

# SPAIN

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

### 2013 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that Spain be placed back on the Special 301 Watch List in 2013.<sup>1</sup>

**Executive Summary:** Contrary to the expectations surrounding the implementation of ley Sinde that led to Spain's removal from the Special 301 Watch List last year, Spain saw no positive developments in 2012. The landmark adoption of regulations to implement the Law on the Sustainable Economy (LES) in late 2011, through Royal Decree 1889/2011, introduced much needed procedures to facilitate the removal of infringing content from hosted websites and actions against linking sites and similar sites, which are at the center of a digital market mired in record levels of piracy. But, to the great disappointment of IIPA's members, the IP Commission established under the LES procedures has been extremely slow in response to rights holders' complaints. To date, only two websites have closed in response to complaints submitted to the IP Commission by IIPA's member affiliates, and those websites closed voluntarily. As of yet the IP Commission has not once made use of its authority to request a judicial writ from the Administrative Court to order the closure of a single infringing website or service. Meanwhile, IIPA is aware of at least 80 complaints that remain outstanding. Whatever deterrent effect against online infringement the initial introduction of the measures had has now been halted by government inaction, as the LES procedures in practice have proven to be ineffectual. More than ever, websites providing or linking to illegal content can be secure in the knowledge that takedown measures are nonexistent and result in no consequences.

IIPA urges the Government of Spain to take a broad look at its intellectual property enforcement regime in 2013, and develop a national campaign incorporating (1) improved resources for the IP Commission to allow complaints to move forward toward speedy resolution, making full use of its enforcement powers under the new legislation, (2) clarifying instructions to prosecutors (and, if necessary, legal reforms) to permit civil and criminal efforts against Internet piracy and corporate end-user software piracy to resume, (3) an effective public awareness campaign on the importance of intellectual property rights, (4) cooperation among agencies and with regional governments on anti-piracy strategies and actions, (5) training for prosecutors and criminal and civil judges to increase their knowledge of intellectual property rights and the impact of piracy, and (6) focused attention on well-known markets for widespread street piracy, with increased *ex officio* actions against labs and street sales and follow-through by prosecutors and courts.

### **PRIORITY RECOMMENDED ACTIONS FOR SPAIN IN 2013**

- Correct the Attorney General's May 2006 Circular that effectively decriminalizes infringing downloads over peer-to-peer (P2P) networks, and that continues to prevent authorities from pursuing cases against Internet piracy and against the illegal copying of software on user computer systems.
- 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 v. Telefonica*.
- Provide adequate resources and improve the functioning of the Spanish IP Commission to use and enforce all of the provisions of the Law on the Sustainable Economy that address web-hosting of pirated content, and,

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<sup>1</sup>For more details on Spain's Special 301 history, see IIPA's "History" appendix to this filing at <http://www.iipa.com/pdf/2013SPEC301HISTORICALCHART.pdf>, as well as the previous years' reports, at <http://www.iipa.com/countryreports.html>. For a summary of IIPA's 2013 global issues, see our cover letter at <http://www.iipa.com/pdf/2013SPEC301COVERLETTER.pdf>.



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 effective means of providing Internet service providers (ISPs) knowledge that infringement is occurring on their services without court orders.
- Amend the incorrect implementation of the right of information contained in article 8 of the Enforcement Directive in the Civil Procedure Law (Ley de Enjuiciamiento Civil) so the "commercial scale" requirement is only applicable to intermediaries, not also to their clients as set out under the current Spanish Law.
- Amend the Intellectual Property Law in order to clarify that linking sites are infringing and can be prosecuted.
- Incentivize ISPs to cooperate in efforts to stem infringing file sharing activities.
- Take appropriate legislative steps to ensure that the commercial dealing in circumvention devices is a criminal offense.
- 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.
- Establish clearly defined lines of communication between rights holders and authorities in the National Tax Agency devoted to tax fraud and smuggling linked to IP infringement, and work with electronic payment services such as VISA, MasterCard, and PayPal to block payments to distributors of pirate product.
- Seek agreements between rights holders and major online advertising services such as AUTOCONTROL and IAB Spain, along the lines of the efforts in 2012 by the Coalition of Creators and Content Industries (*Coalición de Creadores e Industrias de Contenido*) toward the removal of advertising from websites offering illegal material.

## **COPYRIGHT PIRACY IN SPAIN**

For the Internet-connected Spanish population,<sup>2</sup> there is very little to deter the average consumer from participating in an online free-for-all for unauthorized copyrighted content. 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, enterprise end-user piracy of 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, all forms of Internet piracy.

