

SPAIN

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2010 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that Spain remain on the Special 301 Watch List in 2010, and that an out-of-cycle review be conducted later this year.

Executive Summary: More active leadership by the Spanish government is needed on all fronts to address the dire piracy situation harming many of the content sectors in Spain. Effective action to combat the theft of creative content serves to enforce the rule of law, defend Spain's cultural heritage, and expand economic opportunities.

While national and municipal police and prosecutors have made efforts against street piracy, Internet piracy continues unabated. Effectively addressing Internet piracy is a priority for both the U.S. and Spanish creative industries. The government's actions taken thus far on the Internet piracy issue address only part of Spain's online piracy problem. For many of the copyright industries, Spain is among the worst-performing markets in the world, and has suffered greatly from an online piracy problem that is spiraling out of control. Contributing to Spain's high piracy levels are the government's policies that decriminalize illegal downloading of content distributed via peer-to-peer (P2P) file-sharing (as reflected in the 2006 Circular issued by the Attorney General), and its failure to meet the minimum EU-level requirements regarding liability for Internet service providers (ISPs) under the E-Commerce Directive. As a result of the legal uncertainties, the police refuse to take Internet enforcement actions, and the Attorney General's circular instruction dismissal of current criminal cases against illegal portal and link sites remains in force. Moreover, the inadequate legal and regulatory structure has led to a failure in the negotiations between rights holders and the ISP community to find ways to prevent infringing content from being distributed over the ISPs' services and/or networks, given the lack of incentives on the part of the ISPs to reach any reasonable agreement.

Enforcement authorities are taking action against street piracy involving physical goods and are working on actions against organized syndicate connections. However, pirate product remains fairly ubiquitous, and circumvention devices that enable use of illegally copied games remain widely available. The predominant piracy problem for the business software sector in Spain is persistent organizational end-user software piracy and, in this regard, the industry remains concerned about the availability, cost and speed of civil enforcement measures (such as problems associated with expensive bonds and low damages). This sector reports good cooperation with the Ministry of Industry on efforts, including public awareness work, to halt end user piracy in corporate settings.

There were two encouraging developments at the end of 2009. First, the Spanish Government set up a new Inter-ministerial Commission comprised of representatives from the Justice, Industry, Interior and Culture ministries. It will seek to close the gaps in the legal framework to address Internet piracy and advise on the fight against the violation of intellectual property rights on websites. Second, a bill aimed at stimulating the economy contains provisions that would permit the Ministry of Culture to request ISPs to interrupt access to alleged illegal content offered on websites. These provisions would permit site-blocking following a complaint by a rights holder or their designee to the Commission pending a brief judicial review. The launch of both these initiatives met with mixed reactions from the content industries who recognize that this is a key starting point to engage on these projects, but who highlight that these measures would only address part of the overall problem. It is imperative that the Government actively work to have this legislation expeditiously passed by Parliament. However, we highlight that unless there is a strategy that tackles the whole problem and all forms of infringing behavior, piracy will simply shift to other easier alternatives. Creating greater accountability on the part of individual users and those companies that provide network services--while ensuring that subscribers' rights to due process are respected -- is a critical component in the fight against online piracy, and urgently needed.



One positive note in Spain is reported by the business software industry. Thanks to an awareness campaign sponsored by the Ministry of Industry, the software piracy level within the distribution channel has been dramatically reduced (although software piracy levels by business end users remain at similar levels). Due to the success of this campaign, the Business Software Alliance (BSA) is negotiating with the Ministry of Industry to conduct a new campaign during 2010, now extended to business end users -- especially small- and medium-sized enterprises (SMEs) -- seeking similar reductions in organizational end-user software piracy levels, which contribute to a decrease of the general piracy rate. In addition, BSA has been organizing during the last years, in full cooperation with the Spanish Government, yearly events with police forces ("Congreso Nacional de Policía Tecnológica"). It is anticipated that the new event for 2010 also will involve judges and prosecutors, in order to increase awareness within the judiciary. Furthermore, BSA entered into a cooperation agreement with the Tax Agency several years ago, which is likely to result in a greater involvement of the tax authorities in the fight against software piracy during 2010. Considering all these positive developments, and considering that BSA is detecting a more sensible approach from the Ministry of Culture towards the problem of business software piracy, BSA is satisfied with the involvement and actions developed during 2009 by the Spanish Government within the specific field of business software piracy.

Finally, concrete progress on improving the Spanish copyright landscape would demonstrate its leadership and serve as a positive example to other EU members. Along with the EU, Spain recently joined the two WIPO treaties, which will enter into force in March 2010. In addition, Spain holds the EU Presidency for the first half of 2010. Now is the time for the Spanish government to become a leading example for other EU member states and take charge of the Internet piracy problem and take effective action to protect copyright.

Request for Special 301 out-of-cycle-review in 2010:¹ IIPA places great importance on addressing the problem of Internet piracy in Spain, and urges USTR to maintain a regular high level dialogue with the Spanish government to ensure that adequate progress is being made in addressing one of the worst Internet piracy problems in Western Europe, as well as to conduct a formal out of cycle review in the fall of 2010. Spain's music market is in virtual collapse, having dropped by over 65% in the past five years, mostly the consequence of P2P piracy. Spain's market has suffered more than its EU neighbors due to limitations in Spanish legislation, regulation and practice.

