

SPAIN

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

Special 301 Recommendation: IIPA recommends that USTR continue its out-of-cycle review of Spain in 2014, and return Spain to the Special 301 Watch List if copyright enforcement fails to improve markedly in 2014.¹

Executive Summary: Spanish policymakers, over the past year, have been developing a set of important reforms to the Intellectual Property Law, Criminal Code, and Civil Procedure Law. Many of these changes, if adopted and implemented effectively, could close loopholes that for years have prevented law enforcement authorities and rights holders from taking meaningful action against digital piracy and end-user software piracy. Despite these good efforts, adoption of law reform is still pending and is not likely to enter into force until the end of 2014, and necessary changes to the Law of Information Society Services and Electronic Commerce (LSSI) to eliminate the need for a court order to establish effective knowledge appear to be stalled. In the meantime, the black market for copyright works continues to expand and evolve in the online environment, with enterprise end-users, and even in the streets of Spain's major cities, while administrative and criminal copyright enforcement efforts remain at a standstill.

Most notably, the Spanish Copyright Commission, established by law in 2011 within the Intellectual Property Commission (herein, the IPC) has yet to remedy its extremely slow response times to rights holders' complaints. Of the complaints submitted by rights holders reporting their results to IIPA, only one has been the subject of a full case with effective takedown results since the IPC began operations in early 2012. While Spain's police, prosecutors and judges point to Spain's laws as the reason for their inaction against pirates and sellers of circumvention devices, the IPC already has many of the legal tools needed to take expeditious and deterrent actions against online piracy. IIPA urges the U.S. Government to stress the need for the IPC to effectively exercise its administrative authority, and for Spain's prosecutors and courts to take action wherever possible under the law, taking their cue from Spain's policymakers that the country's anti-piracy efforts must press forward without delay. We also urge that enactment of needed legal reforms be accelerated and that their subsequent implementation is comprehensive and effective.

PRIORITY ACTIONS REQUESTED IN 2014

- Resolve shortcomings in existing legislative proposals and quickly adopt needed reforms to the IP Law, Criminal Code, Civil Procedure Law, and LSSI, so that criminal and civil actions may proceed against all forms of piracy and the manufacture and sale of circumvention devices.
- Provide adequate resources to the IPC and improve its operations for more effective enforcement of the Law on the Sustainable Economy, in actions against infringing web-hosting, linking, indexing, and torrent sites.
- Establish a national authority to coordinate online piracy enforcement, ensure allocation of adequate resources for investigation of Internet and computer crimes, and avoid unnecessary delays within the Ministry of Interior, the Guardia Civil, the National Police, the Criminal Courts, and the Commercial Courts handling IP cases.
- 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, similar to the 2012 efforts of the Coalition of Creators and Content Industries toward removal of ads from websites offering illegal material.

¹For more details on Spain's Special 301 history, see previous years' reports at <http://www.iipa.com/countryreports.html>. For the history of Spain'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>.



COPYRIGHT PIRACY IN SPAIN

In stark contrast to so many of its neighbors in Western Europe, Spain suffers from unrelentingly high rates of digital piracy in every sector – music, film, videogames, software, and books. The sheer volume of content being taken without compensation to rights holders is staggering. A 2013 survey conducted by GfK and the Coalition of Creators and Content Industries (*Coalición de Creadores e Industrias de Contenido*) (the GfK study),² shows that in 2012, users in Spain accessed 170 million illicit videogames, valued at 4.38 billion Euros (US\$ 5.92 billion). The volume of pirate music products in 2012 was valued at 6.9 billion euros (US\$ 9.3 billion). More than 40% of software installed on personal computers (PCs) in Spain in 2011 was unlicensed with a commercial value of more than US\$1.2 billion.³ The GfK study shows there were more than 500 million illicit audiovisual downloads in Spain during 2012, valued at 3.3 billion euros (US\$ 4.1 billion). Widespread Internet-based piracy in Spain undercuts the legitimate market for music publishers and their royalty collections. In Spain, 33% of Internet users download music content illegally, and one in two Internet users have accessed unauthorized content online at some time. In short, there isn't a sector within IIPA's membership that doesn't experience significant loss in the Spanish market due to piracy.

