

BULGARIA

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2014 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that Bulgaria remain on the Watch List in 2014.¹

Executive Summary: The year 2013 for Bulgaria was marked with disruptive political upheaval and prolonged reorganization that prevented any meaningful signs of improvement in Bulgaria's intellectual property (IP) regime. Enforcement difficulties that IIPA's members faced in 2012 persisted and, in some cases, worsened. Cases brought against the notorious torrent trackers *arenabg.com* and *zamunda.net* still have not been fully resolved, and in the meantime the number and reach of Bulgaria's hosted pirate sites, infringing peer-to-peer (P2P) services and networks, and even services hosting open and notorious pirate sites and uploaders continues to expand. Bulgaria's Cyber Crime Unit at the General Directorate was once an important ally for the initiation of investigations into Bulgaria's copyright criminals, but the Unit has been inactive since it was transferred to a new independent agency and pending cases under its review were transferred to regional police forces. An important casualty of this reorganization was the work begun in late 2012 by the Cyber Crime Unit against uploaders at the popular video streaming service *VBox7.com*, which provides hosting services to hundreds of thousands of sound and video recordings without authorization. The case now appears stalled. The Cyber Crime Unit was also an important ally in cases against enterprise end-user software piracy, an effort that is now severely hindered for rights holders, mainly due to the structural changes that were ongoing in 2013. Obstacles in collective management continue to chip away at an important source of income for the beleaguered music industry. The overall picture for copyright owners in Bulgaria at the end of 2013 is extremely grim.

PRIORITY ACTIONS REQUESTED IN 2014

- Revisit proposals to adopt new provisions to combat online piracy through administrative measures and clarifications regarding intermediary liability.
- Reinstate the Cyber and IPR Crimes Unit to ensure effective criminal IPR enforcement.
- Take the necessary and appropriate steps to address notorious torrent trackers that knowingly provide access to infringing materials, setting a strong example for other infringers.
- Increase public-private cooperation within prosecutors' offices and improve timely prosecutorial attention to copyright crimes.
- Complete an updated Manual for Uniform Prosecutors' Practices in Investigating and Prosecuting IPR Crimes for circulation by the Attorney General as mandatory instructions to district and regional prosecutors.
- Modify the 2011 amendments to the copyright law to resume the now inoperable collective management of simulcasting, webcasting, private copy, and performance remuneration rights in Bulgaria.
- Build public-private cooperation within the process of drafting of the new Penal Code of Bulgaria in order to secure strong and adequate criminal protection of IPRs in the country.

¹For more details on Bulgaria's Special 301 history, see previous years' reports at <http://www.iipa.com/countryreports.html>. For the history of Bulgaria's Special 301 placement, see <http://www.iipa.com/pdf/2014SPEC301HISTORICALCHART.pdf>. For a discussion of IIPA's 2014 Key Initiatives and Challenges, see IIPA, *2014 Special 301 Submission*, at <http://www.iipa.com/pdf/2014SPEC301COVERLETTER.pdf>.



THE NATURE OF PIRACY IN BULGARIA

Internet piracy, predominantly via peer-to-peer (P2P) services including bitTorrent file sharing, is a severe threat to legitimate sales of copyright works of all kinds in Bulgaria. Numerous download sites, BitTorrent sites, Rapidshare sites, online storage servers, streaming sites and widespread P2P piracy provide ready access to illegal music, making it very difficult for a legitimate online music market to develop. The legitimate online music services in Bulgaria struggle to survive in a marketplace with an extremely high online piracy rate, and cannot contend with multiple different pirate services. Among the most notorious pirate sites are *zamunda.net* and *arenabg.com*, along with the user-generated video exchange platform, *VBox7*.² Hosting services based in Bulgaria, such as *superhosting.bg*, provide services to illegal sites that operate internationally, such as Yify-Torrents, Primewire, Viooz and Rarbg, all of which are ranked in Alexa's top 2,000 most popular sites. Dozens of sites and services offer unauthorized material to the Bulgarian audience.³ The Internet piracy rate for music is suffocating. The music and film piracy situation persists notwithstanding some laudable efforts of the Cyber Crime Unit that were initiated in the first half of 2013, detailed below. Court cases continue against some of the largest pirate sites, including *zamunda.net*. Unfortunately, while the cases continue, *zamunda.net* has seen a spike in its popularity, reportedly generating enormous revenues from advertising.