We recommend that USTR conduct an out-of-cycle review in the Fall of 2010 that examines how the Spanish government has responded to the challenge posed by Internet piracy, and how it plans to meet its obligations under Article 41 of TRIPS, Article 23 of the WPPT, and Article 14 of the WCT to "ensure that enforcement procedures are available under their law so as to permit effective action against any act of infringement of rights covered by this Treaty, including expeditious remedies to prevent infringements and remedies which constitute a deterrent to further infringements." Specific topics for review should include examination of Spain's progress in advancing the specific legislation addressing websites, its progress in curing the various deficiencies identified in this report, including reversing the 2006 Circular, and the progress achieved in addressing infringements that take place other than via websites, including through ensuring action by ISPs to prevent proprietary networks from being used for the storage or transmission of infringing materials.

Priority actions requested to be taken in 2010: 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:

Enforcement

- Ensuring action by ISPs to prevent proprietary networks from being used for the storage or transmission of infringing materials.

¹ For more information on the history of Spain and Special 301, see Appendices D and E at <http://www.iipa.com/pdf/2010SPEC301USTRHISTORY.pdf> and <http://www.iipa.com/pdf/2010SPEC301HISTORICALSUMMARY.pdf> of this submission. For more information on IIPA's 2010 challenges, see the IIPA cover letter to this Special 301 submission, posted at <http://www.iipa.com/pdf/2010SPEC301COVERLETTER.pdf>.

- Reverse or rescind the Attorney General's May 2006 official instruction (Circular) that decriminalizes infringing downloads using peer-to-peer (P2P) networks.
- 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.
- Take appropriate steps to ensure that circumvention devices are illegal.
- Continue to take actions in well-known markets to combat the widespread street piracy problem harming the film, music publishing and sound recording, and videogame industries, 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 and regional governments on anti-piracy strategies and actions, resulting in more criminal actions, effective prosecutions and deterrent sentencing.
- 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 and include intellectual property into law schools' curricula.
- Develop and implement an effective national campaign on the importance of intellectual property rights through educational, press and similar public outlets.

Legislation

- Expeditiously pass the Law on the Sustainable Economy which includes provisions to address websites hosting infringing content.
- Develop legislation to address infringements that take place other than via websites, including through ensuring action by ISPs to prevent proprietary networks from being used for the storage or transmission of infringing materials.
- 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 the Data Protection legislation so that rights holders can enforce their rights on the Internet, in both civil and criminal proceedings.
- Amend Spain's e-commerce laws, specifically the LSSI, to establish a workable notice-and-takedown procedure and eliminate the current definition of "actual knowledge", which limits the application of the EU Directives.
- 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.

COPYRIGHT PIRACY IN SPAIN

Piracy of audiovisual products, music and sound recordings, and entertainment software in Spain has supplanted the legitimate marketplace, making it extremely difficult for these industries to distribute authorized content.

Internet piracy: There are now approximately 29.1 million Internet users in Spain, amounting to 71.8% of the population (a significant increase from the 2007 statistics of 22.8 million Internet users and 55%, according to www.Internetworldstats.com). Overall, this reflects a 440% increase in number of Spanish Internet users from 2000 to 2009.

Starting in 2007, Internet piracy in Spain exploded, and it has continued to grow at a tremendous rate. Comparative studies by the music, videogames and motion pictures industries (below) demonstrate that Spain has one of

the worst Internet piracy problems in the world. For example, 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. As detailed below, the entertainment software industry conducted a recent survey of targeted markets and found that Spain is number two in highest overall volume of P2P game downloads, and number two in highest volume of P2P game downloads per capita. Spain has the worst online piracy problem among the major European markets, with 32% of Internet users frequently using peer-to-peer (P2P) networks for illegal music downloads. This is more than double the European average of 15% (source: Jupiter Research, 2009).

The extent of online piracy faced by the content industry is enormous. Just to cite an example for the music industry, Spain has been one of the worst performing recorded music markets in Western Europe over the last five years. Today, Spain's recorded music market is approximately one third of its size compared to 2001, with the market having experienced its most dramatic drop in 2009. The levels of piracy also have had a serious impact on the make-up of the Spanish market, despite the availability of many legal online services (from Apple's iTunes to Spotify, Deezer and 7digital). Research by GfK in June 2008² found that there were 8.6 million people engaged in P2P music piracy in Spain. Combined with estimates of the volume of files downloaded on average (57.4 files per person per quarter) taken from a Ministry of Culture report (2007), the International Federation of the Phonographic Industry (IFPI) estimates that 2 billion songs were illegally downloaded in Spain in 2008. This compared to only 7.3 million legitimate songs downloaded online (Nielsen SoundScan International). In Spain, illegal music offerings on the Internet are available in many formats. Recent research and surveys carried out by the Coalition of Creators and Content Industries consider different percentages regarding levels of offer and modalities to access infringing content. Although some differences exist on the type and size of music files compared to other industries (films, software, books), the illegal offer of music in Spain may be summarized as follows: (a) P2P file exchange protocols (eMule, Pando and BitTorrent, mainly) -- 60% of music content users' offer and access; (b) Web pages offering links to music files direct download -- roughly 30% of the problem; and (c) blogs, FTP, Cyberlockers and other systems (chat, e-mail, etc.) -- around 10% of music content users' offer and access.

