

# INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

## 2006 SPECIAL 301 REPORT

### BULGARIA

#### **EXECUTIVE SUMMARY**

**Special 301 Recommendation:** IIPA recommends that Bulgaria remain on the Watch List for 2006.

#### **Actions Which the Bulgarian Government Should Take in 2006:**

##### **Law Reform**

- Revise the recently adopted Optical Disc Law in order to incorporate all amendments submitted by the copyright industry;
- Amend the Criminal Code
  - to criminalize the possession of pirate products for commercial purposes;
  - to increase criminal and administrative sanctions for copyright infringement to deterrent levels;
- Amend the Copyright Law to fill gaps (especially with respect to injunctive relief, protection of technological measures, and border measures);
- Amend the Criminal Procedure Code to streamline prosecutions and permit rightsholder participation;
- Ban street sales of cultural and copyrighted products nationwide, and enforce these bans.

##### **Enforcement**

- Vigorously enforce the new optical disc regulatory system;
- 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;
- Take action against Internet piracy, especially ISPs and LANs facilitating illegal traffic in copyright materials in the online environment;
- Increase *ex officio* enforcement actions against retail piracy, and in support of local decrees banning street sales of copyrighted products;
- Reorganize the judiciary and require prosecutors to take the IPR training course, and order them to give priority to IPR infringement cases;
- 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: 2001-2005<sup>1</sup>**

INDUSTRY	2005		2004		2003		2002		2001	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Records & Music	7.0	80%	6.5	75%	7.0	80%	7.2	83%	3.0	65%
Business Software <sup>2</sup>	20.5	73%	18.0	71%	16.0	71%	6.2	68%	8.3	75%
Motion Pictures <sup>3</sup>	NA	NA	4.0	35%	4.0	25%	3.0	20%	3.0	20%
Entertainment Software <sup>4</sup>	21.0	81%	NA	50%	NA	NA	21.9	91%	NA	84%
Books	NA	NA	NA	NA	0.3	NA	0.3	NA	0.3	NA
<b>TOTALS</b>	<b>48.5+</b>		<b>28.5</b>		<b>27.3</b>		<b>38.6</b>		<b>14.6</b>	

Over the years, several trade tools have been used to engage Bulgaria to improve copyright protection and enforcement, including Special 301<sup>5</sup> as well as the Generalized System of Preferences (GSP)<sup>6</sup> trade program. Bulgaria presently has three bilateral agreements with the U.S. which contain IPR obligations.<sup>7</sup> IIPA and its members look to Bulgaria to improve its on-the-ground copyright enforcement which, we believe, is imperative to reducing the high levels of piracy in that country.

<sup>1</sup> The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2006 Special 301 submission at [www.iipa.com/pdf/2006spec301methodology.pdf](http://www.iipa.com/pdf/2006spec301methodology.pdf).

<sup>2</sup> BSA's 2005 statistics are preliminary. They represent the U.S. publishers' share of software piracy losses in Bulgaria, and follow the methodology compiled in the Second Annual BSA/IDC Global Software Piracy Study (May 2005), available at <http://www.bsa.org/globalstudy/>. These figures cover, in addition to business applications software, computer applications such as operating systems, consumer applications such as PC gaming, personal finance, and reference software. BSA's 2004 piracy statistics were preliminary at the time of IIPA's February 11, 2005 Special 301 filing; the 2004 data has been revised and is reflected above.

<sup>3</sup> MPAA's trade losses and piracy levels for 2005 are available for a limited number of countries and are based on a methodology that analyzes physical or "hard" goods and Internet piracy. For a description of the new methodology, please see Appendix B of this report. As loss numbers and piracy levels become available for additional countries at a later time, they will be posted on the IIPA website, <http://www.iipa.com>.

<sup>4</sup> ESA's reported dollar figures reflect the value of pirate product present in the marketplace as distinguished from definitive industry "losses." The methodology used by the ESA is further described in Appendix B of this report.

<sup>5</sup> For more details on Bulgaria's Special 301 history, see Appendix D (<http://www.iipa.com/pdf/2006SPEC301USTRHISTORY.pdf>) as well as Appendix E (<http://www.iipa.com/pdf/2006SPEC301HISTORICALSUMMARY.pdf>) of this submission. Previous IIPA Special 301 filings on Bulgaria are posted at <http://www.iipa.com/countryreports.html>.