After years of difficulty in and decimation of the Spanish market, many in the copyright industries see not a hint of optimism for the levels of piracy in the country—and this is so despite the implementation of LES. For both consumers and businesses, the available variety of delivery and content of pirated material over the Internet is continuously expanding. For music, online streaming is growing and is becoming an important form of piracy in Spain. An increasing number of businesses, such as discothèques and night clubs, have become comfortable using

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<sup>2</sup>Spanish consumers are remarkably Internet-savvy. As of June 2012, 31.6 million Internet users comprise 67.2% of Spain's population, an increase of 5% in just the past year (according to [www.internetworldstats.com](http://www.internetworldstats.com)).

music from illegal sources or without proper public performance licenses. For the film industry, Internet traffic associated with pirated material has increased over the past year, with a notable migration from cyberlocker activity (following the international closure of Megaupload) to peer-to-peer (P2P) networks, and in particular BitTorrent P2P protocols. The business software sector in Spain faces increasing organizational end-user software piracy.

**Online Piracy Generally:** Internet piracy in Spain began to skyrocket in 2007, and it has continued to grow at a tremendous rate. Today, Internet piracy in Spain occurs via hosted websites, linking sites that direct users to infringing content stored in “cyberlockers” and increasingly via BitTorrent networks, more “traditional” P2P networks (such as Edonkey), 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 among the worst Internet piracy problems in the the EU, and continues to suffer considerable damage to the distribution infrastructure for legitimate content.

**Online Piracy of Motion Pictures:** According to the Anti Piracy Federation (FAP), whose members include film and videogame groups in Spain, the rate of piracy for the film industry in Spain reached 73.9% in the first half of 2011, and the value of pirated content grew to 1.4 billion euros. Of the digital piracy in Spain, 55% occurs via P2P networks, 34% via hosted websites, and 11% by streaming sites. FAP is aware of nearly 400 websites offering to Spanish consumers unauthorized access to movies and videogames. For the independent motion picture industry, Spain ranks consistently among the worst countries in which unfettered 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. For the film industry generally, unfettered digital piracy of motion pictures in Spain has a ripple effect across Latin America, where Spanish-language films proliferate, originating from Spanish pirates.

**Online Music Piracy:** In general terms, Spain remains one of the worst performing music markets in Western Europe, and the situation for online music piracy in the country is extremely serious. More than 90% of the music downloaded by Spanish users today is unauthorized. According to Musicmetric’s September 2012 report, the Digital Music Index, Spain ranks seventh in the world for number of illegal music downloads using P2P protocols such as BitTorrent (at over 10.3 billion downloads).

Spain’s legitimate music market is approximately one-fourth of its 2001 size,<sup>3</sup> with a modest improvement in digital sales in 2012,<sup>4</sup> and consumption through digital platforms now accounts for one-third of total revenues. Among the many legal online services available in Spain are Apple’s iTunes, Deezer, Google Play, Amazon MP3, and 7digital. It is interesting and sad to note that two of the main Spanish streaming services have either closed (Rockola.fm), or have been sold through creditor procedures (yes.fm).

In Spain, illegal music offerings on the Internet are available in many formats. According to recent data compiled by SOLUS, 52% of Spain’s online music piracy problem is via P2P file exchange protocols (with BitTorrent as the clear favorite accounting for two-thirds of Spain’s P2P traffic). The remainder of digital music piracy is split among cyberlocker users (at 55% of non-P2P activity); hosted web pages (31% and streamed music including music ripped from streaming sources (at 14%). The growth of illegal music streaming over a short lapse of time is cause for concern, and is boosted by facilitating apps for smartphones and tablets – an especially important market in Spain, which leads Germany, the United Kingdom, and France with a smartphone penetration of 55.2%.

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<sup>3</sup>The value of physical recorded music sales in Spain has decreased from €626 million (US\$826 million) in 2001 to just €93 million (US\$123 million) in 2012, which means an 85% decrease in value. Total recorded music sales (including physical and digital sales) are now €141 million euros (US\$186 million). In unit terms, sales were 73 million in 2001 and only 12 million in 2012, a drop of 83%. Because of these falling sales, more than 50% of the employees of the music sector have lost their jobs in the last few years.

<sup>4</sup>The Spanish music market declined by 5% in 2012 after its spectacular 21% collapse in 2010 and its 11% decrease in 2011. According to details from the producers’ collecting agency AGEDI, as of early 2012, more than 50% of jobs have been lost during the last four to five years in Spanish recording companies.

The legitimate hard goods and online marketplaces are unsurprisingly stunted as a result. 2012 sales of music CDs and DVDs in Spain reached their lowest point in 25 years, falling 7.89% from 2011. This marks the eleventh consecutive year drop. Overall, consumption of both physical and digital recorded music in Spain amounted to 141 million euros during 2012, a 5% decline compared to 2011 (149 million).

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 2012. For the videogame industry, online piracy via illegal downloads has completely overtaken hard goods piracy in Spain. There are dozens of major websites targeting Spanish consumers which offer links to unauthorized downloads of videogames. These links mostly allow users to directly download unauthorized copies of ESA member content that is hosted on cyberlockers or to access such files via P2P networks. ESA reports that in 2012, Spain placed fourth 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.<sup>5</sup> 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 contribute to this growth, as unauthorized copies of video game software downloaded from the Internet can only be played on consoles modified by such devices, technologies or services.

