

SPAIN

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2009 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that Spain remain on the Special 301 Watch List in 2009, and that an out-of-cycle review (OCR) be conducted this summer.

Executive Summary: Internet piracy in Spain continues to worsen, such that many of the copyright industries believe that Spain has the worst per capita Internet piracy problem in Europe and one of the worst overall Internet piracy rates in the world. Exacerbating the high piracy levels are the Spanish government's policies of: (1) "decriminalizing" P2P file-sharing (as reflected in the 2006 Circular issued by the Attorney General) and (2) failing to establish the minimum EU-level requirements regarding liability for Internet service providers under the E-Commerce Directive so that rights holders have the necessary tools to enforce their rights on the Internet. As a result, the police have ceased taking Internet enforcement actions given the legal uncertainties, and the Attorney General has requested dismissal of current criminal cases against illegal portal and link sites. Importantly, negotiations between rights holders and the Internet service provider (ISP) community to find ways to prevent infringing content from being distributed over the ISPs' services and/or networks finally started in 2008, and a satisfactory conclusion must be reached soon. The Spanish government should continue to press for conclusion of these negotiations because some legal reform will likely be required. In addition to Internet piracy, pirated hard goods are still offered in the streets and there remain strong links to organized criminal syndicates; enforcement authorities are taking action against street piracy involving physical goods but more work is needed to attack organized syndicate connections. Book publishers report ongoing illegal photocopying of academic materials on and around university campuses. The business software sector remains concerned about the availability, cost and speed of civil enforcement measures.

Certainly the status quo in Spain is unacceptable, and active leadership by the Spanish government is needed on all fronts -- law reform, enforcement and public education -- to address this dire situation harming the copyright industries. To support continued momentum in Spain, IIPA recommends that USTR conduct a Special 301 out-of-cycle Review regarding progress made on the following two benchmarks. By summer 2009, the Spanish government should:

1. Conclude development of an effective action plan to reduce the availability of unauthorized content online and to govern ISP responsibility, in particular the adoption of an effective system to educate subscribers and provide for deterrent sanctions against repeat infringers and effective site blocking or removal.
2. Begin the legislative and regulatory process to provide the legal framework within which anti-piracy measures and ISP responsibility can operate.

Priority actions requested to be taken in 2009: The copyright industries recommend that the following actions be taken in the near term in Spain in order to improve the adequate and effective protection of copyrighted materials there:

Enforcement

- Achieve, as mentioned above, an agreement among ISPs and content owners to effectively prevent infringing content from being distributed over the Internet. This effort should include the immediate and effective implementation of graduated response procedures (contractual or administrative procedures affecting consumers who abuse their ISP accounts), including any necessary related legislative changes, effective notice and takedown procedures (for removal and blocking of sites engaged in copyright violations) and, where appropriate, for the use of available technologies to identify and prevent repeat infringements.
- Reverse or rescind the Chief Prosecutor's May 2006 official instruction (Circular) that "decriminalizes" peer-to-peer (P2P) downloading.
- 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 2008 European Court of Justice (ECJ) decision in the *Promusicae v. Telefonica* case, take appropriate steps to facilitate the ability of rights holders to obtain the necessary information to take civil actions to protect their rights in the online environment (this may include legislative reform).



- Take appropriate steps so that the 2008 decision of a Valencia court finding circumvention devices are not illegal does not provoke similar resolutions in other courts (whether this may involve legislation that clearly criminalizes circumvention).
- 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.
- Improve interagency cooperation on anti-piracy strategies and actions, resulting in more criminal actions, effective prosecutions and deterrent sentencing. This also includes the involvement of regional governments in the anti-piracy fight.
- Establish and fund training seminars for prosecutors as well as criminal and civil judges to increase their knowledge of intellectual property rights and the impact of piracy. Intellectual property courses should be incorporated into law schools' curricula.
- Develop and implement a national campaign on the importance of intellectual property rights through educational, press and similar public outlets. This should be undertaken at the most senior levels of government.

Legislation

- Develop legislation to allow rights holders to obtain the necessary information to take civil actions in Internet piracy cases in order to protect their rights, consistent with the ECJ *Promusicae v Telefonica* case
- Amend Spain's e-commerce laws to establish a workable notice-and-takedown procedure and eliminate the current definition of "actual knowledge", which limits the application of 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").
- Amend the Data Protection legislation so that rights holders can enforce their rights on the Internet, in both civil and criminal proceedings;
- Amend Spanish Intellectual Property legislation in order to make clear that compensation of damages must be valued, at least, for the full retail value of the infringed goods or copies.
- Amend civil procedural legislation to (1) avoid bonds for *ex parte* raids for software copyright infringement (keeping bonds only for *ex parte* raids based on anonymous evidence) and (2) permit anonymous evidence to be used to justify *ex parte* raids.

