

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2005 SPECIAL 301 REPORT

BULGARIA

EXECUTIVE SUMMARY

Special 301 Recommendation: IIPA recommends that Bulgaria be placed on the Priority Watch List for 2005.

Overview of Key Problems: Optical media piracy is back in Bulgaria — and it is getting worse. Despite a string of warnings from Bulgaria's trading partners and the private sector, the Government of Bulgaria and the various enforcement agencies have dramatically failed to clamp down on it. Pirated CDs of all types of copyrighted materials, and an increasing number of illegal DVDs, are easily available in all major cities. Problems with both the growing local production and the importation of pirated optical disc (OD) media abound. Bulgaria's OD plant licensing system is failing to prevent a resurgence of pirate OD production and export. Efforts have been underway for years to implement a new optical media licensing system. But the legislation currently pending is completely inadequate, and government officials have consistently rebuffed the expertise offered and proposed amendments advocated by several copyright industry sectors to strengthen the legislative proposal.

On the enforcement front, cooperation between right holder organizations and police authorities are generally improved, though problems such as pre-raid leaks remain. The real enforcement bottlenecks, however, are the prosecutors and the courts, who in practice consistently fail to treat copyright offenses as serious crimes. Unjustified delays permeate the process. Cases simply fail to progress; the few that do reach final judgment do not produce deterrent sentences; and the whole system lacks transparency. Outmoded and cumbersome proof requirements, including demands for expert opinions on infringement that only one government office is allowed to provide, typify the obstacles to effective judicial enforcement of copyright.

Actions Which the Bulgarian Government Should Take in 2005

Law Reform

- Enact the new optical disc law as a top priority, after incorporating all amendments submitted by the copyright industry in 2003-04;
- Increase criminal and administrative sanctions for copyright infringement to deterrent levels;
- Amend the criminal procedural code to streamline prosecutions and facilitate right holder participation;
- Fill gaps in the copyright law;
- Criminalize possession of pirate products for commercial purposes;
- Ban street sales of cultural and copyrighted products nationwide.

Enforcement

- Vigorously enforce the current OD plant licensing regime, and the new OD regulatory system once it is enacted into law.
- Work with copyright industries to implement a coordinated anti-piracy strategy, make anti-piracy efforts a priority for law enforcement, and step up actions against crime syndicates involved in piracy;
- Increase *ex officio* enforcement actions against retail piracy, and in support of local decrees banning street sales of copyrighted products;
- Improve judicial issuance of adequate civil remedies in business software cases, including the issuance of *ex parte* civil searches, damages, and injunctive relief;
- Improve border enforcement to halt the importation and exportation of piratical products, especially optical media products;
- Give tax authorities the power to seize infringing copyrighted products and impose administrative sanctions (fines);
- Ensure that seized pirated goods are destroyed, not returned to the market.

BULGARIA
Estimated Trade Losses Due to Copyright Piracy
(in millions of U.S. dollars)
and Levels of Piracy: 2000-2004¹

INDUSTRY	2004		2003		2002		2001		2000	
	Loss	Level								
Motion Pictures	4.0	35%	4.0	25%	3.0	20%	3.0	20%	3.0	25%
Records & Music	6.5	75%	7.0	80%	7.2	83%	3.0	65%	NA	NA
Business Software²	16.0	71%	16.0	71%	6.2	68%	8.3	75%	8.1	78%
Entertainment Software	NA	50%	NA	NA	21.9	91%	NA	84%	NA	NA
Books	NA	NA	0.3	NA	0.3	NA	0.3	NA	NA	NA
TOTALS	26.5		27.3		38.6		14.6		8.1	

Bulgaria appeared on the USTR Special 301 Watch List in 2004, after a five-year absence. The Priority Watch List ranking is requested because the piracy situation has deteriorated, while the Bulgarian government continues to defer the needed enforcement and law reform steps to tackle it.³

Bulgaria presently has three bilateral agreements with the U.S. which contain IPR obligations. First, in April 1991, the U.S. and Bulgaria signed a bilateral trade agreement, under which Bulgaria agreed to provide "adequate and effective protection and enforcement" for copyrights and other intellectual property. That bilateral provided clear and explicit enforcement

¹ The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2005 Special 301 submission at www.iipa.com/pdf/2005spec301methodology.pdf.

² BSA's final 2003 figures represent the U.S. software publisher's share of software piracy losses in Bulgaria, as compiled in October 2004 (based on a BSA/IDC July 2004 worldwide study, found at <http://www.bsa.org/globalstudy/>). In prior years, the "global" figures did not include certain computer applications such as operating systems, or consumer applications such as PC gaming, personal finance, and reference software. These software applications are now included in the estimated 2003 losses resulting in a significantly higher loss estimate (\$26 million) than was reported in prior years. The preliminary 2003 losses which had appeared in previously released IIPA charts were based on the older methodology, which is why they differ from the 2003 numbers in this report.

³ For more details on Bulgaria's Special 301 history, see Appendix D (<http://www.iipa.com/pdf/2005SPEC301USTRHISTORY.pdf>) as well as Appendix E (<http://www.iipa.com/pdf/2005SPEC301HISTORICALSUMMARY.pdf>) of this submission. Previous IIPA Special 301 filings on Bulgaria are posted at <http://www.iipa.com/countryreports.html>.

obligations for Bulgaria to adopt. Second, in 1994, a Bilateral Investment Treaty (BIT) between the U.S. and Bulgaria took effect. This BIT is important as it provides a broad provision on national treatment. Third, in letters exchanged between the U.S. and Bulgaria in April 1995, Bulgaria made a number of commitments, notably to establish a title verification system to prevent piracy of compact discs, laser discs, CD-ROMs and videos; and to enact deterrent criminal penalties, applicable to a broad range of infringements, including inflation-adjusted fines and mandatory destruction of pirate product. In addition, Bulgaria is a beneficiary country under the Generalized System of Preferences (GSP) trade program.⁴