The damage to the legitimate recording industry in Spain is huge. The value of recorded music sales in Spain has decreased from €626 million (US\$802 million) in 2001 to just €257 millions (US\$450 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 physical market in Spain continued to slide, and was worth €225 million (US\$306 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. Second, 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, piracy also harms 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 Entertainment Software Association (ESA), representing the videogame industry, also reports that piracy levels in Spain worsened in 2009. P2P is still the most prevalent form of piracy affecting this sector, along with sites that

² We reiterate three stunning points from the qualitative research about the penetration of online piracy in Spain done by GfK (June 2008) and reported in IIPA's 2009 Special 301 report: (1) 67% of the Spanish Internet surfers (8.8 million) admit to downloading illegal copyright content (music, film, TV series, videogames) 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 (8.6 million people) download music illegally, 58% are men, and two in every three are people between 16 and 34 years old.

provide links to infringing material. 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. 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. ESA estimates there to have been approximately 1.2 million infringing downloads³ made of ESA members' computer and video games through P2P file sharing by ISP subscribers in Spain during December 2009. This comprises approximately 12.5% of the total number of illegal copies made by P2P users globally during this period. As mentioned above, these figures place Spain as number two in highest overall volume of P2P game downloads, and number two in highest volume of P2P game downloads per capita during the study period. Breakdowns by ISP show that Telefonica subscribers were responsible for approximately 52% of this activity occurring in Spain--more than 620,000 downloads during the one-month period. These figures do not account for downloads that occur directly from hosted content, such as games found on "cyberlockers" or "one-click" hosting sites which continue to account each year for progressively greater volumes of infringing downloads. 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.

The music industry highlights that piracy associated with websites accounts for only 30% of the piracy problem, and that the present legislative proposal in the Law on Sustainable Development fails to address the bulk of the music industry's online piracy problems, notably the issue of peer-to-peer file sharing through services that facilitate the unauthorized exchange of copyrighted content between users without going through a centralised system. Research by Jupiter in 2009 found that Spain had a very strong bias towards P2P file-sharing compared to other European markets. Despite continued growth in other forms of online piracy, P2P continues to dominate illegal downloading for the music industry in Spain.

Furthermore, Internet piracy, especially of film titles that have not yet reached the Spanish theatrical market, is very harmful. The Independent Film & Television Alliance (IFTA) reports that a Internet monitoring program it conducted in the last quarter of 2009 for 90 of its members' films recorded over 4,500,000 instances of P2P infringements and almost 50,000 instances of OSP infringement. As broadband penetration climbs in Spain, some IFTA member companies are pioneering electronic sell-through partnerships with ISPs, however such ventures and partnerships with local distributors have had almost no success because of the high rates and easy availability of free illegal copies. Since 2004, DVD sales have declined by 46% and the number of video stores has dropped from 12,000 down to 3,000. Spain's Ministry of Culture indicates that the Spanish theatrical market contracted by 12.4% in 2009 with a 7.4% drop in admissions. IFTA reports that for independent audiovisual producers, the ability to rely on national distributors (who cannot compete with free) is interfering with the ability of national distributors in Spain to provide a part of production financing, resulting in a decreased ability to create independent films and in some cases films are not being made at all.

Street piracy and the influence of organized criminal syndicates: The music and motion picture industries report that there was no substantial reduction in street piracy during 2009. While digital piracy today has a bigger impact on music sales, street piracy continues to harm the local industry as 81% of music sales in the country still come from physical formats. Pirate networks running illegal sale activities in the streets and flea markets seem to be mostly selling film DVDs. Police actions against "mochileros," who sell out of backpacks, remain more difficult than actions against the highly mobile street "manteros," who sell from blankets and are relatively fixed in location and maintain more product.

Hard goods piracy and unauthorized public performances of music and sound recordings: Regarding physical piracy for music, the piracy level in some specific cities has risen, ranging between an average of 18% and 24%; this indicates that last year's overall average of 20% for Spain was conservative. These levels, which were expected to have fallen in 2009, are not only at the same level, but in fact showed an increase in particular regions like Andalusia,

³ This figure is representative only of the number of downloads of a small selection of game titles. Consequently, this figure is under-representative of the overall number of infringing downloads of entertainment software made during the period.

Catalonia, Murcia and Valencia, due to the economic crisis and the presence of back-street illegal sellers. Also for the first time, the music industry detected the appearance in top manta of pirate CDs pre-release music in physical format. So far pre-release piracy does not seem to have spread much, but it is likely this kind of piracy will grow as physical pirate networks have to fulfill a demand for new content or compilations to compete also them with the growing illegal Internet offer.

In order to study the issues regarding physical piracy in Spain, Promusicae's (Spain's national association of record producers) enforcement department conducted a national survey and in November 2009 issued "The Map of Physical Music Piracy in Spain 2009." This report investigated 25 cities from 22 provinces and 12 autonomous regions during October 2009, and covered an area that represent 81% of legal music sales. The number of usual pirate CD-R/DVD-R sellers exceeds 1,200 and can reach up to 2,000 during the spring and summer. The survey found that 53.4% of the sales were carried out by rucksack sellers (top mochila), 26.7% in the open air flea markets and 18.6% on blankets (top manta). Last year it seems that sellers have started to transition away from CD-R/DVD-R piracy activities and turned toward trademark counterfeiting. According to police general headquarters data, 1,725 people were arrested for reselling, with most of the arrests occurring in the regions of Madrid, Andalucia and Valencia.