SPAIN Estimated Trade Losses Due to Copyright Piracy (in millions of U.S. dollars) and Levels of Piracy: 2005-2008 ¹								
INDUSTRY	2008		2007		2006		2005	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Sound recordings & musical compositions ²	13.4	20%	16.7	20%	25.0	22%	27.0	22%
Entertainment software ³	NA	NA	510.0	35%	111.5	48%	135.3	43%
Business software ⁴	624.0	42%	542.0	43%	471.0	46%	417.0	46%
Motion pictures ⁵	NA	NA	NA	NA	NA	NA	253.0	32%
Books	NA	NA	NA	NA	NA	NA	NA	NA
TOTALS	637.4		1,068.7		607.5		697.0	

¹ The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in Appendix B of IIPA's 2009 Special 301 submission at www.iipa.com/pdf/2009spec301methodology.pdf. For the history of Spain and Special 301, see Appendices D and E at <http://www.iipa.com/pdf/2009SPEC301USTRHISTORY.pdf> and <http://www.iipa.com/pdf/2009SPEC301HISTORICALSUMMARY.pdf> of this submission. For more information on IIPA's 2009 challenges, see the IIPA cover letter to this Special 301 submission, posted at <http://www.iipa.com/pdf/2009SPEC301COVERLETTER.pdf>.

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 above reflect the value of pirate product present in the marketplace as distinguished from definitive industry "losses."

⁴ BSA's 2008 statistics are preliminary, represent the U.S. software publishers' share of software piracy losses in Spain, and follow the methodology compiled in the Fifth Annual BSA and IDC Global Software Piracy Study (May 2008), available at www.bsa.org. 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.

⁵ MPAA's 2005 data used a methodology that included both hard goods and Internet piracy loss estimates.

COPYRIGHT PIRACY IN SPAIN

Rampant Internet piracy: There are now approximately 25.6 million Internet users in Spain, amounting to 63% of the population (a significant increase from the 2007 statistics of 22.8 million Internet users and 55%, according to www.Internetworldstats.com). Some 51% of households (7,700,000) have broadband access (that is an estimated 17 million users) which represents a growth of more than 1 million connections and an 11% increase in number of users from the previous year (source: INE – Instituto Nacional de Estadísticas, the Spanish government, National Statistics Institute).

Internet piracy reached epidemic proportions in Spain in 2007 and has continued to escalate at an alarming rate. Comparative studies by the music, videogames and motion pictures industries demonstrate that Spain has one of the worst Internet piracy problems in the world. In fact, tracking illegal exchanges of motion picture product consistently places Spain among the top five worst countries in absolute downloads and nearly always the number one major country in the world in terms of per capita exchanges of illegal copies of films.

The sound recording industry reports that its most serious problem in Spain involves illegal downloads on the Internet. Estimates indicate that some 2 billion music tracks were illegally downloaded in 2008, an 80% increase compared to 2007 (when 1.1 million tracks were illegally downloaded, according to CIMEC; see 2008 download data, below). Although the widespread downloading of illegal music files through peer-to-peer (P2P) file-sharing continues (Emule and BitTorrent being the most popular), 2008 saw a sharp increase in direct downloads of files from websites that provide direct links to music files hosted in cyber lockers of a third country. The quality and speed of these downloads are why users increasingly opt for this method. According to a recent qualitative research about the penetration of piracy in Spain (GfK study, June 2008), three points are stunning: (1) 67% of the Spanish Internet surfers (8.77 from 11.48 million) admit to downloading illegal copyright content from the Internet; (2) of Internet users under 24 years of age, 81% admit to downloading files illegally with P2P programs in the Internet; and (3) 62% of the Internet surfers (7.12 million people) download music illegally, 58% are men, and two in every three are people between 16 and 34 years old. Also, 2008 saw the offering of illegal music files for mobile phones, with the appearance of the first companies and websites that offered content without license. Illegal mobile downloading in Spain is not yet as wide-spread as Internet piracy, but this is clearly a phenomenon that must be closely monitored as the number of mobile phones with a higher and better transmission, storage and reproduction capacity of digital formats continues to grow.

The damage to the legitimate recording industry in Spain is huge. The value of recorded music sales in Spain have decreased from €626 million (US\$807 million) in 2001 to just €257 millions (US\$331 million) in 2007, which means a 59% decrease in value. In unit terms, sales were 73 million in 2001 and only 31 million in 2007, a drop of 57%. According to IFPI (the International Federation of the Phonographic Industry), the physical market in Spain continued to slide, and was worth €225 million (US\$290 million) last year, a year-on-year decrease of 12.4%. Because of these falling sales, 50% of the employees of the music sector have lost their jobs in the last few years. Looking just at the digital market, the following facts illustrate these challenging problems. First, for 2008, digital sales accounted for just 11.5% of the overall legitimate music market in Spain, compared to 10.5% in 2007, while worldwide this figure was 20%, compared to 15% in 2007. This is because most of the digital sales come from mobile, where piracy was very limited in the past, but this market was almost flat in the first half of 2008; full year results were expected to be worse as mobile sales of full tracks and real tones were declining. Second, although online sales in Spain were increasing in 2008, they were still very far behind the average of the main European markets. For 2008, IFPI reports that online sales in Spain represented 4.2% of the overall market for recorded music and 36.9% of total digital sales of the recorded music market, compared to an average of 4.6% in the Top 5 European markets). Third, in 2008 an estimated 2 billion tracks were downloaded illegally in Spain, as mentioned above (based on studies by GfK). Compared to an estimated 2.2 million *a la carte* legal downloads, this means a mere 0.1% of all tracks downloaded were legal. Said another way, the music piracy levels on the Internet in Spain represent a staggering 99.9% of the local market. Furthermore, this piracy affects music publishers; the National Music Publishers' 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 undercuts the legitimate market for music publishers and their royalty collections.

