

# INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

## 2002 SPECIAL 301 REPORT

# HUNGARY

## EXECUTIVE SUMMARY

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Hungary has made great strides in modernizing its copyright legal regime over the past several years, including extensive revisions to the Copyright Act in 1999, passage in 2001 of a new Act on Electronic Commerce and Information Society Services, and amendments to its Criminal Code. However, the copyright industries report mixed results at best with on-the-ground enforcement operations in a market that could otherwise sustain good growth. This is because of the ongoing problem of prosecutorial delays, the ineffectiveness in moving criminal cases forward, and poor border enforcement. The growth of Internet piracy operating from within Hungary has hurt all of the copyright industries inside and outside the country; more enforcement efforts are also needed against this form of piracy, although passage of the new e-commerce legislation, which implements a notice and takedown system, could provide much-needed relief.

In 2001, as in years past, the copyright industries experienced prosecutorial enforcement problems even as there remained relatively good police cooperation. The police conduct raids and seizures, but criminal enforcement breaks down at the prosecution and sentencing stages. Prosecution of infringement cases is slow, and the sentences imposed have not been at levels sufficient to deter piracy, especially to combat the sophisticated optical media and other piracy operations in Hungary, including Internet piracy. Hungary needs fully to comply with its TRIPS Agreement enforcement obligations by fixing its criminal enforcement problems, including the need to impose deterrent penalties. Hungary should be placed on the Watch List this year.

### ESTIMATED TRADE LOSSES DUE TO PIRACY (in millions of U.S. dollars) and LEVELS OF PIRACY: 1996 - 2001

INDUSTRY	2001		2000		1999		1998		1997		1996	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Motion Pictures	18.0	40%	18.0	40%	22.0	40%	19.0	40%	18.0	40%	26.0	60%
Sound Recordings/ Musical Compositions	4.5	30%	3.0	20%	4.0	20%	7.0	20%	7.0	20%	7.0	23%
Business Software Applications <sup>1</sup>	NA	NA	21.0	50%	30.1	52%	30.8	57%	19.6	58%	32.9	71%
Entertainment Software	43.3	90%	9.6	86%	NA	NA	13.2	75%	NA	NA	NA	NA
Books	4.0	NA	4.0	NA	4.0	NA	4	NA	4.5	NA	4.5	NA
<b>TOTALS</b>	<b>69.8</b>		<b>55.6</b>		<b>60.1</b>		<b>74.0</b>		<b>49.1</b>		<b>70.4</b>	

<sup>1</sup> BSA loss numbers for 2001 are preliminary.

## COPYRIGHT PIRACY

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For a country with a well developed legal system like Hungary, piracy remains moderately high, and contributes to the overall regional piracy problem due to poor border enforcement. The problem of optical media production and distribution in this region continues to grow. Hungary continues to face the importation of pirate CDs, primarily music CDs being produced in and imported from Ukraine. However, the nature of other pirated material in Hungary is changing somewhat from years past. Although CDs from Ukraine can still be found in Hungary, the flow of lower quality musical cassettes and CDs from Romania and Bulgaria has lessened; these are being replaced by CD-R pirate materials due to the relatively low prices of CD burners and blank CDs. Pirate VCDs (imported by the local Chinese community mainly from Malaysia and Thailand) and locally burned CD-Rs containing audiovisual contents are beginning to appear in the market.

In years past, there was evidence that the production of pirate materials by CD plants in Hungary is being exported to other Central and Eastern European countries as a result of poor optical media production control systems and lax border enforcement. However, both the recording industry and the software industry now report improvements in Hungary, and neither consider Hungary to be a major producer of counterfeit CDs nor a producer of infringing stampers, used to produce disks in Hungary or elsewhere. Hungary's two known replication facilities appear to use source identifying, or SID, codes on their manufactured CDs. So this problem, at least for now, has abated, even though optical media regulations were never adopted. At present, the copying or "burning" of CDs by private users is responsible for the majority of illegal CD production.