According to the GfK study, 17% of Spanish Internet users believe there are no legal consequences to downloading material without authorization, and twenty percent believe there is nothing legally or morally wrong in doing so. A more brazen one out of four in Spain feel it is a user's right to access unauthorized content. And perhaps most telling of all, 69% argued that they would not pay for something they could get for free. These attitudes are fueled by an environment where there are no real deterrents against online piracy.

The entire Spanish-speaking market suffers as a direct result. Once one of the top markets in the world for consumption of legitimate copyright works, the Spanish market has been decimated in recent years. Revenues for sound recordings have dropped for eleven years straight in Spain to less than a quarter of what they were in 2001. Annual income in the Spanish digital market is now surpassed by much smaller countries such as Norway, and total recording industry revenue in Spain has been overtaken recently by Sweden. The videogame industry, which saw its Spanish market value peak in 2007 and has since faced steady declines, expects to see a five percent drop in annual sales in 2013, based on preliminary estimates. At the same time, Spain is increasingly becoming a hub for illicit activity. The Entertainment Software Association (ESA) reports that in 2013 Spain ranked fifth in the world in terms of the number of connections by peers participating in the unauthorized file sharing of select ESA member titles on public peer-to-peer (P2P) networks. Spain has ranked among the top five countries since ESA began measuring such data in 2009.⁴ Compounding the problem of unfettered digital piracy in Spain is the ripple effect it has for music, audiovisual, videogame, software, and book publishing markets across Latin America, where Spanish-language products proliferate, originating from Spanish pirates.

Piracy leads to shrinking revenues for Spain's creative sectors and its government. Piracy in 2012 caused the music industry in Spain lost profits valued at almost 580 million euros (US\$ 784 million), according to the GfK study. The same research shows that for the videogame industry, the loss of potential profits was 269.5 million euros (US\$ 364.5 million), or a 55% increase over the current market, and for the film industry, potential earnings without piracy were 209 million euros (US\$ 285 million), a 42% increase over the current market. The Spanish independent film industry has been especially hard hit – where they once 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. The income loss for the music industry alone accounts for a loss in government revenue (including taxes and social security income) of 310 million euros. A study by BSA | The

²See http://www.mcu.es/libro/img/MC/Observatorio_Pirateria_2012.pdf.

³Data on software piracy rates and commercial values are taken from the 2011 BSA Global Software Piracy Study at <http://www.bsa.org/globalstudy>. This study assesses the rate and commercial value of unlicensed software installed on personal computers during the year in more than 100 markets. The study includes a detailed discussion of the methodology used. BSA | The Software Alliance (BSA) plans to release an updated study in the second quarter of 2014.

⁴ESA'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.

Software Alliance (BSA) and the business school INSEAD indicates that a one percent increase in the use of authorized software in Spain would result in nearly US\$1.5 billion more growth to Spain's economy than a one percent increase in unauthorized software.⁵

The decline in the Spanish market for legitimate content is directly related to the prevalence of piracy. In a study supported by the Ministry of Culture in 2011, "*Encuesta de hábitos y prácticas culturales 2010-2011*," nearly 80% of users engaged in piracy admitted that they do it to save the money they would have to pay for legal content. As a result, Spain's own creators are hard hit by the pervasive piracy problem. The GfK study demonstrates that sales of albums by Top 50-ranked national recording artists dropped by 72% between 2004 and 2012, and in the last four years only one Spanish recording artist has placed in the Top 50 albums of the year. As a result, local jobs in the music industry alone have dropped by more than 50% in recent years. Economists point to 4,000 jobs in the sector that have been lost due to piracy.

Online Piracy Generally: Digital piracy accounts for the lion's share of the problem in Spain. Today, Internet piracy in Spain occurs via hosted websites, linking sites that direct users to infringing content stored in "cyberlockers," BitTorrent networks, more "traditional" P2P networks (such as Edonkey), and increasingly via streaming sites. The incidence of digital piracy is generally evenly split between P2P formats and non-P2P formats. Within the P2P categories, piracy via BitTorrent networks is by far the most favored for pirated music, audiovisual, and videogame content, particularly since the closure of MegaUpload led to a notable migration from cyberlocker activity to P2P networks of all kinds. Among non-P2P formats, unauthorized files stored on cyberlockers account for the majority of music piracy, but that activity is diminishing as the growth of stream-ripping is mushrooming. Smartphone apps that facilitate piracy are increasingly worrisome in the Spanish market.

