

SPAIN

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2011 SPECIAL 301 REPORT ON COPYRIGHT ENFORCEMENT AND PROTECTION

Special 301 Recommendation: IIPA recommends that Spain be elevated to the Special 301 Priority Watch List in 2011.

Executive Summary: IIPA welcomes Spain's recent movement toward adoption of the Law on the Sustainable Economy (LES) in early 2011, which would establish a mechanism for the removal of pirated content on hosted websites and would mark an important first step toward combating the significant problem of Internet piracy in Spain. To be effective, it is essential that the law apply either in the language of the law itself or through implementing decrees, to the activities of torrent and link sites that direct users to infringing materials. This would be consistent with representations of the Spanish Government as to the scope of this measure. While this proposed law is welcome, IIPA notes that the procedures contemplated by the most recent version are unnecessarily complicated for what should be a straightforward procedure. The copyright industry is also disappointed that the Spanish government is not presently considering a more robust solution to an Internet piracy problem that has decimated the Spanish market. The highly connected Spanish population remains a market that is largely out of reach for legitimate digital content due to Spain's persistent high levels of Internet piracy, which emerge in particular through peer-to-peer (P2P) platforms that will largely remain unaffected by the currently proposed LES amendments. Active leadership by the Spanish government is needed on all fronts to address the heavy consumption of infringing materials, remove the protective cloak of anonymity, and secure greater cooperation on the part of Internet service providers (ISPs) with respect to the use of their proprietary networks and platforms for infringing purposes. Effective action to combat the theft of creative content is critical to defending Spain's cultural heritage, stopping the hemorrhaging, and expanding economic opportunities.

The sky-high Internet piracy levels in Spain can be attributed to government policies that have created an Internet-wide safe harbor for infringing activities. Spanish enforcement authorities have established the de facto decriminalization of illegal downloading of content distributed via P2P file-sharing (despite provisions in the Copyright Act making it clear that copies made from illegal sources are not private copies). Spain's laws fail to meet the minimum requirements of the EU E-Commerce Directive regarding liability for ISPs, or to establish the necessary tools to obtain the identity of the direct infringer. As a result of these legal defects, police frequently refuse to take Internet enforcement actions. Moreover, private sector negotiations to address online piracy have failed largely for lack of adequate legal or regulatory incentives for ISPs to cooperate. Enforcement authorities are taking some action against street piracy, although amendments to the Penal Code have made enforcement more complicated and driven this activity down in the past year. As a consequence, pirate product remains fairly ubiquitous, and circumvention devices enabling use of illegally copied games are widely available. The business software sector in Spain reports good cooperation with the Ministry of Industry on public awareness efforts and important reductions in the level of certain types of software piracy. However, the industry faces persistent organizational end-user software piracy and remains concerned about the availability, cost, and speed of civil enforcement measures, citing problems such as expensive bonds and low damages.

PRIORITY RECOMMENDED ACTIONS FOR SPAIN IN 2011:¹

- Correct the Attorney General's May 2006 Circular that decriminalizes infringing downloads over P2P networks, so that the work of digital enforcement authorities may move forward.

¹For more details on Spain's Special 301 history, see IIPA's "History" appendix to this filing at <http://www.iipa.com/rbc/2011/2011SPEC301HISTORICALSUMMARY.pdf>, as well as the previous years' reports, at <http://www.iipa.com/countryreports.html>. For a summary of IIPA's 2011 global issues, see our cover letter at <http://www.iipa.com/pdf/2011SPEC301COVERLETTER.pdf>.



- Consistent with the 2008 European Court of Justice (ECJ) decision in *Promusicae vs. Telefonica*, develop legislation to allow rights holders to obtain the necessary information to take civil actions in Internet piracy cases.
- Amend Spain's e-commerce laws to adopt the standards required for ISPs to gain effective knowledge of infringing activity under the EU E-Commerce Directive, and to establish a workable notice-and-takedown procedure that ensures action by ISPs upon direct notice from rights holders of infringing activities.
- Expediently pass provisions of the Law on the Sustainable Economy to address web-hosting of pirated content, and, consistent with representations of the Spanish government, ensure their application to linking, indexing and torrent sites, and begin to address all forms of infringing online conduct in a robust manner.
- Take appropriate steps to ensure that circumvention devices are illegal.
- Establish a national authority to coordinate Internet piracy enforcement, 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.

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. Piracy of copyright works in Spain takes many forms, including street sales of pirated optical discs, end-user piracy of business software, sale of circumvention devices for the use of illegal copies of videogame software, illegal camcording in theaters, unauthorized public performances of music and sound recordings, and, overwhelmingly, Internet piracy.

