

SPAIN

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2015 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA asks that USTR monitor Spain through special engagement in 2015 for full resolution of key enforcement challenges.¹

Executive Summary: In October 2014, Spain adopted long-awaited amendments to its Intellectual Property and Civil Procedure Laws that seek to address major gaps in the country's legal infrastructure to fight Internet piracy. The legislation came into force on January 1, 2015, and its success will rest on the will of the government to vigorously enforce its provisions, on the interpretation of the courts and administrative bodies charged with copyright enforcement, and on the strength of further amendments to the Criminal Code that Spain's Congress could adopt as early as mid-2015, in a companion effort to reform Spain's IP enforcement regime. But the significance of the recent amendments, clarifying the scope of administrative actions regarding linking activity, liability for inducing infringement, and other important areas, cannot be overstated. Nonetheless, it would be premature to proclaim that Spain has lifted itself from the grip of severe piracy levels, or that Spain's administrative, civil, and criminal enforcement infrastructure have implemented the needed changes to a degree commensurate with the importance and influence of this developed market.

Spain has a history of support for high international standards of copyright protection, and yet it is home to levels of street and online piracy on par with the most entrenched piracy cultures in the world. In 2012, Spain finally put itself on the online enforcement map with the establishment of the Second Section of the Intellectual Property Commission (IPC), an administrative body intended to address cases of Internet piracy quickly and effectively. Unfortunately, despite the good intentions underlying the establishment of the IPC and its personnel, the work of the IPC is neither quick nor effective, with an average case response time of 400 days just to begin a case. Compounding Spain's overall piracy problem, law enforcement bodies lack the resources and legal certainty to address forms of piracy that are not within the IPC's scope, such as peer-to-peer (P2P) piracy and circumvention devices. USTR opened a Special 301 out-of-cycle (OCR) review of Spain in 2013, "focused in particular on concrete steps taken by Spain to combat copyright piracy over the Internet." At that time, IIPA made several recommendations to improve the effectiveness of the IPC's activities, strengthen law enforcement actions, and close gaps in the laws so that cases can move forward. In this report, we review those recommendations and describe developments in 2014 along with remaining elements still to be addressed, and highlight the following priority actions for 2015.

PRIORITY ACTIONS REQUESTED IN 2015

- Quickly adopt needed reforms to the Criminal Code and Law of Information Society Services and Electronic Commerce (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 to dramatically improve its operations and response times for more effective enforcement in actions against infringing web-hosting, linking, indexing, and torrent sites.
- Prosecutors and courts should 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.
- 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.

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/2015SPEC301HISTORICALCHART.pdf>.



- Provide government support for agreements between rights holders and major online advertising services toward removal of ads from websites offering illegal material.

COPYRIGHT PIRACY IN SPAIN

Already dramatically more widespread in Spain than in so many neighboring countries in Western Europe, piracy over the Spanish Internet is still on the rise, devastating the markets for music, film, video games, and books. Research conducted by The GfK Group (GfK) and the Coalition of Creators and Content Industries (*Coalición de Creadores e Industrias de Contenido*) (the GfK study),² shows that in 2013, there were more than 724 million illicit audiovisual files acquired, causing 450 million euros (US\$506 million) in lost profits. The volume of physical and online pirate music products in 2013 amounted to 1.982 billion files, causing an estimated 513 million euros (US\$577 million) in lost profits. Pirated books in Spain, where online piracy of textbooks is a growing problem, totaled 302 million files in 2013, causing 79 million euros (US\$88.85 million) in lost profits. Altogether, the GfK study found a total loss in Spain of potential earnings due to piracy of 1.326 billion euros (US\$1.49 billion).³

According to the GfK study, 70% of Spanish Internet users proclaim that they would not pay for something they could get for free, while 56% argue that they should not have to pay for content that they may not like later. These attitudes are fueled by an environment where there are no real deterrents against online piracy, and have contributed to Spain's status as a global hub for digital piracy. The video game industry saw its Spanish market value peak in 2007 and has since faced steady declines. At the same time, Spain is increasingly becoming a hub for illicit activity.

