

SPAIN

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

2012 SPECIAL 301 REPORT ON COPYRIGHT ENFORCEMENT AND PROTECTION

Special 301 Recommendation: IIPA recommends that Spain remain on the Special 301 Watch List in 2012.¹

Executive Summary:² IIPA applauds the Government of Spain for taking swift action in December 2011 to implement the Law on the Sustainable Economy (LES), establishing a mechanism for the removal of pirated content on hosted websites, and, we understand, for addressing linking sites and indexers. The action sets in motion a much needed procedure for rights holders to engage with Internet Service Providers (ISPs), in a manner that respects principles of due process. It also makes an important statement on behalf of creators: there can and must be a reasonable means to respond to blatant violations of law, even if those violations occur in the digital environment. IIPA will continue to support the Spanish Government as it moves forward in 2012 to put the Commission established by the LES to work, in the hopes that it will continue to remove obstacles to fighting the widespread piracy that plagues its market, not only in the hosted web environment but in all forms – many of which have overtaken online hosted piracy in both scope and sophistication. In 2012, the highly connected Spanish market remains largely out of reach for legitimate digital content due to Spain's persistently high levels of Internet piracy, which emerge in particular through peer-to-peer (P2P) platforms that will largely remain unaffected by the recently implemented LES amendments.

Coordinated leadership is needed both in legislative reform and on all fronts of Spain's enforcement efforts to turn Spanish consumers from infringing materials to legitimate products, in the face of an Internet piracy problem that, for many of the copyright sectors, has decimated the Spanish market. The cooperative relationships that rights holders report with police officials and the Ministry of Industry are highlights to be replicated across the Spanish judicial system. Illegal downloading of content via P2P file sharing has been effectively immune from prosecution due to a long-standing statement by the Attorney General decriminalizing the activity. This will need to be revisited by the Spanish Government in light of the implementation of LES. Meanwhile, Spain's laws fail to establish the necessary tools to obtain the identity of a direct infringer, making civil piracy actions impossible. As a result of these and myriad legal defects, police frequently refuse to take Internet enforcement actions. Certain amendments to the Penal Code have made enforcement more complicated and undermine what positive efforts enforcement authorities have demonstrated in 2011. As a result, pirate product and circumvention devices enabling the 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 2012

- Correct the Attorney General's May 2006 Circular that decriminalizes infringing downloads over P2P networks, and that continues to prevent authorities from pursuing cases against Internet piracy.

¹IIPA applauds the Government of Spain for its swift implementation of the Law on the Sustainable Economy (LES). Given the significance of this step, some IIPA members were of the view that Spain should be removed from the Watch List at this time. However, other IIPA members believe that removal would be premature given the work that lies ahead and the perilous state of the Spanish market at the time of this filing.

²For more details on Spain'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>.



- 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, consistent with the 2008 European Court of Justice (ECJ) decision in *Promusicae vs. Telefonica*.
- Expediently move forward with establishment of the Spanish Copyright Commission to complete implementation of the provisions of the Law on the Sustainable Economy that address web-hosting of pirated content, and, consistent with representations of the Spanish Government, ensure their application to linking, indexing and torrent sites.
- Amend Spain's e-commerce laws to clarify that rights holder-submitted notices of infringement are capable of imparting ISPs with effective knowledge that infringement is occurring through its service without a court order.
- Incentivize ISPs to cooperate in efforts to stem infringing file sharing activities.
- Take appropriate legislative steps to ensure that circumvention devices are illegal.
- Introduce changes in legislation to facilitate civil cases against software piracy, by avoiding bonds for *ex parte* raids, permitting anonymous evidence to initiate *ex parte* raids, and clarifying that compensation of damages must be valued at least at the full retail value of the infringed goods or copies.
- Establish a national authority to coordinate Internet piracy enforcement, and ensure allocation of adequate resources for investigation of Internet and computer crimes within the Ministry of Interior, the Guardia Civil, and the Cuerpo Nacional de Policía (National Police).
- Ensure allocation of appropriate resources for Criminal Courts and Commercial Courts ("Juzgados de lo Mercantil") that have jurisdiction over IP cases, to avoid unnecessary delays.