**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 nearly 75% of all U.S. films annually, with most of those films financed, produced and internationally distributed outside of the six major Hollywood studios. Independent producers partner with national distributors worldwide to finance production and secure distribution on a territory-by-territory basis. Piracy has severely damaged the ability of independent producers to raise production funding in order to support new projects.

The health of Spanish distributors and the emergence of new online distributors to license content 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 financing and distribution of independent films. When legitimate Spanish distributors and businesses must compete with “free” illegal copies (digital or hard goods), they can no longer afford to partner with producers to provide 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 reportedly may only be able to guarantee a mere two to three percent of a 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 on unlicensed platforms that are unfairly competing with licensed services. 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.

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<sup>5</sup>ESA'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.

**Street piracy:** Street piracy continues in Spain and, while it has diminished for some copyright sectors, overall remains wide spread and 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 selling mostly film DVDs.

**Street piracy of music and sound recordings:** While digital piracy today has a bigger impact on music sales, street piracy continues to harm the local industry – 66% of music sales in the country still come from physical formats. Physical piracy of music and sound recordings in the streets and flea markets of Spain persists, especially in certain regions where organized networks operate with impunity, for example, in tourist areas where police surveillance is more difficult, local authorities are lenient, or there is a deeply rooted culture of flea market selling. Whereas physical music piracy is at about 20% in all of Spain, cities such as Granada, Murcia and Alicante greatly exceed 30%, and in the case of Sevilla, levels rocket to 55%. These areas serve not only as the centers of extremely high levels of street piracy, but have also displaced Madrid and Barcelona as the main operational centers for the structured pirate networks that produce pirate CDs and DVDs for the rest of Spain. Sevilla alone is the home of more than 20 flea markets across the city, representing almost 2,000 points of sale from which more than 300 are devoted to pirate sales of copyrighted content (music, films, software, games, etc.). Police sources estimate that some six million pirate CDs and DVDs are sold in Sevilla's flea markets yearly. Sold at a price of 1€ per unit or 4€ per six units, much lower than at other flea markets across Spain, pirate optical disks are sold at such volume as to bring in a healthy profit, with little to no risk of enforcement.

The City Council of Seville authorizes licenses to its local flea markets and charges consumption taxes for their activities, but otherwise exerts no control at all over their operations. Instead, the City Council has expressly delegated, sometimes through signed agreements and in most cases tacitly, the management and control over the markets to the Association of Street Selling (Asociación del Comercio Ambulante – ACA). The ACA administers the issuance of points of sale licenses and the collection of payment, putting all of the receipts toward control measures and private security and surveillance in the premises where markets are established, and also authorizes the placement of blankets and stalls to sell pirate and counterfeit CDs and DVDs at various flea markets. There is reason to believe the ACA has connections with Sevilla's organized networks involved in pirate CD and DVD duplication and distribution throughout Spain. Two judicial proceedings in Sevilla courts are investigating the possible irregularities in the management and control of the city flea markets. For unknown reasons, Sevilla local police have instructions not to patrol or act inside the grounds of flea markets, and the local police unit specializing in investigating and monitoring piracy in the city was dismantled in October of 2012.

**Unauthorized public performances of music and sound recordings:** The music industry in Spain continues to see an 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.

**Hard goods piracy of entertainment software:** In general, hard goods piracy of videogames has declined as Spanish consumers increasingly turn to the Internet to download pirated games. Nevertheless, sales of circumvention devices, such as mod chips and game copiers, continue unabated by online vendors and e-commerce sites. The widespread availability of mod chips and game copiers that bypass technological protection measures (TPMs) are central to the overall piracy problem for the local and international video game industry, as these devices are needed to play unauthorized copies of video game 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:** Local film industry representatives report that although there is a slight reduction in hard goods piracy of audiovisual material compared to previous years, the level of piracy remains unacceptably high. Street vendors are visible in Madrid, Sevilla, Alicante, Valencia, and especially in the north of Spain, in Oviedo, Gijón, and Vigo. There are an estimated 3,000 street vendors across Spain. The

legitimate home video market for Blu-ray and DVD was barely 15 million DVDs and Blu-ray discs sold in 2011, while pirate street vendors are estimated to have sold 20 million pirate DVD-Rs. Home video shops numbered 9,000 in 2005, but now count less than 2,000. Video distributors are abandoning the market – since 2006, membership of the major trade association for video distributors decreased from thirteen members to five. Large companies, like Universal Home Entertainment, have also left Spain in late 2010 reportedly due to piracy. Overall, the home video market shrank by 35% during 2011, and another 11% during the first half of 2012.