Piracy leads to shrinking revenues for Spain's creative sectors and its government. The independent sector of the film industry, for example, has been especially hard hit – where they once could receive as much as 10% of a production budget from a minimum guarantee of an exclusive license fee in Spain, surviving Spanish distributors reportedly may only be able to guarantee a mere two to three percent of a film's budget, if any. The GfK study shows that in 2013, because of piracy the potential for more than 25,000 new jobs went unrealized in the creative sectors. The revenue lost across these sectors also accounts for a loss in government revenue (including taxes and social security income from unrealized new jobs) of an estimated 526.2 million euros (US\$600.13 million).

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, P2P networks (such as *Edonkey*), and increasingly via streaming sites. The incidence of digital piracy is generally evenly split between P2P and non-P2P formats. Within the P2P categories, piracy via BitTorrent networks is by far the most favored for pirated music, audiovisual, and video game 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.

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. Websites such as *exvagos*,

²See <http://lacoalicion.es/observatorio-de-la-pirateria/observatorio-de-la-pirateria-2013/>. A new GfK report will be published in the coming weeks.

³GfK estimates that the total value of pirate content among IIPA's membership (the sectors included in the GfK study), accessed online from Spain in 2013, reached 16.136 billion euros. Together with physical piracy, the value of illicit material totaled 16.279 billion euros. The study found that the "conversion" rate of illicit product value to lost profits—or in lay terms, the percentage of the value of illegally obtained material that consumers responded they *would* spend on legitimate goods if illicit goods were not available—varies from sector to sector. Illicit audiovisual products were valued at 3.8 billion euros (US\$ 4.4 billion), with a conversion rate of approximately 11.7%, thus producing the 450M euro lost profits figure cited in the text above (11.7% of 3.8B euros). Illicit music products were valued at 6.099 billion euros (US\$ 6.859 billion), with a conversion rate of approximately 8.3%. Illicit digital books were valued at 1.837 billion euros (US\$2.066 billion), with a conversion rate of approximately 4.3%.

downtwarez, and *argentinawarez*, for example, are operated in Argentina, but are hosted out of Spain, and are very popular among Spanish users for the wide selection of Spanish content they offer.

Mobile piracy compounds the already severe problems for creative sectors in Spain. Mobile phones have entered the vast majority of Spanish households, and among mobile users 47% use their phones to access the Internet for the express purpose of listening to digital music. Yet only 12.7% of Internet users report going online to acquire legitimate music or films—a figure that illustrates how far illegitimate activity is outpacing the legitimate market. Piracy of video games on smartphones has also increased in the past year.

In another growing trend, business operators are using hard drives and massive storage devices for background music in entertainment premises, especially those whose activity is mainly based in music, such as night clubs, discotheques, clubs, etc. In as many as 90% of these types of establishments, music is accessed and stored illegitimately from a growing number of companies providing black market services without any kind of authorization from music producers.

Hard goods piracy: Across Spain, physical piracy remains a highly visible and unabated problem, particularly for the book, music, and film industries. For the music industry, illegal CD sales in 2014 amounted to 15% of the legal market. The film industry reports that hard goods piracy in Spain has not subsided, incorporating organized DVD-R labs, distribution centers, and street vendors. Physical piracy has not subsided in the touristic cities of Seville, Madrid, Granada, Murcia, Barcelona, Alicante and Valencia, which serve as outlets to the main operational centers for the organized pirate networks that produce pirate CDs and DVDs for all of Spain. Also affected are the coastal cities in Andalucía, Comunidad Valenciana, Murcia and Cataluña. There is strong demand for hard copies of pirate DVDs across Spain, and the result is a decimated legitimate retail market. The most representative trade association for video distributors, UVE, reports that in 2013, the legitimate home video market declined by 23% compared to 2012.

Camcording piracy: Camcording in theaters 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 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 video game industry also continues to suffer from the availability (primarily online) of circumvention devices for video game 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) is 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.

COPYRIGHT ENFORCEMENT ACTIONS IN SPAIN

The Spanish Copyright Commission, approved by law in 2011 to be set up within the IPC, (herein, the IPC) issued in 2014 a small number of orders against online infringers that could mark a new effort to address the web's worst piracy offender; but the IPC has yet to remedy its extremely slow response times to rights holders' complaints. Some tweaks were made to the IPC's authority in the recent IP Law amendments, and there should now be no question that the IPC has the legal tools necessary to begin to take expeditious and deterrent actions against online piracy. Representatives of the IPC recently assured industry representatives that under the new legislation the procedures will be shortened to about two or three months; however, even two months is still an unreasonable delay

when dealing with illegal online activity. Under the amended IP Law the IPC must issue a decree setting forth an updated procedure, but government officials have stated that instead, the IPC is expected to continue to operate under the old decree, despite the fact that it is no longer compatible with the terms of the new law. Meanwhile, some of the most harmful infringing websites that had closed just before the new law entered into force, are now back up and operating again.