COPYRIGHT PIRACY IN BULGARIA

Sound Recordings

The piracy of U.S. sound recordings and music remains unacceptably high in Bulgaria, with around 70% of all foreign sound recordings sold being illegal copies. There is a huge and fast growing pirate CD-R market. Considering the number of CD-R and DVD-R plants in Bulgaria, the likelihood of blank CD-R production moving straight into the pirate chain of unauthorized burning and distribution remains very high. Streets and markets in Sofia (such as the Slaveikov Square market), and in other major cities, are full of pirated CD-R music, DVD-R music and film. For example, a Bulgarian press article at the end of 2004 reported on pirate vendors located "next to the Ministry of Interior and the Sofia municipality," selling pirate music discs for 3-5 leva (US\$2-3).⁵ Pre-recorded CDs from Russia, including MP3 collections, are in abundance. Some of the pirated music in CD-R form is imported from Russia and possibly Ukraine, though a greater proportion is likely to come from unauthorized recording onto Bulgarian produced blank media. Estimated trade losses to U.S. companies due to recording piracy in Bulgaria, not including the devastating effects of sharply growing Internet-piracy, is placed at \$6.5 million in 2004.

Entertainment Software

The entertainment software industry reports a continuing problem of piracy at Internet cafés, with only 40% of the 3,000-4,000 cafés licensed. Criminal syndicates appear to be in control of a number of Internet cafés where either pirated or unlicensed entertainment software is in use. CD-R burning is also allowed on the premises, with the customer ordering from a catalogue of pirate video games and then making a copy using the café's equipment—all at \$1.00 per copy. These syndicates have also taken to organizing themselves into informal "associations," indicating the highly organized nature of the piracy in this sector. However, there has been increased police activity against unlicensed cafes. Pirate entertainment software products remain readily available at retail stores and in market stalls and kiosks. Organized criminal groups tied to the Russian criminal syndicates control distribution and sale of pirate products at informal street markets. While CD-R burning occurs with greater frequency at the Internet cafés, silver (or factory-produced) discs remain the primary form of pirate product in the country, most of which is shipped from Russia, Ukraine, or Turkey, or from as far away as

⁴ During 2003, \$41.9 million worth of goods from Bulgaria entered the United States under the duty-free GSP code, accounting for 9.5% of its total exports to the U.S. During the first 11 months of 2004, \$36.7 million worth of Bulgarian goods (or 7.7% of Bulgaria's total exports to the U.S. from January to November) entered the U.S. under the duty-free GSP code, representing a 2% drop from the same period in 2003.

⁵ Alexandrov, "Pirate Disc are Sold Just Next to the Ministry of Interior and the Sofia Municipality," Sega, 28 December 2004.

Malaysia. Piracy of cartridge-based entertainment software products is also of concern with pirate and counterfeit product still shipping into Bulgaria from China through the United Arab Emirates. The Entertainment Software Association (ESA) estimates a 50% piracy rate for their sector in Bulgaria.

Audiovisual

The Motion Picture Association of America (MPAA) reports that the most significant problem the industry faces in Bulgaria continues to be the threat posed by pirate digital media. Pirate optical discs and the Internet have completely overtaken traditional videocassette piracy. The popularity of home burning has led to an increase in the number of DVD-Rs and CD-Rs in the market, with pirates increasingly choosing to make their own discs rather than run the risk of having their shipments detained by customs. These locally produced discs are distributed by street vendors, mail order, and Internet auctions. In 2004, the local anti-piracy organization, BullACT, seized 10,863 CD-Rs, 4,292 DVD-Rs and 128,157 DVDs containing unauthorized films. Pirate DVDs from Russia are also found in the local market with Bulgarian and Russian subtitles. Although several successful seizures along the border have led to the dismantling of one network that used Bulgaria as a transshipment point for pirate DVDs, factory-replicated discs are still being imported from Russia, Ukraine and China for export to other European markets (some Chinese imports typically contain only Chinese, Spanish and French subtitles). In addition, Internet cafés are serving as the conduit for the increase in burned discs. Consumers use high-speed access to download films and burn them onto CD-Rs and DVD-Rs. The cafés also serve as centers to rip and copy DVDs and to trade film files. It is estimated that Bulgaria currently has around 3,000–4,000 cafés that require constant monitoring to ensure that they are conducting legal activities. The distribution of films through informal networks and chatrooms has made the Internet one of the most popular methods for distribution of pirate product. Annual losses to the U.S. motion picture industry due to audiovisual piracy in Bulgaria are estimated to be approximately \$4 million in 2004, reflecting an increased video piracy level of 35%.

Business Software

Piracy of business software remains pervasive throughout Bulgaria, and criminal enforcement overall remains inadequate, with strong efforts of the enforcement agencies undermined by shortcomings in prosecution and punishment. The Business Software Alliance (BSA) reports that there is widespread use of unlicensed software in the corporate sector (end-user piracy). In addition, the practice of distributing illegal software copies on the hard disks of sold computers (HDL/hard disk loading piracy), while still a common practice among Bulgarian resellers, is being increasingly replaced by selling so-called “naked PCs” with an additional service for installation of pirate software at the customer's premises. BSA also reports an increase in use of the Internet for distribution of illegal software.

Internet piracy has become a major threat to legitimate software businesses in Bulgaria. The introduction of high-speed cable Internet created a favorable environment for a substantial increase in illegal online distribution and use of computer programs, including operating systems and a wide variety of business software applications. These pirate products are accessed via Internet clubs and cafés, as well as through more than 200 so-called local area networks (LANs) in neighborhoods across the country. LAN members pay a monthly subscription fee for access to a local server storing unlicensed software and other information resources. Through these

various channels, unlicensed online use and unauthorized software downloads are increasingly replacing the sales of legal, licensed business software in Bulgaria.