**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 services. Spanish-sourced copies routinely 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 of 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 resources or ability to coordinate “day and date” releases amongst their national distributors, leaving them and their authorized distributors especially vulnerable to piracy stemming from illegal camcords. The public prosecutors are generally not inclined to prosecute criminal cases.

**Software piracy:** BSA | The Software Alliance (BSA) reports that the software piracy rate in Spain stood at 44% in 2011 (an increase from 43% in 2010), representing a commercial value of unlicensed software of \$1.2 billion.<sup>6</sup> This includes a significant level of unlicensed software use by business end-users, particularly small- to medium-sized enterprises (SMEs). 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. Internet piracy also continues to present significant challenges to the software market.

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 ten 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 US\$2.923 billion.<sup>7</sup>

## **COPYRIGHT ENFORCEMENT ACTIONS IN SPAIN**

The expectations surrounding the decisive action of the Government of Spain in December 2011 to implement the Law on the Sustainable Economy (LES) have, regrettably, been sorely undermined.

Industry groups continue to report good cooperation with certain enforcement authorities in Spain, but judicial attention to IP cases is extremely slow or nonexistent. Seven years ago, the Attorney General issued instructions effectively decriminalizing organized online file sharing of pirated content, and instructing prosecutors that end-user piracy of business software must meet several unrealistic criteria to be considered to have a “commercial purpose” subject to criminal liability. Unfortunately, to this day Spain’s public prosecutors in general still do not follow through with cases against defendants in any copyright actions brought by the police involving online piracy, and appellate courts are dismissive of similar claims. Prosecutors also do not bring actions for corporate

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<sup>6</sup>BSA | The Software Alliance’s 2012 Global Software Piracy Study, conducted with two leading independent research firms, IDC and Ipsos Public Affairs, measured the rate and commercial value of unlicensed PC software installed in 2011 in more than 100 markets. In 2011, the software piracy rate in Spain was 44%, representing a commercial value of unlicensed software of US\$1.2 billion. These statistics follow the methodology compiled in the Ninth Annual BSA and IDC Global Software Piracy Study (May 2012), <http://portal.bsa.org/globalpiracy2011/index.html>. The BSA study covers piracy of all software run on PCs, including desktops, laptops, and ultra-portables, including netbooks. It includes operating systems, systems software such as databases and security packages, business applications, and consumer applications such as games, personal finance, and reference software. It also takes into account free software, open source software, and software as a service if it is paid for. It does not cover software that runs on servers or mainframes and routine device drivers, free downloadable utilities such as screen savers, and software loaded onto tablets or smartphones. The methodology used to calculate this and other piracy numbers are described in IIPA’s 2013 Special 301 submission at <http://www.iipa.com/pdf/2013spec301methodology.pdf>.

<sup>7</sup>See The Economic Benefits of Reducing PC Software Piracy, available online at <http://portal.bsa.org/piracyimpact2010/index.html>.

criminal liability arising from software infringement, available under amendments made to the Criminal Code in 2010. Court procedures suffer from lengthy delays, lasting on average 18 months, and appeals are unlikely to result in deterrent sentences. 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.

**Administrative Internet Enforcement under The Sustainable Economy Law (LES):** On December 30, 2011, the Spanish Government adopted much-anticipated implementing regulations for the LES establishing Section 2 of the IP Commission, the Spanish Copyright Commission (herein, the IP Commission) for the administration of notices and removal orders regarding infringing hosted online content. In the time since the IP Commission has been established, it has produced remarkably few results in the fight against online piracy. It is more urgent than ever that the Spanish Government provide a strong message of its intent to combat piracy by following through with implementation of the LES with more speedy and effective responses to complaints, holding responsible not only locker and host sites, but also linking sites, and by encouraging the Spanish consumer to embrace the benefits of accessing licensed content through authorized online distributors.

From the establishment of the IP Commission on March 1, 2012 to the time of reporting (December 31, 2012), collecting societies and associations in Spain associated with IIPA members have filed a total of 87 complaints to the IP Commission, only 16 of which have been initiated into cases under the IP Commission and none of which have resulted in a blocked website. The simple initiation of a case has proven to be an agonizingly slow process: all 16 of the initiated cases were initiated more than 30 days after their filing, 44% of them more than 90 days after their filing, and in two proceedings the delay exceeded 240 days. The most egregious and urgent of the complaints pertain to repeat infringement, but to date only one such complaint has been processed. Altogether, the IP Commission has fully resolved only seven of the complaints brought by IIPA affiliates, some by expiration of the proceeding and others through the voluntary action of the subject website.

