication. However, the 2007 follow-up seems delayed; only 1/3 of the amount was used. It is essential that the awareness campaign is continued.

Economic Studies: According to a study on the economic contribution of the copyright industries in Bulgaria released by the Ministry of Culture and the World Intellectual Property Organization (WIPO) in May 2007, the Bulgarian copyright industries have a major contribution to the national economy. The study stated that the creative industries' contribution to the total growth of economy in 2005 was as follows: 4.52% of the gross output, 2.84% of the GDP, 3.43% of the gross value added, and 4.31% of national employment. A rapid increase in the number of people employed in the copyright-based industries occurred during 2003-2005. In fact, Bulgarian employment in the copyright industries was comparable to that in Canada. For the same two-year period, the relevant value added growth rate in Bulgaria was 38%. The study reflects the positive trend of the copyright-based sector development and grants serious arguments to claim sustainable support and relevant policy making solutions from the state authorities that would protect IPR and give impetus to the creative sector.

Training: The recording industry (represented locally through BAMP) and the BSA regularly conduct training for the law enforcement agencies and the judiciary, and participate in conferences and seminars organized by local or international governmental or non-governmental organizations.