Illegal CD-ROMs, both silver and gold, containing a full range of different business software applications remain readily available. All the CD production facilities in Bulgaria have the capability to produce high quality (silver disc) CD-ROMs loaded either with unauthorized compilations of pirate copies of business software applications and entertainment software or single company counterfeit programs. Illegal custom-made gold CD-ROMs with various business software applications are still offered for sale in the local market. BSA estimates the piracy rate for business software at 71%, inflicting losses to U.S. companies estimated at \$16 million in 2004.

Despite the troubling problems outlined above, there have been some positive steps taken. BSA strongly commends the steps taken by the Bulgarian government to ensure legal software use throughout the state administration. The government has adhered to its commitment to legalizing the desktop software in use in the state agencies and throughout the educational system, and in this way has sent an extremely positive message to the private sector.

Books

The Association of American Publishers (AAP) reports that American books, especially popular fiction and textbooks, continue to be pirated in Bulgaria.

Optical Disc Piracy in Bulgaria

Optical media piracy has been growing in Bulgaria over the last few years. The domestic market is flooded with pirate optical discs (as discussed above). Although finished pirated discs are still being imported into Bulgaria from Russia and elsewhere, domestic pirate production is a more serious problem. Indeed, mounting evidence throughout 2004 shows that Bulgaria has once again become a major producer and exporter of pirate optical disc products.

Local plant capacity. The number of optical media plants and production lines in Bulgaria far exceeds legitimate demand, and continues to rise. There are now eight plants operating in Bulgaria: CHSL, Media Plant, TOT 2000, Euro Silver Group, and Crystal Ton (all in Sofia); Media Sys and Optical Storage (both in Stara Zagora); and Silver First (in Plovdiv). Two further plants are believed to be non-operational and unlicensed (the former Unison in Botevgrad and the former DZU plant in Stara Zagora). The eight operational plants have a total of twelve production lines, giving a likely operational capacity of some 55 million discs per year. If the four non-operational lines are included, the potential production capacity totals some 71 million units per annum. The legitimate demand for optical discs in Bulgaria (all formats) is far below 10 million copies per annum. Incredibly, given this degree of persistent over-capacity, ground-breaking for yet another DVD plant, near Voivodino in the Plovdiv region, was announced in July 2004. When this plant becomes operational, the glut of production capacity will worsen, and it can be expected that more of this capacity will be devoted to pirate production, unless the government takes immediate and decisive action.

OPTICAL DISC PLANTS IN BULGARIA		DESCRIPTION
OPERATIONAL PLANTS (8)		
CHSL	Sofia-based. Has one licensed production line, with an annual capacity of about 4 million discs.	
MEDIA PLANT	This plant in Sofia has one licensed production line with a capacity of 4 million CD disks annually. Successor from TOT 2002 of the Hemus Group line, and located in Hemus' old location, in premises owned by the Kyralfa mastering plant, whose location remains unknown.	
TOT 2002	Successor to Hemus' location, though equipment was sold to Media Plant and relocated with new equipment to new premises in Sofia. Annual capacity 4 million disks.	
EURO SILVER GROUP	Located in Sofia, two production lines, with both CD-R and DVD-R production capability. No visits to the facility have been permitted so machinery and production capacity unverified. A production capacity figure of approximately 8 million units is estimated.	
MEDIA SYS	This is a DVD plant operating in Stara Zagora. Its DVD production line has a maximum annual capacity of about 5.4 million units. There is one mastering facility, which is also licensed and operational.	
OPTICAL STORAGE	This is a CD-R and DVD-R production line operating in Stara Zagora. Production capacity of around 15 million blank media might be expected annually.	
SILVER FIRST	This is a CD-R production line operating in Plovdiv, with a production capacity of about 5 million CDs or blank CD-Rs annually.	
CRYSTAL TONE 2	This is a Sofia-based CD production line, understood to have received its operating license in January 2005, with an annual capacity of about 4 million units.	
KNOWN NON-OPERATIONAL PLANTS (2)		
VIDEOTON	This is a Hungarian-owned company which purchased the former Bulgarian state-owned DZU plant in Stara Zagora. It had an estimated capacity of 7.4 million discs per year. Reportedly, one of the two production lines is inoperable and the other is not licensed and does not operate. There is also one mastering facility which is not licensed and not operational.	
UNISON DCM	This plant in Botevgrad has two lines and an estimated capacity of 7.4 million discs per year; it is not licensed and is not operational.	
TOTAL	Estimated 55 million discs per year for the existing eight plants (a potential of 71 million units per year, if the non-operational lines are included)	

SOURCE: IFPI, FEBRUARY 2005

Pirate production in Bulgaria. Bulgarian government officials assert that the bulk of optical disc piracy in Bulgaria is due to piratical imports. The industries disagree, and believe that that attitude is a diversion to draw attention away from the growing domestic production problem, predominantly on CD-Rs. It is estimated that around 70% of all optical disc piracy in Bulgaria involves illegally burned CD-Rs.

Two major seizures of pirate DVDs in the course of export were made at Bulgarian borders in April 2004. Forensic evidence shows that the bulk of the 240,000 DVDs seized were produced at a licensed plant within Bulgaria. Similar evidence implicates at least one other plant in large-scale production of pirate music CDs. Detailed complaints regarding both plants were submitted to Bulgarian authorities in September 2004, but aside from one inspection of one plant, there have been no consequences, and production continues at both plants.

Plant inspections in October 2003 revealed that whole batches of blank CDs, produced at one Bulgarian plant, disappeared before arriving at the location where the traditional CD-R type information was supposed to be printed on the discs. The authorities were informed but there has been no follow-up. Large-scale burning activity of CD-Rs continues in underground workshops, and it has to be assumed that this takes place with the full knowledge and co-operation of certain plants. These burned CD-Rs are subsequently printed with content-related label information and artwork in order to look like originals. This phenomenon also reinforces the need to introduce a SID code obligation for all blank media, including all equipment and molds/mirror blocks, regardless of whether these are or are not actually used in the production process.

