

HUNGARY

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

2012 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that the U.S. Government should actively monitor developments in Hungary during 2012 with respect to the issues discussed in this Special Mention report.¹

Executive Summary: The copyright industries report good cooperation in general with Hungarian law enforcement officials on investigations and prosecutions, especially against hard copy piracy. However, as the nature of piracy has changed, from mostly hard copy to mostly digital (Internet) piracy, under-resourced and under-equipped enforcement officials have not been able to keep pace effectively. Additionally, there has been a recent government reorganization pertaining to the tasks of copyright administration and other related matters; while this is a positive step, it has temporarily slowed some of the legal reform and enforcement activities (as a result of budget cuts for IPR enforcement, and the loss of some IPR enforcement police and investigators). There are institutional obstacles that impede effective enforcement in Hungary, including: criminal evidentiary procedures that make proof of ownership especially burdensome and slow (requiring expert opinions for seized goods); the reluctance of prosecutors and judges to commence cases; and, the lack of deterrent sentencing for those criminal cases that do move forward. There are two legislative hurdles, one on the verge of being corrected, the other that needs to be addressed. The positive development is the Copyright Law amendments that are pending for final enactment (in 2012), that would change the current requirement of a single collective management organization for rights owners, and would permit competitive organizations (and which would eliminate the required contributions to, and levels of “cultural” deductions from rights holder monies). The other legislative concern is the absence in the law of a statutory prohibition on private copying from illegal sources. While such activity is barred by European law, the Hungarian Copyright Law would benefit from clarity on this matter.

PRIORITY ACTIONS REQUESTED TO BE TAKEN IN 2012

The copyright industries make the following recommendations of priority actions to the Government of Hungary:

Enforcement

- Implement the national action plan against piracy that was prepared (in 2008) and presented by the inter-ministerial task force known as HENT (the National Board against Counterfeiting) to the Government of Hungary.
- Encourage the (new in 2011) IT Division within the National Tax and Customs Office (NTCO) to undertake digital piracy investigations and, to commence cases against Internet piracy in all its various forms.
- Allocate more resources (including training) to police and customs officials to fight Internet piracy, and make it clear to police, prosecutors, customs officials, and the courts that copyright cases, including those against digital piracy, are a priority.
- Encourage Internet Service Providers (ISPs) to cooperate with the content industries in the fight against piracy (including encouraging the work of the HENT dedicated working group on ISP – right holder cooperation issues).

¹For more details on Hungary's Special 301 history, see IIPA's "History" appendix to this filing at <http://www.iipa.com/pdf/2012SPEC301HISTORICALCHART.pdf>, as well as the previous years' reports, at <http://www.iipa.com/countryreports.html>. For a summary of IIPA's 2012 global issues, see our cover letter at <http://www.iipa.com/pdf/2012SPEC301COVERLETTER.pdf>.



- Undertake enforcement actions against business (end-user) infringement of software.
- Develop procedural systems to aid the police and prosecutors in undertaking copyright infringement investigations, and, for cases that go forward, to encourage judges to impose deterrent sentences.
- Develop, with the copyright industries, a joint IPR enforcement public awareness campaign, including instructions on the detrimental effects of Internet piracy, CD-R/DVD-R burning, and commercial scale photocopying of books in and around educational institutions (schools, colleges, universities).

Legislation

- Revise the expert opinion system in copyright infringement cases to allow for sampling methodologies, and increase resources allocated to fund the requisite expert opinions.
- Clarify that the private copy exception does not extend to those cases where the persons making the copies have actual or constructive knowledge about the illegal nature of the source.
- Withdraw legislation that would deny compensation to foreign performers and producers of sound recordings, and also create an exception to performance rights for commercial broadcasters.
- Adopt (final steps) and implement the pending legislation (November 2011) to eliminate the legal monopoly of collective management organizations, and to eliminate the mandatory payments for “cultural” contributions taken from rights holders monies from such organizations.