The Motion Picture Association (MPA) reports that the leading audiovisual piracy problem in Hungary is the high level of back-to-back copying of videos in small, locally owned rental/retail shops. Shop owners purchase a single cassette and make copies in their homes. It is estimated that up to 40% of rental shops carry pirate product. The product is packaged with high quality counterfeit labels created from modern color copiers that make detection very difficult. In addition, the quality of the copies themselves has become so advanced that they are virtually indistinguishable from the original. There is also a strong presence in the flea markets of pirated videos that are created upon request. The fact that these copies are made to order makes them difficult to detect, and the amount of product confiscated does not reflect the true amount of the vendor's business. Local television and cable companies regularly transmit titles for which they do not have broadcast or retransmission rights. Pirate videocassettes are also broadcast, especially by small cable providers in tiny villages. There has been progress in this area over the past year, with the piracy levels dropping from 60% to approximately 30%. There is still a high level of pay-TV signal theft through the use of pirate smart cards and cable/satellite decoders.

Pirates are also beginning to use the Internet to market their wares. Pirate VCDs and CD burners are starting to appear in Hungary in greater quantities. The local anti-piracy organization for filmed entertainment, ASVA, is increasingly seizing CD-Rs containing audiovisual content, possibly downloaded from the Internet. The Internet is also being used to market technical equipment for inactivating copyright protection. This is despite 1999 Copyright Act amendments that contained important anti-circumvention provisions, as well as sanctions for signal theft. Annual losses to the U.S. motion picture industry due to audiovisual piracy in Hungary are estimated to be \$18 million.

For the recording industry, as noted, Ukraine became the main source of pirated musical CDs entering Hungary, once the flow from Bulgaria subsided a few years ago. There are still Ukrainian imports in Hungary, but fewer than there were last year. However, there are now more home-copied CDs appearing in markets and shops alike due in part to the falling prices of CD writers and recordable compact disks (CD-Rs). Estimated trade losses due to recording piracy in Hungary are \$4.5 million in 2001, with a 30% piracy level.

Internet piracy and MP3 CDs continue to be a growing problem in Hungary. The recording industry and business software industry have, to date, received good cooperation in Hungary from Internet service operators, and the new treaty ratification and in Hungary and recent e-commerce legislation should improve the situation. It is too early to tell if the new legislation will be effectively enforced, and so far no criminal cases have been brought. In March and June 2000, the police in Paks raided an operation in which a small group of counterfeiters was advertising illegal copies of software online, but was distributing copies offline. According to preliminary results of the investigation, more than 8,000 end-users had purchased illegal software through the counterfeiters. Over 400 suspects continued to be investigated in connection with the operation throughout 2001.

In the 1999 Copyright Act amendments, Hungary addressed the long-standing problem of protection for pre-existing sound recordings (pre-1974 recordings). The failure to take action for many years permitted back-catalog material to accumulate in Hungary, even as this material was illegal in neighboring countries. Starting on September 1, 1999, when the new law went into force, a one year sell-off period for such material in existing stock was adopted; now that that period has ended, Hungarian police and enforcement officials must work with the recording industry to sweep this material off the streets and out of kiosks, flea markets, and retail stores so that it does not interfere with the market for legitimate product. The recording industry reports that small quantities have been seized at second-hand CD outlets, and another, more prominent local dealer has been sued by the industry.

According to a 1976 customs decree, sound recordings could not be cleared without the relevant certification from the author's society and MAHASZ, the local recording industry association. Because of this clearance system, the import of illegal sound recordings has been significantly reduced and parallel imports stopped. Unfortunately, revisions to the customs code in 1996 eliminated the provision regarding the clearance of sound recordings. As noted, effective border enforcement is badly needed to prevent an influx of pirated materials.

The BSA was generally pleased by a number of encouraging signs indicating that Hungarian authorities were taking IP protection seriously, from the police to the judges. The police conducted seven criminal raids on end users during 2001. Additionally, the Prime Minister's office and the Ministry of Finance each issued software asset management orders requiring the use of licensed software in government offices. The predominant concerns for the software industry are threefold: (1) no effective *ex parte* search authority for right holders; (2) generally slow criminal and civil proceedings; and (3) inadequate sanctions imposed in many cases. According to the BSA, the average duration of court proceedings is approximately 2 - 4 years for civil or criminal claims; further, fact-finding examinations by experts that take six months to a year to conduct are routinely required by the courts, even when not strictly necessary. Amendments to the criminal code, which now sanctions copyright infringements performed either for the purpose of gaining profit or causing financial injury to the right holder, were a welcome development, as was the extension of

protection to computer databases. Estimated 2001 piracy levels and losses for business software piracy are not available.