Organized crime. The link between organized crime elements and OD piracy is blatant and undeniable. There have been highly publicized “turf wars” among various organized syndicates. The fact that organized crime elements are involved in piracy makes it very dangerous for the private sector to take anti-piracy actions. Time and again, the private sector has urged the relevant authorities to definitively clamp down on the organized groups controlling the illegal trade at some of the most blatant pirate hotspots, such as the infamous Slaveikov Square in Sofia. Many Internet cafés seem to be heavily controlled by organized crime, using unlicensed and illegal business and entertainment software.

Bulgaria’s anti-organized crime agency openly acknowledges the involvement of organized criminal groups in the pirate distribution business.⁶ The former deputy director of the National Service for Combating Organized Crime (NSCOC) has publicly referred to “a chain of corruption [that] supports the trade with pirate CDs.”⁷ However, their proposed action plan to tackle the problem does not include any initiative aimed at dismantling these groups and dealing with the root of the problem. Instead, it focuses on the prohibition of street, outdoor and market sales of optical discs and increased customs controls. Although the copyright sector endorses these actions, they fail to address the core of the problem: organized and highly dangerous criminal groups involved in all forms of copyright theft. Furthermore, even on their own terms, these steps are ineffective. Although the city government of Sofia introduced strict regulation of street sales of copyright product more than a year ago, and ordinances banning street sales were issued in 2004 in Bourgas and Plovdiv, two hotbeds of retail piracy, there has been little meaningful enforcement (for instance, enforcement was carried out only during normal office hours), and the Sofia ban has now been suspended by a court after a complaint from pirate retailers; its future is in doubt. The street sale ban should be imposed nationwide and vigorously enforced.

COPYRIGHT ENFORCEMENT IN BULGARIA

Interagency coordination efforts. In November 2002, a new Inter-Ministerial Council for the Protection of Copyright and Neighboring Rights was formed by an ordinance issued by the Minister of Culture. (The first Inter-Ministerial Council was formed in 1997, but was abolished in July 2002 when the Council of Ministers repealed the 1997 decree [Decree No. 120/1997] which created it.) The council was organized to better coordinate and direct Bulgaria’s anti-piracy enforcement efforts. It is currently headed by the Director of the Copyright Department in the Ministry of Culture and includes representatives of several ministries and of various law enforcement agencies, including the Customs Service, National Police, National

⁶ “There is a danger that Bulgaria may be put on the black list,” *Noshten Trud*, January 26-27, 2004.

⁷ “Bulgaria in a pirates’ list again? This must not happen,” *Dneven Trud*, April 14, 2004.

Service for Combating Organized Crime (NSCOC), and other agencies. Such an effort cannot be successful without input from private sector anti-piracy organizations, but the Council rarely invites such participation.

It is quite disturbing that the Bulgarian law enforcement agencies and judiciary still fail to make any significant progress in their enforcement actions, despite the training and assistance provided by both the U.S. government and the E.U. in the last 8-10 years. As described in more detail below, the general attitude of the entire Bulgarian enforcement system with respect to copyright crime leaves very much to be desired. This attitude, which has prevented any effective clamp-down on widespread and blatant piracy, is exacerbated by a continued lack of political will. The continuing frustration of the legislative process with respect to the new optical disc regulation is just one of many examples of a government policy that is more focused on symbolic action than on introducing and implementing meaningful, strong and effective enforcement legislation and programs.

Poor enforcement of existing OD plant licensing requirements. OD plant licenses are issued by the Minister of Economy upon a proposal made by a special Licensing Commission composed of an equal number of representatives from the Ministry of Culture, the Ministry of Interior and the Ministry of Economy. Regrettably, communication between the Licensing Commission and interested private industry is poor; licenses are issued without consultation, and industry is often not informed of new licensed production lines or plants. For example, on September 23, 2003; a license for CD-R production was given to EURO SILVER GROUP. Production started in October 2003, though the recording industry (BAMP/IFPI) found out about this only in mid-November after contacting the commission. The plant surveillance system which was supposed to be undertaken by economic police within the Ministry of Interior and its units has all but disappeared, leaving plants unregulated.

Plant licensing and surveillance of licensed facilities alone cannot stop plants from illegal production. Plant licensing will only work if combined with effective title verification, general application of SID-codes, polycarbonate (raw material) and equipment monitoring, involvement of the private sector in the controlling activities, deterrent criminal prosecutions of individuals engaged in commercial piracy, and seizures and destruction of equipment used in the course of pirate activity. The government needs to give the Ministry of Culture additional means to carry out proper title verification and post-production controls. This should be made as high a priority as plant surveillance, so that product is not "licensed" without any serious investigation into the ownership of the copyright as required by the title verification regulations. Plants which take advantage of the lax title verification system should be permanently closed, and parties presenting fake licenses should be prosecuted. An additional concern is that a licensed manufacturer is able to hold as many molds—including non-coded molds—as it wishes, since effectively only the production of non-coded discs constitutes an infringement. In the absence of an obligation on the plant to declare and submit molds for examination, and of regular, proactive checks, a plant can readily undertake illegal production.

Another example of the weaknesses inherent in the current system follows. In October 2003, a check was carried out by NSCOC, the Ministry of Economy and the General Tax Directorate in the CD-R plant Silver First, in Plovdiv. It was ascertained that the plant had acquired a second mold for CD-R replication, and in fact that the Licensing Committee had been informed about this. During the inspection, the plant owners failed to provide production records for CD-Rs, nor any information about the sales of their output. The owners maintained that such information is prepared only in their registered Sofia office. Further, the owners stated that the produced CD-Rs are transported to Sofia and kept in a warehouse, the location of which

they were “unaware.” The recording industry never learned whether this matter was ever fully investigated. Nonetheless the following conclusions can be reached:

- The plant was able to acquire a further mold, and receive the consent of the licensing committee.
- Any plant can acquire as many molds as it wishes. Only the proven fact of production of CDs/DVDs without use of a code will be considered an offense.
- Enforcement agencies were not empowered to deal satisfactorily with the plant management’s lack of cooperation and obstruction concerning production records, etc.
- The inability of enforcement agencies to monitor production of blank media—at any of the plants in the country—is fuelling the huge domestic and regional CD-R/DVD-R problem.