Online piracy: With a highly connected population, Spain represents an enormous market of opportunity for audiovisual products, music and sound recordings, and the business and entertainment software industries. Yet the 29.1 million Internet users that comprise 62.6% of Spain's population² remain out of reach for legitimate digital content due to Spain's persistent status as one of the world's worst offenders of Internet piracy. Starting in 2007, Internet piracy in Spain exploded, and it has continued to grow at a tremendous rate. Comparative studies by the music, videogame, and motion picture industries demonstrate that Spain has one of the worst Internet piracy problems in the world. Today, according to the Anti Piracy Federation ("FAP"), whose members include film and videogame groups in Spain, 55% of digital piracy in Spain occurs via peer-to-peer (P2P) networks, 34% via hosted websites, and 11% by streaming sites. For motion picture products, Spain ranks consistently among the five worst countries in absolute downloads, and is nearly always the number one major country in the world in terms of per capita exchanges of illegal copies of films. Spain has the worst online music piracy problem among the major European markets, with close to half (45%) of all active Internet users in Spain using services that distribute music illegally – a ratio well above the average among the top 5 EU markets (23%).³

Online Music Piracy: 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 fifth of its 2001 size,⁴ despite the availability of many legal online services (from Apple's iTunes to Spotify, Deezer, and 7digital). Research by IDC in 2010 found that the Internet music piracy rate in Spain was 97.8%. The value of pirated music in the first half of 2010 was US\$3.6 billion. According to IDC estimates, Spain's legitimate online music market could have been

²According to www.internetworldstats.com, June 2010.

³According to The Nielsen Company, October 2010

⁴The value of recorded music sales in Spain has decreased from €626 million (US\$802 million) in 2001 to just €128 million (US\$171 million) in 2010, which means an 80% decrease in value. In unit terms, sales were 73 million in 2001 and only 16 million in 2010, a drop of 78%. Because of these falling sales, more than 50% of the employees of the music sector have lost their jobs in the last few years.

valued at US\$2.3 billion. IDC also found that almost 70% of Spanish Internet users admit to downloading illegal copyright content (music, film, videogames, and books) via P2P sites (85% in the case of Internet users under 24), and that almost 50% of Internet users downloaded content from direct download sites (75% in the case of those under 24).

In Spain, illegal music offerings on the Internet are available in many formats. According to recent research and surveys carried out by the Coalition of Creators and Content Industries, 60% of Spain's online music piracy problem is via P2P file exchange protocols (eMule, Ares and BitTorrent, mainly); 30% via web pages offering links to infringing music files for direct download; and 10% via other means (blogs, FTP, Cyberlockers and other systems like chat or e-mail that are used illegally to provide access to infringing content). The legitimate online market is already stunted as a result. Meanwhile, another form of piracy linked to the Internet is developing with the online trade of physical product offered by national and international pirate networks that specialize in offering products such as full discography collections of artists and bands, both official and unreleased, as well as film and software. A centralized unit within the Customs Department of the Tax Agency could help reduce this specialized form of Internet piracy.

Piracy also harms music publishers; the National Music Publishers' Association (NMPA) indicates that its Spanish counterpart, SGAE (the collecting society, la Sociedad General de Autores y Editores), reports that widespread Internet-based piracy in Spain undercuts the legitimate market for music publishers and their royalty collections.

Online videogame piracy: The Entertainment Software Association (ESA), representing the videogame industry, also reports that piracy levels in Spain worsened in 2010. Online piracy is now the primary problem for this industry, with illegal downloads clearly overtaking the hard goods piracy problem. More and more of these sites are beginning to include cyberlocker links for direct downloads of infringing material. Two Spanish ISPs (Telefonica de Espana and Jazz Telecom S.A) are among the top 10 ISPs worldwide whose networks were used to facilitate illicit file sharing activity. Without meaningful efforts by these ISPs to cooperate with rights holders and stem infringing activity on P2P networks, the staggering levels of online videogame piracy will continue. ESA reports that during 2010, ESA vendors detected 13.59 million connections by peers participating in unauthorized file sharing of select member titles on P2P networks through ISPs located in Spain, placing Spain third in overall volume of detections in the world.⁵ Globally, Telefonica de Espana subscribers accounted for 4.85% of the overall detections during 2010. Widespread availability of circumvention devices and services also significantly contributes to growing Internet piracy, as downloaded infringing video game software can only be played on consoles modified by such devices.

Online audiovisual piracy: The film industry reports that Internet piracy continues to cause the greatest damage to the audiovisual market in Spain, where FAP estimates that more than 400 million films are illegally downloaded every year, including many that have not yet reached the Spanish theatrical market. Between 2006 and 2009, DVD sales declined by 60% (from 300 million Euros to 120 million Euros); the number of video stores has dropped from 12,000 down to 2,000; and movie theatres have lost 200 screens and estimate a 9% reduction from the box office. Piracy levels continued to grow during 2010. According to an IDC study, the value of the audiovisual pirate market in the first half of 2010 was 1.87 billion Euros, with a piracy level of 77.1% for the movie industry.

The independent film and television segment of the motion picture industry (IFTA) reports that online piracy remains a significant export constraint for independent producers and distributors, the majority of which are small to medium sized businesses. 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 piracy rates and easy availability of free illegal copies. Internet piracy prevents the establishment of legitimate online distribution platforms and services for consumers, which independents can use to finance future productions. The independent film and television production sector is limited

⁵These figures do not account for downloads that occur directly from hosted content, such as infringing games found on "one-click" hosting sites, which appear to account each year for progressively greater volumes of infringing downloads.

in its ability to shift to technology-enabled new business practices that might limit piracy. For example, worldwide same day releases (referred to as “day and date” releases) may prove an effective method to curb or delay piracy for major studios that control their own worldwide distribution, but for independents, whose national distributors release on their own schedule, this technique is impossible.