The Motion Picture Association (MPA) similarly reports that, according to the same third-party survey (GfK), the situation for Internet piracy of filmed entertainment worsened during 2008, with film downloads increasing to 350 million in 2008, up from 240 million downloads in 2007. As broadband penetration climbs in Spain, some MPA member companies are

pioneering electronic sell-through partnerships with ISPs, however such ventures have had almost no success because of the high rates and easy availability of free illegal copies.

The Entertainment Software Association (ESA), representing the videogame industry, also reports that piracy levels in Spain worsened in 2008. According to the same 2008 GfK study, 50 million infringing copies of videogames were downloaded in 2008, a huge increase from the 20 million reported in 2007. P2P is still the most prevalent form of piracy affecting this sector, along with illegal link sites. More and more of these sites are beginning to include cyberlocker links for direct downloads. Online piracy is now the primary problem for this industry, with illegal downloads clearly overtaking the hard goods piracy problem. A private sector market study also found that the number of pirated games sold illegal through informal retail outlets was at only 500,000 in 2008 (source: FAP-Federation for the Protection of Intellectual Property, with data from GfK and the European Information Technology Observatory). In contrast, the number of illegal downloads from IP addresses located in Spain of a popular racing title in the month of December 2008 alone was already well over 480,000. Furthermore, during a 4-week industry online monitoring trial (December 2008), there were estimated to have been more than 974,000 completed downloads made by Spanish subscribers of 13 game titles covered by the study, representing 15.1% of the game downloads completed globally during the study period. Spanish downloaders were also responsible for 14.4% of downloads made of the two most heavily copied game titles. Overall, Spain was the second most active game downloading country by overall volume as well as on a per-capita basis. With three Spanish ISPs (Telefonica de Espana, Jazz Telecom S.A. and Uni2) included among the top 10 ISPs whose networks were used to facilitate this file sharing activity, meaningful efforts to cooperate with rights holders and stem infringing activity on P2P networks would make a significant difference in the level of online piracy in the country. Widespread availability of circumvention devices (and of circumvention services) also significantly contributes to growing Internet piracy as downloaded infringing video game software can only be played on consoles modified by such devices.

Street piracy and the influence of organized criminal syndicates: 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 seem to be mostly selling film DVDs now. Still, according to the record industry, Spain has the worst pirate CD-R problem in Western Europe, and the 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), 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.

Hard goods piracy of music and sound recordings: Estimated trade losses due to physical music piracy in Spain last year were \$13.4 million for U.S. repertoire. The recording industry reports that the 2007 trend of declining music piracy in the streets and markets continued in 2008. There are two principal causes for the gradual decrease of this kind of street piracy. First, more police action is being taken against street sales, in particular from local police. There were also several major police actions taken against organized criminal networks (either national and international operations) in 2008 and that has temporarily reduced the supply capacity of the local groups. Second, there appears to be a trend that indicates that movie DVDs have taken the place of the music CDs in the requests to "top manta" or "top mochila." The simplicity of downloading music on the Internet has increased this imbalance between CD and DVD piracy (or at least until network broadband penetration grows more). The national average piracy level of CD and DVD piracy was slightly above 20%, with piracy levels varying in the cities, for example: Andalucía 32%, Granada 55%, Sevilla 38%, Valencia 27%, Alicante 31%, Madrid 22%, Cataluña 21%, and Barcelona 22%. In these cities, there still are permanent illegal sale points in the streets, and municipal and police authorities (both national and local) have failed to stop those sales. To be clear, there is no doubt that physical piracy is also being affected by digital piracy through the Internet. The expansion of Internet connectivity and increase of broadband access not only affect the legitimate market, but also the physical piracy market as illegal downloads are burned onto CDs.

DVD piracy and camcording: The MPA, working with its local anti-piracy organization, FAP, reports that hard goods piracy of audiovisual products in Spain continues to hurt the local markets. In 2008, some 25 million pirate DVD-Rs were sold, compared to the legal market barely distributing 30 million legal DVDs. Some municipalities have adopted a very effective solution by forbidding street vendor activity. Madrid, Barcelona, Valencia, Malaga, Sevilla are some of the cities where piracy is of greatest concern. FAP reports that the police and municipalities are very active against this type of street DVD-R piracy. However, judicial cooperation is poor and FAP has to provide experts and evidence storage in most cases; some raids are even conditioned to FAP's provision of such services. As mentioned above, Internet piracy, especially of film titles that have not yet reached the Spanish theatrical market, is very harmful. It appears that even exchanged P2P movies are now initially produced locally via camcording in Spanish theaters. Shockingly, 52 films were illegally camcordered in Spanish theaters in 2008., *Star Wars: Clone Wars*, *Quantum of Solace*, *Body of Lies*, *Made of Honor*, *Hancock* and *Madagascar: Escape 2 Africa* were all stolen from Spanish theaters the very same day of their theatrical release in Spain and uploaded to the Internet. MPA has also found Spanish-sourced copies in other markets, particularly in Latin America. FAP data indicates that the Spanish film market contracted by 21% in 2008.