Improved cooperation from police, but significant problems remain. Several entertainment software companies enjoy positive relationships with law enforcement agents who are assisting on the significant problems with piracy in Internet cafés. However, little to no enforcement action is taken against high-level suppliers and organized crime syndicate operations. Without the aid of enforcement authorities, investigations into syndicate operations involved in piracy will continue to be extremely difficult for the industry, given the obvious dangers inherent in pursuing actions against criminal enterprises.

However, some police districts remain ineffective in their anti-piracy actions. Some police refuse to focus their enforcement efforts on larger targets and only agree to raid small companies, computer game clubs or Internet cafés. There are some signs of a shift of focus to larger targets. However, the recording industry reports that pre-raid leaks remain very common. Slow and ineffective criminal procedures, the many instances of corruption among both executive authorities and the judiciary establishment, as well as the lack of knowledge and experience in the field of computer software and IT crimes, lead to groundless delays in police investigations and court proceedings.

The motion picture industry reports that BullACT engages in a high level of activities and enjoys excellent cooperation from the law enforcement authorities. Police also raided an Internet Service Provider near Sofia in November that was hosting a server specializing in downloadable films (some 600 titles were available) and software, a welcome instance of enforcement action against Internet-based piracy. In 2004, BullACT, in cooperation with local law enforcement, conducted 531 investigations and 371 raids. Besides the seizures of pirate audio-visual product noted above, these raids netted over 18,000 CDs containing unauthorized musical works, and more than 52,000 CD-Rs of illegal entertainment software. These raids have had a positive impact, but it has been diluted by the lack of follow-up in terms of prosecutions and deterrent sentencing. In short, optical disc piracy problems are growing worse, despite these law enforcement efforts.

The recording industry reports that, in 2004, the competent authorities in Bulgaria carried out **1,472** checks at over **3,699** points, including wholesale and retail points, storage places, production premises (recording facilities), as well as vehicles (during checks at customs), during which they seized a total of **348,373** pirate CDs, CD-Rs and MCs (**including also DVDs and DVD-Rs**). **182** of those raids were carried out together with BAMP (representing right holders). **160,541** optical discs and tapes with music, films, entertainment and business software were seized in these joint actions.

BSA also continues to report good cooperation with the IPR section of the National Services to Combat Organized Crime, the economic police departments in most regions, and with the General Tax Directorate. The business software industry's enforcement activities have been focused on companies using illegal software in their daily business (end-user piracy); distribution of unlicensed software by system builders (hard disk loading/HDL piracy); and Internet-based piracy. The ongoing good cooperation between the police and the BSA still gives hope that Bulgaria will make further progress in the fight against software crimes, start prioritizing larger targets, and improve the collection and preservation of valuable evidence revealed during raids.

In 2004, based upon BSA criminal filings, ten major end-user raids and six reseller (HDL and CDR) raids were conducted by the police, resulting in seizure of a total of 103 PCs allegedly loaded with unlicensed business software. However, in many instances, prosecution of software cases has been delayed by the inability of the Ministry of Culture's software experts to prepare their expert reports in a timely manner (see discussion below).

In 2002, the Ministry of Interior launched a program in which the police started issuing protocols of warning to legal entities suspected of using unlicensed software. Over the course of the past two years this program has produced notable results in raising awareness; many companies have legalized their software assets. In 2004 alone, 1,383 police protocols of warning and instruction were issued to corporate end-users.

BSA also reports that as a consequence of a joint initiative by the IP industries, the Bulgarian parliament approved amendments to the Tax Procedure Code in April 2002 pursuant to which tax authorities are now entitled to review the software licensing status of companies being audited for compliance with tax laws. Unfortunately, the amendments failed to authorize tax inspectors to impose administrative penalties, although the software industry is working with the Ministry of Finance to change the law in this respect. The business software industry stresses that an explicit mandate granting authority to impose sanctions for illegal software use is needed to make this an effective means to fight software piracy.

Prosecutions, court procedures and judicial sentencing remain ineffective.

This is a continuing bottleneck in pursuing criminal copyright infringement cases, and the track record of courts and prosecutors remains highly disappointing. As a result, the impact of enforcement efforts is undercut by the lack of deterrent impact from prosecution and sentencing.

There are unwarranted delays in moving a case from the police, through the magistrate investigator, and on through the prosecutor's office to the courts. The relatively short time frames set out in the Penal Proceedings Code are often ignored due to the inexperience of investigators, competing priorities, heavy workload, and/or corruption. While these delays persist, seized pirate product may deteriorate (creating evidentiary problems if seized materials are no longer in their original condition) and caseloads can become unmanageable.

Additional problems and delays are caused by the need for expert reports in criminal proceedings. After the initial "check" stage of criminal proceedings, the next stage (preliminary investigation/decision to prosecute phase) requires an expert opinion including a description of each copyrighted work that has been pirated. The only body authorized to provide such opinions is the Copyright Department of the Ministry of Culture, which lacks the resources and staff to move cases to the court stage. One proposed solution to the resources shortage would be to permit copyright owners to assist in the preparation of the expert report, but if the Penal Proceedings Code is not amended, prosecutors and judges will not accept such opinions as

valid evidence. The requirement necessitating an expert opinion for each pirated work is unworkable, inefficient, unduly burdensome and too expensive.