COPYRIGHT PIRACY IN SPAIN

Spanish consumers are remarkably Internet-savvy. But unfortunately, as such a well-connected population³ exists within a market that to date has been completely void of rule of law on the Internet, there is little to deter the average consumer from participating in an online free-for-all for copyrighted content. Street piracy in Spain has diminished in recent years, but only to an extent attributable to the uptake in digital infringement. 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: Internet piracy in Spain began to skyrocket in 2007, and it has continued to grow at a tremendous rate. Today, Internet piracy in Spain takes place via hosted websites, linking sites that direct users to infringing content stored in "cyberlockers" and BitTorrent networks, more "traditional" P2P networks, and streaming sites. Comparative studies by the music and videogame industries, and information from the independent motion picture industry, continue to show that Spain has one of the worst Internet piracy problems in the world, and has already suffered damaged to the distribution infrastructure for legitimate content. According to the Anti Piracy Federation (FAP), whose members include film and videogame groups in Spain, 55% of digital piracy in Spain occurs via P2P networks, 34% via hosted websites, and 11% by streaming sites. By the end of 2010, Spain had 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%).⁴ For the independent motion pictures, Spain ranks consistently among the worst countries in which unfettered

³As of June 2011, 29.1 million Internet users comprise 62.2% of Spain's population (According to www.internetworldstats.com).

⁴According to The Nielsen Company, October 2010.

and unlicensed downloading and streaming have damaged the ability of independents to finance and distribute content and also to identify and license their content to legitimate online distributors.

Online Music Piracy: Spain has been one of the worst performing music markets in Western Europe over the last five years. Today, Spain's music market is approximately one-fifth of its 2001 size,⁵ 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 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 Spanish counterpart of the National Music Publishers' Association (NMPA), 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 significantly worsened in 2011. For the videogame industry, online piracy via illegal downloads has completely overtaken hard goods piracy in Spain. More and more of these sites are beginning to include cyberlocker links for direct downloads of infringing material. There are about 30 major websites offering links to unauthorized downloads of videogames in Spain. These links mostly direct users to cyberlockers and BitTorrent files, while some link to files for downloading via the eDonkey P2P network, which is still very popular in the country. ESA reports that in 2011, Spain placed fifth in the world in the number of connections by peers participating in the unauthorized file sharing of select ESA member titles on public P2P networks.⁶ Spain's Telefonica de Espana ranked second among the world's ISPs in the number of connections by subscribers participating in the unauthorized file sharing of select ESA member titles. To date, Spanish ISPs have shown no willingness to cooperate with rights holders and stem infringing activity on P2P networks, allowing these staggering levels of online videogame piracy to continue. Widespread availability of circumvention devices and services significantly contributes to growing Internet piracy, as downloaded infringing video game software can only be played on consoles modified by such technologies.

Digital and hard goods piracy of independent films and television programming. The independent film and television industry represented by the Independent Film & Television Alliance (IFTA) produces about 75% of all U.S. films, with most of these films financed, produced and internationally distributed outside of the six major Hollywood studios. Independent producers partner with national distributors worldwide to finance production and

⁵The value of physical recorded music sales in Spain has decreased from €102 million (US\$134 million) in 2001 to just €128 million (US\$171 million) in 2011, which means an 83% decrease in value. Total recorded music sales (including physical and digital sales) are now €149 million euros (US\$196 million). In unit terms, sales were 73 million in 2001 and only 13 million in 2010, a drop of 82%. Because of these falling sales, more than 50% of the employees of the music sector have lost their jobs in the last few years.

⁶ESA's reporting on P2P activity does not take into account downloads of these titles that occur directly from hosted content, such as games found on "cyberlockers" or "one-click" hosting sites, which appear to account each year for progressively greater volumes of infringing downloads.

secure distribution on a country-by-country basis. Piracy has damaged the ability of independent producers to raise production funding in order to produce films.