For matters that fall outside the IPC's scope, Spain's police, prosecutors and judges pointed in the past to Spain's laws as the reason for their inaction against pirates and sellers of circumvention devices. Yet even before the October 2014 amendments had come into force, Spain's courts in the past year have already begun to bring final judgments against the operators of infringing linking sites. Clarifications and amendments are still needed in Spain's laws to permit court actions to go forward against other online infringers, and against manufacturers and distributors of circumvention devices; 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:

ACTION ITEM: 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.

The establishment in 2012 of Spain's administrative body for the notification and removal of online infringements, Section 2 of the IPC, brought much international praise as a major step in the fight against piracy. But gaps in the IPC's scope of authority and severe delays have plagued its first three years of operation. Adopted amendments to the IP Law resolve some concerns, but the success of the IPC still largely rests on the institution itself to improve its response times.

Since its inception, the IPC has been plagued by delays. Because of inordinate delays, only a small portion of the infringing material that has been referenced to the IPC has been removed. The IPC takes on average more than 400 days to initiate an investigation into a site after receiving a rights holder complaint. The recording industry reports that as of December 2014, since the IPC began operations, just 50 albums and 6833 songs have been voluntarily or compulsorily removed (of these, 6819 correspond to one site, *Goear*, which is also the subject of a lawsuit currently pending for judicial review of the measures ordered by the IPC). Just a handful of small-scale websites have closed down in response to IP Commission activities, although the IPC has not issued any decision obliging the closure of any website. Altogether, the IPC has issued a removal order in response to only three of the 46 complaints the recording industry has filed in the past three years. The anti-piracy organization in Spain for the audiovisual and video game industries reports that of the 80 cases it filed in 2014, only two have resulted in the removal of infringing material – and those occurred voluntarily. To date, the *Goear* case is the only instance in which complaints of recidivist infringing sites submitted by IIPA's affiliates resulted in IPC actions – and this includes two complaints that were filed as far back as September 2012. A number of factors contribute to these delays.

The bureaucratic makeup of the Commission: Under the IPC's procedures, each case must be reviewed by a panel of inter-ministerial government officials. The October 2014 amendments to Article 158 of the IP Law codify the placement of government officials from multiple ministries on the Second Section's Committee; however, there is no expectation that this will take place in the near future. While the law as amended requires the appointed members of the Committee to have IP expertise, a helpful provision, it also reaffirms the bureaucratic and slow nature of the IPC's deliberating process.

The scope of the IPC's authority: Certain of the adopted changes, specifically to Article 158^{ter} of the IP Law, appear to be aimed at streamlining or prioritizing the types of cases subject to IPC procedures. Helpfully, the amendments clarify that "ISPs that actively facilitate the localization of copyright protected works made available without rights holders' consent" are included within the IPC's scope. Time will tell whether the overall result will be

more efficient processing of cases, or if excluded categories of ISPs (for example those that directly infringe only a small number of works, or that have a smaller audience) are significant omissions in the anti-piracy effort.

New pre-requisite to apply for IPC action: In another change that could further delay anti-piracy actions, Article 158ter(3) now requires rights holders to provide, along with an application for the IPC to take action in a particular case, proof of the rights holder's prior attempt to request by email that the ISP in question remove the allegedly-infringing material.

Spanish authorities have failed to carry out IPC orders to sanction sites linking to infringing material. Spain's Secretary of State for Telecommunications and the Information Society (SETSI) is the administrative body charged with sanctioning websites that do not comply with the LSSI, for example with the law's requirements of providing contact information for website operators. Rights holders report that SETSI failed to issue sanctions against any of the more than 40 cases regarding linking sites reported by the IPC in 2014.