Independent producers and distributors confirm that DVD sales in Spain have been particularly damaged, since pirated digital copies are offered for free online and with the same quality viewing experience as a DVD. Unable to compete with free, legitimate distributors cannot commit to distribution agreements or offer drastically lower license fees which are inadequate to assist in financing of independent productions. IFTA reports that the inability of national distributors in Spain to provide any part of production financing is resulting in a decreased ability to create independent films, and in some cases films are not being made at all.

Street piracy: Street piracy remains a steady problem for copyright industries in Spain. Copyright industries report that there was no substantial reduction in street piracy during 2010. 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 street “manteros,” who sell from blankets and are relatively fixed in location and maintain more product.

Street piracy of music and sound recordings: Physical piracy of music in Spain did not increase in 2010, although some peaks registered in tourist places around the Christmas and summer seasons. The overall average is near 20%, while cities such as Sevilla, Granada, Murcia and Alicante suffer rates reaching over 30%. Also for the first time, the music industry detected pirate CDs of pre-release music in street sales, although this cannot be considered a general trend in Spain. This kind of piracy likely will grow as physical pirate networks compete against growing Internet piracy. While digital piracy today has a bigger impact on music sales, street piracy continues to harm the local industry – 77% of music sales in the country still come from physical formats.

Promusicae, Spain’s national association of record producers, 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 represents 81% of legal music sales. The number of regular pirate CDR/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). The structural situation shown by the Map of Physical Piracy remained the same in 2010, although a general decrease has been seen in the volume of physical piracy of music in favor of film piracy.

Unauthorized public performances of music and sound recordings: The music industry in Spain is experiencing a gradual increase of new illegal business niches linked to public performance in entertainment premises. Companies reproduce unauthorized music in both audio and video formats for loading coin activated jukeboxes, or, more and more frequently, place 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 21% in 2010, compared to 2009. According to details from the producers’ collecting agency AGEDI, more than 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, apart from the proposals included in the Sustainable Economy Bill, have been taken to date. In response, the Instituto Ibercrea launched an Internet campaign on behalf of those who lost jobs as a result of Internet piracy, including a petition that had collected 3,260 signatures as of January 2011.

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, making the pirate market nearly the same size as the legal market. While some municipalities have effectively forbidden street vendor activity, Madrid, Barcelona, Valencia, Malaga, Ginón, Vigo, Sevilla, and many towns in the north remain serious concerns. Judicial cooperation is poor, and FAP has to provide experts and evidence storage in most cases; some raids are even conditioned on 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 report that they must pay lower licensing fees due to declining DVD sales caused by piracy.

Camcord piracy: Camcording is particularly damaging in Spain because it fuels rampant online piracy negatively impacting worldwide distribution and preventing the establishment of legitimate online distribution. There were two raids against camcording operators in 2010, which led to the closure of a pirate website, taquilladivx.com. Unfortunately, this is a drop in the bucket in light of more than one hundred illegal movies and soundtracks sourced from Spanish theaters that remain available on international pirate networks. In 2010, 87 audio captures and 9 video captures were stolen from Spanish theaters. MPA has also found Spanish-sourced copies in other markets, particularly in Latin America. Even illegally exchanged P2P movies are sourced locally via camcording in Spanish theaters. 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 film producers' collecting society). The public prosecutors are generally not inclined to prosecute criminal cases.

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

Business software piracy: The Business Software Alliance (BSA) reports several sources of piracy in Spain, among which organizational end-user piracy causes the most economic damage. Small- to medium-sized enterprises (SMEs) in particular contribute to widespread corporate use of unlicensed software. Resellers distribute illegal software openly at shops, and the Internet continues to present challenges.

Spain is a country largely characterized by SMEs, among which levels of piracy are more pervasive than among larger corporations. According to IDC market data, it is projected that the IT industry in Spain will generate a market volume of €21 billion (approximately US\$27.5 billion) by 2013, and will employ directly 102,000 people. According to IDC, if piracy levels were reduced by 10 percentage points within the next four years, at least 2,244 high qualification jobs would be created; US\$538 million would be generated in additional tax income for the Spanish treasury; and the increase for Spain's GDP would be \$US2.923 billion.⁶

BSA recently introduced a study of regional software piracy levels in Spain. The overall piracy rate for the country in 2009 was 42%, with a total commercial value of U.S.-vendor pirated software of \$608 million. BSA's preliminary estimate for 2010 shows a PC software piracy rate of 44%, representing a commercial value of US\$692 million worth of U.S.-vendor pirated software.⁷ The regional breakdown for 2009 is as follows:

⁶See The Economic Benefits of Reducing PC Software Piracy, available online at <http://portal.bsa.org/piracyimpact2010/index.html>.