The opportunity for the LES procedures to lead to speedy takedowns of infringing links from the very problematic linking and indexing sites that target Spanish consumers was an important goal for rights holders, and something the Government of Spain assured that these procedures would address. To that end, the LES provides that for each complaint filed, the IP Commission is to issue notifications to both the responsible party (the infringer) and the intermediary. The responsible party is required to remove the infringing content within 48 hours, but the procedure also fixes the intermediary with effective knowledge of the infringement, including future links to the same file, and is required to take down the infringing link or material if the responsible party has not done so. Unfortunately, the IP Commission has treated linking sites that have been the subject of complaints as intermediaries (with the exception of those who also act as streaming sites and host their content or those sites that embed videos from sites like YouTube, naming as the responsible parties the cyberlockers such as Uploaded.to and Letibit.net that hold the infringing source files. The effect of this misnomer is that linking sites (in practice the more dynamic and harmful actor in these circumstances) are not held accountable for immediate takedowns as responsible parties. Meanwhile, the cyberlockers deemed to be responsible parties are frequently, if not always, located in foreign jurisdictions.

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 may ask a tribunal—the Central Administrative Court—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 by incorporating this important due process check directly into the review. To the knowledge of IIPA, not a single complaint has been referred to the Central Contentious Administrative Court for

issuance of a judicial order. As far as IIPA members are aware, the IP Commission also has not, as is required of it under article 13.4 of the implementing decree, proceeded to file complaints before any relevant authority in the cases in which known facts indicate criminal intellectual property infringement under article 262 of Criminal Procedure Code. It is unclear why the IP Commission has allowed so many complaints to languish. Its workload is all the more backlogged due to the fact that rights holders are not permitted to claim infringements for the entire repertory of material on a given website, but rather must limit complaints to approximately 15 albums or works per complaint.

It was hoped that with time and experience, this process would become routine and efficient. This has sadly not come to pass, and the comprehensive elements of the law and its implementing regulations to ensure judicial review and due process have as yet gone untested, while complaints with the IP Commission continue to accumulate in a backlog. Moving the existing complaints through the due process steps provided for and removing other unnecessary procedural hurdles will not only demonstrate the fairness of the system for this narrow category of online infringement, but will also allow Spain to move toward meeting its key obligations under the World Intellectual Property Organization (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 WIPO Performances and Photograms Treaty (WPPT), and Article 14 of the WIPO Copyright Treaty (WCT)). At present, the IP Commission has taken no deterrent action whatsoever – the system currently serves to simply present a voluntary removal option to hosts of infringing content.

**Criminal actions and prosecutions involving Internet enforcement:** Criminal actions in Spain face very slow court actions and ultimately a lack of deterrent sentencing. The national, regional, and local forces in Spain continue to be proactive in seeking training and in taking *ex officio* actions against both physical and digital piracy, but much of the value in these actions is lost when cases are turned over for prosecution due to a variety of factors, including capacity and gaps in the law. Legal shortcomings in Internet piracy cases are attributable in large part to the standing instructions regarding Internet piracy that the Attorney General issued in 2006, described in greater detail under Copyright and Related Laws in Spain, below. Due to the 2006 Circular and various court decisions, the police, prosecutors, and the National Police, Technology and Internet Division (BIT) have all significantly reduced work on Internet piracy cases.

Rights holders have been active in sending cease and desist letters, resulting in 18 site closures. As far back as 2009, 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 State Secretariat for Telecommunications and Information Society (SETSI) with the details for 200 websites offering links to illegal downloads of copyright works, of which only 41 have yet been subject to administrative procedures to date, with very poor results: more than half were dropped, as the Ministry found no grounds for administrative infringement. Only 17 cases have been initiated to date, but so far none have been subject to sanction.

**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 2012, having led to a halt in criminal enforcement actions against illegal file sharing. Circular 1/2006 from Spain’s Office of the Prosecutor-General (Attorney General) argues that unauthorized uploading of copyright protected materials over the Internet, including via P2P systems, is not subject to criminal action under Article 270 of the Criminal Code unless such acts are “for commercial profit”, and that unauthorized downloading must be considered an act of private copying.

Article 270 of the Criminal Code requires that to be considered a criminal infringement, infringing activities have an aim of profit, but it does not specify how to interpret the element of profit in intellectual property crimes. Intellectual property rights are protected against unauthorized reproduction, distribution and public communication, that is to say, acts from which they obtain economic benefits. For that reason, infringement against intellectual property rights are addressed in Title XIII of the Criminal Code, “Crimes against the patrimony and the socio

economic order.” The interpretation of the aim of profit for crimes against intellectual property rights, then, should be the same that the Supreme Court uses for other crimes against the patrimony, that is to say: “any advantage, utility, benefit or return that the subject may intent to obtain, without taking into account the way of producing his aim of profit or whether he obtained it or not.” Instead, the Circular considers that for Intellectual Property crimes, the aim of profit required should be commercial profit, excluding the activities carried out by P2P networks. On page 43, the Circular explains: “The activity of uploading phonograms can be pursued in the civil Courts, but it will not be considered a crime unless he (the uploader) obtains remuneration.”