Entertainment software piracy: Though much of the video game piracy problem has migrated online, hard goods piracy and trafficking in circumvention devices does remain a problem. Mod chips and game copiers that bypass the technological protection measures employed in console hardware and handheld systems, respectively, are prevalent in Spain. Prosecuting individuals or entities engaged in the trafficking of circumvention devices and/or the provision of services related to them is subject to new difficulties despite the fact that such devices are clearly prohibited under the EU Copyright Directive and Spanish law itself contains similar prohibitions. Though there have been several successful actions against mod-chipping, a 2008 decision before a Valencia court found this type of circumvention device not to be illegal. The court held that since such devices purportedly could be used for other purposes, they could not be considered per se illegal. Fortunately, this decision, though enthusiastically reflected in the media, is still an isolated pronouncement among many others that postulate the opposite. Similarly, importers and distributors of game copiers, even users, claim the legality of such devices by uttering that they are intended for providing handheld systems with new functionalities and/or for making them able to play homebrew applications. No judicial decision has declared the illegality of game copiers in Spain, nevertheless, an entertainment software publisher has recently attended the first police actions against the commercialization of game copiers. These actions, in response to a major video game company's complaint against a chain which distributes computer equipment all around Spain, resulted in raids against fifteen stores, the detention of a number of individuals, and the seizure of hundreds of game copiers. The operation was carried out by members of a special unit for prosecuting offences against intellectual property of the Spanish National Police, with collaboration from officers of the Regional Police Headquarters of Cataluña, Valencia, Castilla León and Castilla La Mancha.

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). The software industry in Spain is formed by about 12,000 companies, which generates a market volume of €2.9 billion, or -US\$3.7 billion in 2007 (source AETIC), employs directly 80,000 people, and generates 300,000 more indirect jobs (source AETIC). 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's preliminary estimated trade losses due to U.S. business software piracy in Spain in 2008 amounted to \$624 million, with a 42% piracy rate. Last year BSA's Spanish Committee also conducted a regional piracy study, establishing the piracy levels for business software in different Spanish regions (Comunidades Autónomas) in order to develop better contacts with the responsible departments of regional governments, some of which (such as the Basque Country, Cataluña) have their own police forces. During 2009, meetings will be held with all regional governments in order to seek their cooperation in the fight against software piracy.

PROBLEMATIC GOVERNMENT POLICIES REGARDING INTERNET PIRACY

The lack of action by, and indeed the inaction of, the Spanish government (legislative, executive and judicial branches) has contributed to the Internet piracy problems.

More leadership needed to implement the Spanish national anti-piracy strategy: The Spanish government needs to become far more active in implementing its own national antipiracy strategy. The Parliament made a formal call to the Administration in December 2008 to establish a clear anti-piracy plan, but the Administration has not yet responded. Parliament's formal call suggested that the Interministerial Anti-Piracy Committee, coordinated by the Ministry of Culture, be the focus for the development of this plan. However, other than coordinating (on its own) related media campaigns and assisting the Ministry of Justice in a "Best Practices" Manual, this Anti-Piracy Committee has had a poor history of coordinating with other Ministries (such as Interior, Justice and, especially, Industry) and has not accomplished its own goals. For example, its efforts to foster negotiations between the content industry and ISPs was a complete failure with little attempt, or ability, to effectively broker those discussions. Both REDTEL (a coalition of Spanish Internet service providers) and the Content Industry Coalition requested membership in this Committee in the Spring of 2008 but have not been invited to join. This Interministerial Anti-Piracy Committee is not a sufficient forum for leadership unless other Ministries (such as Industry) step up in a leadership role, and the Administration, at the vice presidential level as a minimum, also makes a strong commitment to an effective process. For Internet piracy, it is clear that leadership must come from the Ministry of Industry, including the Secretary of State for Telecommunications (see more, below).

The Ministry of Justice should take steps to increase its involvement in providing solutions to the many problems with criminal copyright enforcement addressed in this report. More resources and practical trainings on copyright piracy issues and criminal and civil enforcement are needed for prosecutors and judges. The Ministry of Interior is responsible for the police forces and must encourage more investigation of web sites. Another key agency is the Ministry of Industry, which is also in charge of the information technology industry. BSA has a good relationship with this Ministry, which has, at BSA's request, approved and funded a program to train and prevent the software piracy in the illegal retail channel; this program will be deployed during 2009.

In the Internet context, a potentially important government entity is the Secretary of State for Telecommunications (SETSI), a entity within the Ministry of Industry, which regulates telecommunications, including ISPs. The Intellectual Property Department within SETSI should be commended for its proactive outreach to the content industry in 2008, including the investigation of solutions for Internet piracy. However, their effort appears to be minimized within SETSI as SETSI's upper levels seems to prefer denying that a problem exists. SETSI, in fact, appears to dedicate more time to producing written arguments dismissing the scope of the problem and defending its non-action than it does to producing any useful recommendations suggestions or proposals. SETSI's focus on Internet and technology issues could be extremely valuable to resolving the Internet piracy problem if it were to be more open to evaluating all Internet interests. For example, SETSI's private sector consulting commission, CATSI, does not have any content industry representation on it, yet SETSI would propose that CATSI approve any Internet anti-piracy plan forwarded by the content industry. Despite its potential leadership position, SETSI's tendency toward defensiveness, its refusal to recognize the scope and impact of the Internet piracy problem, and its apparent unwillingness to balance its Internet interests has significantly reduced its credibility to-date on these issues.

The 2006 Attorney General's Circular is still being used to justify no criminal actions in P2P cases: In May 2006, Spain's Office of the Prosecutor-General (Attorney General) issued a Circular (Circular 1/2006) to all district attorneys. This Circular explains why the profit-making criteria in the Criminal Code (Article 274) should be considered "commercial profit." It concludes that the use of new technologies to communicate or obtain copyright protected materials by uploading or downloading through the Internet or sharing files via P2P systems does not meet the requirements for consideration as criminal offenses, unless such acts are "for commercial profit." Said another way, this 2006 Circular de-criminalizes P2P piracy.