The software industry reports that enterprise end-user software piracy, particularly among small- to medium-sized enterprises, is a prevalent practice in Bulgaria that poses a major threat to the local software industry. Local systems builders commonly offer assembled PCs with pre-installed copies of unlicensed business software (a practice known as Hard Disk Loading). In some cases, this involves the central system drives managed by an organization's network system builders. In an even more alarming trend, BSA | The Software Alliance (BSA) reports that where system builders have in the past installed unauthorized software, they are now encouraging their customers to use "Internet resources" to satisfy their software needs, essentially directing customers to download and self-install pirated software at work, and demonstrating relative comfort that there is little risk in such illegal activity.

The collective management market for music copyright holders in Bulgaria faces serious problems. Organizations blatantly purport to license the use of music without proper authorization from the relevant rights holders. One such operation, EAZIPA, has functioned with the tacit support of the previous Minister of Culture to crowd out legitimate rights holders from collecting for public performances, and could be spreading its activity to licensing of other uses.

Public awareness efforts are sorely needed to demonstrate the importance of intellectual property protection for the development of creativity and innovation, and for economic growth. There is a dire need for the Government of Bulgaria to provide high-level political support for long-term public sector programs, emphasizing the social and economic importance of intellectual property rights and countering populist messages in favor of piracy.

COPYRIGHT ENFORCEMENT IN BULGARIA

IP enforcement efforts by Bulgarian authorities deteriorated across the board in 2013, exacerbating an already difficult environment for anti-piracy efforts.

²VBox7, Bulgaria's largest user-generated streaming video platform, operates without licenses from the respective record companies. It is part of the largest online media group Net Info. Recently the majority share of this company was acquired by one of the biggest TV groups in Bulgaria – Nova Broadcasting Group, owned by the Swedish company MTG. While the new owners have expressed interest in negotiating a license agreement with rights holders and discussions have commenced, whether an agreement can be reached is not yet known.

³BAMP has compiled lists of the most popular music pirate sites, illegal services other than P2P, and torrent trackers for illegal music in Bulgaria, which are available from IIPA on request.

Political setbacks in 2013: In the summer of 2013, Bulgaria's new government transferred resources from the Ministry of Interior's General Directorate to Combat Organized Crime (GDCOC), which at the time housed the Cyber Crime Unit, to the independent State Agency for National Security (SANS), leading to a long-term freeze of operations in criminal IP enforcement. The Cyber Crime Unit was once an important ally to rights holders, assisting with criminal actions and even conducting *ex officio* criminal actions. Unfortunately, the activities of the Unit were suspended in 2013, and it is unclear whether IPR enforcement will figure as a priority when the Unit resumes activities, expected in early 2014.

In a positive development during the first two months of 2013, the Ministry of Culture and Ministry of Interior conducted a Government Led Mass Software Compliance Campaign, building on a year of preparations. Approximately 20,000 local businesses received a joint letter from both Ministries, informing them of the risks involved in software piracy and encouraging auditing and compliance programs. BSA accompanied the program with a public awareness initiative to educate users and promote Software Assets Management tools. However, due to political instability, the planned intensive follow-up by authorities with enforcement capacity never occurred, thus undermining the value of the initiative.

The Ministry of Culture's Copyright and Neighboring Rights Inspectorate also suffered from setbacks during the political crisis in early 2013, resulting in a reduced staff of just three inspectors for all copyright claims. The Ministry's capacity to handle collective management matters also was severely reduced. During the second half of 2013, the software industry reports that the Inspectorate resumed activities and successfully cooperated with rights holders in actions against local system builders distributing illegal copies of pre-installed business software. As of late 2013, rights holders report that the Inspectorate conducted five *ex officio* enterprise software end-user administrative inspections for the year. However, other actions continued to be severely hindered.

In past years, the Council for IPR Protection coordinated administrative anti-piracy activities including by mediating negotiations between rights holders and ISPs. However, the Council's working sessions have been greatly reduced over the last few years, and none took place in 2013. The Council should resume its activities to encourage greater attention to online infringement.