⁷BSA's 2010 statistics are preliminary, representing U.S. software publishers' share of commercial value of pirated software in Spain. They follow the methodology compiled in the Seventh Annual BSA and IDC Global Software Piracy Study (May 2010), <http://portal.bsa.org/globalpiracy2009/index.html>. These figures cover packaged PC software, including operating systems, business applications, and consumer applications such as PC gaming, personal finance, and reference software – including freeware and open source software. They do not cover software that runs on servers or mainframes, or routine device drivers and free downloadable utilities such as screen savers. The methodology used to calculate this and other piracy numbers are described in IIPA's 2011 Special 301 (...continued)

Region	2009 Piracy Level	2007 Piracy Level	2009 Ranking	2007 Ranking	2009 Losses*	2007 Losses*
Andalucía	58%	60%	1	1	66 M €	101 M €
Extremadura	56%	57%	2	2	18 M €	13 M €
Comunidad Valenciana	55%	55%	3	3	64 M €	62 M €
Castilla la Mancha	54%	55%	4	4	25 M €	15 M €
Aragón	48%	48%	5	5	17 M €	18 M €
Castilla León	47%	47%	6	6	33 M €	26 M €
La Rioja	42%	42%	7	9	5 M €	2 M €
Cataluña	42%	42%	8	8	79 M €	132 M €
Galicia	41%	43%	9	7	39 M €	27 M €
Asturias	40%	41%	10	10	7 M €	7 M €
Cantabria	38%	40%	11	11	8 M €	5 M €
Baleares	38%	40%	12	12	16 M €	10 M €
País Vasco	37%	38%	13	13	39 M €	37 M €
Canarias	36%	38%	14	14	18 M €	12 M €
Murcia	36%	38%	15	15	14 M €	8 M €
Madrid	32%	34%	16	16	171 M €	155 M €
Navarra	28%	29%	17	17	9 M €	11 M €
AVERAGE SPAIN	42%	43%			631 M €	640 M €

*This data represents the entire business software sector, and is not restricted to U.S. vendors only.

While some regions, such as Navarra or Madrid, are below or at the same level of piracy as the average European rate, other regions have piracy levels similar to countries like Greece, Egypt or Colombia. This regional piracy study will be used by BSA to increase efforts with regional governments in Spain, and increase their involvement in the fight against business software piracy.

On a more positive note, after a targeted awareness campaign conducted by BSA with the Ministry of Industry, the level of piracy in the specific field of illegal resellers reduced dramatically to 21%. BSA will extend this cooperation with the Ministry toward significant reduction of the level of piracy among small businesses. The Ministry of Industry has confirmed that it will dedicate €300,000 during 2011, to consolidate piracy reductions in the distribution channel and to generate a similar reduction of corporate end user piracy among SMEs. At the present moment the Ministry is starting to design the contents of the campaign for this purpose.

COPYRIGHT AND RELATED LAWS IN SPAIN

The continued lack of action on the part of the Government of Spain from the legislative, executive, and judicial branches underlies one of the most serious Internet piracy problems in the world. By failing to bring criminal online infringement actions, or to provide rights holders with the necessary tools to bring civil actions or gain cooperation of ISPs, Spain has fallen out of compliance with its EU and international treaty obligations. The adoption of anti-piracy measures in the proposed Law on the Sustainable Economy (LES) would represent an important step toward addressing the significant problem of Internet piracy in Spain. The following areas must be addressed urgently in the coming year:

- Adopt and put into operation a system for the effective removal of hosted illicit content, such as has been proposed in the Sustainable Economy Bill.

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submission at www.iipa.com/pdf/2011spec301methodology.pdf. BSA's final piracy figures will be released in mid-May, and the updated US software publishers' share of commercial value of pirated software will be available at www.iipa.com.

- Provide the legal tools for rights holders to combat all forms of Internet piracy, to meet its EU and international obligations:
 - Correct the Attorney General's May 2006 Circular, which instructs that P2P filesharing absent an aim of commercial profit is not subject to criminal charges.
 - Incentivize ISPs to cooperate in efforts to stem infringing filesharing activities.
 - Amend the Spanish e-commerce law so that an ISP can gain effective knowledge that infringement is occurring through its service without a court order.
 - Provide rights holders the ability to bring civil and criminal actions against infringers by allowing them to obtain identifying information, in a manner that respects rights to data privacy.
- Address significant gaps in the Spanish legal infrastructure for the protection of copyright works under technological protection measures (TPMs) from illegal circumvention devices.
- Amend Spanish Intellectual Property legislation to clarify that compensation of damages must be valued at least at 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.

IIPA members welcome corporate liability amendments to the Criminal Code that were introduced in 2010, but other penal code amendments may have a negative impact on criminal raids in the coming year. As discussions move forward on these topics, it is imperative that the Spanish government work with copyright industry groups in a transparent and cooperative way to achieve effective solutions to pervasive Internet piracy.

Removal of hosted infringing content—The Sustainable Economy Bill: IIPA supports the enactment of the Sustainable Economy law as a first important step to address hosted illegal content, one of the pervasive forms of Internet piracy in Spain. On December 1, 2009, the Spanish government presented a comprehensive bill called the Law on the Sustainable Economy (the “LES”), that now awaits adoption. Among other measures, the law contains some positive amendments to the Information Society Services and Electronic Commerce Act (the “LSSI”) and the Intellectual Property Law (the “LPI”), and gives an administrative body the authority to examine complaints of hosted copyright infringement from rights holders, and to notify websites of the complaints. This procedure provides for due process to respect the rights of web hosts; however, rights holders await the eventual implementation of such a procedure to determine whether its multiple layers of court review will undermine the law's efforts to encourage swift removal of infringing content.