The Spanish Government has stated that the Circular is “not binding” on any judge. The Ministry of Industry, Tourism and Trade recently confirmed that actions against P2P file sharing cannot be brought in the Criminal Courts, although it stated that “those who commercially benefit for example, from the direct sale of protected content, or from the profits generated by the advertising on the website that links or serves as search engine for downloads, do meet the criminal nature of article 270 and subsequent of the Criminal Code.” Unfortunately, this statement does not reflect the reality of criminal actions in Spain.

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. Spain’s Courts of Appeal (Audiencias Provinciales) have held that advertising revenues for the websites that allow copyright infringement do not meet the profit criterion set by the Circular, thereby rejecting causes of action in the cases of Indicedonkey (10 March 2011), Rojadirecta (27 April 2010) and CVCDGO.com (11 May 2010). Throughout 2011 into 2012, criminal Investigation Courts also continued to dismiss criminal actions against websites linking to unauthorized copies of copyright works (see, e.g., the case of [www.estrenosdivx.com](http://www.estrenosdivx.com), Criminal Investigation Court Ferrol, nº 3, January 24th 2011), and the thinking behind the Circular has also gained traction at the appellate level (see, e.g., the case of [www.indicedonkey.com](http://www.indicedonkey.com), Madrid Appeal Court March 8th 2011; and the streaming case of [www.cinetube.es](http://www.cinetube.es), Álava Appeal Court February 3rd 2012). The latest Court decisions do not expressly mention the Attorney General’s May 2006 Circular, but do reference previous rulings that cited the Circular in finding no criminal grounds to proceed against websites that made direct or indirect gains through advertising income. New rulings from the criminal courts are resulting in dismissals that are affirmed on appeal.<sup>8</sup>

The Attorney General has refused industry requests to amend the Circular, which remains in effect seven 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 are reducing focus on Internet piracy. On the whole, effective police action is not feasible today.

Enforcement against operators of pirate sites is further undermined by a split among Spanish courts regarding whether linking to infringing content constitutes an infringement of the communication to the public right. Some Spanish courts have declared that merely linking to infringing files is not a criminal offense under the Spanish Criminal Code.<sup>9</sup> The Spanish association for entertainment software distributors (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. Rights holders have suggested an important amendment of the Criminal Code that would clarify that websites acting as active intermediaries (such as

<sup>8</sup>See Decision of Audiencia Provincial (Court of Appeal) of Alava, Section 2, February 3, 2012; and Decision of Juzgado de Instrucción No 3 of León, October 30, 2012 (regarding [zonademuxica.com](http://zonademuxica.com), [todoslosexitos.com](http://todoslosexitos.com)).

<sup>9</sup>In 2011 there were several final (unappealable) decisions: [Indicedonkey](http://Indicedonkey) (Madrid), [Edonkeymania](http://Edonkeymania) (Madrid) and [Zackyfiles](http://Zackyfiles) (Zaragoza).

linking sites) to massive IP infringement are subject to criminal penalties, with the hope that prosecutions can once again move forward against services in P2P piracy cases, but it is uncertain whether it will be finally introduced in the Criminal Code.

**Enterprise end-user piracy of software—The 2006 Attorney General’s Circular:** Another element of the 2006 Circular has come to pose a significant obstacle in recent years to rights holders seeking enforcement against enterprise end-user piracy of software. The Attorney General’s Circular includes instructions that to meet the elements of a criminal offence, software piracy must have a “commercial purpose” (in Spanish, “lucro comercial”) as defined in the EU Enforcement Directive. According to the Circular, simply copying material internally in the absence of distribution does not constitute a commercial purpose, nor does the fact of saving quantities of money in the avoidance of software licensing fees. These obstacles have become especially worrisome since the adoption of amendments to the Criminal Code in 2010, which expose not only the management of a software infringing company, but the corporate entity itself, to liability for intellectual property crimes. Prosecutors at present will not make use of these new provisions in the absence of the unrealistic and unlikely circumstances of blatant software piracy outlined in the Attorney General’s Circular. This aspect of the Circular must be clarified to permit software piracy prosecutions to move forward.

**Police actions and prosecutions involving physical piracy:** The recording industry 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. 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. During 2012, Spanish authorities raided six labs and distribution centers for pirated DVD-Rs and CD-Rs, and arrested 834 street vendors. They seized 313,101 CDRs and DVDRs containing pirated content, and 373 DVD-R burners. Cases that do result in final sentences still have mixed results.

Spain: Summary of anti-piracy operations, year 2012 (physical piracy only)										
Actions	Arrested People	Total Carriers	Recorded Carriers		Blank Carriers		Burners	Inlays	Jewel boxes	Organized networks dismantled
			CD-R	DVD-R	CD-R	DVD-R				
834	397	331,311	142,417	170,684	7,160	11,050	373	45,008	22,210	6

Note: All data above are not yet final as more information may be provided in the future.  
Data are provided by enforcement agencies and courts.