Physical piracy is affected by digital piracy through the Internet. As mentioned above, digital piracy of music keeps growing with total impunity, having a greater and greater impact on the illegal sale and distribution of music in both physical and digital formats, thereby depressing sales of pirate carriers as well as deeply affecting the market for legitimate physical, online and mobile offers. In addition, the music industry in Spain is experiencing the step-by-step increase of new illegal business niches linked to public performance in entertainment premises. This is the case of companies that reproduce unauthorized music in both audio and video formats for loading coin activated machines (jukeboxes), or the more and more frequent activity of placing computer devices loaded with illegal music in premises such as pubs, discos, etc. for background ambiance.

The Spanish music market has experienced a spectacular collapse of 31% in the first half 2009, compared to same period of 2008. According to details from the producers' collecting agency AGEDI, 40% of jobs have been lost during the last 4-5 years in Spanish recording companies. To draw attention to this economic plight, a rally was staged by the workers of all the music industries in front of the Ministry of Industry on December 1, 2009, to highlight that "Music is culture" and "music is employment", and asked for tougher action by the government to protect the industry. The Ministry of Industry received a delegation of the demonstrators and promised action, however, no meaningful steps have been taken to date.

Hard goods piracy of film and home video entertainment: The Motion Picture Association (MPA), working with its local anti-piracy organization, FAP, reports that hard goods piracy of audiovisual products in Spain continues to hurt the local market. In 2009, some 25 million pirate DVD-Rs were sold, compared to the legal market barely distributing 30 million legal DVDs. While some municipalities have effectively forbid street vendor activity, Madrid, Barcelona, Valencia, Malaga, Sevilla remain serious concerns. 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. IFTA reports that the damage done to local distributors from piracy may forever change the market by shutting out legitimate audiovisual product. Many local distributors are reporting that they must pay lower licensing fees due to declining DVD sales caused by piracy.

Camcord piracy: MPA reports that, shockingly, 114 films were illegally sourced – both audio and video recordings -- in Spanish theaters in 2009. Films such as *Harry Potter and the Half Blood Prince*, *Inglorious Basterds*, *X-Men Origins: Wolverine*, *District 9*, *Dragonball Evolution*, *Duplicity*, *Star Trek*, *State of Play*, *Michael Jackson's This is It* 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. It appears that even exchanged P2P movies are sourced locally via camcording in Spanish theaters. For example, a camcorder arrested in 2007 in Alicante was also responsible for uploading illicit camcords of films to his website; this case is ongoing. This same camcorder/webmaster has since reopened his site under a different name and has continued to upload titles to the

site. In another incident in December 2009, police arrested an individual audio-recording the soundtrack of a film. The investigation of this incident led the police to the aforementioned webmaster. Despite the clear commercial damage of such camcording and the clear evidence of the organized criminal nature such piracy, prosecution of camcorders remains quite difficult. Only two instances have resulted in police action, and this was only after exhaustive investigations by FAP and EGEDA. The public prosecutors appear disinclined to criminally prosecute.

Entertainment software piracy: Although hard goods piracy remains a continuing concern, growth in online piracy rates represent the biggest threat to the entertainment software industry. The widespread availability of mod chips and game copiers that bypass the technological protection measures exacerbates the online piracy problem, as these devices are needed in order to produce and play unauthorized copies of entertainment software.

Prosecuting individuals or entities engaged in the trafficking of circumvention devices and/or the provision of services related to circumvention devices 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 illegal. A 2009 decision in Salamanca also relied on this faulty reasoning in concluding that mod chips capable of any legitimate use are lawful, notwithstanding the fact that the primary purpose of such devices is to effect a circumvention. 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 had success working with the Spanish National Police and the Specialized Crime Squad in securing raids against targets involved in the distribution of game copiers, including retail establishments, and the seizure of their unlawful products.

Business software piracy: The Business Software Alliance (BSA) reports several sources of piracy in Spain, with the form that causes the most economic damage being organizational end-user piracy. Widespread piracy keeps companies (end-users) using unlicensed software, resellers distribute illegal software mainly at shops, and the Internet continues to present challenges.

Spain is mainly a country of small and medium businesses where the levels of piracy are still rampant (which is not the case of bigger organizations). Nevertheless, and due to the bad economic environment in Spain, BSA is detecting that some big organizations might reduce their budgets for software purchases, and decide to obtain savings by running the risk of using unlicensed software. In an effort to combat this, BSA, with the support of the Ministry of Industry, conducted an awareness campaign in 2009 addressed to the 200 major enterprises and companies in Spain. This included training seminars in Madrid, Barcelona, Sevilla and Valencia, and the furnishing of guides on best practices on legal use of software, and arguments to be addressed to the management of companies about the risks related with the illegal use 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, employs directly 80,000 people, and generates 300,000 more indirect jobs (source AETIC). BSA conducted a regional piracy study in 2008, 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 were held with all regional governments in order to seek their cooperation in the fight against software piracy. As a result of these meetings, BSA is developing a training program in cooperation with the Judiciary School in Cataluña, addressed to judges and magistrates.

As an awareness campaign done with the cooperation of the Ministry of Industry addressed to the illegal channel and to illegal software distributors, the level of piracy in this specific field (illegal resellers) has dramatically been reduced down to 21%. This significant reduction has been identified only in the specific field of the illegal channel, and has not generated a similar decrease in the overall PC software piracy rate, which increased by one point, from 42% in 2008 to 43% in 2009. BSA is seeking to extend this cooperation with the Ministry in order to ensure that the reduction in levels of

channel piracy are sustained in the years to come, and obtain new significant reductions in the levels of piracy among small and medium enterprises.