The Spanish government has stated that the Circular is "not binding" on any judge. Nevertheless, in spite of that assertion both the police and some criminal courts have pointed to the Circular as justification for not taking action against P2P infringers. Police actions against websites 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.

Furthermore, recent decisions has been issued by Spanish courts in criminal actions against websites with links to P2P platforms, declaring that there is no criminal responsibility for these kinds of infringements. Such cases include Elitedivx (Cartagena) and Indicedonkey (Madrid), and pending cases include Spanishare (Madrid), PS2Ripnet (Barcelona), en tramite de acusacion Emwreloaded (Malaga), Elitetorrent (Malaga), FenixP2P (Bilabo), and InfoPSP (Rioja). The Circular also has been mentioned in other decided cases.⁶ The Circular has not been changed or rescinded, despite rights holders' efforts to lobby the Government to do so. In fact, the Attorney General has refused industry requests to meet with him to discuss this Circular.

As an additional example of the negative impact of the Circular, the Technology and Internet Division (BIT) which has successfully engaged in raids against Internet sites that facilitate copyright infringement (and which the Spanish Government has used to demonstrate its commitment to fight Internet piracy), will no longer engage in such raids and is reducing its focus on Internet piracy. In 2008, in contrast to 2006 and 2007, the BIT investigated several cases, but took no action beyond turning the evidence over to the appropriate Judges should the Judge wish to take action. It is expected that no action will be taken and as a result 2008 can be marked as a year in which the Spanish government took no criminal action against Internet piracy.

Inadequate requirements for actual notice undermine removal of infringing content online: The legal loophole in the LSSI (Law 34/2002--the Information Society (Services and Electronic Commerce) Act), 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. A law amending the LSSI, supported by ISPs, was adopted by the Congress on December 28, 2007. With respect to ISP liability, Article 16 of the LSSI establishes liability for the ISP if it has effective knowledge of the infringement and does not act diligently to avoid access to the infringing content. However, "effective knowledge" involves submitting evidence to a competent authority (a court) that has previously declared the illegal nature of such content. As a result, these 2007 amendments 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.

Spanish data protection law used to block identification of users in civil cases: Spanish legislation does not provide a means for identifying holders of Internet protocol addresses in the context of civil proceedings, whereas in criminal procedures the judicial authority issues a warrant. The *Promusicae vs. Telefonica* decision, issued on January 29, 2008, by the European Court of Justice, considered whether Community law permitted Member States "to limit to the context of a criminal investigation or to safeguard public security and national defense, thus excluding civil proceedings," the duty of Internet access and service providers to "retain and make available connection and traffic data" is in line with EU law. The ECJ decision responded to the reference made by a Spanish court in the course of national proceedings between Promusicae and Telefonica, concerning the latter's refusal to disclose data on its subscribers who had shared or uploaded large music files via the Kazaa network. The ECJ ruling establishes that Member States are not obliged to provide for rules on disclosure of personal data in the context of civil proceedings. However, when transposing and implementing Community Directives, Member States must allow a "fair balance to be struck between various fundamental rights protected by the legal order," which in this case involved the "right to respect for private life" and the "rights to protection of property and an effective remedy" (for copyright infringement).

The Spanish court has ruled that the Spanish E-Commerce law, which provides that personal data can only be disclosed in criminal proceedings, is in line with EU legislation. Now that the Spanish court has decided against disclosure in the context of civil proceedings, rights holders will experience severe problems in obtaining any effective remedy in Spain, in particular with regard to P2P file-sharing infringements, due to the Attorney General's 2006 Circular decriminalizing P2P (see above), which would seem to put even criminal proceedings out of reach. It should be noted, however, that Spain had not yet implemented the EU Enforcement Directive when the *Promusicae vs. Telefonica* case was initiated. The Enforcement Directive has been implemented, but the Data retention law, which implements the EU Data Retention Directive, only allows retention and disclosure of personal data for serious crimes. According to the Spanish Criminal Code, serious crimes are those punished

⁶ For example, the Circular has been mentioned in the following decisions: (1) Court of Appeal (n° 1°) Cantabria, Ruling n° 40/08, February 18th, 2008 (Jose Manuel Lanza); (2) Court of Appeal (n° 2) Madrid, Ruling n° 582/08, September 11, 2008 (Sharemula); (3) First instance Criminal Court n° 4 Madrid, December 20, 2006 (Sharemula); (4) First instance Criminal Court n° 4 Cartagena, April 17, 2008 (Elitedivx); and (5) First instance Criminal Court n° 4 Madrid, November 12, 2008 (Spanishare). In the following case, the Circular is not expressly mentioned but that cases say that there is no commercial aim of profit or that the profits are not direct but from the publicity: (1) First Instance Criminal Court n° 1 Madrid, 19th March, 2008 (Indicedonkey); (2) First Instance Criminal Court n° 20 Madrid, 12th January 2007 ("Elitetorrent").

with a prison term of more than five years. However, the punishment provided for intellectual property crimes in their most serious form is four years. As a result, they can never be considered serious crimes and therefore disclosure of personal data in intellectual property crimes is not possible. Evidently, the Data Retention Law also prevents personal data disclosure in civil proceedings and therefore this law prevents the possibility to sue P2P users, both in the civil and in the criminal courts.