It is important to note that BitTorrent trackers and sites that index files on hosted servers are critical tools for users to locate infringing material; without them, the scale of online piracy that occurs in Spain would not be possible. These indexes and trackers are also often the only point of attachment for the jurisdiction of Spain's authorities, since they are frequently located within Spain but they direct users to files located in other jurisdictions.

Hard goods piracy: Across Spain, street piracy remains a highly visible and unabated problem particularly for the music and film industries. For the music industry, illegal CD sales amount to 19% of the legal market. The film industry reports that hard goods piracy in Spain has increased since 2012, through organized DVD-R labs, distribution centers, and street vendors.

Physical piracy is well entrenched in cities such as Seville, Granada, and Murcia, which have displaced Madrid and Barcelona as the main operational centers for the organized pirate networks that produce pirate CDs and DVDs for the rest of Spain. IIPA reported in 2013 a severe epidemic of street piracy in Seville's open air markets, which persists to the present day. Seville 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.).

The City Council of Seville licenses its local flea markets and charges consumption taxes for their activities, but otherwise delegates all management and control over the markets to the Association of Street Selling (*Asociación Del Comercio Ambulante*, or ACA). The ACA administers the issuance of points of sale licenses and the collection of payment, 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 Seville's organized networks involved in pirate CD and DVD duplication and distribution throughout Spain. Seville 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.

⁵Competitive Advantage: The Economic Impact of Properly Licenced Software (2013) at http://portal.bsa.org/insead/assets/studies/2013softwarevaluestudy_en.pdf.

There is strong demand for hard copies of pirate DVDs across Spain, and the result is a decimated legitimate retail market. The number of videoshops has dropped from 9,000 in 2005 to fewer than 2,000 in 2013. The most representative trade association for video distributors, UVE, had 13 members in 2006 but now counts only four. In the first half of 2013 alone, the legitimate home video market declined by 14%.

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 in Spain remains quite difficult. 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 in the markets of initial release.

Circumvention devices: The videogame industry also continues to suffer from the availability (primarily online) of circumvention devices for videogame consoles. Online vendors and e-commerce sites conduct sales of circumvention devices, such as mod chips and game copiers, through highly sophisticated and professional-looking online services. The widespread availability of these tools to 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.

Software piracy: 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.⁶ This includes a significant level of unlicensed software use by enterprises, particularly small- to medium-sized enterprises (SMEs). Spain is a country with a large number of SMEs, among which levels of piracy are still considerably more rampant than among the larger corporations that might characterize other markets.

COPYRIGHT ENFORCEMENT ACTIONS IN SPAIN

Enforcement in Spain needs improvement on all fronts: criminal, civil, and administrative. Rights holders report strong relationships with police forces, but investigations of criminal piracy networks are limited to physical piracy operations, and even those investigations have decreased significantly in 2013. Two positive decisions were issued by Criminal Courts against illegal websites in 2013. But in general, investigations handed over to prosecutors go nowhere or are extremely slow to come to conclusion. Civil actions, particularly for individual acts of Internet piracy, are unavailable as a practical matter because Spain’s data retention laws restrict authorities from accessing identifying information connected with IP addresses. Even if these types of enforcement were functioning well, a modern anti-piracy effort in Spain would not be comprehensive without an effective system for the notice and takedown of infringing online materials. Unfortunately, the IPC that began operations in early 2012 to facilitate such a system remains ineffectual.

A number of clarifications and amendments are needed in Spain’s laws to permit court actions to go forward against infringers, as well as against manufacturers and distributors of circumvention devices, and these are explained in detail below under “Copyright and Related Laws in Spain.” The following four action items are needed to ensure that Spain’s IP Commission and the country’s law enforcement authorities have the resources and coordination mechanisms necessary for effective copyright enforcement:

⁶See footnote 3.

Improve the efficiency of the Spanish IP Commission by providing adequate resources to facilitate effective enforcement of the Law on the Sustainable Economy against web-hosting of pirated content and linking, indexing, and torrent sites.

