

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2008 SPECIAL 301 REPORT

SPAIN

Special 301 Recommendation: IIPA recommends that Spain be placed on the Watch List in 2008.

EXECUTIVE SUMMARY

Despite the serious concerns raised with the U.S. government and the government of Spain last year, piracy in Spain, especially Internet piracy, has worsened. The country is generally noted as having one of the worst piracy rates in Europe and appears to be moving in a direction away from other European efforts to strengthen intellectual property rights enforcement. During the past year, Spanish authorities did very little to address concerns regarding IPR enforcement and completely failed to act effectively on issues regarding the responsibility of Internet service providers (ISPs) to cooperate with right holders in the fight against piracy by taking appropriate steps to ensure that their services and/or networks were not used for infringing purposes. Simply put, there has been no tangible progress that could justify Spain's continued absence from the Special 301 list.

Continuing high levels of piracy in Spain are seriously harming the music, entertainment software and filmed entertainment sectors. Internet piracy is the worst in Europe and continues to grow significantly. In fact, piracy on peer-to-peer (P2P) networks is widely perceived as a positive cultural phenomenon and file-sharing as an element of political freedom. Exacerbating this untenable situation are the Spanish government's policies of: (a) "decriminalizing" P2P file-sharing (including the 2006 issuance by the Attorney General of a Circular that stated such downloading is not a prosecutable crime); (b) failing to establish the minimum EU-level requirements regarding Internet service providers under the E-Commerce Directive; and (c) failing to address seriously content owners' concerns in brokering negotiations with ISPs. Legislative changes have been so watered down they are basically ineffective. Furthermore, there is no government leadership against piracy—all negotiations with ISPs have broken down and the Attorney General is requesting dismissal of current criminal cases against illegal portal and link sites (and judges are granting these requests) because of the 2006 Circular. The delay in implementing a system to facilitate and promote ISP cooperation in addressing online infringement has had the damaging effect of promoting more, not less, infringing activity on P2P networks. Spanish Internet service and hosting providers, far from showing willingness to collaborate in the fight against Internet piracy, instead make use of their file-sharing and downloading service capabilities to promote their businesses.

Spain has been able to make some legislative and administrative advances against piracy. The December 2007 Film Law prohibiting sound and image recording in theaters and the effective police effort against organized street piracy are two examples. However, when the Spanish government disproportionately promotes its policy positions (such as "Internet innovation" utilizing unauthorized content or increasing Internet consumers by allowing a "no-sanctions environment"), over a more fundamental fight, such as the right to property, the result is increased piracy. Beyond the Internet, local street sales still have definite organized crime patterns. Enforcement authorities are taking action against this kind of theft involving physical goods. Factory-produced pirate music CD products as well as locally burned CD-Rs and DVD-Rs are still readily available through street sales.

In sum, the Spanish government has made little progress in improving interagency anti-piracy cooperation and coordination, despite promising it would do so two years ago. Incredibly, there is less coordination today than there was two years ago. It is essential that the Spanish government "step up," not step back, to foster respect for and protection of copyrights.

PRIORITY ACTIONS IN 2008

Enforcement

- Achieve in 2008, through the Ministry of Industry, an effective agreement among ISPs and content owners for the immediate and effective implementation of the Graduated Response procedures (contractual or administrative procedures for consumers who abuse their ISP accounts), effective notice and takedown procedures (for sites engaged in copyright violations) and for the use of filtering technology at the network level to effectively prevent protected content from being distributed without authorization (similar to actions being taken in other European countries such as Greece and the United Kingdom and actions being taken by ISPs and User Generated Content sites in the U.S.).
- Reverse the Chief Prosecutor's May 2006 official instruction "decriminalizing" peer-to-peer (P2P) downloading.
- Identify the competent government agency responsible for notifying ISPs when infringing content must be taken down.
- Seek additional personnel for the Ministry of Interior for investigation of Internet activity and assign additional human resources for Internet investigation from the Guardia Civil and National Police.
- Consistent with the recent European Court of Justice (ECJ) decision in the *Telefonica* case, take appropriate steps to facilitate the ability of right holders to obtain the necessary information to take civil actions to protect their rights.
- Continue to take 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.
- 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

