

SPAIN

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2016 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: Spain is not currently listed on USTR's Special 301 list but is subject to an out-of-cycle review (OCR), announced in 2013, "which is focused, in particular, on concrete steps taken by Spain to combat copyright piracy over the Internet." IIPA recommends that USTR conduct a formal review to determine the strengths and weaknesses of Spain's performance under each of the established OCR benchmarks, and to take appropriate action upon the completion of that review.¹

Executive Summary: If Spain's success in the fight against piracy were to be measured solely by the comprehensive legislative reform that it has undertaken, there is no doubt that the reforms of 2014 and 2015 would put Spain on the online enforcement map. However, Spain's success as measured by any concrete change in the significant levels of piracy in the country is still barely perceptible. A 2015 study shows that, of all of the digital content that Spain's 35 million Internet users consumed in the previous year, 88% of it was infringing.² The demand for creative content is so significant that, absent such massive levels of piracy, Spain's economy would generate over 29,000 new jobs, and the Spanish Government would realize an additional 627 million euros (\$US687 million) in annual sales and income taxes. The situation is a stark reminder that for rule of law to take hold, particularly in the online space, administrative and judicial enforcement bodies must be equipped with the resources and training to implement the law effectively with the aim of obtaining concrete results.

Unfortunately, Spain's Intellectual Property Commission (IPC), which has the ability to make the greatest immediate impact in reducing Spain's online piracy, is also the one enforcement tool that the government of Spain has done the least to improve. With an average resolution time of 480 days per case, the IPC is no deterrent to the massive online piracy operations that maintain a firm grip on the Spanish market. IIPA is hopeful that in the coming year, Spain's judiciary will effectively apply new provisions in its Intellectual Property and Civil Procedure Laws, Criminal Code and newly issued Attorney General's Circular against Spain's worst offenders. However, to truly open the market to legitimate creative products, a better equipped IPC is imperative: one that can process a volume of complaints commensurate with the 4.4 billion digital works accessed illegally in Spain on a yearly basis.

PRIORITY ACTIONS REQUESTED IN 2016

- 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 dedicated to tax fraud and smuggling linked to IP infringement.
- Provide government support for agreements between rights holders and major online advertising services 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/2016SPEC301HISTORICALCHART.pdf>.

²Tommaso Koch and Fernando Navarro, "88% of cultural content consumed online in Spain illegal, says industry," *El Pais* (March 10, 2015), available at http://elpais.com/elpais/2015/03/10/inenglish/1425997747_249854.html.



COPYRIGHT PIRACY IN SPAIN

Online piracy in Spain continues to be quite significant for the markets for music, film, television programs, 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),³ shows that in 2014, there were more than 886 million illicit audiovisual files acquired, causing 571 million euros (US\$625 million) in lost profits. The volume of physical and online pirate music products in 2014 amounted to 1.835 billion files, causing an estimated 410 million euros (US\$449 million) in lost profits. Pirated leisure books in Spain (not including educational and professional texts) totaled 335 million files in 2014, causing 100 million euros (US\$109 million) in lost profits. Altogether, the GfK study found a total loss in Spain of potential earnings due to piracy of 1.7 billion euros (US\$1.86 billion).⁴

According to the GfK study, 61% of Spanish Internet users proclaim that they would not pay for something they could get for free, while 51% argue that they should not have to pay for content because they already pay for an Internet connection. More than one out of three Internet users in Spain say that they would not maintain a broadband Internet service if they were not able to download content. 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 2014, because of piracy the potential for more than 29,000 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 627 million euros (\$US 687 million).

Online Piracy Generally: Digital piracy represents the greatest threat to a legitimate marketplace in Spain. Today, Internet piracy in Spain occurs via hosted websites, linking sites that direct users to infringing content stored in “cyberlockers,” BitTorrent networks, peer-to-peer (P2P) networks (such as *Edonkey*), and increasingly via illegal streaming and ripping services. The incidence of digital piracy is generally evenly split between P2P and non-P2P formats. Of Internet users using P2P services to access illegal music, 95% do so via BitTorrent networks. BitTorrent is also highly favored for access to audiovisual and video game content. Among non-P2P formats, illegal stream-ripping is gaining the most rapidly in popularity for music piracy—with growth of 52% over the past year; while cyberlockers, illegal streaming, and hosted websites continue to be active but at decreasing levels. 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 direct users to files located in other jurisdictions. Websites such as *DivxTotal.com* (ranked the 104th most popular website in Spain), *elmonky.com*, and *fluxy.net*, for example, are operated abroad (Russia, in

³See <http://acoalicion.es/observatorio-de-la-pirateria/observatorio-de-la-pirateria-2014/>.