Once cases arrive in court, other obstacles loom. Bulgarian courts continue to demand excessive and cumbersome proof of rights ownership and chain of title in music piracy cases, even when evidence of infringement is blatant. Courts are slow to issue injunctive orders and fail to impose deterrent penalties in criminal cases or sufficient damages in civil infringement matters. Court cases can still take up to three years to complete. Besides these problems, the Penal Proceedings Code contains a number of gaps and other discrepancies that create prerequisites for prosecutors and courts to drop cases on procedural grounds. This law should be amended to provide for a fast, uncomplicated and smooth development of the IPR cases that would lead to sentences having an adequate deterrent effect.

All these features reflect a lack of recognition of the seriousness of intellectual property crimes. According to official information from the Ministry of the Interior, only 3 persons were convicted for copyright crimes under Article 172a of the Criminal Code in 2004, a sharp drop from the 17 reported sentenced in 2003. Due to the endemic lack of transparency of the court system, it is unknown, even to the Ministry of the Interior and the police, what the nature of sentences was, but suspended sentences appear to be the norm. For example, there is no information showing any person actually serving a prison term for music piracy. It is important that judges in Bulgaria finally recognize the seriousness of these offenses and begin to take swifter action and impose jail time in serious cases involving repeat offenders.

BSA reports that, despite active enforcement by police, the Bulgarian prosecutors and judges continue to undermine software infringement prosecutions. Regional prosecutors, who supervised the work of police and magistrate investigators, delay proceedings by filing inaccurate motions with no legal basis. But an even greater impediment is that prosecutors, as a general principle, refuse to prosecute software crimes or consider them serious offenses. There is no registry of prosecutors specialized in prosecuting IP and digital crimes, cases which clearly require specific knowledge, skills and experience. The prosecutors working on software crimes are often in charge of all classes of economic offenses and devote very little time to IPR matters. Those prosecutors that attend specialized training in the field subsequently do not appear in the court room. As a matter of practice, one prosecutor is in charge of the preliminary investigation of a software case; a different prosecutor brings the indictment to court and pleads during the court hearings. Furthermore, the same prosecutor rarely appears at two consecutive court hearings. Since prosecutors in charge change frequently and seemingly without reason, they lack knowledge of the facts and evidence in the case. This results in poorly drafted indictments, weak or unsubstantiated arguments, unpersuasive pleadings and a significant number of abandoned or lost cases.

Not only are public prosecutors reluctant to seek support and expertise from the right holders, but in many instances when BSA contacts the Prosecutor's Office it is denied any information about the case. The formal reason for this attitude is the fact that software crimes are prosecuted *ex officio* in Bulgaria, and as an injured party, the right holder may join the case as a plaintiff only if a civil claim for damage recovery has been filed. Under recent amendments to the Penal Proceedings Code, such a claim can be filed only at the first court hearing; thus right holders are excluded from the whole preliminary investigation stage. The private sector has repeatedly offered much needed training for investigations and prosecutions, but the Prosecutor's Office is still reluctant to accept it.

Neither civil nor criminal courts accept BSA member companies' standard powers of attorney. Instead, they demand additional, superfluous documents verifying the good standing of the right holder company and the chain of authorization. On formal, procedural grounds, courts refuse to hear software cases or accept right holders' civil claims within criminal trials. Criminal courts also reject the right holders' civil claims on the specious ground that hearings on the civil claim will complicate the court investigation of the case. When a civil claim is lodged, criminal courts often approve plea bargains between the prosecutor and the defense attorney without fulfilling legal requirements to satisfy the civil claim and award damages to the right holder. Criminal courts often reschedule hearings for no good reason.

As a result of all these impediments, in 2004 **only one** software piracy case was completed with a verdict; two other cases resulted in guilty pleas. Compared with the size of the damages to the right holders, the low fines imposed on the offenders are clearly not deterrent sanctions.

The following chart summarizes available data regarding criminal copyright prosecutions in Bulgaria in 2004:

CRIMINAL COPYRIGHT ENFORCEMENT STATISTICS IN 2004 BULGARIA		
ACTIONS	MOTION PICTURES	BUSINESS SOFTWARE
NUMBER OF RAIDS CONDUCTED	371	16
LED BY POLICE	365	
LED BY CUSTOMS	6	
NUMBER OF CASES COMMENCED	80	16
NUMBER OF DEFENDANTS CONVICTED (INCLUDING GUILTY PLEAS)	48	3
ACQUITTALS AND DISMISSELS	0	
NUMBER OF CASES PENDING	32	
TOTAL NUMBER OF CASES RESULTING IN JAIL TIME	0	1
SUSPENDED PRISON TERMS	48	1
MAXIMUM 6 MONTHS		1
OVER 6 MONTHS		
OVER 1 YEAR		
TOTAL SUSPENDED PRISON TERMS	48	1
PRISON TERMS SERVED (NOT SUSPENDED)	0	0
MAXIMUM 6 MONTHS		
OVER 6 MONTHS		
OVER 1 YEAR		
TOTAL PRISON TERMS SERVED (NOT SUSPENDED)		
NUMBER OF CASES RESULTING IN CRIMINAL FINES	48	2
UP TO \$1,000		2
\$1,000 TO \$5,000		
OVER \$5,000		
TOTAL AMOUNT OF FINES LEVIED		

Border measures need strengthening. The Bulgarian market is still facing ongoing pirate imports from Russia, Ukraine, Serbia and Montenegro, and other countries, as well as transshipment of pirate CDs from Ukraine and Russia to the Balkans, Greece and Turkey. Border controls must be significantly improved. An import license should only be granted after

proper inspection of the optical discs in question. In addition, the Ministry of Culture should not automatically issue export licenses in connection with production permits. A certificate must be issued in each particular case, so that customs can clear the shipment.

The recording industry reports positive relations with the Bulgarian Customs Agency, reflected in a Memorandum of Cooperation and Information Exchange signed with the Customs Agency in July 2003, and there have been some notable seizures at the borders, including the exports of optical disc products mentioned above. However, to the best of BSA's knowledge, there has not been a single seizure of pirate software products at the borders in 2004.