Criminal enforcement: For all the copyright sectors, the criminal prosecution of IPR crimes remains severely burdened in Bulgaria's judicial system, and suffered from additional setbacks during the political difficulties in 2013. The Attorney General appointed in late 2012 brought in a new management team at the Supreme Cassation Prosecutor's Office (SCPO). Throughout 2013, the SCPO was engulfed in administrative reforms and internal reviews, while needed reforms in the field of IPR prosecution were left unaddressed. Some progress in late 2012 was made against ten of the major uploaders of pirated music on the VBox7 platform, who were the subject of criminal investigations before the Cyber Crime Unit. One of these uploaders was brought to court and admitted the crime by plea bargain. The other cases, however, are still at preliminary investigation phases, while experts' reports and interrogations are prepared in various regional jurisdictions. This criminal campaign received media coverage in Bulgaria's online publications, but further progress is still pending.

As a general matter, criminal cases regarding online piracy are very difficult to pursue. Besides weaknesses in Bulgaria's judicial system regarding public prosecution, rights holders confirm that a problem that IIPA reported in 2009⁴, created when the Bulgarian Supreme Administrative Court revoked a law permitting the identification of online copyright infringers, has yet to be resolved. Amendments to the Law on Electronic Communications (LEC) adopted in 2010 addressed the problem in relation to serious crimes as defined by Article 93 of the Penal Code (or crimes punishable by more than five years imprisonment), but IPR crimes that do not amount to the level of serious crimes are excluded from that definition. While for these cases public authorities may rely on the disclosure provisions in the Criminal Procedure Code, it is often not possible to obtain additional data that ISPs are required to store under the LEC.

⁴<http://www.iipa.com/rbc/2009/2009SPEC301BULGARIA.pdf>.

While the activities of the Cyber Crime Unit were put on hold, many of the criminal cases it was investigating were transferred to regional police offices, where the capacity to handle IPR cases is extremely limited. As a result, any forward progress came to a full halt. Even if the Cyber Crime Unit is fully reinstated under the SANS, expectations for successful operations are low, due to difficulties the private sector faces in communicating with SANS.

As in the past, the prosecution of IPR crimes is slow and largely ineffectual. Prosecutors at the district court level understand the fundamentals of copyright but need further knowledge and incentives to focus on IPR crimes. Many often terminate or suspend criminal IPR investigations that reach their desks before cases can reach the court phase. Often the rights holders are not even informed of these developments. Burdensome evidentiary requirements for experts' reports mean that the compilation of data for trial can take months or even years. Of course, far fewer cases were initiated in 2013 than in previous years due to the restructuring of the Cyber Crimes Unit.

A long-term supervision program is needed to monitor and analyze the work of particular prosecutors, observe the grounds for their motions to terminate or suspend criminal proceedings and provide institutional guidelines and methodological support on how to investigate and prosecute IPR crimes. Cooperation between the private sector and the SCPO should be encouraged to address the chronic problem of prosecutors wrongfully terminating or refusing to initiate criminal proceedings for IPR offenses. The Attorney General's Office should be encouraged to maintain a sustained dialogue with the private sector, with ongoing high-level support of the SCPO, in keeping with the public-private cooperation it has exhibited in the past. The competent bodies should promptly complete an updated Manual for Uniform Prosecutors' Practices in Investigating and Prosecuting IPR Crimes and circulate the Manual as an Attorney General's mandatory instruction to district and regional prosecutors' offices.

Civil enforcement: Two hurdles in identifying online infringers make civil enforcement nearly impossible. First, the data retention regime under the LEC, as described under "Criminal enforcement" above (available for the criminal enforcement authorities only for serious crimes and computer crimes), is entirely unavailable to private parties such as rights holders in the aftermath of the 2009 Supreme Administrative Court ruling. There is also a contradiction between the applicable Civil Procedure rules and Bulgaria's Law on Copyright and Neighboring Rights, which together require a pending civil proceeding to be initiated before identification of infringers may be requested, yet do not allow the court to open the civil case without the identification of the defendant by at least his name. This means that while the right of information provided by Article 8(1) of the EU Enforcement Directive is implemented, its exercise is hindered by civil procedure rules. This catch-22 prevents rights holders from turning to civil proceedings to combat online infringement. Further burdening civil enforcement, court officials are inexperienced in copyright law, and judges rarely permit *ex parte* provisional measures or the preservation of evidence. Thus, litigation is a lengthy and expensive last resort.