Under the draft law's procedure, if the owner of a website subject to a complaint were to refuse to submit a convincing rebuttal or take down infringing content, the Commission could order ISPs to block access to the site in question and forward to a specialized tribunal a recommendation to remove the infringing content. The tribunal would hear from the interested parties and then authorize or reject the measure proposed 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. Nevertheless, these actions will allow Spain to move toward meeting its key obligations under the WIPO Internet treaties 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). The proposed law is narrowly tailored to handle hosted piracy specifically; it does not, for example, address copyright infringement committed by end users. The proposed law as currently drafted also does not explicitly apply to torrent and linking sites, which Spanish authorities have assured are covered – a point that should be clarified either in the legislation itself or through subsequent regulations or decrees.

P2P Enforcement—The 2006 Attorney General’s Circular: Statements issued by the Attorney General in 2006 de-criminalizing infringing distributions of content by P2P have led to a halt in criminal enforcement actions against illegal filesharing, causing Spain to fall out of compliance with EU Enforcement Directive obligations. Circular 1/2006 from Spain’s Office of the Prosecutor-General (“Attorney General”) explains that unauthorized uploading or downloading copyright protected materials over the Internet, including via P2P systems, does not meet the requirements for consideration as criminal offenses under Article 274 of the Criminal Code unless such acts are “for commercial profit.”

The Spanish government has stated that the Circular is “not binding” on any judge, but in practice it has halted Internet piracy enforcement. Both the police and some criminal courts have pointed to the Circular as justification for not taking action against P2P infringers. The few police actions taken against organized networks and companies that clearly made direct or indirect gains from Internet piracy, including through advertising income, are now being dropped as a consequence of the supposed requirement to establish commercial intent. Most of the cases never even reach the trial stage. Furthermore, in the aftermath of the Circular, Spanish courts have declared that, in criminal actions against websites with links to P2P platforms, there is no criminal responsibility for these kinds of infringements.⁸ Criminal Investigation Courts have cited the Circular in finding 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, but the Criminal Investigation Courts continued to disfavor criminal liability in P2P cases in 2010.⁹ The Attorney General has refused industry requests to discuss the Circular, which remains in effect five years later. Moreover, the National Police, Technology and Internet Division (the BIT) will no longer engage in raids against Internet sites that facilitate copyright infringement, and is reducing its focus on Internet piracy. The BIT and the Guardia Civil each carried out a few actions in 2010 against the illegal downloading of copyrighted content, though none dealt with music. On the whole, effective police action is not feasible today.

Inadequate incentives for ISP involvement in the removal of pirated content: A problematic loophole must be closed in Spain’s Information Society Services and Electronic Commerce Act (the “LSSI”) which, combined with inadequate ISP liability provisions in the copyright law, leaves no incentive for ISPs to cooperate in the removal of infringing online works. In December 2007, the Spanish Parliament approved amendments to the LSSI as part of the government’s “2006-2010 Information Society Development Plan.” Article 16 of the LSSI as amended establishes liability for the ISP if it has effective knowledge of the infringement and does not act diligently to remove or block access to the infringing content. Unfortunately, rights holders cannot establish “effective knowledge” on the part of an ISP by directly notifying a site-operator of the presence of infringing material on their site or service (a standard not in line with Article 14 of the E-Commerce Directive, which refers to “actual knowledge”). Instead, rights holders must take time-consuming steps to submit evidence to a court or administrative body that has previously declared such content illegal. (Up to now, there was no administrative body capable of carrying out this activity, and this obstacle would be amended with the enactment of the proposed LES.) Further, under Article 11.2 of the LSSI, as amended, access may be restricted from Spain to a specific service or content provided from a non-EU State when the “competent authorities” have requested the removal or interruption of such content or service; however, the definition of “competent authorities” is unclear.

⁸In 2010 there were several final (unappealable) decisions: CVCDgo.com (Madrid), Etmusica (Huelva), portal VCD/emule24horas (León) and naiadadonkey (Alicante).

⁹See Indicedonkey (Madrid) (Appeal pending); Cinegratis (Cantabria) (Dismissal upheld by the Court of Appeal in June 2010) and Divxonline (Valencia) (reversed in October 2010). The divxonline case was reversed in January 2010 (discussed further, below).

The LSSI, despite its 2007 amendments, ultimately fails to effectively implement the EU E-Commerce Directive. Not only does the LSSI fail to establish an effective notice and takedown procedure, but it contains a confusing and unachievable rule requiring “actual notice” to ISPs for the removal of unauthorized content. The proposed Law on Sustainable Economy would enable an existing administrative authority to take this kind of action; however, the LSSI still fails to meet the obligation under the E-Commerce Directive that hosting providers must remove content when they are aware that the content is illegal.

Identifying online infringers—*Promusicae vs. Telefonica* and the EU Directives: Serious challenges exist in Spain to identify online infringers in both civil and criminal copyright proceedings. The Government of Spain should provide for an effective mechanism through which rights holders can 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 EU requirements, to permit disclosure of the appropriate information so as to facilitate rights holder action. The *Promusicae vs. Telefonica* decision, issued on January 29, 2008 by the European Court of Justice (ECJ), considered the decision of a Spanish court in the course of national proceedings between the rights holders association Promusicae and the Spanish ISP Telefonica, concerning the latter’s refusal to disclose data about its subscribers who had shared or uploaded large numbers of music files via the Kazaa network. The ECJ stated that Member States must allow a “fair balance” to be struck between fundamental rights, including the “right to respect for private life,” and the “rights to protection of property and an effective remedy.”