- Amend Spain's e-commerce laws to establish a workable notice and takedown procedure and eliminate the current requirement of "actual knowledge" as required by the EU Directives. Specifically, amend 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), including reconsideration of the mid-2007 Ministry of Industry proposal (Article 17bis).
- Work with copyright industry groups in a transparent and cooperative way as copyright reform moves forward. This would include, for example, ensuring against any weakening of the exclusive right of record producers with respect to right of communication to the public and of making available. Also, the limitation of the "making available" right from an exclusive right to a right of remuneration adopted in the 2006 copyright law amendments 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 and this additional right confuses the developing online marketplace.

SPAIN Estimated Trade Losses Due to Copyright Piracy (in millions of U.S. dollars) and Levels of Piracy: 2005-2007 ¹						
INDUSTRY	2007		2006		2005	
	Loss	Level	Loss	Level	Loss	Level
Sound recordings & musical compositions ²	16.7	20%	25.0	22%	27.0	22%
Entertainment software ³	510.0	35%	111.5	48%	135.3	43%
Business software ⁴	568.0	46%	471.0	46%	417.0	46%
Motion pictures ⁵	NA	NA	NA	NA	253.0	32%
Books	NA	NA	NA	NA	NA	NA
TOTALS	1,094.7		607.5		697.0	

COPYRIGHT PIRACY IN SPAIN

Internet piracy: Internet piracy has reached an epidemic level in Spain and is wreaking havoc on the legitimate markets. Spain is consistently ranked as Europe's top country for the percentage of Internet consumers engaged in piracy. The primary facilitator sites, and those that appear to be the most successful commercially, are located in Spain and run by Spanish operators, although there are Spanish-language sites located elsewhere that also affect the market. In addition, it appears that top-source piracy (that is, the organized groups that put together the initial pirate release of content) is increasing in Spain. There are approximately 22.8 million Internet users in Spain, amounting to 55% of the population (according to Internetworldstats.com). Figures of illegally downloaded music files might exceed 1.1 billion in 2007 (805 million in 2006, according to CIMEC data). 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), report that widespread Internet-based piracy in Spain is undercutting the legitimate market for music publishers and their royalty collections.

There are several reasons for this rampant Internet piracy problem, much of which has to do with both the actions and inactions of Spanish government:

- The Government failed to implement its own national Anti-Piracy Plan and the group established by the Ministry of Culture as part of the Anti-Piracy Plan ceased to function in 2006 and was not revived in 2007.

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/2008spec301methodology.pdf. For information on the history of Spain under Special 301 review, see Appendix D at (<http://www.iipa.com/pdf/2008SPEC301USTRHISTORY.pdf>) and Appendix E at (<http://www.iipa.com/pdf/2008SPEC301HISTORICALSUMMARY.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 2007 statistics are preliminary. They represent the U.S. software publishers' share of software piracy losses in Spain, and follow the methodology compiled in the Fourth Annual BSA and IDC Global Software Piracy Study (May 2007), available at <http://w3.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 2006 piracy statistics were preliminary at the time of IIPA's February 12, 2007 Special 301 filing and were finalized in June 2007 (see <http://www.iipa.com/statistics.html>), as reflected above.

⁵ MPAA's trade losses and piracy levels for 2006 and 2007 are not available. MPAA did provide 2005 estimates for a select group of countries, using a new methodology that analyzed both physical/"hard goods" and Internet piracy. Details regarding MPAA's methodology for 2005 and prior years are found in Appendix B of this report.