The interactive entertainment industry still experiences high levels of piracy. The progress made in controlling large-scale commercial optical disc production in the last year have not greatly changed the piracy situation in Hungary. Production of gold (recordable) disks by individuals or at small shops still continues. The advertising and sale of pirate products via the Internet and through the mail is likewise still prevalent. Console material continues to be imported from other countries in the region. All of these activities make it extremely difficult for entertainment software publishers to sell legitimate product in Hungary. Estimated trade losses and videogame piracy levels for 2001 are not available.

The book publishing industry reports no improvements in the Hungarian book marketplace in 2001. Piracy of educational texts, in particular the unauthorized photocopying, continues to be a problem. Estimated trade losses due to book piracy remained constant from the previous year, \$4.0 million in 2001.

## **COPYRIGHT ENFORCEMENT**

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### **Criminal Enforcement**

The ongoing high levels of piracy in Hungary are the result of the copyright industries' inability to get effective criminal enforcement. As they have for many years, the copyright industries continue to report good police cooperation conducting raids and seizing infringing product.

Hungarian prosecutors and judges remain generally reluctant to treat copyright infringements as serious crimes. Prosecutorial delays and the failure to impose deterrent penalties for those few criminal cases that do reach the judgment stage are serious problems. The court system is overloaded with a large number of cases, which contributes to delays in resolving pending copyright cases. The Hungarian Criminal Code is good, but needs improvement. In May 1993, the criminal code was amended to provide higher penalties for copyright infringement, including fines of up to 10.8 million Forints (US\$38,000) and jail sentences of up to five years. In January 2000, further amendments to the criminal code increased the maximum jail sentence to eight years for some offenses related to intellectual property rights ("IPR"), such as piracy, with additional increases for other activities (e.g., an additional two years for signal theft). Additionally, in December 2001, the criminal code was amended to ensure that proprietary databases are protected through the criminal law and that infringements causing financial harm to the right holder (but not necessarily profit for the infringer) are prohibited. Accordingly, the criminal provision regarding the crime of infringement of copyright and neighboring rights now also covers infringement of databases.

In addition, the 1999 Copyright Law amendments amended a 1994 Hungarian Law on Enforcement of Judicial Decisions to establish a special streamlined procedure for the enforcement of judicial decisions in all IPR infringement cases. While IIPA lauded these legislative efforts in 1999 as a good first step, there have been no reports on the actual in-use progress of these new procedures.

As they have in years past, audiovisual anti-piracy efforts in Hungary have been conducted by the police throughout the country in cooperation with ASVA, the local anti-piracy organization. ASVA continues to report excellent cooperation with the police.

Enforcement against duplication facilities in private homes has also improved. Despite the fact that searches of homes are based on “probable cause” and are undertaken on a very stringent standard, which requires testimony from witnesses and documentation establishing that business activity is being carried out on the premises, police searches at private residences have now become more systematic. When decided by the prosecutor, Tax Administration also gets involved in the investigation process. Hungarian police have been active in a number of raids and seizures, but there are reports of “tip-offs” in one district within Budapest.

MPA reports that prosecutorial indifference remains a major impediment to combating piracy. In 206 raids conducted in 2001, ASVA reported the seizure of 6,379 pirate videocassettes, steady with 2000. ASVA initiated 245 new criminal actions in 2001.

Enforcement against recording and music piracy, including production, importation and distribution of unauthorized back-catalog recordings, remained a significant problem for 2001. The 1999 amendments finally fixed the problem of back-catalog recordings, but the one-year sell-off provisions extended the inability to fully address the problem until late in 2000, and it will now take some time to get these illegal materials out of the marketplace. There are also fears that some pirates will try to export the back-catalog material to other markets unless the material is seized or stopped at the border. The Hungarian police have worked cooperatively with the recording industry, but Hungarian authorities need to step up their enforcement activities. Prosecutorial delays and the failure of the Hungarian courts to impose deterrent penalties continue to hamper effective enforcement.

The BSA reported that police cooperation in connection with crimes involving software infringement was good in 2001. The police conducted seven end-user raids, but no reseller raids. Although other countries in the region performed more raids in 2001, the Hungarian end-user raids were typically larger scale raids, and resulted in greater judgments and settlements per raid performed than those in neighboring countries.