With respect to circumvention devices, BSA has its own positive precedent in Spain; this involved the VESATEC case where a guilty judgment was obtained against a company making available circumvention devices through a web site. The judgement confirmed the illegal nature of this activity, correctly enforcing the intellectual property legislation in force in Spain. In sum, BSA's preliminary estimated trade losses due to U.S. business software piracy, of all formats, in Spain in 2009 amounted to \$617 million, with a 43% piracy rate.⁴

GOVERNMENT APPROACH TO INTERNET PIRACY

The continuing lack of action by the Spanish government (legislative, executive and judicial branches) has contributed to the Internet piracy problem in Spain. The main impediments are the Spanish e-commerce law which improperly implements the EU E-Commerce Directive (by requiring actual knowledge coming from a court order or, now, an administrative competent body in order to block access or remove infringing content), problems in data protection laws that prevent right holders from obtaining personal data (i.e. IP addresses to enforce their rights on the Internet), and the Attorney General's May 2006 official instruction that considers P2P file sharing as a private copy unless commercial aim of profit is involved in the activity. IIPA welcomes recent steps by the Government to protect Spain's cultural industries by addressing hosted illicit content and by updating Spain's legislative framework to comply with European norms. We also call upon the Government to not delay examination of other measures that will address P2P piracy or other forms of internet piracy not related to the operation of websites.

The Sustainable Economy Bill: Following the collapse of strained government-fostered negotiations between REDTEL (the Spanish ISP coalition) and content holders, an Inter-Ministerial Commission ("Comisión Interministerial de Trabajo") comprised of eight ministries that was established in October 2009 to consider website-related piracy put forward a legislative proposal to address websites hosting illicit content. According to the Sustainable Economy bill, there would be a procedure whereby right holders would send complaints to a newly created administrative body (the Intellectual Property Commission) which would process the complaint. Absent a convincing rebuttal or corrective action by the sites, the Commission would forward the cases to a judge for review and a court-order suspension of the services (or the blocking of foreign-originating sites). If the owner of a site were to refuse to take down the content, the Commission could adopt a recommendation to remove the infringing content or block access to the site in question and forward this recommendation to a specialized tribunal. The tribunal will hear from the interested parties and will authorize or reject the measure proposed. Under the new law, the tribunal will have to take a decision within four days. The tribunal judge would not be expected to examine the merits of the case beyond a review of whether the remedy is justified and in particular whether fundamental rights have been respected. The idea is to accelerate the current procedure for the taking down of infringing content hosted on websites. It is hoped that with time and experience, the process will become routine and efficient. This proposal has, as predicted, generated significant pushback from the Internet user community who would like unimpeded access to illicit cultural content on the Internet to the detriment of both the Spanish and U.S. cultural industries.

This proposed law is useful, and IIPA hopes that it will be enacted. However, as noted elsewhere in this submission, it is very important that the Spanish government continues to examine additional measures that may be employed to address non-website related issues, through further legal/regulatory reform and through active encouragement and facilitation of agreements between ISPs and content owners. It is essential that the Commission remain actively engaged on tackling Spain's very serious Internet piracy problem including unauthorized file-sharing, and do so in a way that is effective and that respects the right to due process of Internet subscribers.

⁴ BSA's 2009 statistics are preliminary, represent the U.S. software publishers' share of software piracy losses in Spain, and follow the methodology compiled in the Sixth Annual BSA and IDC Global Software Piracy Study (May 2009), 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. BSA's final data for 2009 will be issued later in 2010.

The 2006 Attorney General's Circular is still being used to justify the lack of criminal actions in P2P cases involving infringing content: 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 infringing distributions of content by P2P. 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.

The Spanish government has stated that the Circular is "not binding" on any judge. Nevertheless, 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, decisions have 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, 2008) and Indicedonkey (Madrid, 2008), and pending cases include Spanishare (Madrid, 2008), PS2Ripnet (Barcelona), Emwreloaded (Malaga), Elitetorrent (Malaga, 2007), FenixP2P (Bilabo), and InfoPSP (Rioja). Furthermore, Criminal Investigation Courts (Juzgados de Instruccion), following the Circular, have declared that there were no criminal grounds in cases against Elite Divx, PS2Rip.net and pctorrent.com. Fortunately, these decisions were reversed by Appellation Courts following appeals by private prosecutors.

In spite of these positive decisions, the Criminal Investigation Courts continue to try to close cases against Spanishare.com, CVCDgo.com (Madrid), etmusica.com (Moguer) and portalvcd/emule24horas (León), naiadadonkey.com (Alcoy), todotorrente/spatorrent, and elitetorrent.net. The divxonline case was reversed in January 2010 (discussed further, below).

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 2009, in contrast to 2006 and 2007, the BIT investigated several cases, but took no action beyond turning the evidence over to the appropriate judge should the judge wish to take action.

Inadequate requirements for actual notice undermine removal of infringing content online: No progress was made in 2009 on this longstanding concern to the content industries. 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" cannot be established by directly notifying a site-operator of the existence of infringing material on their site. Rather, to establish "effective knowledge" rights holders must submit evidence to a competent authority (a court or administrative body) 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.

As explained before, the LSSI gives the possibility for ISPs to gain “actual knowledge” that the content they are hosting or linking is illicit only if a competent body (a court or administrative body) has stated it so. Up until now, there was no administrative authority enabled to do this. The Law on Sustainable Economy enables an existing administrative authority to take this kind of action, but the LSSI still lacks the obligation for the hosting provider contained in the e-commerce directive, to remove content when he is aware of facts or circumstances by which the illegality of the content is apparent.