IPC action over cases involving foreign jurisdictions. In November, 2012, the recording industry (*Asociación de Gestión de Derechos Intelectuales* (AGEDI)) filed a complaint with the IPC regarding the notorious BitTorrent tracker *The Pirate Bay* (www.thepiratebay.se). The IPC initiated proceedings in June 2014, appointing the website's owner, Neij Holdings Ltd, a Swedish entity, as the responsible party in the case. On September 11, 2014, the IPC adopted a Final Resolution declaring that Neij Holdings Ltd committed copyright infringement, but subsequently observed that *The Pirate Bay* had not removed the infringing content, and on October 28th 2014 requested an Authorization from the Administrative Judicial Court to take further action. If the Judicial Authorization is granted, ISPs based in Spain will have three days to comply with orders to eliminate links to the infringing sound recordings made available by *The Pirate Bay*, and to block access from Spain to the domains belonging to *The Pirate Bay*. The case will set an important precedent about whether the IPC can be effective in taking action domestically against online infringers that inflict significant damage from outside Spain's borders.

Together with the changes that have been made to the laws governing the IPC's procedures, the IPC should use its existing tools to their maximum effect. Simply stated, the IPC must work faster and focus on linking sites in order to be effective. Moving the existing complaints through the due process steps provided for and removing unnecessary procedural hurdles will not only 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) (emphasis added).

ACTION ITEM: 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.

There have been some noticeable improvements on the part of Spain's law enforcement against Internet piracy in 2014. Still, important steps remain to be taken in 2015 to ensure that police forces and prosecutors have the resources and legal foundation needed to take comprehensive action. Enforcement against physical piracy remains insufficient to tackle the rampant street piracy across the country.

Internet piracy enforcement: There has still been no correction to the 2006 Attorney General instructions that effectively decriminalized organized online file sharing of pirated content.⁴ Subsequent to the 2006 Circular and

⁴For background on the 2006 Attorney General Circular, see <http://www.iipa.com/rbc/2014/2014SPEC301SPAIN.PDF>.

various ensuing court decisions, the police, prosecutors, and the National Police Technology and Internet Division (the BIT) significantly reduced work on Internet piracy cases. During 2014, public prosecutors showed an increased willingness to take on Internet piracy cases, and rights holders report good cooperation with Spanish police forces on criminal Internet piracy cases when industry representatives initiate investigations. For instance, the National Police in late 2014 arrested the operators of the linking site *SeriesPepito*, a possible indication that Internet cases will be more of a priority going forward. In 2014, there were several notable convictions (including prison terms, fines, and damages) against administrators of infringing sites, including the video game circumvention website *crackmanworld*; linking and streaming site *divxonline.info*; and linking site *bajatetodo.com*. (These decisions are described in greater detail below, under “Copyright and Related Laws in Spain.”) Prosecutors have begun to file cases against administrators of linking websites under charges of unauthorized communication to the public of copyrighted works. Draft amendments to the Criminal Code now being reviewed by the legislature (also detailed below) could permit prosecutions to more fully resume in cases currently hindered by the 2006 Circular. Still, criminal court procedures suffer from lengthy delays, lasting on average 18 months, and many appeals are unlikely to result in deterrent sentences. Industry groups continue to report little IP awareness in the judiciary in the digital realm.

For the video game industry, enforcement remains a severe challenge, particularly in clamping down on the distribution of circumvention devices – an area in which Spanish police forces conducted no new actions in 2014. For years, court decisions have been mixed regarding proceedings against sellers of 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. IIPA looks to pending amendments of the Criminal Code to assist the judiciary in interpreting the existing anti-circumvention provisions in the Criminal Code, to promote more effective action against Spain’s distributors of circumvention devices.

Physical piracy enforcement: Police agencies take *ex officio* actions in criminal copyright actions mainly in cases of physical piracy. The vast majority of these are carried out by local police, as the Central Units of the National Police and the Guardia Civil have greatly reduced their investigation activities.

Police raided 18 labs and distribution centers during 2014, seizing more than 54,000 pirate optical discs and arresting 200 street vendors. The local film industry estimates that street vendors sold 10 million pirate DVD-Rs during 2014. In actions against illegal camcording, police arrested four individuals, and one individual was convicted in 2014 for illegal camcording. However, judges do not authorize residential searches to prove that recordings are intended to be uploaded on the Internet. In June 2014, the police, acting on information provided by the local reprographic rights organization, CEDRO, arrested three people who were suspected of illegally scanning, then printing books on a large scale. That investigation turned up eight large-capacity photocopying facilities in Madrid and Seville, where over 1000 unauthorized copies of books and 10 computer hard discs full of scanned texts (for printing) were seized.⁵ A similar action was conducted in December 2014, where 5 copy shops were raided, resulting in the seizure of stockpiles of unauthorized photocopies of books as well as several digital storage devices containing electronic book files.⁶ The video game industry reports that police forces conducted seven raids against an Internet seller of physical pirate video game products.