<sup>6</sup> During the first 11 months of 2005, \$45.5 million worth of Bulgarian goods (or 11.1% 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 24.1% increase over the same period in 2004.

<sup>7</sup> 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 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 has 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.

## **COPYRIGHT PIRACY IN BULGARIA**

**General Overview:** Physical (hard goods) piracy in Bulgaria remains a very serious problem; this includes problems caused by optical disc piracy. Also, Internet piracy is on the rise. These forms of copyright crime combined seriously hamper the development of the creative sector. Pirated CDs of all types of copyrighted materials, and an increasing number of illegal DVDs, are still easily available in all major cities. Although there are no recent indications of large-scale illegal optical disc production as used to be the case in previous years, the capacity of Bulgaria's plants continues to grow without any apparent commercial justification. This reinforces the need for Bulgaria to have very strong optical disc regulations in place.

**Music and Sound Recordings:** The piracy of U.S. sound recordings and music remains unacceptably high in Bulgaria, with around 80% of all foreign sound recordings sold being illegal copies. In comparison, the overall level of music piracy in Bulgaria (including domestic repertoire) is lower, at about 60%. Streets and markets in major cities, as well as at the seaside resorts, are full of pirated music CD-Rs. Some of the pirated music is imported from Russia and possibly Ukraine, though a greater proportion is likely to come from unauthorized recording onto Bulgarian produced blank media. The business of music piracy is run by organized criminal syndicates. Optical media piracy in Bulgaria remains a very serious problem. 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 is high. In addition, Internet piracy of recorded music is rising dramatically and has become a major problem. 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 \$7.0 million in 2005.

**Entertainment Software:** The Entertainment Software Association (ESA) reports that piracy affecting its member companies remained a major problem in 2005. Estimates indicate the piracy rate rose to 81% for 2005. Pirated entertainment software products are openly sold on the streets, even in Sofia and other large cities such as Plovdiv and Varna, and 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 pirated products at informal street markets. CD-R burning, silver (or factory-produced) discs remain the primary forms of pirated product in the country, most of which is shipped from Russia, Ukraine, or Turkey, or from as far away as Malaysia. Piracy of cartridge-based entertainment software products is also of concern with pirate and counterfeit product still being shipped into Bulgaria. The entertainment software industry reports a continuing problem of piracy at Internet cafés, where only 40% of the 3,000-4,000 cafés have licenses with entertainment software companies. It is believed that some cafés have ties to and are operated by organized criminal groups. The estimated value of pirate entertainment software in Bulgaria was \$21.0 million in 2005.

**Business Software Piracy:** 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). 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. BSA estimates the piracy rate for business software at 73%,

inflicting losses to U.S. companies estimated at \$20.5 million in 2005. BSA continues to acknowledge 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. Indeed, certain categories of software use appear to be entirely legalized among government users. Lowering the business software piracy level in Bulgaria could contribute favorably to the local economy, and increase tax revenues.<sup>8</sup>

**Audiovisual Piracy:** The Motion Picture Association (MPA) reports that, for the second year in a row, the most significant problem the industry faces in Bulgaria is optical disc piracy, primarily discs burned locally. These locally produced DVD-R and CD-R discs are increasing in the market, distributed by street vendors, via mail order, and by Internet auctions. There are some factory-replicated counterfeit discs still being imported from Russia, Ukraine and China for export to other European markets (Chinese imports typically contain only Chinese, Spanish and French subtitles), but local burning is the predominant problem. Although there is some concern regarding local production of counterfeit DVDs, BullACT, the local motion picture anti-piracy operation (of which MPA is a member) has not found evidence of it to date. 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. The distribution of films through informal networks and chatrooms has made the Internet one of the most popular methods for distribution of pirate product.

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

**Overview of Optical Disc Piracy in Bulgaria:** Bulgaria's OD plant licensing system is far from watertight. The legitimacy of foreign orders for OD manufacturing is not properly verified by the authorities. Efforts had been underway for years to implement a new optical media licensing system. But unfortunately the optical disc law adopted by Bulgaria's parliament in 2005 is inadequate and fails to include key amendments proposed by several copyright industry sectors to strengthen the legislative proposal (see further discussion in law section, below).