On December 30, 2011, the Spanish Government adopted much-anticipated regulations for establishing Section 2 of the IP Commission, the Spanish Copyright Commission (herein, the IPC) for the administration of notices and removal orders regarding infringing content hosted online. Since its inception, the IPC has been plagued by delays that, in 2013, the Government of Spain promised were being addressed. Yet IIPA members continue to report great difficulty in obtaining orders that require the removal of infringing material or that impose other consequences for online infringers through the IPC. In fact, the mere initiation of a case has proven to be an agonizingly slow process.

What few successes have occurred are the exception to the rule. Rights holders report the voluntary closures of *www.listengo.com* and *www.dtpt.net* in May 2013, and *www.dijafe.com* and *www.descargadirecta.biz* in October 2013, in response to investigations under the IPC proceedings. Often, as in the case of *elitetorrent.net*, cited infringing material is removed but the website remains in operation. The IPC also set an important example in 2013 by treating a linking website owner (*www.foroxd.com*) as a “responsible party” for infringement actions, and not a mere intermediary.⁷ IIPA looks forward to seeing more rapid actions against linking sites according to this treatment. But in other proceedings the IPC has come back to the strategy of directing its action against cyberlockers (such as *Uploaded.to* and *Letitbit.net*) instead of the linking sites. Under the procedures, the “responsible party” must respond to IPC notices within 48 hours, but many of the cyberlockers involved in Spain’s online piracy epidemic are outside of the IPC’s jurisdiction and not likely to respond. It is only after this initial period that any responsibility attaches to the “intermediaries,” and as a result, the opportunity for rapid response is lost.

IIPA members are aware of only 74 cases in which infringing material was successfully removed in response to IPC action since it began operations. This reflects a very small number of IPC removal orders in the context of Spain’s online copyright piracy epidemic, and underscores the fact that a notice and takedown system that requires notices to be sent to and reviewed by a bureaucratic body is unworkable. Indeed, according to the Spanish Coalition of Creators and Content Industries, the IPC takes on average more than 400 days to initiate an investigation into a site after receiving a rights holder complaint. To date, there have been no IPC actions taken in response to complaints of recidivist infringing sites that have been submitted by IIPA’s affiliates – including two that were filed as far back as September 2012. Of the 26 complaints filed with the IPC by the videogame association aDeSe, only one has resulted in an order from the IPC requiring the removal of infringing content. The representative group for the music industry, AGEDI, notes that in 18 months of operation, the IP Commission has initiated only 29 of the 40 complaints it has filed. AGEDI filed a complaint regarding the notorious site The Pirate Bay on November 29, 2012, and submitted new material on March 11, 2013; there has so far been no response from the IPC. Meanwhile, rights holders still must limit the number of works that can be included in a complaint, so that the number of complaints needed for comprehensive action is necessarily greater. The recording industry reports that as of November 2013, just 35 albums and 24 songs had been voluntarily or compulsorily removed and just a handful of small-scale websites have closed down in response to IP Commission decisions.

All told, very little has changed regarding the IPC since the Government of Spain submitted its optimistic report in the 2013 Special 301 Review. IIPA is hopeful that proposed amendments to the IP Law will be further improved, adopted, and ultimately provide additional tools and greater clarity; however, it is fair to assume that such reforms will take time, and likely will not come into effect in the coming months. The IPC should use its existing tools to their maximum effect. To be effective, it simply must work faster and focus on linking sites. Moving the existing complaints through the due process steps provided for and removing unnecessary procedural hurdles will not only

⁷For further explanation of the importance of the “responsible party”/“intermediary” distinction under the IP Commission’s procedures, and a more detailed description of the full set of procedures as provided by the Law for the Sustainable Economy (much of which has still not yet been tested by the IP Commission), see IIPA’s 2013 Special 301 filing, available at <http://www.iipa.com/rbc/2013/2013SPEC301SPAIN.PDF>.

demonstrate the fairness of the system for addressing 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)).

Coordinate Internet piracy enforcement at the national level, 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), the Criminal Courts, and Commercial Courts (Juzgados de lo Mercantil) that have jurisdiction over IP cases, to avoid unnecessary delays.

Government-wide attention and a national action plan is needed to provide adequate personnel and training to local and regional authorities to heighten sensitivity to the piracy problem in Spain. This might include appointing a Special IP Crime Prosecutor’s Office. A previous effort, launched by Royal Decree 118/2005 in October 2005, has completely lapsed; the Cross-sectorial Commission to fight infringement that it authorized has not met since 2010.