In brief, the Government of Spain should provide for an efficient mechanism through which rights holders have the ability to obtain the information necessary to protect and enforce their rights. As the Spanish court has determined that present law permits no such disclosure, the Government should move quickly to adopt legislation, in accordance with the ECJ decision, to permit disclosure of the appropriate information so as to facilitate rights holder action.

Slow progress on negotiations between copyright rights holders and the ISP community: Spain's inadequate legal framework has not been conducive to voluntary agreements between rights holders and ISPs. For much of 2007, the copyright industries requested the leadership and involvement of the Spanish government to promote such negotiations, as Spanish ISPs have little legal incentive to cooperate with rights holders.

In early 2008, a coalition of rights holders composed of authors and their collecting societies, producers of sound recordings and audiovisual producers, was formed to negotiate with the ISPs. This content coalition engaged in negotiations with the ISPs association (known as REDTEL) to reach agreement for coordinating activity involving a graduated response system as well as notice and take down procedures and site-blocking measures. Publishers of entertainment software recently joined the content coalition.

The content coalition has grown frustrated by an apparent lack of good faith and by the constant obstacles presented by the telecommunications industry through REDTEL. At last report, the ISPs are against disconnection or suspension, and instead want a formal (and slow) procedure for notifications from an administrative body created *ad hoc*. It is possible that a minimum agreement outlining only general concepts will go to the Government in February 2009, accompanied by more detailed proposals from the content industry, consistent with what is gradually being accomplished in other countries.

COPYRIGHT ENFORCEMENT ACTIONS IN SPAIN

This section discusses criminal and civil actions taken, and results achieved, by the industries in cases involving both hard goods and Internet piracy in Spain.

Criminal actions in general: Approved in 2006, the Government created an Anti-Piracy Plan, the structure of which involves 11 Ministries, with much of the operational antipiracy coordination given to the Ministry of the Interior. Other agencies involved in enforcement are the Tax Agency (including the Customs Department) as well as local police forces. Rights holders groups, such as FAP, Promusicae and BSA, all report good cooperation with, and highly satisfactory work results from, Spanish police forces on criminal cases. This includes the fine work of the National Police, Regional Police and Civil Guard. The industry groups report, however, that there continues to be a lack of intellectual property awareness among many in the judiciary. Industry has organized several seminars for judges and public prosecutors, but these have had only limited attendance; in contrast, attendance by police at similar seminars have been very high.

The Spanish government issued a Best Practices Manual for the prosecution of intellectual property crimes in July 2008. The document is officially named "Manual de Buenas Practicas para la persecucion de los delitos contra la Propiedad Intelectual" ("*Manual of Good Practice for Prosecuting IP Criminal Offences*") and was released by the "Subdirección General de Propiedad Intelectual," a specialized agency on IP issues that depends on the "Dirección General de Política e Industrias Culturales," a section of the Spanish Ministry of Culture. It was made public on July 10, 2008 and is intended to improve the efficiency and coordination of the Administration of Justice and the Spanish Security Corps and Forces' actions against IP crimes in Spain. The Manual has four sections containing: (i) statistical input and main consequences of piracy on the Spanish market and society; (ii) best practices to be implemented by the Security Forces and in Court when IP rights are involved, and information on a number of international bodies and institutions which cooperate with the police; (iii) information on the dissemination and continuity of the Manual; and (iv) a list of collection societies and associations for defending IP rights. Dissemination of this Manual is being carried out by a follow-up Commission formed of representatives of the Ministries that coordinated the Manual's first draft, that is, the Ministry of Culture and the Ministry of Justice. This Manual is a commendable

undertaking, but because of its recent release, it is too early to determine its impact. It should be widely distributed by the appropriate authorities.

Criminal actions involving Internet enforcement: With respect to Internet enforcement, both the National Police (BIT unit) and the Guardia Civil (UCO, cybercrime unit) have shown exemplary commitments to fight against Internet piracy, and that is much appreciated by the copyright sector. However, due to the 2006 Circular and various court decisions, the police have basically stopped all criminal actions against Internet piracy and prosecutors are not pursuing cases. As a result, there are no known judicial convictions issued in 2008.

The motion picture industry, though FAP, reports that the few police actions in 2008 against Internet piracy revealed the existence of organized structures offering music and movie files, including pre-releases, on-line, using registered companies covering up their illegal activities whilst obtaining important profits, mostly from the publicity these websites offer to their users. The content is presented in a professional way, very similar to certain illegal networks of physical piracy.

The *Sharemula* ruling needs only to be read (the ruling, not the press interpretation) to understand the frustration with Spain's judicial process. In *Sharemula*, the Madrid First Instance Criminal Court No. 4 dismissed the case before the plaintiffs could file their accusations charging *Sharemula*'s administrators with a direct infringement of communication to the public right (specifically, the making available right); this decision was upheld by a higher court. The holding was that this website (the site itself had no illegal content but merely provided links to P2P channels from which downloads could be obtained) did not carry out a criminal offense under Spanish Criminal Code because its activity could not be considered as a communication to the public. Further, the court found that the site and its administrators had not engaged in copyright infringement for publishing links to P2P networks as such act had no commercial purpose. Moreover, the *Sharemula* case adds two confusing additional rulings: links to protected works do not facilitate copyright infringement and link sites are Internet safe harbors. This Madrid court held (in a non-appealable ruling), as a new issue not previously addressed, that a link site is an Internet safe harbor, but cited no analysis, no legislation and no precedent to support that statement. In addition, in ruling that links do not facilitate copyright infringement, the court based its holding on a previous *Navarro* case that specifically limited its holding to links to other websites, and specifically excluded its conclusions from P2P links and links to content protected by traditional copyright (such as books, music and movies). Some rights holders are currently analyzing the legal grounds in order to take a decision regarding a possible civil action.