Spanish data protection law used to block identification of users in civil cases: Although Spanish legislation provides the means to identify holders of Internet protocol addresses in the context of some criminal proceedings (see discussion below related to ability to obtain such information for “serious crimes”, a designation that does not include copyright piracy), no such mechanism exists for civil proceedings.

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 (the LSSI), which provides that personal data can only be disclosed in criminal proceedings, is in line with EU legislation. However, in combination with the Attorney General’s 2006 Circular that decriminalized infringements via P2P (see above), the inability to obtain user information in civil proceedings renders rights holders unable to enforce their copyrights online civilly or criminally. As a consequence, Spain fails to provide the “fair balance” required by the ECJ in *Promusicae* since it offers no meaningful manner in which copyright owners can effectively protect rights guaranteed under EU Directives.

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 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.

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. Because a 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. No known action on any of these points was taken during 2009.

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.

National Action Plan: Although an enforcement-based anti-piracy plan was enacted in 2006, it has been abandoned. Political leadership and coordination to face larger policy and legal reform issues--such as those needed to address Internet piracy--were severely lacking for much of 2009.

Several ministries are critical to anti-piracy and policy efforts. The Ministry of Justice should take steps to increase its involvement in providing solutions to the many problems with criminal copyright enforcement. More resources and practical trainings on Internet 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 and includes the Secretary of State for Telecommunications (SETSI) 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.

BSA has a good relationship with this Ministry, which has, at BSA's request, approved and funded a program to train and prevent software piracy in the illegal retail channel. As mentioned above, BSA has been working with the Ministry of Industry on a public awareness campaign that has resulted in the reduction of software piracy within the distribution channel.

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. Promusicae notes that for many years it was very difficult to obtain collaboration from police authorities and judges because of poor legislation, but the level of hard goods piracy for music and street piracy slightly decreased. On the other hand, as noted above, Internet piracy is growing fast and the police have taken limited actions in that sphere.

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 has been very high. Also on a positive note, the industries are appreciative that the Spanish government issued a Best Practices Manual for the prosecution of intellectual property crimes in July 2008 which has had a positive impact on police willingness to enforce IP crimes but has not helped with addressing judges and public prosecutors disinterest in prosecuting IP crimes.⁵ The music industry has tried to spread this manual as much as possible, but the government has not launched any official campaign to help get the word out.

⁵ 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. 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 and the BIT has significantly curbed its Internet piracy work.

The Motion Picture Association (MPA), though FAP, reports that the few police actions in 2009 against Internet piracy revealed the existence of organized structures offering music and movie files, including pre-releases, online, 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 physical piracy networks and there are clear connections between the webmasters and illicit camcording incidents in Spain. The police carried out only one Internet raid in 2009, after a claim made by EGEDA (the film producers' collecting society).⁶

The different sectors affected by infringements are united in a group called "Coalition of Creators and Content Industries." It includes the record producers' members of Promusicae, the authors and publishers members of SGAE, and different organizations from cinema, videogames, software, etc. The Coalition has provided the Spanish Ministry of Industry and SETSI with the names and directions of 200 websites that offer links to illegal downloads of IP protected content; we are not aware of any action yet taken.

There was also only one conviction in 2009. In February 2010, an operator of three streaming sites for movies and television programs was sentenced by the Criminal Court in Vigo to one year in prison and a fine of 1,825 Euros (US\$2,480) which, if not paid, will lead to an additional 12 months' imprisonment. The action was initiated in December 2006 against, www.simonfilms.tv, www.siglox.com and www.maxivideos.tv, that offered streaming services of recent and new releases dubbed into Spanish for one Euro per film and came with an initial obligation for visitors to pay for a minimum of ten titles. These sites were also very popular in Mexico.

At the end of January 2010, there was another positive decision in Valencia where the Court of Appeal upheld the appeal filed by FAP and ordered continuation of the prosecution against the site, www.divxonline.info. This procedure was initiated by the police in 2007 and FAP joined the case as a private prosecutor. A judge had decided to drop the case based on the Attorney General Circular criteria and in response to a request from the defendant who argued that the site was only providing links and that there was no commercial activity directly connected to the communication of copyrighted works. This was the same argument that was used when the Sharemula case was dismissed.⁷ However, FAP's appeal here was successful. The court's decision states "Despite the Attorney General consideration that there is no commercial activity by this type of web sites, it is clear that there is a commercial activity directly connected to the movies, music, and videogames made available."

This decision is welcome and in line with similar decisions recently handed down by Courts in Murcia, Barcelona, Alava, and Madrid. Despite these six positive decisions (all won on appeal) that state that there is commercial activity on such sites, the Police still do not want to initiate new raids like those called "Descargas en la red" (Internet infringements)

⁶ In December 2009, following a year-long BIT investigation supported by FAP, a massive 30 Terabyte FTP site was taken down and the administrators arrested. The eight servers provided an average connection speed of 220,000 ks and the 30 Terabytes of stored data seeded many of the main P2P sites. All of the sites estimated 500 members were required to pay a monthly fee of 20 Euros (US\$27).

⁷ 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.

to close more sites. Moreover, judges have declared that there are no grounds for criminal procedures against such sites, citing the Sharemula ruling. In other cases, judges work to close cases against this type of website.