In 2006, the Attorney General issued instructions effectively decriminalizing organized online file sharing of pirated content, and preventing the pursuit of criminal cases against enterprise end-user software piracy by establishing that such piracy is not considered to have a “commercial purpose” subject to criminal liability. 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. Also, until proposed amendments to the Criminal Code are adopted, corporate criminal liability arising from software infringement will remain unavailable under amendments made to the Criminal Code in 2010.

Some rights holders report good cooperation with Spanish police forces on criminal cases, including the National Police, Regional Police, and Guardia Civil. But criminal court procedures suffer from lengthy delays, lasting on average 18 months, and appeals are unlikely to result in deterrent sentences. Industry groups report little IP awareness in the judiciary, particularly in the digital realm. For example, in 2013, a criminal software piracy case was brought against a company that not only was using pirated software internally, but also was using the pirated software to provide client services. Such activity should qualify as having “commercial purpose,” even in the context of the 2006 Attorney General instructions, but six months after the case was filed, the court has yet to grant requested raids.

Several decisions in cases of criminal Internet piracy were issued in 2013, with mixed results. There have been mixed rulings handed down by Criminal Courts involving linking websites. For example, a decision of Examining Judge no. 1 of Bilbao, in a case against *mejortorrent.com*, cited the 2006 Circular, among other issues, in exonerating the defendant.⁸ Two cases⁹ dismissed charges because the Public Prosecutor did not include claims of infringement by communication to the public. On the other hand, two decisions came down against illegal linking websites,¹⁰ finding that the website operators did engage in a communication to the public when providing links to infringing content. These decisions illustrate the importance of providing prosecutors with adequate training to ensure that copyright cases are effectively prosecuted. Courts are mixed in response to cases involving circumvention devices, some rejecting cases due to an interpretation of the Criminal Code that the “specific” purpose of the device must be its exclusive purpose.

⁸For a discussion of this case, see <http://ispliability.wordpress.com/2013/11/17/website-operator-sentenced-to-18-months-of-prison-for-linking-to-p2p/>.

⁹See, Decision of Juzgado de Instrucción (Examining Judge) No 1 of Mislata (Valencia) dismissed the Zonaemule case and Decision of Juzgado de Instrucción No 10 of Zaragoza dismissed the Spanishtracker case in 2013.

¹⁰See: Judgment 313/2013 Juzgado de lo Penal nº 3 Valencia, June 24, 2013 and Judgment 453/13 (Divxonline, streaming case) Juzgado de lo penal nº 4 Castellón, October 30, 2013 (bajatetodo.com case).

Police agencies and customs officials do take *ex officio* actions in criminal copyright actions, mainly in cases of physical piracy (including some cases involving circumvention devices). But, despite the fact that physical piracy has not abated in Spain, the total number of actions declined sharply from 834 actions in 2012 to just 265 in the first 11 months of 2013. Rights holders suspect that limited storage facilities and the failure to destroy seized goods could be partly to blame, as is a lack of sufficient funding for enforcement activities. As we have reported in the past, cases against street piracy defendants face a number of obstacles, including the heavy burden placed on local police, and changes to the Criminal Code in 2010 that reduced crimes to minor offenses where the profit valued is below 400 euros (US\$ 541).

In civil piracy cases, rights holders continue to encounter the obstacles IIPA has detailed in the past, including that Commercial Courts handling copyright cases are overloaded; cases suffer from lengthy delays; rights holders lack needed evidence due to data retention laws; and courts misinterpret Spain's IP laws with regard to injunctions.

Criminal and civil actions involving end-user software piracy: BSA has a history of good cooperation with police forces and with the Ministry of Industry, and reports that these relationships improved further in 2013. In the last year, authorities conducted *ex officio* actions in two investigations, a sign of modest progress; although Criminal Courts still resist actions on software piracy due to the instructions of the Attorney General's circular. Other than these two cases, all of BSA's judicial cases involve the civil courts and raids must be initiated by the private sector. As IIPA has reported in 2013 and previous years, Commercial Courts in general perform reasonably well, but the procedures before these courts are on some occasions burdened by high bonds, difficulty obtaining the detailed evidence required to conduct raids, court-imposed measures that frustrate raids in progress, and inappropriately low valuation of damages in some cases.