Several more criminal courts have since ruled in favor of defendant link sites for two reasons based on the Circular: neither the public communication right nor the intent to profit were found. The copyright industries believe such rulings run counter to rulings involving similar facts in other countries where liability has been found. This is a very troubling situation because past years' criminal Internet cases are now making their way through many courts in Spain, and such decisions will set bad precedent, making Internet enforcement in Spain even more difficult.

Police actions and prosecutions involving physical piracy: FAP reports a slight increase in hard goods raids during 2008. For the first three quarters of 2008, the film industry, working through FAP and with the police, conducted over 4,000 raids involving mostly street actions plus raids DVD-R labs and distributors. MPA was pleased with the December 2007 passage of a new Film Law prohibiting sound and image recording in theaters. During the first three quarters of 2008, there were 3 camcording investigations, resulting in 2 raids and 2 arrests (no sentences have yet been obtained).

For the first three quarters of 2008, the entertainment software industry (working with FAP), conducted 172 investigations, including against street vendors, mod-chip distributors, as well as cyber actions, resulting in 152 raids. Given the absence of readily available pirated copies of videogames on the streets, *ex officio* actions are unusual.

Promusicae reports that for the music industry, over 90% of the police actions carried out in Spain (4,833 actions in 2008, which led to the arrest of 1829 persons) are executed *ex officio* by the various enforcement agencies. The statistics of these actions are informally compiled by Promusicae because official statistics are lacking, in particular where it concerns actions carried out by local police forces. The biggest bottlenecks in IP enforcement in Spain are the following: (a) slowness in the judicial proceedings (an average of 2 to 3 years as average to obtain a judgment), which is (b) exacerbated by the lack of interest of the prosecutors as a result of the Attorney General's Circular, and (c) the lack of deterrent sentences, which undercuts the work of the police actions.

The recording industry also notes the severity of criminal activity involved with optical disc piracy. The industry appreciates the work done by its investigators and the Spanish government to uncover a massive operation last year. According to IFPI, in June 2008, Spanish police broke up an organized criminal syndicate based in Madrid that was producing counterfeit CDs and DVDs on an industrial scale.⁷ The gang operated burners that could produce €600,000 (US\$773,200) worth of pirate CDs and DVDs each day. More than 50 police officers were involved in raids on two warehouses and four homes in the Madrid area that were being used to store vast numbers of blank CDs and DVDs, industrial photocopying machines, CD and DVD burners and other equipment. The raids led to the arrest of 32 members of the gang involved in the production and distribution of these counterfeit discs. Police also seized 466,000 blank discs and 306,500 recorded CDs and DVDs, as well as 506 burners during the raids. The production capacity of the seized burners is estimated at 150,000 units daily and they were operating on a 24-hour basis. In sum, this single ring was generating over US\$400 million a year from piracy. To put this in perspective, this is roughly equal the sales volume of the entire legitimate music industry in Spain last year, including both physical and digital sales (an estimated US\$423 million). It is 25% more than the value of legitimate discs sold in the Spanish market.

BSA reports that its work in 2008 with the police forces continued smoothly. 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 2008, BSA started 356 legal actions against alleged business software infringers, according to the following details: 34 cease and desist letters to alleged Internet infringers, 36 cases referred to police forces against alleged illegal distributors or resellers of unlicensed software, 277 cease and desist letters to end user infringer companies allegedly using unlicensed software, and 9 civil raids against end-user infringer companies, which resulted in a total amount of damages of \$717,031.

An additional concern affects street piracy actions: criminal gangs are populated by illegal immigrants and there is a general problem in prosecuting persons without fixed identification or housing. Some judges consider street vendors "victims" at the bottom of an organized system with no criminal liability, and these decisions create further uncertainty, and certainly no deterrent.

Civil actions and the commercial courts: BSA reports that in addition to its criminal cases, its civil actions in Spain are working in an acceptable manner. With respect to end-user cases, BSA ran 7 civil raids and sent 168 letters to companies suspected of using unauthorized software and sound legalization and then compensation of damages. As result of these prosecution activities, a total amount of €546,305 (US\$704,000) in damages have been obtained, and €157,608 (US\$203,000) in software purchases were generated. The commercial (civil) courts act reasonably quickly in the granting of *inaudita altera parte* search orders. However, BSA report that several other problems remain when they work with the civil courts.