The Spanish Mercantile Court #5 of Madrid 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 obligations. However, combined with the Attorney General’s 2006 Circular that decriminalized infringements via P2P networks (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 result, Spain fails to provide the “fair balance” required by the ECJ in *Promusicae* – it offers no meaningful manner in which copyright owners can effectively protect rights guaranteed under EU Directives.

Spain also has not properly implemented a related element of the EU Enforcement Directive (2004), which aims in particular to strengthen enforcement in the digital environment. The “right of information” afforded in Article 8 of the Directive allows rights holders to identify infringers and obtain information about infringements. Article 8 permits rights holders to obtain an order requiring an ISP to disclose an infringer’s identity where it appears a website or a user has committed copyright piracy. Unfortunately, the “right of information” in Spain suffers from a burdensome dual commercial scale requirement, applying to both the services provided by the ISPs as well as to the infringements committed by the direct infringer. Under the Directive, however, the commercial scale requirement should apply only to the services provided by the ISPs, not to the acts committed by the infringer. Spain’s erroneous implementation of this element in effect relieves ISPs from any liability to provide the identity of infringing websites or users, making it impossible for rights holders to bring copyright infringement actions.

Yet a further legal obstacle prevents rights holders from accessing the identity of infringers. Spain’s Data Retention Law allows retention and disclosure of personal data only for serious crimes. Under 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 disclosure of personal data in intellectual property crimes is not possible. Because the Data Retention Law also has been interpreted to prevent personal data disclosure in civil proceedings, this law eliminates the possibility to sue P2P infringers, both in the civil and in the criminal courts.

Anti-Circumvention Measures – WIPO Internet treaties obligations: Spain needs to address significant gaps in its legal structure to protect copyright works that are protected by technological protection measures (TPMs) against circumvention devices. 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) (together, the WIPO Internet treaties), and these obligations entered into force on March 14, 2010. However, Spanish courts have erroneously concluded that devices primarily designed for purposes of circumvention are lawful when capable of some ancillary non-infringing use. Although there is a strong case to be made that these courts are improperly interpreting the law, modifications to the law would ensure that the provisions function as intended to effectively prosecute the manufacture and distribution of circumvention devices.

Prosecuting individuals or entities engaged in the trafficking of circumvention devices and/or the provision of services related to circumvention devices remains subject to difficulties despite the fact that such devices are clearly prohibited under the EU Copyright Directive, and Spanish law itself contains similar prohibitions. Article 270.3 of the Criminal Code imposes criminal penalties against the manufacture and distribution of a device or service “specifically intended to facilitate the unauthorized removal or circumvention” of TPMs. Unfortunately, many Spanish courts have interpreted the statute as imposing liability only if the underlying device is entirely incapable of non-infringing uses. As a result, defendants engaged in the commercial distribution of devices primarily used to defeat industry TPMs (and thus enable the use of infringing copies of games) routinely escape liability by simply arguing that such devices are capable of incidental and commercially insignificant non-infringing uses. A large number of high profile dismissals, including most recently in December 2010 (a Barcelona decision regarding the site ChipSpain.com), has created the impression among the public that mod chips and game copiers are legal in Spain. Such an interpretation of Article 270.3 is at odds with the plain language of the statute and with Spain’s obligations under the WIPO Internet treaties as well as the EU Copyright Directive. As drafted, liability under Article 270.3 should attach upon a showing that a device is “specifically intended” to effect the circumvention of a TPM.

In the most recent criminal prosecution of a mod chip (or videogame circumvention device) distributor, the Las Palmas Provincial Court affirmed a lower court’s dismissal of the action on the grounds that the devices enabled uses other than the playback of pirated games. The court held that the plaintiffs would be unable to satisfy the “specifically designed” requirement of Article 270.3 of the LPI as a matter of law because the chips could in theory be used for purposes other than facilitating piracy. This construction of Article 270.3 has prevailed in nearly all criminal prosecutions involving mod chips in Spain. It should be noted that BSA reported one positive precedent in Spain in the VESATEC case, in which a company making available circumvention devices through a web site was found guilty. However, the VESATEC case took 12 years to prosecute.

Additional WIPO Internet Treaties obligations: Any reform to the copyright legislation in Spain should be adopted in a manner consistent with the two WIPO Internet treaties, to include securing the exclusive right of record producers with respect to the right of “communication to the public” and the “making available” right. Also, the right of remuneration for making available to the public, granted both to audiovisual and musical performers 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 WIPO Internet treaties, and should be eliminated in future copyright law reform.

2010 Amendments to the Criminal Code: New provisions in the Criminal Code entered into force in December 2010, bringing mixed changes in enforcement for the copyright industries. In a positive development for the business software sector, the amendments established for the first time in Spain corporate criminal responsibility arising from crimes, including crimes against intellectual property. The amendments expose not only the management of the company, but the corporate entity itself, to liability for intellectual property crimes. Criminal fines up to 288,000 Euros (US\$ 375,000) shall be applicable directly against the assets of the company, and companies found criminally responsible for software piracy could be subject to a range of new criminal penalties, including potentially the termination of the company.