Attack piracy at the payment level and in cooperation with tax authorities, by establishing 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 by working with electronic payment services such as VISA, MasterCard, and PayPal to block payments to distributors of pirate product.

Rights holders report that the Tax Agency and specifically the Customs' Department have shown some interest in the possibility of addressing IP crimes through tax fraud and smuggling charges. However, no real steps have been taken to assign investigation and coordination units specialized in this field.

Seek agreements between rights holders and major online advertising services such as AUTOCONTROL and IAB Spain, toward the removal of advertising from websites offering illegal material.

In 2013, an agreement was reached between the Coalition of Creators and Content Industries (*Coalición de Creadores e Industrias de Contenido*) and the Spanish Advertisers' Association (*Asociación Española de Anunciantes*). The parties anticipate that this effort will be expanded to include AUTOCONTROL and IAB Spain, along with the support of the Government of Spain.

COPYRIGHT AND RELATED LAWS IN SPAIN

Following the conclusion of the 2013 Special 301 cycle, the Government of Spain began developing a number of important initiatives to correct many loopholes that have made copyright enforcement actions incredibly difficult in Spain. Below is an account of the priority legislative changes that IIPA believes are crucial in the effort to develop an effective anti-piracy program. Each of these was included in the Priority Action Items in IIPA's 2013 Special 301 submission on Spain, where very extensive background information has already been provided for each

topic.¹¹ Here, a brief summary of the issue is provided for each priority item along with any relevant progress made by Spain's lawmakers in 2013. The current bills still require important modifications before they are adopted, as they contain various shortcomings, many of which are mentioned below. Many of the amendments currently being considered are not likely to be adopted until mid-2014, and in the event they are adopted it will be important to monitor their application by Spain's prosecutors and judges upon entry into force.

Clarify that linking sites are infringing and can be prosecuted through amendments to the Intellectual Property Law.

The need for this clarification in Spain's laws is rooted in the many difficulties rights holders face in obtaining judgements or administrative actions against Internet sites that link to and index infringing content, which are arguably at the root of Spain's digital piracy epidemic. IIPA is aware of draft amendments to the Criminal Code that would make certain linking activities a crime where they meet a number of criteria (e.g., active behavior in maintenance and updating of links to infringing works; knowledge or control of the infringement; significant activity as measured by the size of the audience in Spain or the number of works illegally offered; and a criminal intent of commercial gain). However, these criteria are unclear and should be clarified before enactment of the proposed amendments. It is also uncertain how these amendments will be applied to linking sites hosted outside the Spanish jurisdiction. Amendments to the IP Law have been proposed that could ensure that such linking sites are included in the scope of the IPC's administrative procedure, and these updates would likely be applicable to civil liability as well, but the final text of the law and its effectiveness remains uncertain.

Amend the Criminal Code to provide criminal remedies and allow prosecutions to resume in cases of P2P piracy and enterprise end-user software piracy.

Draft amendments to the Criminal Code that were presented for Parliamentary consideration in September 2013 would allow Spanish law enforcement to take criminal actions in important areas of copyright piracy that currently go unprosecuted. The amendments as currently drafted address the need for criminal liability for commercial scale infringement over P2P networks, although further modifications may prove necessary. They also, as mentioned above, would provide criminal remedies for certain instances of linking to infringing material. Finally, the amendments could clarify that enterprise end-user software piracy may be subject to criminal prosecution as well. These amendments are expected to be adopted and to enter into force by the end of 2014.

The amendments are critical because instructions to prosecutors issued by the Attorney General, decriminalizing infringing distributions of content by P2P networks and denying that enterprise end-user software piracy meets the standard for criminal prosecution, have resulted in a cessation of criminal enforcement actions against illegal file sharing and have eliminated the possibility of prosecuting enterprises that are using unlicensed software, as discussed under "Criminal Enforcement Actions in Spain" above.

Empower rights holder-submitted notices of infringement to establish ISP liability, by amending Spain's laws to clarify that these notices are effective means of providing ISPs knowledge that infringement is occurring on their services without court orders.

Decisions issued by the Spanish Supreme Court, most recently in March 2013, confirm that Article 16 of the Law of Information Society Services and Electronic Commerce (LSSI) must be construed to provide that any effective notice to an ISP regarding infringing activity suffices for the knowledge requirement in a copyright liability action, without requiring that such notice be served by a government authority, in accordance with the EU Directive of reference. However, clarifications to the LSSI are needed to prevent lower courts from ignoring this important jurisprudence and to encourage cooperative anti-piracy communications within the private sector.