⁴GfK 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 (US\$18.07 billion). Together with physical piracy, the value of illicit material totaled 16.279 billion euros (US\$18.23 billion). 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 450 million euro (US\$504 million) lost profits figure cited in the text above (11.7% of 3.8 billion 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%.

the case of *DivxTotal*), but are hosted out of Spain, and are 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. Nearly 72% of users search for copyrighted content in browsers, with an overwhelming majority choosing Google to access to illegal content. More than 25% of users say they find illegal content through direct download sites, 17.4% use illegal streaming sites, and smaller percentages use social networks or mobile/tablet apps.

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 a significant number 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 touristic cities such as Seville, Madrid, and Barcelona, where local police have been instructed to ease up on pirate vendors, who frequently are illegal immigrants. 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, has reported declines in the legitimate home video market for years, and in 2014 reports another 5% in losses compared to 2013.

Camcord Piracy: Camcording in theaters has been significantly reduced in Spain thanks to cooperation between distributors and exhibitors in preventing camcording through police action. Unfortunately, audio camcording remains a problem and prosecution of these offenders is an uphill battle. As a general matter, 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. In the past, Spanish-sourced copies have routinely appeared in other markets, particularly in Latin America. 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. The introduction of new provisions in the Criminal Code governing the protection of TPMs in July 2015, together with guidance issued by the Attorney General in December 2015, has helped to strengthen and clarify the existing legal framework in this area. This, in turn, has resulted in a number of e-commerce websites and retail outlets appearing to cease sales of circumvention devices. However, the sales of such devices continue elsewhere, either through consumers purchasing them directly from China or through local online websites. In 2015, Spain had the fourth highest number of peers discovered in P2P swarms in which illegal copies of console games were distributed.

COPYRIGHT ENFORCEMENT ACTIONS IN SPAIN

Spain’s law enforcement bodies for years have lacked the resources and – until 2015 – the legal certainty to address forms of piracy such as P2P piracy and circumvention devices. At the end of 2015, the Attorney General issued new instructions for enforcement in the digital age, replacing the problematic 2006 Circular that all but

exonerated P2P piracy. Spain's courts now have a stronger legal mandate to tackle piracy cases, with amendments to the Intellectual Property and Civil Procedure Laws that came into force in January 2015, and Criminal Code amendments that came into force in July 2015 (described in greater detail below). However, it is still premature to declare a new era of deterrent enforcement in the courts given the slow nature of Spain's civil and criminal proceedings. For the immediate future, an agile administrative remedy is all the more important. The following are top-priority enforcement action items that IIPA recommends for Spain to make effective change in 2016.

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 within 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.

The Spanish Copyright Commission, approved by law in 2011 to be set up within the IPC, (and referred to herein as the IPC) has yet to remedy its extremely slow response times to right holders' complaints of infringement. 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. Assurances that the IPC has made to industry representatives that it would shorten procedures to about two or three months have not been realized; and, in any case, 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.

Since its inception, the IPC has been plagued by delays and uncertainty. 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 480 days to resolve a case initiated from a right holder complaint. The local recording industry (*Asociación de Gestión de Derechos Intelectuales* (AGEDI)) reports that as of December 2015, since the IPC began operations, it has filed 54 cases mostly referencing linking sites, and only 5 have resulted in an IPC order requiring the removal of infringing material (Goear I, Goear II, Goear BV, Thepiratebay and Bajatodo). Only one of AGEDI's cases in four years has resulted in the closure of a website, the Pirate Bay, but those orders were ultimately ineffective. In May 2015, the IPC handed down its final resolution in AGEDI's case against *www.baja-todo.net*, which it filed in June 2012. The IPC ordered the infringing content removed, but when the website operator refused to comply, the IPC reasoned that it could take no further action because, at the time of the initial complaint, the website would not have qualified for enforcement measures.