But, despite the fact that physical piracy has not abated in Spain, the total number of actions has declined sharply since 2012, from 834 actions that year to fewer than 200 in the first 11 months of 2014. Rights holders suspect that limited storage facilities and the failure to destroy seized goods could be partly to blame, in addition to a lack of sufficient funding for enforcement activities and the failure of some judges to authorize search warrants for the seizure of goods. 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\$ 445). IIPA’s members are unaware of any

⁵See <http://www.theguardian.com/world/2014/jun/22/spain-police-arrest-three-illegal-book-publishing>.

⁶See http://www.cedro.org/prensa/noticiasderechosdeautor/noticiasderechosdeautor_/2014/12/17/operaciones-policiales-contra-la-fotocopia-illegal-de-libros.

judicial proceedings having been initiated *ex officio* by the General Prosecutor's Office, and the anti-piracy cases that have moved through the courts rarely produce deterrent sentences, even in the most serious cases.

Civil enforcement: The book publishing industry recently won a key case against several universities for digitizing and making available online the plaintiff's copyrighted texts, for which the court issued a fine of 250,000 euros (US\$278,000).⁷ However, in general, rights holders continue to encounter obstacles in civil courts that IIPA has detailed in the past, including that the Commercial Courts handling copyright cases are overloaded; cases suffer from lengthy delays of six to 18 months (and appeals that can take over a year); rights holders lack needed evidence due to data retention laws; and courts misinterpret Spain's IP laws with regard to injunctions.

ACTION ITEM: 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, to date IIPA is not aware that any steps have been taken to assign investigation and coordination units specialized in this field.

Adopted amendments to Article 158ter5 of the IP Law empower the IPC to require payment and advertising services to collaborate with the Commission and potentially suspend services against infringers. However, representatives of the IPC have expressed fear that this measure could be rejected by the courts, which risks that the provision will not be implemented.

ACTION ITEM: Seek agreements between rights holders and major online advertising services toward the removal of advertising from websites offering illegal material.

Expanding on a 2013 agreement between the Coalition of Creators and Content Industries (*Coalición de Creadores e Industrias de Contenido*, or Coalition) and the Spanish Advertisers' Association (*Asociación Española de Anunciantes*), in early 2014, the parties reached an agreement on self-regulation with Google and the Interactive Advertising Bureau of Spain (IAB Spain - an association that represents the digital publicity sector in Spain). The aim is to adopt a good practices code in the field of advertising that supports the legal offer of digital content and protects IP rights on the Internet. Unfortunately, while an important goal of bringing all these players to the same table was met, bureaucratic delays under the competing oversight of the Ministries of Culture and Industry have prevented the agreement's full implementation.

Setting an important example for all content providers, PRISA, one of the major communication groups in Spain, and Gol TV, a TV station retransmitting football games, have signed an agreement with the main media agencies in Spain to remove advertising from websites offering illegal content.

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 close many loopholes that have made copyright enforcement actions incredibly difficult in Spain. Since that time, IIPA has closely monitored the legislative process in Spain for several priority legislative changes that are crucial in the effort to develop an effective anti-piracy program, which IIPA included in the Priority Action Items of its 2013 and 2014 Special 301 submissions on Spain.⁸ On October 30, 2014 the Spanish Congress passed Law No. 21/2014, amending the consolidated text of the Law on Intellectual Property, approved by

⁷ See <http://www.ifro.org/content/cedro-wins-case-against-university-uab-illegal-digital-uses>.

⁸ See <http://www.iipa.com/rbc/2013/2013SPEC301SPAIN.PDF> and <http://www.iipa.com/rbc/2014/2014SPEC301SPAIN.PDF>.

Law of Royal Legislative Decree No. 1/1996 of April 12, and Law No. 1/2000 of January 7, 2000 on Civil Procedure. The amendments made headway in the areas of the IPC's scope of authority, liability for inducing infringement, and the right of information for infringement cases, as required under article 8.1 of the EU Enforcement Directive. However, the changes are not complete in their response to the gaps in Spain's copyright regime, and additional issues remain to be handled in amendments to the Criminal Code that are currently pending and expected to be voted in Spain's Congress in mid-2015. The following is a brief summary of the legislative issues for each priority item along with any relevant progress made in 2014.