Police actions and prosecutions involving physical piracy: Promusicae reports that police enforcement agencies and customs administration act *ex officio* in more than 95% of actions involving physical piracy of music and sound recordings (for the first nine months of 2009). This reflects their high involvement level. Unfortunately, regarding digital piracy the number of actions is virtually nil due to the numerous legal deficiencies and loopholes in the digital arena.

	Actions	Arrested People	Total Carriers	Recorded Carriers		Blank Carriers		Burners	Inlays	Juke-boxes	Hard Drives
				CD-R	DVD-R	CD-R	DVD-R				
2008	7,406	2,396	2,598,324	986,602	1,030,020	266,922	314,780	1,865	296,474	34	19
2009	3,571	1,820	1,342,451	631,163	680,210	14,256	16,822	928	151,947	11	21

Spain: Anti-piracy operations, years 2008 and 2009. The 2009 data above is not yet final as more information may be provided by the enforcement agencies.

For the music industry, 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 undermines the work of the police actions.

FAP reports a 30 percent reduction in hard goods raids in 2009, mainly due to a reduction in actions against street vendors. MPA member companies working through FAP and with the police conducted over 3,000 raids against street vendors, DVD-R labs and distributors. FAP receives good cooperation from the police but inadequate laws preclude any real reduction in piracy levels. Street vendors move their wares to evade arrest and even when arrested, are released immediately because piracy is considered a minor crime. Barcelona and several Catalan cities have effectively utilized public awareness campaigns on the illegality of street vendor piracy. Such campaigns should be adopted in all major cities, notably Seville, Madrid, and Alicante.

For 2009, the local entertainment software industry association, aDeSe, reported that, through its work with FAP on enforcement efforts against game piracy, it conducted 201 investigations of computers stores, cyber cafés, labs, and mod-chip sellers, resulting in enforcement actions against 194 separate targets. These actions resulted in the seizure of roughly 16,900 pirated games and 26,800 circumvention devices. The industry supported 61 criminal prosecutions that resulted in convictions in 43 of the cases.

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 in 2008.⁸ More recently, there was an important operation carried out in the province of Toledo in September 2009. The raid of a house in Seseña led to the arrest of 4 Chinese citizens and the seizure of 89 burners in 9 towers, over 35,000 burnt carriers (CD-R+DVD-R), 4,500 blanks carriers, 13 printers and 3 computers.

⁸ 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. The gang operated burners that could produce €600,000 (now US\$896,840) 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 in 2008, 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 2009 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 2009, BSA started 442 legal actions against alleged business software infringers, according to the following details: 26 cease and desist letters to alleged Internet infringers, 79 cease and desist letters to alleged illegal distributors or resellers of unlicensed software, 322 cease and desist letters to end user infringer companies allegedly using unlicensed software, and 15 civil raids against end-user infringing companies, which resulted in a total amount of damages of \$815,562.

Difficulties in certain enforcement procedures/logistics: The music industry faces the following problems:

- When producing detailed forensic reports, it is impossible to deliver them within the 72 hours deadline set for special procedures called "fast-track trials." This results in the competent judge sending the procedure to an "abbreviated procedure," which is a much longer procedure and therefore not as effective.
- Some judges require extremely detailed lists identifying every single seized item (such as album name, every artist, producer and song), on a one-by-one bases; this is hugely inefficient, due to the high cost in human resources and time involved for enforcement agencies.
- Police storage facilities are full of millions of units of seized music carriers. In many cases, judges do not order the destruction of goods, and as a result, this involves high expenditures for storage fees and industry monitoring security while pressing for destruction.

Effective civil actions against business end user piracy but continuing problems with certain civil procedures: Nearly all of BSA's judicial work in Spain is done via the civil courts. BSA conducted 15 raids against end-user companies during 2009 (twice the number achieved in 2008), resulting in significant damages. In addition, 322 cease and desist letters were sent to end user companies, 79 cease and desist letters sent to illegal distributors, and 26 take down notices issued against Internet-based software piracy cases. Total legal actions for 2009 has been 442.

BSA is fully satisfied with its cooperation with the Ministry of Industry, as mentioned previously. Furthermore, in 2010 BSA will increase its cooperation with the Tax Agency, which will increase its involvement in the investigation of end-user companies using unlicensed software, as well of illegal resellers of software. Two pilot programs will be launched during 2010 (in the region of Cantabria for end user companies and in the region of Murcia for illegal resellers), that are expected to produce positive results.

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 the target company was not infringing. 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\$163,090 in one instance) as to make it impossible to bring the case. BSA reports that the maximum amount it recently posted was €60,000 (US\$81,500).
- 2) **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, some civil courts (mainly in Madrid and Barcelona) still 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 problem makes it difficult for the software industries to pursue actions in these two major markets.

- 3) **Calculation/valuation of damages:** The usual rule in calculating damages involves the full retail price of the product. However, a decision from a court of appeal (against the company "In Hoc Signo Vincens"), might have a negative effect because it reduces the valuation of damages for right holder companies that are based outside Spain. On the theory that 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 reduced. 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.

BSA also voices generalized concern that the knowledge level of prosecutors, civil (commercial) and criminal judges on copyright issues needs improvement, which may be carried out through the above-mentioned Intellectual Property Congress.

Public performance piracy in restaurants and bars: The recording industry reports that the national government, through its 2006 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. This campaign was actually aimed at preventing sales of physical CDs in restaurants and bars (people with back packs carrying illegal CDs for selling them in stores). No further action has been taken.