Although the 2000 amendments to the copyright law introduced TRIPS border control measures to the Bulgarian legal system, implementation problems remain. The Decree on the Implementation of the Border Control failed to establish a fast and effective procedure for preventing the movement of infringing goods across national borders. The procedure is expensive and time-consuming. Consideration of the rights holder's application for monitoring the movement of a particular product costs an initial BGN 500 (US\$330) plus an additional monthly fee of BGN 150 (US\$100) for each and every title listed in the application. The applications are not considered promptly, and counterfeit and pirate goods are shipped over the border before the customs have decided whether to approve the application or not. Significant guarantees and evidence are also requested before taking action. The decree reportedly contains grave discrepancies compared with the TRIPS and the Copyright Law provisions, which makes border control practically unenforceable.⁸ For instance, TRIPS requires detention of the goods for ten days after which time the goods should be released, if the rights holder fails to produce evidence that proceedings on the merits have been initiated (i.e. evidence of a civil case or a civil injunction); the Bulgarian decree requires both a filing and an application for an injunction. A court decision on a civil injunction application, a rarity in Bulgaria, would usually take much longer than ten days, thus rendering the provision unworkable in practice. In addition, a recent 2003 amendment to the decree explicitly excluded parallel imports from the scope of the border control measures. The border measures ordinance also fails to provide remedies for transshipment of pirate products. The customs agency is willing to work to improve border control measures, but flaws in the legal framework and lack of administrative capacity prevent them from doing so.

COPYRIGHT LAW AND RELATED ISSUES

Law on Copyright and Neighboring Rights (1993, amended through 2002)

Bulgaria's Law on Copyright and Neighboring Rights entered into force on August 1, 1993. Further amendments to the copyright law were made in 1994, 1998,⁹ 2000¹⁰ and 2002.

⁸ IIPA does not have the text of this decree on border control measures.

⁹ IIPA's 2003 Special 301 submission contained a more detailed history of Bulgaria's copyright law amendments; see pp. 359-361 at <http://www.iipa.com/rbc/2003/2003SPEC301BULGARIA.pdf>. The 1998 amendments to the copyright law increased administrative fines imposed by the Ministry of Culture tenfold. However, they also contained two serious problems: (1) they required the placement of holograms on blank audio and video tapes, CDs and CD-ROMs; and (2) they changed the procedures for confiscating infringing copies. These twin problems were resolved by the 2000 amendments.

¹⁰ The 2000 copyright law amendments were aimed to further Bulgaria's efforts to comply with European Union Directives, TRIPS and partially with the WIPO Internet treaties. Industry reports indicate that these amendments

Bulgaria deposited its instruments of accession to both the WIPO Copyright Treaty and the WIPO Performance and Phonograms Treaty in March 2001.

Amendments to the Bulgarian Copyright Act were passed on July 25, 2002, so that Bulgaria would be in compliance with the EU's directives on copyright, e-commerce, and conditional access. These amendments, which entered into effect on January 1, 2003, contained several improvements, including a requirement for obligatory licensing of CD manufacturers to be outlined by the Council of Ministers¹¹ (see discussion of OD legislation, below).

Despite this progress, the amended law did include several troubling provisions and left significant gaps, including shortfalls in proper implementation of the WIPO treaties. For example:

- The right of "communication to the public" for producers of sound recordings is only a right to "grant permission against compensation" (i.e., a right of remuneration). Producers should have the exclusive right to authorize any communication to the public of their sound recordings by wire or wireless means. Confusion may arise from a provision in the law according to which remuneration collected for public performance and broadcasting of phonograms is split equally between performers and producers.
- The "making available right" for sound recordings appears to be implicated only when "an unlimited number of people" may access the recording, instead of encompassing any making available to the public.
- The private copying exception under Article 25 which applies *mutatis mutandis* to sound recording producers is problematic because it does not contain the restriction that the reproduction is for ends that are neither directly or indirectly commercial.
- Fines provided under administrative and criminal sanctions are too low and not deterrent.
- The term of protection for sound recordings remains at only the TRIPS minimum level and should be extended. In fact, the term of protection for works or objects of neighboring rights protection whose term is not measured by the life of the author should be 95 years from publication.
- Another troubling problem is the maximum ten-year duration of agreements for the transfer of rights, which was originally introduced in the 1993 Copyright Law. Proposals to eliminate this transfer provision were made twice (in 2000 and 2002), but were not accepted.
- There is an exception from the importation and exportation right for amounts of less than commercial quantities.

provided for a longer term of copyright protection, a new communication right, provisional measures, and border control measures. They also provided administrative sanctions for tampering with rights management information and for the manufacturing and distribution of decoding devices without the consent of the copyright holder. Amendments also were made which prohibited circumvention devices and the possession of pirate product. Rights holders were granted the right to claim additional damages calculated on the basis of the revenue from the infringing act, the value of the infringing goods at retail price (or the legitimate copy), or pre-established damages instead of compensation.

¹¹ The 2002 amendments accomplished the following positive improvements: A new chapter on database protection was added; the definition of the distribution right was revised; revisions/refinements were made to existing exceptions to protection; criminal sanctions and administrative sanctions (fines) for violations involving technological measures of protection were added; the term of protection of sound recordings was redefined (to conform with the EU directive); amendments regarding the collection and distribution of the reprographic levy and the blank tape levy were made. Additional amendments were made to the provisions involving transfers of rights and the administration of collecting societies. Also introduced was national exhaustion of the distribution right, which prohibits "parallel imports."