**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 nine plants operating in Bulgaria: CHSL, Media Plant, TOT 2002, Euro Silver Group, Crystal Ton, Media Sys, Optical Storage, Silver First, and Alexander Group (alternatively called East European Authoring and Encoding Centre). The nine operational plants have a total of 18 licensed production lines, giving a likely operational capacity of some 63 million discs per year. The legitimate demand for optical discs in Bulgaria (all formats) is far below 10 million copies per year.

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<sup>8</sup> BSA and International Data Corporation (IDC) released a new study on December 8, 2005, which illustrates global economic gains from reducing software piracy. This report, Expanding the Frontiers of Our Digital Future: Reducing Software Piracy to Accelerate Global IT Benefits, using 2004 data, found the following: a 10-point drop in Bulgaria's piracy rate( from 71% to 61%) could add \$212 million to its economy, increase local industry revenues by nearly \$130 million, and pump an additional \$23 million into Bulgaria's tax coffers. The 10-point reduction could also create more than 2,000 new IT jobs. See <http://www.bsa.org/idcstudy/pdfs/Bulgaria.pdf>.

OPTICAL DISC PLANTS IN BULGARIA	DESCRIPTION
<b>OPERATIONAL PLANTS (9)</b>	
<b>CHSL</b>	Sofia-based. Has one licensed production line.
<b>MEDIA PLANT</b>	This plant in Sofia has one licensed production line.
<b>TOT 2002</b>	Sofia-based. One line.
<b>EURO SILVER GROUP</b>	Located in Sofia, three production lines, with CD-R and DVD-R and DVD production capability.
<b>MEDIA SYS</b>	This is a DVD plant operating in Stara Zagora. It has one DVD and 2 DVD-R lines. The plant itself reports 15 million discs produced in 2005.
<b>OPTICAL STORAGE</b>	This is a CD-R and DVD-R production line operating in Stara Zagora. Two CD-R lines, one DVD-R line.
<b>SILVER FIRST</b>	This is a CD-R production line with 2 lines operating in Plovdiv, with a reported production capacity of about 18 million CDs or blank CD-Rs annually.
<b>CRYSTAL TONE 2</b>	This is a Sofia-based plant with one CD and one DVD production line.
<b>ALEXANDER GROUP</b> (alternatively, EastEuropean Authoring and Encoding Centre)	3 DVD lines.
<b>TOTAL</b>	Based on a conservative average estimate of 3.5 million units per year (IIPA methodology) and overlooking some figures used above, the annual production capacity in Bulgaria is <b>63 million discs</b> . It is understood that Optical Storage did not use one CD-R and one DVD-R throughout 2005; however, the lines are understood still to be in place and should be reflected in the potential capacity.
<b>SOURCE: IFPI, FEBRUARY 2006</b>	

**Burning and 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 stance 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. 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. In fact, the recording industry filed two criminal cases in 2004 against two of these plants; to date, there has been no consequence for these plants.<sup>9</sup>

<sup>9</sup> Two major seizures by Bulgarian Customs in April 2004 revealed that one of the Bulgarian DVD plants was producing hundreds of thousands of pirate DVDs. Ample evidence against another plant shows that it produced pirate music CDs. Industry submitted detailed complaints against both plants to the Bulgarian authorities in September 2004. So far, apart from one inspection of the DVD plant (and a follow-up forensic examination in conjunction with a Bulgarian specialist, which according to IFPI vindicates the accusations against the plant), there has been no consequence whatsoever for either of these plants. Although Bulgaria is still used for transshipment of pirate CDs from Ukraine and Russia to the Balkans, Greece and Turkey, the seizures and the forensic evidence referred to above show that this country is not capable of preventing the activity of pirate producers and exporters.