¹¹See <http://www.iipa.com/rbc/2013/2013SPEC301SPAIN.PDF>.

Establish legal incentives for ISPs to cooperate in efforts to stem infringing file sharing activities.

At present, no voluntary ISP cooperation efforts are in place because the Spanish E-commerce Law (LSSI) does not establish liability for ISPs if, absent a Court or administrative authority order, they fail to remove illicit content. Amending the law to define a broader set of circumstances in which ISP liability could attach would encourage further cooperation in combating piracy, and reduce the administrative burden placed on Spanish authorities. Draft Amendments to the IP Law and the Criminal Code could achieve this. In July 2013, a provision was added to the draft IP Law amendments that would establish voluntary codes of conduct with respect to the cooperation of the intermediary service providers, electronic payment providers and advertising providers, but without active engagement by the government, it is likely to prove difficult to encourage all providers to participate.

Permit rights holders to obtain identifying information of infringers, in a manner that respects rights to data privacy consistent with the 2008 European Court of Justice (ECJ) decision in *Promusicae v. Telefonica*, for purposes of bringing civil and criminal copyright actions.

The Spanish Law on Data Retention (Law 25/2007, articles 1 and 6) obligates ISPs to retain and supply data to competent authorities in case of a Court order granted in criminal proceedings involving serious crimes. According to Spanish legislation, Intellectual Property Crimes are not considered serious criminal offenses (those punished with a minimum of five years of prison), and therefore the relevant data is unavailable for criminal copyright cases. Processing retention data for the purpose of civil copyright actions is banned. Amendments to the Civil Procedure Law have been drafted that could improve this matter, and could undergo Parliamentary review by as early as summer 2014. As currently drafted, however, the amendments do not provide the right of information where infringers act in good faith and not on a commercial scale, essentially leaving such cases inactionable.

Correct Spain's implementation of the right of information as provided 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.

The "right of information" provided in Article 8 of the EU Enforcement Directive requires Member States to make available procedures for rights holders to obtain court orders to ISPs 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 ISP 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 ISP, not to the acts committed by the infringer. A remedy to this weakness was proposed in draft amendments to the Civil Procedure Law in the summer of 2013, but a later draft incorporates the requirement that the defendant's acts must be acts that "could not be considered carried out by mere end users in good faith and without the aim of obtaining economic or commercial benefits." This language, unfortunately, would solidify the current status quo in Spain, under which infringing online users are guaranteed anonymity and impunity.

Ensure that commercial dealing in circumvention devices is a criminal offense.

Spain has ratified the WCT and the WPPT, and these obligations entered into force on March 14, 2010. However, to fully comply with these treaties, Spain needs to address significant gaps in its legal structure for the protection of copyright works that are protected by TPMs. Spanish courts have erroneously concluded that devices primarily designed for purposes of circumvention of TPMs 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. Draft amendments to the Criminal Code that would bring the definition of circumvention devices in line with the EU

Copyright Directive, if adopted, could go into force by the end of 2014 and could lead to more effective interpretation by the courts.

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.

These legislative changes to the Civil Procedure law would address longstanding problems faced by the software industry in bringing successful civil actions against enterprise end-user software piracy. Unfortunately, no known resolution is in the works.

TRAININGS AND PUBLIC AWARENESS

The content industries regularly offer training sessions and enforcement assistance in Spain. BSA and the Ministry of Industry agreed in 2011 to collaborate on a joint program, in which the Ministry would have invested 300,000 Euros towards a new training and awareness campaign. Although the program was suspended, BSA intends to work with the Ministry of Industry in 2014 to revive this important initiative. In previous years, a similar investment produced excellent results by reducing piracy levels among illegal channels of software distribution by 20%. A new campaign could further these achievements and extend the program to small- and medium-enterprises.

As a private initiative, in 2013, PROMUSICAE-AGEDI provided 18 training sessions to some 1330 attendees from different enforcement agencies (eight sessions to the National Police/Guardia Civil, eight to the Local Police, one to Customs and one to the regional police Mossos d'Esquadra). A total of 220 training certificates have been delivered.