COPYRIGHT PIRACY AND ENFORCEMENT IN HUNGARY

Internet piracy: As of March 2011, Hungary had almost 6.2 million Internet users, or about 62% of its population online (reflecting a more than seven-fold increase in the last decade, all according to www.internetworldstats.com). In fact, Hungary has the highest broadband penetration in Central and Eastern Europe. As a result, digital copyright piracy has grown significantly, because enforcement has not kept up with the migration from hard copy, to digital copy piracy. Digital piracy in Hungary, as in other countries, takes many forms including: peer-to-peer piracy – with BitTorrent sites being the most popular, as well as computer storage services, hyperlinked (mainly non-Hungarian) sources, and premium file transfer protocols that include pay-per-download services that occur via “sms” (a short message service, i.e., text messaging). The most commonly used peer-to-peer service is DC++, although it has steadily been losing popularity. The music and recording industry, represented by its local anti-piracy organization ProArt, initiated several criminal actions against operators and major uploaders, including criminal cases launched against the DC++ hub operators over four years ago. The recording and film industries have also successfully filed complaints with police who in turn have run several major raids over the years against BitTorrent and FTP sites.

In 2011, the largest case launched by ProArt, was the “Apollo FTP” filed against an illegal service. The IT Division within the National Tax and Customs Office, which now has IPR enforcement authority, investigated the operations of this illegal service – a premium file transfer (“sms”) service. Their investigation revealed that profits from illegal activity over a four year period was 100 million HUF (Hungarian Forint) or approximately US\$450,690; two persons were taken into custody and several computer servers were seized, and the criminal case is now proceeding. One of the largest internet movie piracy enterprises (a “release” group) was also uncovered – Cinedub – as part of that investigation. Other services have been gaining popularity which feature illegal film and television programs, including video streaming sites via YouTube and videa.hu.

There are two major Internet-based piracy cases about to go to trial (in 2012), as a result of good cooperation with rights holders and enforcement authorities. Additionally, the IT Division in NTCO was able to disable

and take down Cinedub, as a result of the investigation noted above; Cinedub was one of the largest pirate networks in Hungary.

The Entertainment Software Association (ESA) reports that online entertainment software piracy consists primarily of file sharing and commercial FTP servers offering pirated content. According to a 2011 ESA study, Hungary is in the top 20 countries worldwide in terms of the number of detected connections from peers participating in unauthorized file sharing (taken from a sampling of ESA titles on public peer-to-peer networks). The ESA reported that in 2011, the police did seek additional support from ESA in investigations (pertaining to uploading and downloading cases), and that this cooperation resulted in almost all of the new cases commenced in 2011. There is also one major case, held over from 2010, involving an FTP server (including film and music predominantly) which ESA is also assisting on, but which has not yet gone to trial.

Entertainment software piracy: The majority of entertainment software piracy in Hungary is now digital piracy, in the various forms already described. ESA reports the entertainment software hard copy piracy consists primarily of material made for personal computers, with a smaller portion of material being made for use platforms, such as on Xbox360 and PS2/PS3 players. Thus, in addition to the extensive downloading of games in Hungary, ESA reports that locally burned pirated game discs, produced in small quantities or on-demand by small dwelling operations, or in burning labs, continue to be available at flea markets and through small retail shops (some of which accept orders for specific titles), although hard copy piracy is generally on the decline (as it is replaced by digital piracy).

The ESA reported about 40 cases that were commenced by local enforcement officials aimed at entertainment software piracy; that is down considerably from the nearly 170 cases undertaken in 2010. Since hard copy piracy has been the main target of enforcement officials, even as Internet piracy increases, the diminishing amount of hard copy piracy is likely the “reason” for the decline in enforcement cases. There were also 10 cases in 2011 that ended due to insufficient evidence or the inability to properly identify the infringer; often times cases are hampered by the lack of communication between investigative authorities and rights holders (who could provide substantive evidence to help with prosecutions). There were 10 cases that did result in sentences in 2011, although, as with the other copyright industries, most included very low fines or sentences. With cases taking at least two years in some instances, criminal defendants often have the ability to plea to small fines or suspended sentences, for the few cases that do proceed.