Additionally, the timeframes established in the procedure for safeguarding IP rights on the Internet have been broadly ignored. For example, according to Article 122 bis 2 of Act 29/1998 of July, regulating Administrative Litigation Jurisdiction, "within the non-extendable period of 2 days after receipt of notification of the Commission's final resolution, the Court shall summon the Administration's Public Prosecutor, . . . to a hearing that will decide whether to authorize the execution measures or not." Experience shows that these terms are not met. For instance, in the procedure against *www.goear.com* (Goear BV), right holders received the summon on the December 17, 2015 and the hearing was finally set for April 18, 2016. The Court explained the reason for the delay was that many of the intermediaries to be summoned are located abroad.

Positive results from the IPC have included the decision against Goear BV, held to be directly responsible for piracy and subject to injunction by Internet access providers in Spain and the elimination of Goear search results from search engine providers. The execution of such measures should be granted by the Court in the hearing to be held in early 2016. But the overwhelming characteristics of the IPC are of delay and inefficiency. 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 recent 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, helpfully requires the appointed members of the Committee to have IP expertise, it also reaffirms the bureaucratic and slow nature of the IPC's deliberating process.

New Pre-requisites to Apply for IPC action: In another change that could further delay anti-piracy actions, Article 158ter(3) of the IP Law now requires right holders to provide, along with an application for the IPC to take action in a particular case, proof of the right holder's prior attempt to request by email that the ISP in question remove the allegedly-infringing material. Also, the IPC has recently narrowed the scope of its action with a requirement that the target websites be engaged in "economic activity," an element not required by law under the IPC's procedures. The IPC is no longer admitting cases against websites that fail to meet this requirement, which clearly weakens the reach of the IPC and should be reversed

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 Law 34/2002 of July 11th, on Information Society Services and E-Commerce (the "LSSI," which is the Spanish Law that implements the E-commerce Directive), for example with the law's requirement to provide contact information for website operators. Right holders report that SETSI still fails in 2015 to issue sanctions against any of the cases regarding linking sites reported to it by the IPC. In fact, in many cases SETSI has failed even to acknowledge receipt of the cases reported to it. In November 2015, AGEDI filed a complaint before the SETSI against www.marcharte.es because this site infringes the LSSI. Although the Article 10 of the LSSI correctly implements Article 5 of the E-commerce Directive, the vast majority of the Spanish infringing sites do not comply with it.

IPC action over cases involving foreign jurisdictions. In November, 2012, right holders 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 28, 2014 requested an Authorization from the Administrative Judicial Court to take further action. Unfortunately, as mentioned above, on November 25, 2015 the Judicial Authorization was denied. The case has set highly disappointing 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 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 Phonograms Treaty (WPPT), and Article 14 of the WIPO Copyright Treaty (WCT)) (emphasis added).

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.

Armed with important improvements in the relevant laws in 2015, there are new opportunities for the development of effective criminal enforcement against copyright theft at a national level. The special office for cybercrime has improved its cooperation with copyright holders but could be improved. Right holders have proposed a special General Attorney's office for Intellectual property, which might improve judicial response, but has not been accepted by the Spanish Government. Still, important steps remain to be taken in 2016 to ensure that police forces and prosecutors have the resources and legal foundation needed to take comprehensive action. The percentage of copyright cases resulting in convictions has dropped from 80% in 2012 to only 50% in 2015. Enforcement against physical piracy remains insufficient to tackle the rampant street piracy across the country. The July 2015 entry into force of the new Criminal Code has not yet resulted in an increase in police actions, either for online or physical piracy.