- 1) **High bonds:** Nearly all ex-parte searches are submitted to the previous postings of bond, in order to cover potential damages in the event target company was not illegal. After successful raids, these bonds cannot be returned to copyright holders until the closing of the case. Although amounts requested are reasonable (between US\$2,300 to \$4,500), in some cases the bonds requested have been so costly (€120,000—approximately US\$154,600—in one instance) as to make it impossible to bring the case. BSA reports that the maximum amount it recently posted was €36,000 (US\$46,400).
- 2) **Calculation/valuation of damages:** The usual rule in calculating damages involves the full retail price of the product. However, a recent decision from a court of appeal (against the company "In Hoc Signo Vinces"), might have negative effects in this respect. This decision reduces the valuation of damages because there rightholder companies are based outside Spain. Since the benefit obtained by such companies directly from the Spanish market was arguably not the same as the full retail value, the valuation of damages was permitted to be reduced. This might have a negative impact for future cases. The correct definition of valuation of damages appears within article 140 of the Spanish Intellectual Property legislation, and it is clear that the valuation of damages must correspond to, at least, full retail value. Meanwhile, the judgment in this case is fine, as the Supreme Court has rejected requests for appeal.
- 3) **Raids granted based on anonymous information:** Before the civil courts were empowered to handle intellectual property issues in 2005, civil courts had no problems in granting raids based on anonymous information. However,

⁷ See IFPI Press Release, "Organized pirate CD crime network smashed in Madrid," 5 June 2008 posted at http://www.ifpi.org/content/section_news/20080605.html.

some civil courts (mainly in Madrid and Barcelona) refuse to accept anonymous information as evidence to grant a raid, even if a bond is offered. In comparison, other courts in Spain have no such 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.

- 4) Delays: There are long delays in the civil courts. At the beginning of 2008, a general strike affecting all courts generated massive delays in the judiciary. Recovery from that strike has not yet happened, as the delays are now worse because the commercial courts are busy handling a huge influx of insolvency and bankruptcy cases.

Public performance piracy in restaurants and bars: 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 that have been completed are due to the work of the various associations contacting local municipalities directly.

TRAININGS and PUBLIC AWARENESS

The content industries regularly offer training sessions and enforcement assistance in Spain. For example, FAP organized seminars, provided experts for judicial procedures' reports, provided evidence storage and closely cooperated with police forces during investigations. Promusicae organized and carried out 40 training seminars and courses for a total of 6200 police and custom officers, judges and prosecutors. Some of these seminars were co-organized with other copyright industry sectors. What is clearly needed is more government involvement in such seminars particularly to increase the participation of judges and public prosecutors.

With respect to media and public awareness, there are several ongoing activities. Over the past two years, the Spanish Ministry of Culture has been involved in implementing its public campaign, called "take a stand against piracy. Defend your Culture." For example, its 2006-2007 budget was €2.8 million (US\$3.6 million). During Christmas 2008, a new advertising campaign with a budget of well over US\$1.0 million was launched; this campaign, with the slogan "If you are legal, you are legal," will continue through March 2009. That Ministry also has started a program for secondary school students to support respect for copyrighted content. The Ministry of Industry, Tourism and Trade has been engaged in a public campaign to support the use of legitimate software. An Internet website run by the Spanish Patent and Trademark Office (SPTO), www.oepm-antipirateria.es, has been created to engage public awareness on piracy and ways to protect intellectual property rights.

BSA notes that during 2008 it successfully generated the publication of more than 600 press reports specifically devoted to business software copyrights and/or piracy, an amount double of news published for 2006 (341), and implies a 30% more than those published during 2007 (431). BSA suggests that the full involvement of the Ministry of Industry in the funding of extensive campaigns against business software piracy, the support of the Ministry of Culture to business software copyright protection in its nationwide PR campaigns against piracy, plus the organization of the National IT Police Congress, are clear indicators of this recommendation.

COPYRIGHT LAW IN SPAIN

EU Enforcement Directive (2004): Proper implementation of the EU Enforcement Directive is especially important because it aims to strengthen enforcement, particularly in the digital environment. Spain's weak and improper implementation of this Directive basically conditions the right of information to a commercial activity. The "right of information" afforded in Article 8 of the Directive 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 user's identity, where it appears the user has been committing infringements. This is a critical tool in Internet piracy enforcement.

However, the "right of information" in the Spanish law suffers a defect in 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. In sum, this erroneous implementation of this Directive in effect leaves ISPs largely off the hook for any potential liability.

E-Commerce Directive (2000): In December 2007, the Spanish Parliament approved amendments to the Information Society (Services and Electronic Commerce) Act (LSSI) as part of the government's "2006-2010 Information Society Development Plan." Two points must be made. First, the 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.

Second, 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.

Data Retention Law (2007): The Data Retention Law implementing the Data Retention Directive only allows retention and disclosure of personal data for serious crimes. According to the Spanish Criminal Code, serious crimes are those punished with a prison sentence of over five years, and the punishment provided for intellectual property crimes in their most serious form is four years, which means they can never be considered serious crimes. As a result, disclosure of personal data in intellectual property crimes is not possible. Moreover, the Data Retention Law also prevents personal data disclosure in civil proceedings and therefore this law prevents the possibility to sue P2P users, both in the civil and in the criminal courts

Film Law (2007): 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. 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.

Copyright law reform: As discussions move forward on limitations on ISP liability, possible amendments to improve Spanish implementation of the EU Directives as well as the ECJ decision, it is imperative that the Spanish government work with the copyright industry groups in a transparent and cooperative way.

Furthermore, a hallmark of reform should be that copyright legislation be adopted in manners consistent with the two WIPO Internet treaties (the WCT and the WPPT). 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 rights holders that were already granted in accordance with the requirements of the WPPT and WCT, and should be eliminated in future copyright law reform.