Business software piracy: Business Software Alliance (BSA) reports that during 2011, while the NTCO did conduct raids, most were directed against individuals, and not large (or even small) business enterprises engaged in end-user piracy. Almost half of the raids were conducted because of other, non-IPR related, criminal activities, highlighting the low priority of IPR enforcement. As is true for all of the other copyright industries, the consolidation of IPR enforcement authority – effective January 1, 2011 – means NTCO has the authority for software piracy cases. The BSA reported that NTCO is undertaking *ex officio* actions and does have dedicated IPR enforcement personnel for all the regions of Hungary (but, unfortunately, there are no dedicated prosecutors for such cases).

The BSA reported in 2011, there were about 90 total raids undertaken; they further reported that in civil and/or criminal investigations that followed, about 70% to 75% of the cases resulted in some fine being imposed, but that the targets, and the fines, were very small. The courts rely on expert opinions to assess damages (in some cases using the street price as the damages price), which means that the cases are expensive (and take a long time to proceed), and the fines imposed are very low. Of the total number of raids involving software piracy, almost all concerned end-user piracy.

Piracy of books and journals: The book and journal publishing industry reports that unauthorized photocopying of academic textbooks in and around university campuses continues to be problematic. While there has been some improvement in the market, progress remains slow. Law enforcement authorities have been

responsive to rights holder requests for actions against copy shops while also undertaking a few actions *ex officio*. Prosecutions, when they occur, unfortunately continue to be very slow.

Audiovisual piracy: As with the other copyright industries, the motion picture industry (MPA) and ASVA (the local film industry anti-piracy group) report that 2011 continued the migration from hard copy piracy to Internet piracy. Hard copy piracy exists, but is decreasing in size and scope; it consists of locally burned pirate DVD-Rs sold at flea markets, by street vendors, and in video retail shops. MPA and its members have worked with local theaters and police to address camcording of films, and report some success. With the consolidation of IPR enforcement in NTCO, the MPA reports good cooperation, especially with the new IT Division (established in March 2011). MPA has also had good relations with customs and tax enforcement authorities. MPA reports, however, that most NTCO *ex officio* actions, to date, have been directed at hard copy (burned disc) operations, and not at Internet sites. They report good cooperation with NTCO on the hard copy cases, but the same obstacles as other copyright industries: namely, prosecutorial and investigative delays, and the lack of deterrent sentences in the cases that do go to trial.

One concern for all of the copyright industries, is the definition and calculation of damages caused by illegal online content services. While anti-piracy groups insist that such calculations should be done based on the value of the (many) works being made available, the current procedures usually apply the “retail” (pirate) price of a single work – the difference of damages being a few dollars per work versus the thousands of dollars in damages caused.

Hard copy piracy: Hard copy piracy, in general, is on the decline in Hungary, and the police are bringing fewer (and smaller) cases. These cases include some street piracy including flea markets and independent retail stores, but mostly involve burned optical discs replicated in small facilities (or dwellings), that mass-produce CD-Rs and DVD-Rs (especially because of the relatively low local prices of CD and DVD-R burners and blank CD-Rs). CD-burning is done by private users – especially students and small retail operations, and organized syndicates in some cases. The pirate product is predominantly distributed through Internet sites, or via advertisements in newspapers, and in small retail shops.

There is one optical disc factory in Hungary; the plant has been issued and does use SID codes. There are regular plant visits (by ProArt), including the collection of exemplars and lab testing, and there is no evidence or reason to believe that this factory is used for an illegal activity.

Inter-Ministerial Task Force (HENT): It has been five years since the Hungarian government agreed to establish an Inter-Ministerial IP task force (in January 2007). This task force, known as the National Anti-Counterfeiting Body (HENT), is under the Ministry of Justice and Law Enforcement and coordinated by the Hungarian Patent Office and is composed of government and industry representatives. HENT’s objectives include cooperating in developing the national strategy against piracy and counterfeiting, preparing awareness campaigns, coordinating the activities of the state bodies and non-governmental organizations, and preparing legislative proposals, among others. The government accepted the HENT plan, as a new national strategy, on October 1, 2008. The three pillars of the strategy involve: statistics, raising public awareness, and enforcement.