Border enforcement: In 2007, Promusicae signed an agreement with the Tax Agency, and this is being implemented in the fight against tax and customs fraud affecting the music industry. The primary results of this agreement are helping to improve communication and collaboration with the customs authorities regarding training, investigation and actions in customs premises. Several investigations are ongoing.

COPYRIGHT AND RELATED LAWS IN SPAIN

Proposed Sustainable Economy Law: On December 1, 2009, the Spanish government presented a comprehensive bill called the "Sustainable Economy Law" aimed at stimulating the economic recovery. Among many other measures, it proposes to amend several articles of the LSSI and the Intellectual Property Law (as discussed in some detail, above). The proposal also calls for the creation of an Inter-Ministerial Commission with the power to examine complaints from rights holders or their designees and notify websites which would be able to challenge the notifications. Absent a convincing rebuttal or corrective action, the Commission would forward the cases to a judge for review and a court-ordered suspension of the service. U.S. and Spanish rights holders are actively lobbying for swift passage of the draft bill without negative amendments.

EU and Spain join the WIPO Treaties: The European Communities and 12 of its Member States, including Spain, finally deposited their instruments of ratification to the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT), and these obligations will enter into force on March 14, 2010. Addressing the erroneous conclusion reached by Spanish courts that devices primarily designed for the purposes of circumvention are not unlawful when capable of some ancillary legitimate use is made all the more important in light of the obligations under the WCT and WPPT with respect to the protection of technological protection measures. We also highlight that Spain, by ratifying the WIPO Treaties, has committed itself to "ensure that enforcement procedures are available ... so as to permit effective action against any act of infringement of rights ..., including expeditious remedies to prevent infringements and remedies which constitute a deterrent to further infringements" (Article 23 of the WPPT, and Article 14 of the WCT). To achieve this, Spain will need to address adequately the various deficiencies identified in this report, including reversing the 2006 Circular, and ensuring more responsible action by ISPs to prevent their proprietary networks from being used for the storage or transmission of infringing materials.

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 any

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.

EU Enforcement Directive (2004): Proper implementation of the EU Enforcement Directive remains of vital importance 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, there was an amendment affecting the redefinition of who is a "competent authority" to notify ISPs.⁹ The amendments proposed by the Sustainable Economy Bill would streamline this issue but only with respect to content hosted on websites.

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): 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.

Proposal to reduce penalties for street piracy: On November 13, 2009, the government approved a proposal to amend the Criminal Code in order to avoid prison penalties for street sellers in case of minor offenses of Intellectual

⁹ 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.

Property rights ("minimum economic profit obtained by the infringer"). In these cases, the Court would impose fines or community work services (from 31 days to 60). The bill is at a very early stage and there has been no movement recently.

TRAININGS and PUBLIC AWARENESS

The content industries regularly offer training sessions and enforcement assistance in Spain. What is clearly needed is more government involvement in such seminars particularly to increase the participation of judges and public prosecutors. FAP organized 14 seminars, provided experts for judicial procedures and evidence storage and closely cooperated with the police during investigations.

Promusicae believes training for enforcement agencies as well as judges and prosecutors is very important. During the first nine months of 2009, Promusicae organized and carried out 15 training seminars and courses for a total of 1,850 attendees. This figure reflects the number of training seminars and courses organised directly by Promusicae-Agedi. Also during the year, Promusicae took part in a total of 28 courses held by other associations. The total number of training and courses in which Promusicae have participated was 43, with 2,852 attendees. This is not as many events as in 2008, and the challenging Spanish economy is part of the reason for this. In addition, Promusicae and other associations are aware of the direct relationship between training to enforcement agencies and their involvement in the prosecution of IPR crimes, and much of the training dealt with physical piracy. Promusicae keeps making big efforts to promote and organize training sessions that can contribute to enforcement agencies' awareness.

During 2009, BSA worked with the government to create a cooperative project with the Spanish Judiciary School. As a result, an Intellectual Property Congress will be held in 2010, aimed at training judges and magistrates, specifically in intellectual property issues. Also during 2009, the third annual Technological Police Congress took place, and that afforded an opportunity to strengthen the present cooperation with the Ministry of Interior and police forces. FAP organized seminars, provided experts for judicial procedures reports, provided evidence storage and closely cooperated with police forces during investigations.

MARKET ACCESS BARRIERS

Film Dubbing (Catalunya): IFTA reports that the Catalan regional government is proposing new restrictions on films released in Catalunya. Basically they are planning to require that for any film released in more than 15 prints (which means most films), half must be dubbed into Catalan. This is costly and not warranted by public demand. Details of the proposals are just emerging. While promoting "linguistic access" is the goal and not something we question, the means are not suitable or fair. This restriction would be particularly burdensome to independents and their local distributors who, depending on size of release, may not be able to recoup the costs of additional dubbing and this may further impede release of independent films.

Investment Obligation: Spain maintains discriminatory investment provisions whereby audiovisual media service providers, including broadcasters, must annually invest five percent of their revenues in the production of European and Spanish films and audiovisual programs. In addition, 60% of this allocation should be directed towards productions in any of Spain's official languages. These investment obligations also apply to future digital terrestrial channels.

Screen Quota: For every three days that a non-EU country film is screened, in its original language or dubbed into one of Spain's languages, one European Union film must be shown. This is reduced to four to one if the cinema screens a film in an official language of Spain and keeps showing the film at all sessions of the day in that language. Non-observance of the screen quotas is punishable by fines. These discriminatory measures ignore market demand for U.S. and non-EU country films and stifle development of Spain's theatrical market.