Internet Piracy Enforcement: After a decade without correction to the 2006 Attorney General instructions that effectively decriminalized organized online file sharing of pirated content,⁵ Spain's Attorney General issued a new Circular in late 2015 addressing many concerns that IIPA has raised in previous submissions, recognizing that:

- Links to infringing content amount to an act of communication to the public, and thus a violation of copyright, in line with the *Svensson* decision of the European Court of Justice.⁶
- The "aim of profit" element in criminal copyright infringement may be satisfied by an indirect economic benefit.
- The legislative intent of the Criminal Code amendments is to respond to the rapidly developing technology through which infringement might occur; and as a result, the Criminal Code Article 270 does not contain an exhaustive list of infringing conduct. (It does not, however, cover the activities of end users that only irregularly access illegal files.)
- The "effective knowledge" requirement for liability on the part of an ISP under the Spanish E-commerce Law may be satisfied by communications from rights holders or a court or competent administrative body, a determination that is consistent with recent Supreme Court decisions.
- Search engines may be subject to liability where they have been put on notice of illegal content appearing in their search results.
- Uploading unauthorized works for file-sharing, or links to works, may be subject to criminal liability, particularly for site administrators that manage such activity, or users that are part of an organized framework of unlawful activity with the possibility of economic benefit.
- Repeat infringers should be subject to enforcement action, even with respect to differing works of the same right holder.
- The penalties reserved for lesser infringements may not be applied to online infringement, due to the multiplying effect of the Internet.

Many of the above clarifications target issues that had been cited in the past by Spain's police, prosecutors, and judges in dropping Internet cases. Right holders in Spain are hopeful that this new, clearer mandate will permit prosecutions to more fully resume in cases that had been hindered by the 2006 Circular.

In 2015, the Coalition's proposal for a special Attorney General's Office on Intellectual Property was rejected by the Spanish Government. Currently, criminal copyright procedures are lengthy and fail to reasonably judge piracy cases. In some instances, the timespan is so long that many offenders avoid punishment by leaving the country or

⁵For background on the 2006 Attorney General Circular, see IIPA's 2014 Special 301 submission, available at <http://www.iipa.com/rbc/2014/2014SPEC301SPAIN.PDF>.

⁶Judgment of 13 February 2013 (C-466/12).

relying on a statute of limitations. On the enforcement side, police conducted only 3 raids on linking sites in 2015. In addition, a release group was dismantled and defendants in 3 Internet piracy cases were deemed not-guilty.

Nonetheless, the Special Office for Cybercrime has improved its cooperation with copyright holders, who report that the public prosecutors demonstrated increased support in 2015. 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 IPR awareness in the judiciary in the digital realm. In 2015, AGEDI filed two criminal complaints against the linking websites *Bajui* and *Descargasmix*. AGEDI sought to file them before the High Court with jurisdiction across Spain, but the prosecutor refused to take the case to the High Court and finally it was rejected. As a result, these important cases will be heard in lesser local Courts, which lack specialization.

A vital aspect to effective court enforcement will be the speed with which the cases are processed, as illustrated by a December 2013 decision of the 15th Section of the Barcelona Court of Appeals – a Section specializing on IP. Based on the Spanish implementation of Article 8(3) of the EU Copyright Directive, the Court ordered an Internet service provider (ISP) to close the Internet account of a subscriber who used the ISP's services to engaged in unauthorized file sharing. The decision could not be executed because, under Spain's data retention law, the ISP was not obliged to retain the relevant data for more than a year, and the time had expired.

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. The Criminal Code amendments adopted in 2015 appear to resolve this conflict, clarifying the availability of criminal penalties for trafficking in devices that are “primarily” designed to facilitate the unauthorized removal or circumvention of TPMs.

In March and April of 2015, two Spanish criminal courts confirmed that the importation and sale of game copying devices (R4 cards) used to play pirated games on video game consoles, is illegal. One company had attempted to import R4 game-copying devices into Spain but was intercepted at an airport, where those devices were then seized. A court found the other company to have violated the law by selling those same R4 circumvention devices to users. IIPA hopes to see continued enforcement actions against devices that facilitate copyright infringement, particularly since the entry into force in July 2015 of Spain's Criminal Code amendments.

Physical Piracy Enforcement: Police agencies have taken *ex officio* actions in criminal copyright actions mainly in cases of physical piracy, and these right holders report positive relationships with the State enforcement agencies, local police and customs authorities. Unfortunately, the number of actions decreased in 2015, both on the part of the national and autonomous enforcement agencies (*Cuerpo Nacional de Policía, Guardia Civil, Mossos d'Esquadra and Ertzaintza*), and the local police.