- The legal loophole in the LSSI (Information Society Services Law) combined with inadequate ISP liability provisions in the copyright law, result in a failure to implement the minimum obligations of the EU Directives and undermine the legal framework necessary for content owners to do business and commercially survive in the online environment.
- This inadequate legal framework has in turn produced an environment that is not conducive to the ability to reach voluntary agreements between right holders and ISPs that could address the situation. Unfortunately but predictably, discussions between these parties (content owners and ISPs) have gone nowhere. This situation is exacerbated by a seemingly biased Spanish Government, that fails to play its role of neutral and honest broker. In fact, the current Government has neither fostered any agreement between right holders and ISPs, nor has it established alternative measures. In the meantime, illegal Internet sites and P2P file-sharing continue to erode the market for copyrighted products in Spain.
- To make matters worse, the Spanish Government recently took a step backward in the protection of intellectual property. A bill amending the LSSI, supported by ISPs, was adopted by the Congress on December 28, 2007. These December 2007 amendments to the LSSI failed, again, to effectively implement the EU E-Commerce Directive, leaving Spain without effective notice and takedown procedures and with a confusing and unachievable rule requiring “actual notice” by ISPs for the removal of unauthorized content. Liability of the ISPs remains unchanged and the notice and takedown process has not been implemented.
- Furthermore, Spanish legislation does not provide for an express possibility of identifying holders of Internet protocol addresses in the context of civil proceedings, whereas in criminal procedures the judicial authority issues a warrant. The recent *Promusicae vs. Telefonica* decision, issued on January 29, 2008 by the European Court of Justice, considered whether a lack of rules on disclosure in civil proceedings is in line with EU law. The ECJ decision replied to questions referred by a Spanish court in the context of national proceedings where Promusicae had sought to obtain a court order obliging the ISP, Telefonica, to disclose data on users who had shared or uploaded very large music files via the Kazaa network. The ECJ ruling establishes that Member States are allowed, but not obliged, to provide for rules on disclosure of personal data in the context of civil proceedings. Further, the Member States are obliged to strike a fair balance between the fundamental right to privacy and the fundamental right to protection of intellectual property and the right to an effective remedy. The Spanish court, in its reference to the ECJ, had indicated that it is uncertain whether the Spanish law allows for disclosure of data in civil proceedings. The Spanish court will now make its decision in the national proceedings applying the reply given by the ECJ. Should the Spanish court decide against disclosure in the context of civil proceedings, right holders would experience severe problems in obtaining any effective remedy in Spain, in particular with regard to P2P file-sharing infringements, due to the Chief Prosecutor’s circular “decriminalizing” P2P (see below). It should be noted, however, that Spain had not yet implemented the Enforcement Directive when the *Promusicae vs. Telefonica* case was initiated. The Government of Spain should ensure that right holders have the ability to obtain information necessary to protect their rights. In the event that the Spanish court ultimately determines that present law permits no such disclosure, then the Government should move quickly to adopt legislation, as permitted by the ECJ decision, to mandate disclosure.
- In May 2006, Spain’s Office of the Attorney General issued a Circular to all district attorneys, which decriminalizes P2P piracy. The situation has deteriorated over the last year, as the decriminalization of P2P file-sharing expands to facilitation sites and emboldens piracy proponents. For example, a judge recently dismissed a criminal case against the operators of a major link site at the request of the prosecutor, which was based on the Circular.
- Police actions against web sites and pages offering links to files on P2P networks are being derailed because of the 2006 Circular. Those few police actions against organized networks and companies that were clearly obtaining a direct or indirect gain from Internet piracy are now being dropped as a consequence of the requirement to establish commercial intent. This is all the more unacceptable since these sites do generate income through advertising related to the number of visits of the web page, as well as the number of persons signing in to use the service. This means that a clear profit is derived from

the illegal offer and, as such a clear commercial intent. Most of the cases never even reach the trial stage.

- Spanish ISPs do not acknowledge the standing of copyright collecting societies and associations as interested parties and representatives of relevant right holders in notice and takedown requests. They hide behind the unfounded argument that they could be held criminally or civilly liable if they take action based on requests from such organizations, even though it is an established fact that the collective rights societies are fully mandated by their members to file such requests.

Piracy on the streets and the influence of organized crime: Efforts to combat street piracy are having a positive effect, as the National Police and the Guardia Civil have been working hard to combat street piracy. Pirate networks running illegal sale activities in the streets and flea markets seems to be mostly selling film DVDs now. Still, according the record industry, Spain has the worst pirate CD-R problem in Western Europe, and piracy of DVD music videos is also very high. Police actions against “mochileros,” who sell out of backpacks, remain more difficult than actions against the street “manteros,” who sell from blankets and are relatively fixed in location and maintain more product.