- The ephemeral recording exemption for TV and radio organizations does not clearly require that the reproduction should be done by means of their own facilities. It also lacks any regulation with respect to the recordings made and does not require the broadcasting organization to destroy the recordings within a certain time limit.
- Provisions on the legal protection of technological measures are incomplete and do not meet the standards either of Article 6 of the EU Copyright Directive or of the WIPO Internet Treaties.
- Article 97 should be amended to provide administrative remedies against unauthorized public performance or broadcast of sound recordings, and against storage in commercial quantities of products containing copyrighted materials.

In correcting these shortcomings of existing law, Bulgarian legislators should also take the necessary steps to bring their national laws into line with the European Union Directives on copyright, enforcement, and electronic commerce, including provisions on ISP liability.

Optical Disc Regulation

From 1998 till 2003 the control of optical disc production in Bulgaria was subject to Decree 87/96, which included, among other things, the 1996 title verification system. Over the years it became clear that the optical disc licensing system had many loopholes and, in the summer of 2003, the Minister of European Integration finally launched a much-needed initiative to introduce a new comprehensive and strengthened optical disc regulation. A government working group was urgently established and started working on a draft. Unfortunately, the drafting team, headed by the Ministry of Economy, disregarded the bulk of recommendations made by the copyright industries (see below). In December 2003, a "Draft Law on the Administrative Regulation of the Manufacture and Trade with Optical Discs, Matrices and Other Carriers Embodying Subject of Copyright and Neighboring Rights" was approved by the Council of Ministers, and was forwarded to the Bulgarian parliament in January 2004.¹² However, no action has been taken on it since then. The government has failed to push the draft in the parliament, where members of the ruling party within the leading committee have consistently boycotted any possible progress on this issue.

With respect to the draft optical disc law, IFPI/BSA have identified at least four specific areas where reform is essential:

- Most important, a SID code obligation is needed for all optical discs produced in Bulgaria, and this must include blank discs (CD-R, DVD-R, etc.). First, the requirement to have SID codes on blank CD-R would ensure that there is an obligation for SID codes to be etched on all of the relevant replication machinery, molds, etc. In this way, a plant owner can not possess a clean mold and tell the authorities that it is only used for blank CD-Rs. In addition, it is useful to have blank CD-Rs identified so that if that disc is used to manufacture pirate product, the chain of distribution may be uncovered. (The industries had earlier received some reassurances that this would be included in the draft legislation, but unfortunately it was omitted from the version adopted by the Council of Ministers.)
- Private sector experts must at all times and unconditionally be permitted to participate in plant inspections.

¹² The discussion herein is based on reports of local copyright experts and industry representatives in Bulgaria; an English translation of the draft legislation is not available.

- Additional, enhanced rights and powers are needed to permit inspectors to search premises, investigate documents and equipment, and seize, for further investigation, all relevant materials.
- A full-fledged import-export registration system is needed for optical disc grade polycarbonates and other essential raw materials as well as equipment for optical disc production, including matrices (the industries are asking only for a registration scheme, not a licensing regime). The various local copyright industries question whether polycarbonate imports are being analyzed alongside—and cross-referenced with—declared production levels. It is also important that the resale or movement of imported polycarbonate within Bulgaria be tracked carefully in order to counteract illegal production.

Lacking these amendments, the proposed OD legislation contains very serious gaps and inconsistencies, even compared to the currently existing licensing regime. If adopted by the Parliament as is, it will make it more—not less—likely that local production of piratical optical discs containing copyrighted materials will re-emerge and grow. Enactment of a strong and enforceable OD law in Bulgaria is a top priority for the copyright industries.

Several politicians and OD plant representatives have claimed that an OD regulation is not required, as Bulgaria's plants are not engaged in illegal manufacturing. Major seizures in 2004 and subsequent detailed forensic evidence confirmed that at least two Bulgarian optical disc plants are engaged in illicit production and export of pirate goods and, thus, proved these claims to be wrong. The evidence, and the failure of Bulgarian authorities to proceed against the plants on this evidence, have also clearly demonstrated that the current system is not working effectively. Enactment of an updated and more comprehensive optical disc regulatory system, as described above, and the vigorous implementation of that system, are the only viable long-term solutions to this problem. In the meantime, however, the existing plant licensing regime must be properly enforced. The National Service for Combating Organized Crime (NSCOC) is the key agency in enforcing control over OD manufacturing and as such it must request the Minister of Economy to immediately suspend any licenses issued to OD plants when evidence of infringing activities of these plants is submitted.

Criminal Code

The levels of fines for copyright piracy fall far short of deterrent levels. The fines in the Penal Code have not been increased since 1997, and range from 1000-3000 BGN (US\$650-1950) for a first offense, and 3000-5000 BGN (US\$1950-3250) for a second offense. Administrative fines have also been frozen since 1998 and are comparably paltry. Both must be increased to deterrent levels so that pirates do not treat them as simply a cost of doing business.

Article 172a of the Penal Code should also be amended to:

- Criminalize possession of commercial quantities of pirate product;
- Provide mandatory minimum imprisonment terms for copyright offenses, so that they cannot be routinely replaced with probation, community service or other non-custodial remedies;
- Provide the formal basis for participation by right holders in criminal trials in the capacity of “injured party.”

Additional reforms of the Criminal Procedure Code are needed to address the manifest shortcomings of Bulgaria's current criminal enforcement system. These include:

- Introducing a presumption of rights ownership in criminal infringement cases;
- Allowing rights holders or their organizations to assist in preparing expert opinion reports concerning infringement of their intellectual property rights;
- Providing for criminal liability of managers of entities where IP crimes are committed;
- Re-establishing the option for right holders to file civil claims at any stage of the criminal trial, and the requirement that civil claimants approve the terms of any plea bargain in the criminal case;
- Refining the definition of "injured party" in the criminal trial to cover right holders who have incurred a loss of profit.

Existing procedures also need to be improved to facilitate investigation and prosecution of crimes in the digital environment, specifically the Internet. Courts should also be instructed to accept affidavits from right holders rather than requiring the authentication of large numbers of documents that are often very difficult to obtain.

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