The health of Spanish distributors is of vital importance to the independent film industry, and piracy remains a significant constraint for independent producers and distributors, the majority of which are small- to medium-sized businesses that rely on local distributors in Spain to form partnerships for the finance and distribution of independent films. When legitimate Spanish distributors and businesses must compete with “free” illegal copies (digital or hard good), they can no longer afford to partner with independent producers to provide minimum guarantees toward licensing fees which assist the producer in financing the production. Once part of a flourishing marketplace where an independent producer could receive as much as 10% of a production budget from a minimum guarantee of a license fee, surviving Spanish distributors may now be able to guarantee only 2 to 3% of the film’s budget, if any.

Internet piracy not only continues to prevent the establishment of legitimate online distribution platforms and services for consumers, but has damaged the ability of independent producers to finance and then license their content online, via DVD, Video on Demand or other platforms in Spain. It is not enough to direct consumers to legitimate sources if in fact they can access the content for free. These rogue sites must not be allowed to deal in unlicensed content for their own gain and benefit. Piracy is devastating the legitimate distribution channels in Spain in favor of rogue web site operations.

Street piracy: Street piracy continues in Spain and, while it has diminished for some copyright sectors, overall remains steady as an unacceptable problem for copyright industries in Spain. Pirate networks running illegal sale activities in the streets and flea markets seem to be mostly selling film DVDs.

Street piracy of music and sound recordings: Physical piracy of music in Spain did not increase in 2011, 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%. In 2010, 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 – 69% 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 2011, although a general decrease has been seen in the volume of physical piracy of music in favor of film piracy. It should also be highlighted that the number of street sellers has increased since the entry into force of the amendment of the Criminal Code at the end of 2010, which defines the street sale of illegal goods valued under 400 Euros as a minor offense instead of a criminal offense.

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 declined an additional 11% in 2011 after its the spectacular 21% collapse in 2010. 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, the implementation of the Law on the Sustainable Economy represents the only meaningful steps 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 3,332 signatures as of January 2012.

Hard goods piracy of entertainment software: Hard goods piracy of videogames has declined as Spanish consumers increasingly turn to the Internet to download pirated games. However, street vendors are still easily seen in Madrid, Seville, Alicante, Valencia, Oviedo, Gijón, and Vigo. The widespread availability of mod chips and game copiers that bypass technological protection measures (TPMs) are central to the overall piracy problem for the industry, as these devices are needed to produce and play unauthorized copies of entertainment software. Due to deficiencies in Spain’s laws and enforcement discussed in further detail below, circumvention of videogame console TPMs remains an enormous challenge for the entertainment software industry.

Hard goods piracy of film and home video entertainment: Hard goods piracy, when combined with online piracy, deals a devastating one-two punch to independent producers that further lowers the licensing fees that can be paid by authorized Spanish distributors. Street vendor activity is easily visible in Alicante, Madrid, Sevilla, and Valencia, and particularly in Spain’s northern regions, included Gijón, Vigo, and Oviedo.

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. Spanish-sourced copies appear 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. While not an anti-piracy tool, the independent film industry reports that independent producers are less likely to have the ability to coordinate “day and date” releases amongst their national distributors, leaving them and their authorized distributors especially vulnerable to piracy stemming from camcording piracy. The public prosecutors are generally not inclined to prosecute criminal cases.

Business software piracy: The Business Software Alliance (BSA) reports that business end-user piracy remains the most damaging of several sources of piracy of business software in Spain. Small- to medium-sized enterprises (SMEs) in particular contribute to widespread corporate use of unlicensed software. Internet piracy also continues to present significant challenges in the business software market.

Spain is a country largely characterized by SMEs, among which levels of piracy are still considerably more rampant than among the larger corporations that might characterize other markets. 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.⁷

⁷See The Economic Benefits of Reducing PC Software Piracy, available online at <http://portal.bsa.org/piracyimpact2010/index.html>. BSA’s 2011 software piracy statistics will not be available until after the filing deadline for this submission, but will be released in May 2012, at which time piracy rates and U.S. software publishers’ share of commercial value of pirated software will be available at www.iipa.com. In 2010, the software piracy rate in Spain was 43%, representing a commercial value of unlicensed software attributable to U.S. vendors of US\$663 million. These statistics follow the methodology compiled in the Eighth Annual BSA and IDC Global Software Piracy Study (May 2011), <http://portal.bsa.org/globalpiracy2010/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 2012 Special 301 submission at <http://www.iipa.com/pdf/2012spec301methodology.pdf>.