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

Although the adopted IP Law amendments fell short of explicitly clarifying that linking sites may infringe copyright, which IIPA recommended as a top priority and necessary criterion under USTR's Special 301 out-of-cycle review of Spain, the past year has brought some constructive court decisions against infringing linking sites.

The need for this clarification in Spain's laws is rooted in the many difficulties rights holders have faced in obtaining judgments or administrative actions against Internet sites that link to and index infringing content, which are arguably at the root of Spain's current digital piracy epidemic. The amended Article 158^{ter} of the IP Law authorizes the IPC to apply an administrative procedure against certain linking sites, and the civil procedure law has also been amended to permit certain remedial measures against Internet linking sites. However, it is not clear how these provisions will be interpreted, as the IP Law has not been amended to declare that linking sites are infringing.

Many judges in the past have not considered linking activities to violate the making available right under copyright law, and as a result, police have been unable to initiate the necessary raids. However, courts in 2014 have issued important convictions in cases against sites that link to infringing material, affirming that the activity constitutes communication to the public under the making available right. For example, the Castellón Court of Appeal upheld a conviction of the operator of the linking site *Bajatetodo*, finding that the operator was engaged in unauthorized communication to the public by providing links to infringing content hosted in P2P networks; the court rejected the claim that the activity was protected under Spain's safe harbor laws.⁹ Notably, the ruling cites the recent *Svensson* decision of the European Court of Justice¹⁰ as grounds that linking to infringing material amounts to an act of communication to the public. Similarly, the Valencia Court of Appeal upheld a conviction of the operator of the streaming and linking site *Divxonline*.¹¹ Spain's Audiencia Nacional (a high court with national jurisdiction) upheld decisions of the IPC that ordered two linking torrent websites (*elitetorrent* and *multiestrenos*) to remove certain links to protected works, also citing the ECJ decision in *Svensson*. Draft amendments to the Criminal Code would make certain linking activities a crime where they are operated for direct or indirect profit, and could allow future cases move more swiftly through investigation and prosecution in Spain's courts.

ACTION ITEM: Amend the Criminal Code to provide criminal remedies and allow prosecutions to resume in cases of P2P piracy.

Draft amendments to the Criminal Code that were adopted by Spain's lower house and are now before the Senate 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.

⁹Decision of November, 2014, upholding the decision of the Criminal Court (judgment 453/13 Juzgado de lo penal nº4 of Castellón, October 30, 2013). The sentence included 18 months of prison, a 7,200 € fine and damages awarded to the rights holders who brought the action.

¹⁰Judgment of 13 February 2013 (C-466/12).

¹¹Decision of February 2014. The sentence consisted of 19 months of prison, a 7,560 € fine and damages awarded to the rights holders.

The amendments are critical because instructions to prosecutors issued by the Attorney General in its 2006 Circular, which still have the effect of de-criminalizing infringing distributions of content by P2P networks, have resulted in a cessation of criminal enforcement actions against illegal file sharing.

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

Decisions issued by the Spanish Supreme Court 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.

Adopted amendments to Article 158ter3 of the IP Law amendments require that, before initiating the IPC's administrative procedures, a rights holder must show a prior attempt to request directly from the ISP the removal of the infringing material. This provision includes a helpful clarification that such an attempt on the part of the rights holder can serve to establish actual knowledge of infringement, with reference to the safe harbor provisions within Articles 16 and 17 of the LSSI. However, local experts anticipate that the effect of that actual knowledge will be limited to the administrative procedure under the IPC, and not applicable generally. In illustration of the type of positive cooperation that can be achieved, the film industry reports that it has had some success in sending cease and desist letters to cyberlockers; in 2014, rights holders sent nearly 1,500 letters, and more than 108,000 links were removed. An amendment to the LSSI is still needed to include rights holder notices as a means to establish effective knowledge of infringement as an element of liability, so that cooperation in removing infringing material can be more widespread.