Following two years of intensive investigations, BullACT and the police dismantled a major pirate gang operating in the cities of Sofia, Vratza and Bourgas. In coordinated, simultaneous raids on apartments, warehouses and shops on August 31, 2005, the police made ten arrests and seized 64 DVD and CD burners, over 50,000 pirate discs containing movies, music and games, along with over 20,000 blank discs, 3 to 4 million inlays, 8 computers, printers and other equipment. The pirate gang, which supplied pirate discs to tourists in the country's Black Sea and mountain resorts, first came to BullACT's attention in 2003. Test purchases were made and suspects were put under surveillance to try to locate their duplication labs. The gang distributed pirate products via mail and couriers, and also used cars, buses and trains. When BullACT had gathered sufficient intelligence on the operation, it brought the matter to the attention of the Police. For a year and a half, BullACT and the police kept suspected members of the gang under surveillance and eventually located the gang's duplication facilities. At the end of July, police officers from Sofia, Vratza and Bourgas gathered to plan the raid the following month. Over 90 police officers took part in the raids that, in Sofia alone, netted 44 burners, 6 printers and thousands of pirate and blank discs in an old textile factory, over 10,000 pirate discs in the gang leader's apartment, and 4 burners, 9 hard discs and thousands of blank DVDs and CDs in a printing company's warehouse. In Vratza, the police raided 7 locations and seized computers, 16 burners, about 5,000 pirate discs, millions of inlays and thousands more blank discs. Six shops and a warehouse were also raided in and around Bourgas, where over 4,500 pirate discs were seized. This was the biggest operation carried out by the police in the last ten years. Disappointingly, however, judging by recent press reports, the judicial system appears to have dismissed all charges on those arrested in relation to CD piracy, taking further action solely against two people who were arrested for distribution of child pornography.

On January 20 and 21, 2006, simultaneous police raids were conducted on fifteen locations across the country, including seven addresses in Sofia, as well as sites in the cities of Plovdiv, Bourgas, Rousse and Vidin. The operation was undertaken by the Economic Department of the National Police, with the assistance of the tax authorities and BullACT. The most successful of the raids was at a residential address in Sofia where a small lab was discovered comprising 4 computers, 22 burners, 5 printers and a scanner, plus 8,329 pirate discs and 7,000 inlays. The 27-year old pirate was detained overnight before being released on bail. Other raids in Sofia resulted in the seizure of 764 pirate optical discs from a storage unit at the market in Lyulin, and of 2,210 pirate discs from the cellar of a building in Slaveikov Square. A vendor with a previous conviction for copyright infringement, trading at Vitoshka Boulevard in Sofia, was also found in the possession of 1,500 pirate discs.

**Internet Piracy:** The introduction of high-speed cable Internet created a favorable environment for a substantial increase in illegal online distribution and use of computer programs, music, films, and entertainment software. 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. The problem lies with tracking down servers containing pirate product as well as with smaller ISPs and Internet clubs that have their own networks closed to outside access and that cannot be investigated centrally. Bulgaria also has approximately 3,000–4,000 Internet cafés, which often serve as centers for consumers to rip and copy DVDs and CDs, and trade files of copyrighted materials. MPA reports that the distribution of films through informal networks and chatrooms has made the Internet one of the most popular methods for distribution of pirate product. ESA also reports serious problems involving game piracy occurring at these cafés.

Active police investigations, raids and prosecutions are needed to combat Internet piracy. In December 2005, the Director of the Copyright and Neighboring Rights Directorate in the Ministry of Culture indicated that the closure of illegal LANs will be one of its IPR priorities in 2006.

Simultaneously, the chief of the “IP, trademark, computer crime and gambling”/IPR sector of the National Services to Combat Organized Crime (NSCOC) publicly expressed his agency’s determination to focus on combating illegal upload and digital distribution of protected material via the Internet. Consequently, and in light of expected structural reforms in the Ministry of Interior, it is crucial that the trained and experienced officers of this agency remain an integral part of law enforcement activity against IP and Internet crimes. (The NSCOC IPR sector is a material participant in the IP industries’ Internet strategy launched in early 2005. This strategy provides for involvement of the right holders’ organizations, major local ISPs and the NSCOC in conducting a number of Internet anti-piracy initiatives: (i) identification of alleged offenders on behalf of the film, music and software industries; (ii) a local notice-and-take-down campaign; (iii) issuance of police protocols of warning and instructions to ISPs knowingly hosting infringing material; (iv) police raids against LANs as well as against Internet customers uploading illegal content; (v) joint enforcement PR. This strategy, however, needs the support of both enforcement agencies and the judiciary in order to be successful.) The recording industry is concerned about the lack of fast, effective and adequate measures to counteract violations on the Internet. Authorities have shown interest in this field and have run checks on the net, identified infringements and informed ISPs. Some of ISPs recently have started to cooperate with the local industry group and have deleted the information that the industry identified. Disappointingly, there are many cases where pirates have returned to a former site.