Court actions against street piracy defendants face a number of obstacles. As a threshold matter, a street vendor will not be subject to criminal charges unless pirate activity can be proven to have been for economic gain, an element difficult to prove against individuals who keep no business records. The year 2012 has seen a substantial increase in rulings handed down by criminal courts that refuse to grant any compensation for damages to rights holders. Many courts and judges hold that as long as the seized pirated product has not been distributed, it has not caused any economic damage to the rights holders. Recent amendments to the Criminal Code have reduced penalties for street piracy. Where rights holders bring private infringement actions, there were 155 judicial decisions in the last year, and 120 (78%) of these resulted in convictions. Of the negative decisions, 28 related to street vendors and frequently were closed as a result of expiration in the application of new Criminal Code amendments. The presence of a private prosecutor significantly increases the likelihood of conviction from 50% (in the absence of a private prosecutor) to 85% (where the private sector is able to participate).

ADESE, the Spanish entertainment software industry association, reports continuing difficulties in prosecuting individuals engaged in the distribution of illegal circumvention devices in 2012. Since 2008, there have been 11 high profile dismissals of criminal prosecutions against retailers of circumvention devices. As a result, police forces are largely unwilling to investigate complaints regarding circumvention device distributors due to the expectation that judges will likely find no grounds for conviction.

**Police actions and prosecutions involving end-user software piracy:** BSA reports that its work in 2012 with the police forces continued smoothly. There were 16 civil raids against infringing end-user companies in 2012, resulting in the recovery of substantial damages. In addition, 254 audit and warning letters were sent to infringing end-user companies. In the aftermath of the Attorney General's Circular, police forces do not initiate *ex officio* actions in cases of enterprise end-user software piracy. Instead, all of BSA's judicial cases involve the civil courts and raids must be initiated by the private sector. In 2011, the General Prosecutor of the State established a Prosecutor's Office for Computer Crimes, a positive development that should result in greater attention to digital piracy cases. In general, the knowledge level of prosecutors and civil and criminal judges on copyright issues needs improvement.

According to BSA, commercial courts are working through software piracy cases efficiently, except in certain cities such as Lérida or Córdoba, where courts will not grant raids despite written statements and affidavits from identified informants. Madrid has performed especially poorly in this regard, not only frequently rejecting grants for raids but jeopardizing raids that are conducted by sending minor bailiffs to accompany the raid rather than the secretary of the court, as required by law. Instead, the executive body of the judiciary (the "Consejo General del Poder Judicial") should issue instructions that *ex parte* searches always be conducted under the responsibility of the secretary of each commercial court to ensure effective results.

BSA reports that several other problems remain when they work with the civil courts:

**High bonds:** Nearly all *ex parte* searches require postings of bonds, 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.

**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.

**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 rights 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.

**Civil copyright enforcement:** The Commercial Courts ("Juzgados de lo Mercantil") in Spain have jurisdiction over copyright cases, but are unable to effectively handle the large amount of piracy cases among their many other areas of jurisdiction (including bankruptcy and trademark, to name a few). The 82 Commercial Courts in Spain handled 5,000 intellectual property cases in 2011 alone, apart from the other cases in their jurisdiction. Decisions are not issued for six to eighteen months, and appeals can take more than a year. Even if civil courts had the needed capacity, rights holders lack the legal footing to bring some of the most significant Internet piracy cases in Spain. Spanish law does not clearly implicate the very problematic linking sites as direct infringers. Furthermore, to prove any underlying direct infringement in such cases against websites would require evidence against end-users, which is unobtainable due to Spain's data protection laws (detailed further below). Another obstacle to civil adjudication of copyright infringement stems from an incorrect interpretation of articles 138 and 139 of the Spanish Intellectual Property Law, by which rights holders may apply for an injunction against intermediaries whose services

are used by a third party to infringe, even where the acts of the intermediaries as such are not infringing, “without prejudice to” the provisions of the Spanish e-commerce law (the LSSI). Courts have viewed this clause as allowing ISPs to avoid action altogether because of safe harbors contained within the LSSI — an interpretation which, if correct, would swallow any anti-piracy incentives for ISPs that might have been borne out of the risk of liability.

## **COPYRIGHT AND RELATED LAWS IN SPAIN**

Many legislative challenges in Spain remain to be addressed. Ambiguities in Spain’s laws have made criminal online infringement actions virtually impossible, and rights holders still lack many of the legal tools needed to bring civil actions against online piracy committed by operators of websites that choose more evasive methods than simple hosted piracy. While the Law on the Sustainable Economy (LES), if more effectively implemented in 2013, should 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 file-sharing and linking sites. There are also significant gaps in the Spanish legal infrastructure for the protection of copyright works through technological protection measures (TPMs) and specifically from the large-scale distribution of 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 reduce levels of Internet piracy.