Unfortunately, the penal code amendments reduced penalties and changed the legal nature of the unauthorized distribution of CD-Rs and DVD-Rs containing copyright works when sold by street vendors. Vendors selling pirate products valued under 400€ are no longer subject to criminal liability, and the evidence of an adequate level of economic gain is a particularly evasive element for rights holders to prove. Courts as a result would impose

only fines or community service (from 31 to 60 days). Following these amendments, judges in the Basque region adopted decisions not to prosecute illegal street vendors. This change has led to a significant decrease in street piracy actions on the part of Spanish law enforcement. The Ministry of Justice also rejected industry proposals to amend the penal code to ensure that circumvention devices are illegal. Such an amendment would have brought clarity to the problem rights holders face that the judicial criteria in this field vary depending on the region of the country. These amendments have, unfortunately, undermined one of the few bright spots in Spain's enforcement of copyright.

COPYRIGHT ENFORCEMENT ACTIONS IN SPAIN

In addition to the priority actions mentioned in the Executive Summary, IIPA encourages the Government of Spain to take the following enforcement steps in 2011:

- Develop and implement an effective national campaign on the importance of intellectual property rights through educational, press and similar public outlets.
- Take actions in well-known markets to combat widespread street piracy, including: (1) actions against labs supplying street vendors; (2) *ex officio* police actions against street sales; (3) increased police coordination; and (4) prosecutors pursuing and courts issuing deterrent criminal penalties.
- Improve cooperation among agencies and with 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 and criminal and civil judges to increase their knowledge of intellectual property rights and the impact of piracy and include intellectual property in law schools' curricula.
- Establish a central unit within the Customs Department of the Tax Agency aimed at the investigation and monitoring of organized networks dealing in piracy of physical and digital goods.

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 2010. In a recent show of astonishing tolerance toward piracy, the mayors of two Catalan seaside resorts stated that they lacked the resources to pursue the high number of street vendors, suggesting that bootleggers move from central and commercial areas to “pirate zones.” Only the sharp reaction by local retailers, FAP, Promusicae, and other rightholders associations led to retraction of the policy one month later. Unfortunately, many other cities, particularly in the northern regions of Galicia and Asturias, continue to tolerate open street piracy. Industry groups report good cooperation with certain enforcement authorities in Spain, but government-wide attention to copyright enforcement is needed. Local and regional authorities must be incorporated in a national action plan to heighten sensitivity to the piracy problem in Spain.

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

Some rights holders report good cooperation with Spanish police forces, including the National Police, Regional Police, and Guardia Civil, on criminal cases. In contrast, industry groups report a lack of intellectual property awareness among many in the judiciary. Attendance of industry organized seminars among judges and public prosecutors is limited, although attendance among police officials has been very high. Judges and public

prosecutors show little interest in prosecuting IP crimes, and the Best Practices Manual for the prosecution of intellectual property crimes issued by the Spanish Government in July 2008 has not improved the situation.¹⁰

Criminal actions involving Internet enforcement: Due to the 2006 Circular and various court decisions, the police, prosecutors, and the BIT have all significantly reduced work on Internet piracy cases.

According to the local film industry, the few police actions in 2010 against Internet piracy revealed the existence of organized structures offering online movie files, including pre-releases, using registered companies to cover up illegal activities while profiting from the publicity these websites generate. The content is presented in a professional way, very similar to certain illegal physical piracy networks, revealing clear connections between webmasters and illicit camcording incidents in Spain. The Civil Guard carried out four Internet raids in 2010. The "Coalition of Creators and Content Industries," representing record producers, authors, publishers, and representatives from cinema, videogames, and software industries, provided the Ministry of Industry and SETSI with the details for 200 websites offering links to illegal downloads of copyright works, but no action has been taken.

Spanish authorities initiated over thirty legal procedures in 2006 and 2007 after Police operations called "Descargas en la red I" and "Descargas en la red II," but only two so far have resulted in convictions, one of which was issued in 2010.¹¹ In the aftermath of the Attorney General's 2006 Circular, six of the cases resulted in acquittals at the appellate level. Private prosecutors have stepped in where public prosecutors backed away from these cases, leading to only three appellate decisions in 2010 to uphold criminal liability in Internet piracy cases.¹²

Police actions and prosecutions involving physical piracy: Some of the biggest bottlenecks in IP enforcement in Spain include: (a) slowness in the judicial proceedings (an average of 2 to 3 years to obtain a judgment), which is (b) exacerbated by the lack of interest of the prosecutors following the Attorney General's Circular, and (c) the lack of deterrent sentences, which undermines the work of the police actions. An example is the Blubster case: in April 2008, Promusicae filed a case against the Blubster P2P file sharing service, which was followed by a hearing in May 2009. The main petition came along with an injunction that was never served, and the final decision has not been issued.

Additional enforcement problems include:

- Detailed forensic reports must be delivered within the stringent 72 hours deadline set for special procedures called "fast-track trials," the failure of which leads the competent judge to refer the case to an "abbreviated procedure," which is in fact a much longer and less effective process.
- 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 basis; this is hugely inefficient, due to the high cost in human resources and time involved for enforcement agencies.

¹⁰For more details about the manual, see the IIPA's 2010 Special 301 Report on Spain, available at <http://www.iipa.com/rbc/2010/2010SPEC301SPAIN.pdf>.

¹¹In 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 (sites also popular in Mexico), which offered streaming services of Spanish-dubbed recent and new releases for one Euro per film and required visitors to pay for a minimum of ten titles.