COPYRIGHT AND RELATED LAWS IN SPAIN

The end of 2011 brought a major change in direction for the legislative prospects of copyright protection in Spain. After months of inaction on the part of the Zapatero Administration to implement the Sustainable Economy Law that was adopted in early 2011, Spain's new government wasted no time in adopting the awaited regulations at the end of December. IIPA members greatly appreciate this action of the Spanish Government, both for the anticipated improvements in enforcement against Internet piracy, and for the demonstration of political will that it represents. As a result, rights holders anticipate the ability in 2012 to initiate much needed procedures that will facilitate the removal of infringing content from hosted websites, and hopefully effective actions against linking sites and similar sites.

Still, many legislative challenges in Spain remain to be addressed. Ambiguities in Spain's laws have made criminal online infringement actions impossible, and rights holders still lack many of the legal tools needed to bring civil actions against online piracy committed by users or websites that choose more evasive methods than simple hosted piracy. While the Sustainable Economy Law as implemented will now enable action against certain forms of piracy – the laws in Spain need immediate attention in the coming year to address the many types of infringement that may still elude enforcement, including P2P filesharing. There are also significant gaps in the Spanish legal infrastructure for the protection of copyright works under technological protection measures (TPMs) from illegal circumvention devices.

IIPA members welcome corporate liability amendments to the Criminal Code that were introduced in 2010, but other penal code amendments have severely limited the available remedies against unauthorized distribution by street vendors. 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 Law: On December 30, 2011, the Spanish Government adopted much-anticipated regulations implementing the comprehensive bill called the Law on the Sustainable Economy (LES). The implementing regulations establish a Commission for the administration of notices and removal orders regarding infringing hosted online content. The enactment of the LES and establishment of Section 2, the Spanish Copyright Commission in charge of these of infringements, serves as a major step to address hosted illegal content – one of the pervasive forms of Internet piracy in Spain. Rights holders will be closely monitoring how the Spanish Government employs its new powers and ensures access to remedies and enforcement mechanisms for rights holders. We look forward to robust implementation of the LES, and in particular await action by the Commission to ensure that the law effectively applies to torrent and linking sites, as Spanish authorities indicated would be the case.

Under the 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 ask a tribunal for authorization to block access to the site through an ISP. 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 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. The procedure has, as predicted, generated significant pushback from the Internet user community, and much of the popular coverage of the law has mischaracterized the scope of the Commission's authority. The proposed law is narrowly tailored to handle hosted piracy specifically; it does not, for example, address copyright infringement committed by end users. It is also comprehensive in its effort to ensure judicial review and due process. 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).

P2P Enforcement—The 2006 Attorney General’s Circular: Statements issued by the Attorney General in 2006 de-criminalizing infringing distributions of content by P2P networks continued to have ramifications in 2011, having led to a halt in criminal enforcement actions against illegal filesharing, and 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 of 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 undermined criminal 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. In previous years 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 Appellate Courts following appeals by private prosecutors, but the Criminal Investigation Courts have continued to disfavor criminal liability in P2P cases. The Attorney General has refused industry requests to discuss the Circular, which remains in effect six 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 did not carry out any new actions in 2011 against the illegal downloading of copyrighted music content. On the whole, effective police action is not feasible today. At the end of 2011, the Attorney General’s Office created a new position, a Prosecutor specialized in Cybercrime, who will coordinate the activities performed by the Prosecutors that deal with cybercrime cases.

In the aftermath of the Circular, Spanish courts have declared that merely linking to infringing files is not a criminal offense under the Spanish Criminal Code.⁸ ADESE reports that of the four criminal cases brought against operators of infringing online services, two were dismissed on the grounds that the provision of links to infringing material is not an infringement of the communication to the public right. In one case, however, based on a criminal complaint filed by aDeSe, the Spanish game industry association, the Provincial Court of Vizcaya found the operators of two prominent Spanish linking sites, FenixP2P.com and MP3-es.com, guilty of criminal copyright infringement. The court reasoned that the provision of links to infringing content hosted on third-party servers was a communication to the public due to the defendants’ “technical intervention,” which involved indexing, ranking and commenting on the infringing works to which they linked.