Administrative enforcement: Despite a general lack of administrative capacity within the Ministry of Culture and the resulting deficit of effective administrative enforcement, the new Minister and his team have demonstrated the will to overcome some of the Ministry's most serious problems related to the collective management market. The Ministry of Culture finally rejected the registration of EAZIPA as collective management society in the field of music rights by an ordinance that is currently subject of appeal before the Administrative Court in Sofia. In another positive development in 2013, the Council of Electronic Media (CEM) increased its role in regulating the media market. As a result, most of the major radio and TV operators in Bulgaria started the year in 2014 under legitimate license with the music industry. Still, positive developments related to administrative enforcement are sporadic and lack sustainability.

COPYRIGHT LAW REFORM AND RELATED ISSUES

Pending Copyright Law reform: Lawmakers in Bulgaria are contemplating new amendments to the Law on Copyright and Neighboring Rights to transpose the terms of protection for phonogram producers and performers

as required by EU Directive, which came into force on November 1, 2013 and requires EU member states to implement the provisions as soon as possible to ensure that all accompanying measures provided in the Directive are put in place. The amendments are an important opportunity to address other shortcomings in Bulgaria's copyright law, including by adopting provisions on administrative measures for online piracy. This could also be an opportunity to address, through tandem amendments to the Law on Electronic Commerce, the need for Bulgaria to fully implement provisions of the EU E-Commerce Directive regarding ISP liability, and the EU Enforcement Directive 2004/48/EC. Such amendments should specify that (a) ISPs are required to terminate or prevent infringements upon an order by a court or administrative body (Article 12.3 of the E-Commerce Directive); and (b) ISPs should provide information to authorities regarding known infringements that occur over their services (Article 15.2 of the E-Commerce Directive). Currently, intermediaries such as the hosting service *superhosting.bg* are not cooperating with rights holder efforts to close websites dedicated to piracy. Notices of infringement are ignored, and after repeated communications the service *superhosting.bg* insisted that it was not obligated to take action without court or police action. Legal incentives are needed to bring all parties to the table in cases of persistent infringement.

On March 25, 2011 the National Assembly of Bulgaria adopted amendments to the Bulgarian Law on Copyright and Neighboring Rights (LCNR). Disappointingly, much-needed provisions on compulsory administrative measures for combating online piracy were removed from the draft prior to passage. This negative legislative development deepened the problem of the general administrative inefficiency of the Ministry of Culture to cope with law enforcement efforts, especially dealing with online copyright and related rights infringements. Instead, the amendments codified a number of flaws, chipping away at the ability for recording artists and producers to be remunerated for the use of their music – a vital element of revenue for the Bulgarian music industry, which relies on collective management for about 40% of its yearly income.⁵ The range of problems created by these amendments, and reported by IIPA in the past,⁶ continue to exist and have ultimately led to such a drop in resources for the umbrella collective management organization, Copy BG, that it was forced to close operations during 2013.

The recording industry remains especially concerned that the LCNR amendments failed to eliminate the very problematic law limiting the freedom to enter into licensing contracts for more than a set number of years (a ten-year limitation for licenses with authors under Article 37(2), and a five-year limitation for licenses with artists, under Article 76(3)). The need to renegotiate contracts every ten or five years, respectively, is inconsistent with industry best practices across the EU and prevents producers from exercising their neighboring rights in full.

Proposed new Criminal Code: Rights holders expect that Bulgaria's lawmakers will revisit amendments to the Criminal Code in 2014 that were contemplated in 2013. The new draft should address the new challenges posed by evolving forms of Internet piracy, and resolve enforcement difficulties faced in IPR cases. It is crucial that the contemplated changes to the Criminal Code provide deterrent sanctions for copyright crimes, and that they provide the necessary resources to the Cyber Crime Unit in SANS so that it may continue its important efforts to police online criminal activity. It is also crucial that new texts on IPR crimes be both comprehensive and clearly drafted, so as to avoid any future misinterpretations that will jeopardize successful criminal prosecution. IIPA encourages the Bulgarian Ministry of Justice to consult with IPR experts and representatives as any such draft moves forward.

⁵These new provisions are described in detail in IIPA's 2013 Special 301 filing on Bulgaria, available at <http://www.iipa.com/rbc/2013/2013SPEC301BULGARIA.PDF>.

⁶See <http://www.iipa.com/rbc/2013/2013SPEC301BULGARIA.PDF>.