In 2011, a new working group within HENT was created to try to develop a cooperative enforcement plan with ISPs and rights holders. Additionally, HENT has been working with the BSA on developing a new government procurement policy that would require companies contracting with government agencies to ensure their use of legal software. IIPA encourages both of these undertakings.

In 2005, ASVA, BSA and ProArt (together the three groups are known as the Alliance for Copyright Protection) signed a co-operation agreement with the Anti-Crime Division of the National Police Headquarters, confirming their intention to collaborate in a united effort to address copyright crime. These three groups also signed a similar agreement with APEH (the Tax and Financial Control Administration) aimed at assisting government efforts to crack down on the “black economy” and the losses sustained by Hungary’s economy as a result of piracy. Parties to the cooperation agreements provide expert assistance, training and technical information. In 2007, a new sub-

department of the Budapest Police was established to deal specifically with online infringements. Thus, in sum, the apparatus is there for effective enforcement, including good cooperation with rights holders. However, budget cuts, and the lack of sufficiently available trained enforcement officials, along with the procedural and other institutional obstacles, are not resulting in effective enforcement, especially for Internet piracy.

Border enforcement is a longstanding concern, especially because of Hungary's proximity to Ukraine, Slovak Republic, and Russia, and the possibility for cross-border traffic in hard copy materials. The border patrol was integrated into the police (formerly, the IPED – Intellectual Property Enforcement Department within Customs), into the new NTCO. In theory, this should facilitate border officials, working on Internet piracy investigations, and working with the tax administration, to initiate tax cases.

One procedural hurdle has been long-identified: expert opinions given to the police by registered “experts” of intellectual property are often plagued with errors. There are a number of experts in the Hungarian Copyright Experts Council (appointed by the Minister of Justice and Law Enforcement and linked to the Hungarian Patent Office) who work with industry and are well versed in the nature of piracy, but it is always up to the authorities to choose the expert they wish to get the official opinion from. The practical problem is that the authorities have developed their “favorites,” who are not necessarily fully qualified. The expert opinion system should be revised to allow for sampling methodologies. Resources allocated to fund the requisite expert opinions should also be increased (the police budget for judicial expert fees has been significantly decreased).

The copyright industries reported, as they have in prior years, on numerous training programs that they have conducted with IPR enforcement officials, and stand ready to continue to conduct such programs in 2012. With the reorganization, many of the copyright industries report on the need to have more and better trained police, prosecutors and judges.

LEGAL REFORMS

Copyright law: Hungary has amended its copyright law (the Copyright Act No. LXXVI of 1999, as amended) to comply with international norms and accede to the European Union. It also has implemented the relevant EU Directives, including the EU Information Society Directive, the EU Enforcement Directive, and the EU Resale Right Directive. In Hungary the Electronic Commerce Act (Act CVIII of 2001) contains detailed regulation with respect to ISP liability and also includes a notice and takedown procedure. The Act is in full compliance with the EC requirements laid down in the relevant EC Directives (basically 2000/31/EC and 98/27/EC). At the end of 2008, the Parliament adopted a law to amend the Copyright Act (in particular, extending the application of the public lending right and regulating the use of “orphan works”). The amendments entered into force on February 1, 2009; the entry into force of the orphan works provisions was postponed until the publication of the implementing government decree (May 16, 2009). A new law on data protection and privacy was also adopted, and came into force on January 1, 2012.

In September 2011, Hungary also fully implemented the extension of term for sound recordings from 50 to 70 years from fixation.

IIPA members have two long-standing legal reform recommendations (concerns). First, IIPA and its members remain concerned that the private copy exception might be interpreted to extend to copies from illegal sources; IIPA recommends that the law be clarified. Second, there is the long-standing concern regarding the monopoly positions of certain collecting societies, and the existing required deductions (taken from rights holder monies) for “cultural” purposes. Legislation to allow for other entities, including foreign entities, to operate collecting societies and to eliminate the mandatory contributions is nearing final enactment. IIPA and its members are encouraged by this development and hope it can and will be finalized in 2012.