Street piracy is highly structured with links to organized crime elements. This aspect has fostered a more pro-enforcement attitude by both the police and the public. 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 Chinese plants. Product consists primarily of international releases, although albums of some important national artists have also been detected. The depth of the street piracy 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, Granada, and reportedly in Girona, Tarragona, and Alicante. Significant increases in pirate activity have occurred in Granada, Seville, Oviedo and Gijón.

Piracy of sound recordings and musical compositions: The situation for the recording industry in Spain is dire. The most serious problem is now undoubtedly the illegal use of recorded music on the Internet. Illegally downloaded files might exceed 1.1 billion in 2007 (805 million in 2006, according to CIMEC data). The local music collecting society, la Sociedad General de Autores y Editores, also report that widespread Internet-based piracy in Spain is undercutting the legitimate market for music publishers and their royalty collections. Although physical piracy has decreased in general terms, in particular that of top manta (blankets in the streets), there still remain some black spots in some cities. Estimated trade losses due to music piracy in Spain are \$16.7 million, with a 20% piracy rate and a year-on-year decrease of legitimate sales of a staggering 26%, principally the consequence of Internet piracy.

Audiovisual piracy: The Motion Picture Association (MPA) reports that Internet piracy in Spain is wrecking havoc on the market. It appears that even exchanged P2P movies are now initially produced locally via camcording in Spanish theaters. As broadband penetration climbs in Spain, some MPA member companies are pioneering electronic sell-through partnerships with ISPs. The first was announced in July 2006 between Universal and the largest Spanish ISP, Telefonica (and Telefonica has opened their own EST site called www.pixbox.com which features film and music download to own). This movement, along with the growth of Internet piracy, makes it urgent that Spain revise its implementation of the relevant EU Directives (discussed above and below). MPA reports that the theatrical market in Spain dropped in 2007 (estimated 115 million tickets in 2007 versus 124 million in 2006). Home video sales remained even with the prior year, but is at a level significantly lower than what the Spanish market should be and less as compared to similar markets (such as Italy). Improved enforcement against street piracy has calmed that problem somewhat.

Entertainment software piracy: The Entertainment Software Association (ESA) reports that Spain is consistently among the top five countries in which infringing activity occurring online (particularly through P2P networks) is persistently high. For example, a member company’s monitoring of downloads of four top game titles last year indicated that on average, Spain accounted for approximately 10% of BitTorrent downloads and as much as 35% of eDonkey downloads. A substantial portion of these downloads were hacked versions of the localized

version of the game. The ISPs have generally been of no help, and remain unresponsive to the notices of infringement sent to them. Circumvention devices, such as mod chips and game copiers that bypass the technological protection measures employed in console hardware, remain prevalent in Spain. Spanish law appears ambiguous as to the illegal nature of circumvention devices, despite the fact that such devices are clearly prohibited under the EU Copyright Directive (which Spain was to have already fully and adequately implemented). ESA reports that counterfeit Nintendo video game products remain readily available in several cities in Spain. Adequate implementation would provide for prohibitions against circumvention of the technological measures employed by rights holders to protect their works. An ESA member company also reports a significant decrease in the number of customs (and police) enforcement actions against pirated entertainment software in 2007. ESA estimates that the value of pirated videogame product in the Spanish marketplace rose to \$510 million in 2007, with a 53% piracy rate.

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 large companies in Spain have policies to implement a reasonable legal use of software, with only some under-licensing problems. However, piracy at smaller enterprises 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). While the Internet is one of the main sources of piracy against business software, Spain is not to be considered one of the top pirate countries in Western Europe for business software Internet piracy. BSA estimates trade losses due to business software piracy in Spain in 2007 amounted to \$568 million, with a 46% piracy rate. According to a 2008 report issued by BSA-IDC, the information technology sector's contribution to the Spanish economy could be even bigger if Spain's PC software piracy rate were to be lowered 10 percentage points over the next four years. This would create an additional 1,982 jobs, \$2.1 billion in local industry revenues and \$288 million in additional tax revenues for federal, regional, and local governments.⁶

COPYRIGHT ENFORCEMENT IN SPAIN

Lack of government leadership: The Spanish government has let another year go by without any leadership to actually implement its own national anti-piracy strategy. To date, no working groups or coordinated inter-ministerial actions have been established by the government to address Internet piracy. The group previously established by the Ministry of Culture as part of an old Anti-Piracy Plan ended its work in 2006, and was not revived in 2007. The only anti-piracy discussions with Government now are *ad hoc* and not coordinated or communicated between Ministries.