**Confirming Criminal Liability for P2P Piracy Under the Law:** As explained in detail above under “Copyright Enforcement Actions in Spain,” the 2006 Attorney General’s Circular de-criminalizing infringing distributions of content by P2P networks has led to a halt in criminal enforcement actions against illegal file sharing. Rights holders have suggested an important amendment to the Criminal Code in Spain’s legislature that would clarify that websites acting as active intermediaries (such as linking sites) to massive IP infringement are subject to criminal penalties, with the hope that prosecutions can once again move forward against services in P2P piracy cases. Some are optimistic that the bill could pass in 2013, but if the legislation languishes this significant form of criminal online piracy will continue to go unaddressed in Spain’s courts. In actuality, Spain’s existing law does not limit criminal actions against online pirates to the extent proclaimed by the Attorney General’s 2006 Circular. Therefore, nothing is precluding the possibility for the Attorney General to correct the existing Circular with new instructions – without making changes in the existing law – which would be a speedy and direct solution that would permit P2P cases to move forward immediately.

**Incentives for ISP involvement in the removal of pirated content:** IIPA had expressed optimism in early 2012 that the establishment of the IP Commission in December 2011, described above, would establish an effective and speedier mechanism whereby illicit content could be declared infringing and taken down, establishing effective knowledge on the part of the relevant ISP for purposes of potential liability. However, the IP Commission’s view of treating only locker sites as responsible parties instead of also addressing linking sites, the slow pace with which cases are progressed, as well as the reluctance to refer cases to the Administrative Court for a blocking order leaves the new law in practice ineffective, without realizing the potential to incentivize ISPs to cooperate in the fight against online piracy.

Also, 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, continues to leave 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 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 LES, 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 v. 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 the Spanish Data Protection Agency has determined that present law permits no such disclosure and the Court of Appeal has confirmed it, 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 v. 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.”

Courts have established that the Spanish E-commerce Law (the LSSI), which provides that personal data can only be disclosed in criminal proceedings, does not contravene 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. Proposals to amend Article 256 of the Civil Procedure Law (the LEC) to remedy this shortcoming did not move forward in 2011, but new proposals for amendments to the Civil Procedure law could move forward in early 2013.

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 WCT and the 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 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. IIPA therefore urges the Government of Spain to adopt an amendment to the Criminal Code that introduces an article 270.4 that states: “The same penalty shall also be applied to those who manufacture, import, distribute, put into circulation, make available, sell, rent, advertise for sale or rental, or possess for commercial purposes any means, device, product or component or who performs or provides a service which is primarily designed, produced, adapted or performed for the purpose of enabling or facilitating the circumvention of any effective technological measure that is used to protect any of the other works, interpretations or implementations in the terms set out in Section 1 of this Article.”

**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. 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 (US\$537) are now characterized as a misdemeanor rather than a crime, and the evidence of an adequate level of economic gain is a particularly evasive element for rights holders to prove. As a result, in practice courts now impose only fines or community service (from 31 to 60 days) in 95% of sentencing proceedings. 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 what was once one of the few bright spots in Spain’s enforcement of copyright.

In a positive development for the software sector, the amendments established 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

finances 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, Spanish prosecutors have not made use of this new provision, but instead refer to the Attorney General's May 2006 Circular requiring a "commercial purpose" but effectively denying that software piracy is undertaken for a commercial purpose under the law.

## **TRAININGS AND PUBLIC AWARENESS**

The content industries regularly offer training sessions and enforcement assistance in Spain. In 2012, the Judicial Police General Commissioner conducted programming in Madrid to bring together 60 top provincial senior officers in charge of Judicial police units, to discuss new strategies, tools, and emerging issues in physical and digital piracy. What is clearly needed is more government involvement in such seminars, particularly to increase the participation of judges and public prosecutors.

During 2012, altogether the rights holders organizations Promusicae, AGEDI, and FAP offered a total of 15 training programs on the investigation of IP protection and enforcement. Five of these courses were provided jointly with the Chair of Public Law (Cátedra de Derecho Público) of the Universidad Rey Juan Carlos. The programs trained a wide range of enforcement agency officials from the National Police, Guardia Civil, Customs Department, and local city police. A total of 1,850 individuals attended the training sessions, 350 certificates were issued, and 2,000 CDs were delivered containing IP training material. One example of these activities resulted from a June 2012 Memorandum of Understanding between Promusicae-AGEDI and the Association of Chiefs and Senior Offices of Local Police of Spain (UNIFEPOL), under which rights holders participated in several national meetings of local police senior officers, including a meeting on November 15, 2012 in Castellón in which rights holders addressed over 100 Chiefs of Local Police of the Valencia region.

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. An investment of 300,000 euros (US\$402,930) has been dedicated for a new training and awareness campaign, which aims to reduce levels of piracy among illegal channels and to target SMEs for similar results in piracy reduction. BSA encourages the Ministry of Industry to move forward with the campaign together with private sector support in 2013.

## **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 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.