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

Adopted amendments to Article 138 of the IP Law hold parties responsible for infringement where they induce infringement, cooperate and know or have reason to know of the offending activity, and have a direct financial interest in the infringement. However, Article 138 references the Spanish E-commerce Law (LSSI), which limits liability for ISPs, and courts have had conflicting interpretations of the combined provisions, allowing the safe harbors to swallow the liability provisions of the IP Law. Further, the LSSI does not explicitly require ISPs to remove illicit content absent a court or administrative authority order. It may be too soon after the amendments have entered into force to know whether the changes to Article 138 will accomplish the intended goal of incentivizing ISPs to cooperate in antipiracy measures by establishing clear guidelines of liability for inducing infringement. IIPA urges the U.S. Government to continue to monitor Spanish court interpretations of these provisions and future voluntary cooperation on the part of ISPs.

SETSI could further encourage service providers to act legitimately by enforcing the requirements of Article 10 of the LSSI to make the identity and address of website operators available, and to cooperate with judgments handed over by the IPC. Rights holders have submitted nearly 200 complaints to SETSI regarding websites that do not provide the required contact information, but SETSI has responded regarding only one of these. As a result, bad actors in the Internet space are able to remain anonymous and avoid the reach of plaintiffs and prosecutors.

ACTION ITEM: 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,

and

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 their clients, as set out under the current Spanish Law.

Adopted amendments aimed at addressing these concerns appear to fall short of the needed clarity to meet these goals. 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 for 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 suffered from a burdensome dual commercial scale requirement, applying to both the services provided by the ISP and to the infringements committed by the direct infringer. Adopted amendments to Article 256.1(11) of the Civil Procedure Code will permit rights holders to seek user data from ISPs for purposes of infringement actions; but the new provision excludes cases involving end users who act in good faith or who lack a motive of commercial gain. This language, unfortunately, solidifies the existing status quo in Spain, under which infringing online users are guaranteed impunity for copyright infringement. The elements could also continue to present an obstacle in cases against sites and services engaged in secondary or indirect infringement, which depend on proof of the underlying end-user infringement, including end-user identity.

ACTION ITEM: Ensure that the existing provisions of the Criminal Code (as amended) are applied correctly against commercial dealing in circumvention devices.

Spain must 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 lead to more effective interpretation by the courts.

ACTION ITEM: Ensure that authors and publishers receive fair compensation for reuse of their works.

In December 2012, Spain's Council of Ministers amended the Copyright Act to eliminate the existing system of levies, under Article 25, which applied to equipment for making private copies, and provided compensatory remuneration to authors and publishers. In place of the levy system, the amendment provided for payment out of the central government's budget. This change obligates all Spanish tax payers, rather than linking the payment of fair compensation (to the rights holder) to the act of private copying (by a consumer). Since the enactment of this amendment, remuneration for private copying has fallen dramatically for reprographic rights organizations (RRO), due to reduced payment from the government.¹²

Unfortunately, the October 2014 amendments to the Copyright Act are not expected to improve the likelihood of fair compensation for authors and publishers, despite such compensation being a requirement under

¹² For example, in 2013, the government set the total compensation to be distributed among all collective management organizations in Spain at less than 10 % of the compensation previously raised through the levy system. See, Raquel Xalabarder, "A Bill to Amend the Spanish IP Law," (Jul. 10, 2014) available at <http://kluwercopyrightblog.com/2014/07/10/a-bill-to-amend-the-spanish-ip-law/#private>.

Directive 2001/29/EEC. These amendments also included two new exceptions for educational uses, one allowing “regulated” educational institutions to make uncompensated use of portions of works, the other creating a compulsory license to ensure that universities and research centers compensate rights holders (via payments to RROs that will distribute the revenue collected). It is unclear whether these new provisions will effectively encourage universities to obtain, or whether the exception for uncompensated uses will lead to continued resistance by universities to obtain repertoire licenses for educational uses. It is clear, however, that the current remuneration scheme for private copying in Spain has reduced compensation to local industry, and that this harm also extends to “authors and publishers from other countries [who] are being discriminated against by Spain because they are not remunerated for the reuse of their works in [Spain].”¹³ IIPA encourages Spain to revise its existing remuneration scheme for private copying, and to monitor the implementation of the educational exceptions to ensure that authors and publishers of any work reused in Spain receive fair compensation.

¹³See Resolution Adopted by the IFFRO Annual General Meeting (Oct. 29, 2014) http://www.ifro.org/sites/default/files/ifro_resolution_re_spain_agm_2014_1.pdf (noting a number of legal infirmities in the law).