During 2015, police seized more than 42,000 pirate Optical Discs and arrested 214 street vendors. Police forces conducted 3 raids against linking sites and dismantled a release group. Only one lab was raided, compared with 15 raids against labs and distribution centers in 2014. More than 2,000 street vendors were raided within the first ten months of 2015. Of 21 judicial decisions in 2015 against labs and distribution centers, only 9 resulted in convictions.

As in the previous year, the number of police actions in 2015 has declined. The 2015 Criminal Code amendments provide higher penalties, addressing a concern under the 2010 Criminal Code that crimes below 400 euros (US\$445) were minor offenses, but have yet to bear fruit. 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. IIPA's members are unaware of any 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: 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 IPR laws with regard to injunctions. As an example, right holders filed a case against *Exvagos* in April 2015 and the preliminary hearing (prior to the main hearing) will not be held until February 2016. The decision of the mercantile Court is expected by the end of 2016.

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 IPR 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 IPR Law empower the IPC to require payment and advertising services to collaborate with it, and to 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.

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 Contenidos*, 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 of the agreement is to adopt a good practices code in the field of advertising that supports the legal offer of digital content and protects IPR 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.

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 legislative changes needed to develop an effective anti-piracy program, which IIPA included in the Priority Action Items of its 2013, 2014, and 2015 Special 301 submissions on Spain.⁷ On October 30, 2014 the Spanish Congress passed Law No. 21/2014, amending the consolidated text of the Law on Intellectual Property, approved by 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, which went into effect in January 2015, 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.

⁷ See <http://www.iipa.com/tbc/2013/2013SPEC301SPAIN.PDF>, <http://www.iipa.com/tbc/2014/2014SPEC301SPAIN.PDF>, and <http://www.iipa.com/tbc/2015/2015SPEC301SPAIN.pdf>.

The Spanish Congress then adopted Criminal Code amendments, which entered into force in July, 2015, clarifying the scope of judicial actions regarding linking activity, liability for inducing infringement, and other important areas. Specifically, these amendments target illegal websites, including linking sites if they are operated for direct or indirect profit, and provide for injunctions to restrict access to sites that are found to be illegal. Together with the recently issued Attorney General's Circular, of December 2015 (detailed above), many of the legal gaps that IIPA has raised in previous submissions have been significantly improved, including: clarifying that infringing linking sites can be criminally prosecuted; allowing prosecutions to resume in cases of P2P piracy; and empowering rights holder-submitted notices of infringement to put ISPs on notice for purposes of establishing liability. However, the following concerns still remain regarding Spain's copyright law regime.

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. Right holders are still evaluating 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. Film industry representatives (from the organization FAP), however, note that some ISPs are beginning to cooperate. In 2014, FAP sent 68 letters to cyberlockers asking for the removal of more than 5,000 illicit links, which were mostly withdrawn.

Correct Spain's implementation of the right of information as provided in Article 8 of the Enforcement Directive in the Civil Procedure Law to eliminate the requirement that clients are not "mere end users in good faith and without an aim to obtain economic or commercial benefits."

Adopted amendments to Article 256.1(11) of the Civil Procedure Law 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. The provision thus failed to provide the needed clarity required under Article 8 of the EU Enforcement Directive. This language, unfortunately, solidifies the existing status quo in Spain, under which infringing online users are guaranteed impunity for copyright infringement. The amendments 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.

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, due to reduced payment from the government.⁸ Questions as to whether this amendment conforms with the European Information Society Directive 2001/29/EC are currently in front of the Court of Justice of the European Union, and a decision is expected mid 2016 (EGEDA and Others; Case C-470/14).

⁸For 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>.

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 Directive 2001/29/EC. 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 collective management organizations that will distribute the revenue collected). It is unclear whether these new provisions will effectively encourage universities to obtain repertoire licenses for educational uses, or whether the exception for uncompensated uses will lead to continued resistance by universities to obtain these licenses. 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].”⁹ 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.

⁹See 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).