Incentives for ISP involvement in the removal of pirated content: Up until the end of 2011, there existed no incentive for Spanish ISPs to cooperate in the removal of infringing content from the web. With the establishment of Section 2 of the Spanish Copyright Commission in December 2011, a mechanism now may be put into operation whereby illicit content is declared infringing, establishing effective knowledge on the part of the relevant ISP for purposes of potential liability. The procedures put in place by the LES will permit rights holders to initiate the Spanish Copyright Commission review of allegedly infringing content, for eventual notification to the responsible party and removal of the infringing content or presentation of a defense.

Outside of the scope of the Commission’s authority, a problematic loophole in Spain’s Information Society Services and Electronic Commerce Act (LSSI), combined with other shortcomings of 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

⁸In 2011 there were several final (unappealable) decisions: Indicedonkey (Madrid), Edonkeymania (Madrid) and Zackyfiles (Zaragoza).

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 its site or service (a standard not in line with Article 14 of the E-Commerce Directive, which refers to “actual knowledge”). 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. Despite the implementation of the Law on Sustainable Economy, due to these loopholes the LSSI ultimately fails to effectively implement the EU E-Commerce Directive. The Law on Sustainable Economy enables an existing administrative authority to take this kind of action; however, the LSSI still fails to meet the important 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 remain 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 ECJ also established 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. The Spanish Government in 2011 rejected proposals to amend Article 256 of the Civil Procedure Law (the LEC) to remedy this shortcoming.

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 bring P2P infringers to justice, both in the civil and in the criminal courts.

Anti-Circumvention Measures – WIPO Internet treaties obligations: Spain has ratified 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. To come fully into compliance with these treaties, Spain needs to address significant gaps in its legal structure for the protection of copyright works that are protected by technological protection measures (TPMs) against circumvention devices. Spanish courts have erroneously concluded that devices primarily designed for purposes of circumvention are lawful when capable of some ancillary non-infringing use. While these courts arguably are improperly interpreting the law, legislative amendments would ensure that the provisions function as intended to effectively prosecute the manufacture and distribution of circumvention devices.

Rights holders continue to face challenges in prosecuting individuals or entities engaged in the trafficking of circumvention devices or the provision of services related to circumvention devices, 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 upon proof that the “sole purpose” of the device is to circumvent TPMs in order to facilitate piracy. 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 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.

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

With the recent implementation of the Law on the Sustainable Economy, copyright industries are hopeful that the Government of Spain will take further action to provide needed tools to address devastating piracy in Spain. It is important that the Spanish Government provide a strong message of its intent to combat piracy by following through with implementation and effectively encouraging the Spanish consumer to embrace the benefits of accessing licensed content through authorized online distributors. As in 2010, 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.

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, particularly in the digital realm. Attendance of industry organized seminars among judges and public prosecutors is limited, as they tend to favor only official seminars provided by the General Council of Judges (the CGPJ). Attendance among police officials, however, has been very high. Judges and public prosecutors show little interest in prosecuting IP crimes in general. Court procedures suffer from lengthy delays, lasting on average 18 months, and appeals are brought before regional courts with different and unpredictable criteria.

In addition to the priority actions mentioned in the Executive Summary, IIPA encourages the Government of Spain to take the following enforcement steps in 2012:

- Develop and implement an effective national campaign on the importance of intellectual property rights through educational, press and similar public outlets.
- 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.
- 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.

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 local industry, Spanish police raided 9 pirate website raids and dismantled two release groups in the first 11 months of 2011. 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, of which only 35 have yet been subject to administrative procedures. Of these, just over half were dropped, as the Ministry

found no grounds for administrative infringement. Only 16 cases have been initiated to date, but so far none have been subject to sanction.

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 three so far have resulted in convictions, one of which was issued in 2011.⁹ 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.¹⁰

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 two to three 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 served after the first petition, but the court of first instance did not issue a final decision until December 2011, when it dismissed the case.