In February 2001, the police – acting on a lead provided by BSA – raided an end user in the transport industry. Police discovered 36 PCs, 21 of which were loaded with illegal software. This was a notable success, as the police had initially been reluctant to act on the lead, which was anonymous.

The software industry reports that prosecutions, even of cases reaching final judgment, generally secured sentences involving probation and small fines. The average sentence was between two and 12 months suspended. The software industry reported no fine above US\$1,000; in fact, criminal fines that are ordered by courts are usually below US\$200 in cases involving software piracy. Obviously, these penalties are not deterrent to commercial piracy.

## Border Enforcement

Hungary adopted customs legislation in 1997 in order to meet its TRIPS obligations (Decree No. 128/1997). The Hungarian government reports that this decree applies to both the exportation and importation of infringing goods. The copyright industries remain concerned about its effective enforcement in practice. Because of the ease in which pirated product, particularly pirated digital product (CDs and the like), is imported into and exported from Hungary, it is critical that Hungary's border enforcement system improve.

As noted above, a 1976 decree ruled that sound recordings could not clear customs without a certification from the author's society and MAHASZ, the local recording industry association. This clearance system significantly reduced the import of illegal sound recordings and stopped the importation of parallel goods. Unfortunately, revisions to the code in 1996 eliminated the provision. Now, customs authorities have difficulty distinguishing between legal and illegal products. Since Hungary is both a market and a transit country for pirated optical disks, and Hungarian customs rules are not working, the customs rules must be fixed immediately to stop the cross-border trade in illegal products.

## Civil Enforcement

There are still no provisions in the Hungarian law that can grant effective civil *ex parte* search orders. The 1999 copyright law amendments did not change the Copyright Act because Hungarian authorities insisted that such provisions already existed in the civil code. Since the 1999 revisions made no changes, the industry tried to use the provisions found in the Hungarian civil code even though these are not specifically intended to address IP violations. These provisions are set out at articles 207-209 of the Civil Procedure Act, and permit the procurement of "preliminary evidence" before the commencement of an action. This uncertain and imprecise tool did not prove effective. After testing these old provisions, the software industry is convinced that new provisions are needed to obtain civil *ex parte* searches in practice. To date, the software industry has had at least one application for preliminary evidence refused by a Hungarian court. In a second case, a court order appearing to permit a civil search was shown to be unenforceable after the target refused to permit entry by an independent expert, leaving no recourse for rightholders. A criminal raid was subsequently undertaken.

The BSA managed to achieve some positive civil litigation results in 2001, similar to the situation in the last two years. The BSA initiated five civil lawsuits against end users during 2001; additionally, BSA obtained 11 judgments against and reached three settlements with end users during 2001. As for criminal proceedings, delay remains a concern. The software industry continues to find that cases take approximately one year on average to reach an initial court hearing, with an additional delay of about a year for cases that are appealed.

## LEGAL REFORM AND RELATED ISSUES

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### Copyright Law

On June 22, 1999, Hungary adopted amendments to its copyright law; the provisions entered into force on September 1, 1999. The new law, Act No. LXXVI of 1999, was aimed at bringing Hungarian law into compliance with numerous bilateral, regional and multilateral obligations. On September 24, 1993, the U.S. and Hungary entered into a comprehensive bilateral Intellectual Property Rights Agreement, which obligated Hungary to make significant and important improvements in their copyright laws. The 1999 amendments were also aimed at implementing most, if not all, of the provisions of TRIPS and the European Union Directives (including software, rental/lending, satellite, duration and databases), plus the new WIPO Copyright Treaty and WIPO Performances and Phonograms Treaty.

In 1994 and 1996, Hungary amended its copyright law in light of the WTO TRIPS Agreement and the 1993 Bilateral Intellectual Property Rights Agreement with the U.S. The 1994 amendments (Act VII, entry into force July 1, 1994) extended terms of protection and expanded the scope of protection for producers of sound recordings, performers and broadcasters.

On a positive note, Hungary ratified both of the WIPO treaties, the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty, in October 1998. It deposited its instruments of accession with WIPO in Geneva on November 27, 1998. And in June 1999, in the copyright law amendments, it adopted provisions that, *inter alia*, implemented the two new digital treaty obligations. In 2001, Hungary passed its Act on Electronic Commerce and Information Society Services, to address the problem of online infringement. These developments are all very laudable, undertaken by the Hungarian government to lay the legal framework to combat digital piracy.