**Organized Crime.** The connection between organized crime and OD piracy in Bulgaria is no secret. Even the National Police report that there are five major organized crime groups in Bulgaria, and they share the markets for illegal businesses (like piracy) and drugs. The undeniable fact that organized crime elements are involved in piracy makes it very dangerous for the private sector to take anti-piracy actions. 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. Furthermore, many Internet cafés seem to be heavily controlled by organized crime. However, Bulgaria’s 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.

## **COPYRIGHT ENFORCEMENT IN BULGARIA**

**Overview:** On the enforcement front, although cooperation between right holder organizations and police authorities has generally improved, authorities are seriously hampered in their task because the possession of pirated materials for commercial purposes is not criminalized in Bulgaria’s Criminal Code. Pirates only offer empty jewel boxes for sale. The illegal discs are stored elsewhere and are thus kept out of reach of law enforcement agents. The main reason for continued high levels of piracy, 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 understaffed and under-equipped government office (Copyright Office of the Ministry of Culture) is allowed to provide, typify the obstacles to effective judicial enforcement of copyright.

**Interagency coordination with industry.** In late 2005, the Bulgaria government established a new inter-government council on IPR to include deputy ministers. Including more senior officials in

this council is important because the prior interagency body was not very effective.<sup>10</sup> The industries hope that this council will invite more participation from the private sector, and listen to industry expertise. This Council, headed by the Ministry of Culture, held its first meeting on December 22, 2005, and agreed they will seek a formal Council of Ministers' decision regarding its formation; this will help identify the format and duties of this new group. The copyright industries invest much time in meeting with senior enforcement and trade officials in the Bulgarian government, to raise the problems experienced by the industries and offer possible solutions.

**Street bans need to be enforced in practice.** This situation in 2005 remained similar to that experienced in 2004. There has been a slight increase in street raids. Although the city government of Sofia introduced strict regulation of street sales of copyright product over two years ago, and ordinances banning street sales were issued in 2004 in Bourgas and Plovdiv, there has been little meaningful enforcement (for instance, enforcement was carried out only during normal office hours). The Sofia ban was signed in June 2005, but has now been suspended by a court after a complaint from a music producer who distributes legitimate local repertoire on CDs via street sales. All industries believe that the street sale ban against pirate products should be imposed nationwide and vigorously enforced.

**Police cooperation is good, but significant problems remain.** Last year there were several high profile raids. For example, in October 2005, Bulgarian tax authorities destroyed more than 40,000 pirated CDs, DVDs and videos seized from retail stores. One tax official said that some vendors of pirated products make a daily profit of 1,000 leva (US\$612), and often these businesses help fund organized crime.

The motion picture industry reports that in 2005, BullACT continued to work numerous cases and enjoyed excellent cooperation from the law enforcement authorities. Through the third quarter of 2005, BullACT seized 17,096 CD-Rs, 9,900 DVD-Rs, 3,336 counterfeit DVDs (from Russia, with Bulgarian and Russian subtitles), 16,027 music CD-Rs, 848 videocassettes, 167 VCDs, 30,591 Sony PlayStation® discs and PC games, 57 DVD-R burners, 41 CD-R burners and 568 PCs. As in the case of prior years, these raids have had a positive impact, but this was diluted by the lack of follow-up in terms of prosecutions and deterrent sentencing.