Additional enforcement problems include:

- Detailed forensic reports must be delivered within the stringent 72-hour 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.
- 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 the vast majority of actions involving physical piracy of music and sound recordings. 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 carried out in 2011 by the Madrid local police, Guardia Civil and the National Police, were 24 raids against organized pirate groups in the provinces of Alicante, Almería, the Balearic Islands, Barcelona, Granada, Madrid and Valencia. As a result of these police actions, 116 people were arrested and over 400,000 pirate carriers and 910 burners were seized. In a coordinated action on December 13, the Guardia Civil raided entertainment premises in several Catalonian provinces and seized jukeboxes machines. The company preparing and distributing pirated music for the jukeboxes was also raided, and 3 people were arrested for unauthorized reproduction for the public performance.

⁹Vizcaya Appeal Court handed down an unappealable ruling dated 27th September 2011, sentencing the administrators of two websites to one year imprisonment and fines for linking to copyrighted works.

¹⁰In 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.

	Actions	Arrested People	Total Carriers	Recorded Carriers		Blank Carriers		Burners	Inlays	Juke-boxes	Hard Drives
				CD-R	DVD-R	CD-R	DVD-R				
2009	3571	1820	1342451	631,163	680,210	14,256	16,822	928	151,947	11	21
2010	4,788	1,199	792,828	347,828	424,217	40,900	9,654	506	103,664	8	35
2011	1,636	582	809,072	355,851	422,217	12,579	18,425	918	110,419	13	94

Spain: Anti-piracy operations, years 2009, 2010 and 2011. The 2011 data above is not yet final as more information may be provided by the enforcement agencies.

ADESE, the Spanish entertainment software industry association, reports continuing difficulties in prosecuting individuals engaged in the distribution of illegal circumvention devices in 2011. Police forces do not accept complaints due to the expectation that judges are likely to find no grounds for conviction. Of the four criminal decisions issued on circumvention devices in 2011, half were dismissed by judges on grounds that the device had ancillary uses apart from circumventing antipiracy measures.

BSA reports that its work in 2011 with the police forces continued smoothly. There were 13 raids against infringing end-user companies in 2011, resulting in the recovery of substantial damages. In addition, 246 cease and desist letters were sent to infringing end-user companies, four cease and desist letters to illegal distributors, and one takedown notice in a case of Internet software piracy. The police typically seek BSA support to file criminal complaints, as well as industry support in technical experts and other logistics regarding raids, but occasionally police forces initiate *ex officio* actions. 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.

In a recent positive development, in 2011 the General Prosecutor of the State established a Prosecutor's Office for Computer Crimes. 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 must correspond to at least full retail value. This was confirmed by other recent lower court decisions, including the judgment issued by the Juzgado de Primera Instancia núm. 6 de Logroño y Mercantil de la Rioja, on April 15, 2011.

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.

During 2011, in addition to two training sessions for public prosecutors hosted by the Ministry of Culture and the Prosecutor's office respectively, Promusicae organized or took part in a total of 19 training seminars and courses on intellectual property enforcement. A total of 1,575 people attended from the Guardia Civil, local police and National Police. Eight of the seminars were hosted by the Madrid University URJC through its *Catedra Legalitas*. A total of 723 certificates were issued.

BSA is cooperating with the Ministry of Industry to continue its ongoing awareness efforts, and specifically with the Secretary of State for Telecommunications and the Information Society (SETSI), which regulates telecommunications, including ISPs. SETSI has allocated an investment of at least 200,000 Euros for a new awareness campaign. The Campaign aims to reduce levels of piracy among illegal channels, and in a new initiative, to target SMEs for similar results in piracy reduction. Since BSA's awareness work with the Ministry of Industry began, the level of piracy in the specific field of illegal resellers reduced dramatically to 21% (although software piracy levels by business end-users have not improved). 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.

MARKET ACCESS BARRIERS

Film Dubbing (Catalunya): Independent film producers still suffer from restrictions adopted in July 2010 on films released in Catalunya. Article 18 of the Law on Cinema, adopted by the regional parliament, 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.

Screen Quota: The independent film sector also faces discriminatory screen quotas that disadvantage U.S. and non-EU country films, and stifle development of Spain's theatrical market. 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.