At the end of January 2010, the Court of Appeal in Valencia ordered continuation of 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 in part on the Attorney General Circular criteria and in part on the defendant's argument that the site containing links involved no commercial activity directly related to the communication of copyrighted works. However, the appellate court found for FAP, finding that "[d]espite 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."

¹²In 2010, an Alicante Court ordered the blocking of sixteen sites. One of these was the infamous Spatorrent website, one of the largest release sites in Spain and the subject of a lengthy 2009 investigation into a camcording thief.

- 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 monitoring security while pressing for destruction.

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). Unfortunately, regarding digital piracy the number of actions is virtually nil due to the numerous legal deficiencies and loopholes in the digital arena.

The recording industry reports that the criminal activity involved with optical disc piracy in Spain is severe. The industry appreciates the work done by its investigators and the enforcement agencies, which have carried out important operations. Among the most significant actions were: one in Madrid, where the National Police arrested 3 individuals and seized almost 25,000 burnt and blank carriers, 6,000 inlays and 42 burners and other material during a raid; another by the Catalonia autonomous police, Mossos d'Esquadra, in Reus (Tarragona) that resulted in the arrest of 6 individuals and the seizure of 24,500 burnt carriers and 50 DVD-R burners. Another National Police operation was carried out in Hospitalet (Barcelona) in May 2010, which resulted in the seizure of 74 burners in 8 towers and 11,500 recorded carriers, and the arrest of 7 people. In Galicia, the National Police raided in February the premises of a company that supplied night clubs (gentlemen's venues) with jukeboxes containing unauthorized copies of music videos. The police also carried out raids in some of the venues in different Galician provinces and seized jukebox hard drives used for unauthorized reproduction and public performance.

	Actions	Arrested People	Total Carriers	Recorded Carriers		Blank Carriers		Burners	Inlays	Juke-boxes	Hard Drives
				CD-R	DVD-R	CD-R	DVD-R				
2009	3,571	1,820	1,342,451	631,163	680,210	14,256	16,822	928	151,947	11	21
2010	1,788	1,199	792,599	347,828	424,217	10,900	9,654	506	103,664	8	35

Spain: Anti-piracy operations, years 2009 and 2010. The 2010 data above is not yet final as more information may be provided by the enforcement agencies.

FAP reports a precipitous reduction in hard goods raids in 2010, mainly due to the penal code amendments. While in 2009, police conducted over 3000 raids against street vendors, DVD-R labs and distributors, in 2010 fewer than 1000 raids were conducted. A notable raid in July by the Madrid police successfully dismantled a gang engaged in illegal replication and distribution of music, film and videogames. Documents seized in this raid indicate that 1000 units of infringing product were sold daily. This action was held in the larger framework of a special summer campaign coordinated by the national and municipal police. While FAP receives cooperation from the police, 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. By contrast, Barcelona and several Catalan cities have effectively utilized public awareness campaigns on the illegality of street vendor piracy.

For 2010, the local entertainment software industry association, aDeSe, reports a significant decrease in the number of enforcement actions against vendors of pirated entertainment software products. Despite relatively consistent levels of piracy, arrests of vendors dropped from approximately 3,000 in 2009 to fewer than 600 in 2010. Similarly, raids of retail establishments and cybercafés engaged in the sale of illegal product were down from 198 in 2009 to 67 in 2010.

BSA reports that its work in 2010 with the police forces continued smoothly. The police typically seek BSA support to file criminal complaints, as well as industry support in technical experts and other logistics regarding raids. However, nearly all of BSA's judicial cases involve the civil courts. BSA is fully satisfied with its cooperation with the Ministry of Industry. Furthermore, in 2011 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.

The civil courts act reasonably quickly in the granting of *inaudita altera parte* search orders. However, BSA reports 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 often reasonable (between US\$2,300 to \$4,500), in some cases the bonds requested have been so costly (in one instance €120,000, approximately US\$163,090) as to make it impossible to bring the case.
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) now refuse to accept anonymous information as evidence to grant a raid, even if a bond is offered. 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 Vinces"), 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 and civil and criminal judges on copyright issues needs improvement.

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 several seminars for police and a seminar for judges.

During 2010, in addition to a training session for judges and public prosecutors hosted by the Ministry of Culture, Promusicae organized and carried out 17 training seminars and courses on intellectual property infringements and also took part in a total of 6 courses held by other associations and police academies, for a total of 1,875 attendees from the Guardia Civil, local police and National Police.

With evidence that, in a difficult economy, larger organizations are turning to unlicensed software, BSA is extending into 2011 its awareness campaign for the 200 major corporations in Spain, with the support of the Ministry of Industry. This has already 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.

MARKET ACCESS BARRIERS

Film Dubbing (Catalunya): The Catalan regional government adopted new restrictions on films released in Catalunya. Article 18 of the Law on Cinema imposes on the distributors the obligation to dub and subtitle in Catalan – the regional language – half of the analog prints, and all of the digital prints, of any film dubbed or subtitled that is to

be released in Catalonia, with the single exception of European dubbed (not subtitled) films whose distribution amounts to 15 or fewer prints. Similar obligations apply to DVD distribution. This is costly and not warranted by public demand. For independent motion picture producers, for instance, which generally release fewer prints, the per-print costs will be higher, thus constituting higher market access barriers. While promoting "linguistic access" is a legitimate goal, the means are neither suitable nor fair.

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 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.