The Spanish Government was supposed to broker negotiations with the copyright industries and the ISPs. The effort broke down for many reasons, including ISP intransigence and the mandatory participation of "free Internet" non-governmental organizations. To many in the private sector, it seemed that the Ministry of Industry's attempts at negotiation were weighed towards the ISP and user groups and the Ministry's view that the unauthorized use of content in P2P systems encouraged innovation.

In addition, the recording industry reports that the national government, through its Anti-Piracy Plan, agreed to negotiate with restaurant and bar associations to encourage actions against on-site piracy sales, but no action was ever taken by the government. The only agreements of this type have been completed due to the work of the various associations contacting local municipalities directly.

Internet piracy enforcement: There has been no reconsideration of the Attorney General's 2006 Circular. In fact, a legal study arranged by the music and movie industries was held up by Ministry of Culture (who had previously agreed to present the study to the Attorney General, at the latter's request). Meanwhile, the situation has worsened significantly.

⁶ [The Economic Benefits of Reducing PC Software Piracy](http://www.bsa.org/idcstudy), commissioned by BSA and conducted independently by International Data Corporation (IDC), released January 22, 2008, looks at the bottom-line economic benefits of reducing piracy in 42 countries that together account for more than 90 percent of global IT spending in 2007. It is available online at <http://www.bsa.org/idcstudy>.

For example, a criminal case against the operators of major link site/forum, which had been the target of a police investigation, was provisionally dismissed in December 2007. The Judge agreed with the prosecutor's request for a dismissal based on the Circular; if uploading and downloading are not criminally prosecuted, then facilitating them should not be prosecuted either, despite the fact that such facilitation is commercially-driven. After that decision, the Copyleft Foundation ("Fundacion Copyleft") publicly stated that they would file criminal complaints against any police officer that continued to investigate P2P sites. The Government did nothing to indicate that the dismissal or the threat against investigations were out of line. The head of the police technical unit that investigates these cases subsequently announced at a recent webmasters forum that P2P sites and its activities are in fact not prosecutable and such activity can be engaged in. This decision is being appealed.

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).

MPA reports that cooperation with police authorities on street actions has been very good. With respect to Internet piracy investigation against larger websites, cooperation also is good in terms of the investigation work. However, the recent judicial precedent based on the long-standing Attorney General's Circular is now changing the attitude of even previously cooperative police investigators.

The international recording industry reports that the Spanish authorities undertook 12,542 enforcement actions in 2007 which resulted in the arrest of 4,636 individuals.

ESA reports that the Spanish authorities took a positive step in the area of online enforcement. For example, in July 2007, Spanish police arrested 16 people involved in an Internet piracy ring. The police found the pirate ring to be in possession of a collection of software codes that facilitated the downloading of more than 4,000 infringing files of video games, movies, music, and other content. Given the state of online piracy in the country, much more needs to be done to address the situation.

BSA reports that its work in 2007 with the police forces continued to work well. Usually the police request BSA support in order to file criminal complaints, as well as industry support in technical experts and other logistics regarding raids. During 2007, BSA conducted the following actions: (a) 9 raids against end user companies; (b) 266 cease and desist letters were issued to end user companies; (c) 12 cases were referred to the police for investigation of alleged infringement activities by illegal distributors; and (d) 29 cease-and-desist letters were issued to Internet infringers.

Civil actions and the commercial courts: BSA reports that in addition to its criminal cases, its civil actions in Spain are working at an acceptable level. 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 orders. 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 courts (like those in 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 these two major markets.
- b) High bonds: All raids are granted under the condition of bonds being posted. Although amounts requested 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 for damages to be awarded as result of piracy is confusing. Although nearly all business software piracy cases award damages based on the retail price of the legitimate products (a good result), there is an important software piracy case pending before the

Supreme Court that might affect the damage calculation to a lower criteria. This situation is being watched closely.