In sum, these legislative developments addressed the following major issues:

- Full retroactivity for sound recordings was provided, in compliance with the TRIPS Agreement. The 1994 amendments had failed to extend the term of protection for sound recording released prior to July 1, 1974 (20 years prior to the effective date of the 1994 amendments). As a transition matter, the 1999 amendments provided for a one-year sell-off of existing stock that ended on September 1, 2000. Hungary is also obligated under TRIPS (articles 9 and 12) and Berne (Article 18) clearly to provide such protection for pre-existing foreign works other than sound recordings as well. To date, there have been no judicial decisions, but the Hungarian government has assured the U.S. government and IIPA members that such protection is afforded by the existing Hungarian copyright law.
- Exceptions to the exclusive rights of copyright owners were narrowed to comply with the TRIPS Agreement. The 1999 copyright law also established a private copying levy; this provision came into force on September 1, 1999 (the exceptions are the provisions in Articles 21 and 22 relating to devices used for reprography which came into force on September 1, 2000). The Hungarian government should be urged to limit the private copying exception to ensure that it does not extend to digital copying of works or sound recordings. Nor should any private copying exception interfere with the ability of right holders to protect their works and sound recordings using technological protection measures.

- Communist-era provisions that prevented employers from exercising all economic rights with respect to software created by employees were eliminated. Employers are now able to exercise all economic rights for software created by employees in certain circumstances, and economic rights are fully transferable (assignable). The law's old provisions of fixed royalty rates in favor of author/employees were removed. The old provisions had acted to discourage foreign and local investment in software development and publishing and inappropriately interfered with the marketplace.
- Protection for encrypted signals was adopted, prohibiting the unauthorized retransmission of signals, and prohibiting the manufacture, distribution, possession, sale, rental and use of unauthorized descrambling devices.
- A notice and takedown regime for infringing online content was created, whereby ISPs must remove infringing content that they host within 12 hours of being made aware by the copyright owner.

However, certain other issues remain unaddressed, as highlighted in previous filings by the IIPA:

- Civil *ex parte* search procedures are still not clearly available as required for Hungary to meet its TRIPS obligations (Article 50). Hungary is required to provide this expeditious remedy to prevent infringements as an effective tool against end-user software piracy in particular. For years, the Hungarian government has argued that this remedy is available under existing law; however, these provisions have not proven as reliable and effective as officials have claimed them to be, and further amendments to the law and/or its implementation in the copyright act are needed to create an effective and streamlined process, as has been promised by the Hungarian government for several years.
- The law currently does not include a presumption of ownership of rights in sound recordings.
- The law currently does not have provisions for the calculation of damages; the act only refers to general civil law rules on damages, which will not help to adequately compensate copyright owners or producers of sound recordings for infringements.
- Amendments to the customs and criminal codes to comply with TRIPS to improve border enforcement were not adopted.

In January 1996, the copyright law was amended by the Law on Television and Radio (the "Media Law") with respect to the broadcasting compulsory license; it entered into force on February 1, 1996. This law requires compliance with copyright as a condition for obtaining and maintaining broadcast licenses, and is an important tool in the fight against broadcast piracy.

## **Criminal Code**

In January 2000, Hungary amended its criminal code, increasing the maximum jail sentence to eight years for general copyright infringement and making signal theft a criminal offense that carries a maximum sentence of two years. The criminal code provisions should improve enforcement if they are utilized. Also added into the code were provisions to improve the evidentiary presumptions of copyright ownership. Additionally, in December 2001, the criminal code was amended to ensure that proprietary databases are protected through the criminal law. Improvements for border enforcement are still needed.



## **Government Software Management**

The software industry was very pleased when sections of the Hungarian government voluntarily engaged in a software management program to ensure that only licensed software was in used in their offices. In 2000, the Ministry of Finance issued a software asset management decree (following an earlier one in Prime Minister's Office in 1999), which applied both within the ministry and to all of its subsidiary offices. Similarly, during 2001, the Prime Minister's Office and the Ministry of Finance issued orders requiring the use of licensed software in government offices. By these actions, the Hungarian government has exhibited its desire to cooperate with the software industry in avoiding piracy within its offices.