COPYRIGHT LAW REFORM IN SPAIN

Spain has a poor track record implementing the various EU Directives. At the onset, copyright legislation should be adopted in ways that are consistent with the two WIPO Internet treaties (the WCT and the WPPT). Furthermore, it is imperative that the Spanish government work with the copyright industry groups in a transparent and cooperative way if comprehensive reform of Spanish copyright laws moves forward. 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. Also, the right of remuneration granted both to audiovisual and musical performers for making available to the public adopted in the 2006 copyright law amendments represented an erosion of the value of the exclusive rights of right holders that were already granted in accordance with the requirements of the WPPT and WCT, and should be eliminated in future copyright law reform.

Effective implementation of the EU Enforcement Directive (2000) is especially important because it should improve enforcement, particularly in the digital environment. However, this appears not to be the case in Spain. A serious problem in the Spanish implementation involves the “right of information” afforded in Article 8 of the Directive (this allows rights holders to identify infringers and obtain information about infringements). This right is supposed to extend to ISPs and to allow rights holders to obtain an order requiring the disclosure of the identity of users, where it appears the user has been committing infringements. This is a critical tool in Internet piracy enforcement. However, industry reports that this right in the Spanish law appears to suffer the defect that it has a dual commercial scale requirement applying to both the services provided by the ISPs as well as to the infringements committed by the user. The Spanish formulation thereby misses a fundamental principle of this Directive, which is that the commercial scale requirement should only apply to the services provided by the ISPs and not to the infringements committed by the user.

Spain’s previously improper implementation of E-Commerce Directive (2000) still has not been corrected. In December 2007, the Spanish Parliament approved amendments to the “Law for the Impulse of the Information Society” (LSSI) which affected different sections the former LSSI and the Electronic Commerce law. This new law was part of the Spanish Government’s “2006-2010 Information Society Development Plan.” In earlier drafts of the law, the Ministry of Industry, on September 2006, introduced a new provision (Article 17bis), which corrected the ineffective implementation of notice-and-takedown procedures. But after strong opposition from ISPs and Internet users associations, the government, during the lead-up to general elections, withdrew the provision from the law. As a result, the only positive point of the new law (Article 11.2) refers to the possibility of preventing access from Spain to a specific service or content provided from a non-EU State when the “competent authorities” have requested the removal/interruption of such content/service. The most important amendment concerns the redefinition of who is a “competent authority” to notify ISPs. The former LSSI gave the possibility that the Ministry of Industry could be the “competent authority,” but now that possibility has been removed. The new wording is not clear, but implies that such a competent authority must be either an administrative or a judicial body. Moreover Article 11.3 says that in situations where the Spanish Constitution, or the laws concerning freedom of information and speech, give competence “exclusively” to the Courts, then only the courts could impose restrictions. It is possible, however, that the new law opens the possibility of creating (probably by new legislation) a “competent authority,” other than current administrative or judicial courts. Unfortunately, the Spanish government, in tune with the ISPs and Internet users associations, appear to support the idea that this provision mandates that only a court order can impose restrictions.

Film Law: On a positive note, and demonstrating that Spain can take positive anti-piracy steps, on December 28, 2007, the Spanish Legislature approved specific legislation prohibiting camcording movies. Regulations determining specific application of the legislation are still pending and may not be issued until after the March 9 general elections. Although camcording has been addressed previously as a general violation of the Copyright Law, this legislation is more specific and expansive and clarifies the problematic private copy defense. The legislation, contained in the Film Law (*Ley de Cine*, Section 5, Article 15.3), states clearly that recording movies (image and/or sound) is prohibited. The prohibition on recording is beneficial to enforcement efforts.

Previously, such conduct had to be directly linked to a further commercial activity to be prosecutable and the private copy exception allowed a very viable defense. Now, however, the specific prohibition eliminates both those difficulties and could allow direct enforcement follow-up.