In 2005, the local sound recording industry participated in 74 operations against the manufacture and distribution of pirate music carriers, 62 of which were successful. During these operations, enforcement agencies seized 106,124 units of optical and magnetic carriers (cassettes) with music, films, entertainment and business software; 18 computer systems with 23 burners for DVD-R and CD-R; 1 color printer as well as huge numbers of inlays and materials advertising the sale of pirate products. In addition, 4 servers were seized containing over 1 million illegal MP3 tracks from the catalogues of the major record labels. On December 20 and 21, 2005, officers from DNSP and National Revenue Agency (former General Tax Directorate) carried out an operation in Sofia, Vidin, Rousse, Plovdiv and Bourgas. 15 targets were checked, 7 of which were in Sofia. Seizures totaled 13,000 DVDs, DVD-Rs, CDs and CD-Rs, 4 computer configurations, 5 printers, 22 burners and a scanner. Five preliminary investigations were instituted and 2 exchanges of letters and statements of infringements were drawn by the Tax Administration. These kinds of actions will only

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<sup>10</sup> In November 2002, an Inter-Ministerial Council for the Protection of Copyright and Neighboring Rights was formed by an ordinance issued by the Minister of Culture. The council was organized to better coordinate and direct Bulgaria's anti-piracy enforcement efforts. It was headed by the Director of the Copyright Department in the Ministry of Culture and included representatives of several ministries and of various law enforcement agencies, including the Customs Service, National Police, National Service for Combating Organized Crime (NSCOC), and other agencies. However, this Council rarely invited participation from the private sector.

have lasting effect if they are followed by tough and swift prosecution/sentencing, which is the main issue in Bulgaria today.

The recording industry understands that there have been 3 inquisitorial cases carried out by the investigation authorities, 21 preliminary investigations carried out by the police supported by documents about crimes under Article 172a of the Penal Code, 20 statements of infringements drawn by the Tax Administration, and 2 administrative cases instituted by the Customs Agency and the Inspectorate Department at Metropolitan municipality. But the recording industry has not received any information about penalties handed down and imposed against persons convicted of intellectual property crimes in Bulgaria.

BSA continues to report good cooperation with the IPR sector of the National Services to Combat Organized Crime, the economic police departments in most regions, and with the General Tax Directorate. 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, nine end-user raids and eight reseller (HDL and CDR) actions and three Internet raids were conducted by the police, resulting in a total of 20 criminal cases initiated. 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).

BSA also reports that 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 several years this program has produced notable results in raising awareness; many companies have legalized their software assets. In 2005 alone, 766 police protocols of warning and instruction were issued to corporate end-users. Feedback on the targeted companies' compliance with the protocols is necessary to measure the effectiveness of the program. The lack of such feedback to the right holders is one of the major shortcomings of the program. To bridge this gap, in 2005 BSA and the National Police Directorate reached an agreement whereby a computerized center for information exchange would be set up, and BSA would provide the necessary IT training for the police officers in charge. Anticipating structural reforms within the Ministry of Interior, this initiative was postponed to 2006. Furthermore, 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.

Several entertainment software companies enjoy positive relationships with law enforcement agents who are assisting on the significant problems with piracy in Internet cafés as well as retail piracy. However, the problem remains the reluctance of law enforcement authorities to take action against high-level suppliers and organized criminal syndicate operations. Some police districts remain ineffective in their anti-piracy actions, refusing to focus their enforcement efforts on larger targets and only raiding small companies, computer game clubs or Internet cafés.

In 2005, an entertainment software company concluded a successful prosecution against an Internet café owner who continuously refused to cease his illegal activities and ignored warnings to do so. The café owner was sentenced to six months in jail and three years' probation. This is an extremely welcome development and one that the industry hopes will be sustained, as only through enforcement and the imposition of deterrent penalties will those engaged in infringing activities be

forced to stop. However, despite this promising news, the industry also experienced setbacks. A similar case was being developed against the owner of several Internet cafés engaged in infringing activity, but the case never proceeded as the prosecutor did not appear to be well versed in the prosecution of intellectual property cases. Another entertainment software company reported that in July, in an action on the Black Sea coast, the company's representative had worked with Burgass police to investigate five establishments selling counterfeit games, including a large quantity of the company's games. When the raids were conducted, the company's products were no longer among the establishments' inventory. It appeared that the dealers under investigation were linked to the police and a leak in the force had alerted them to the upcoming raid. Leaks of this nature make it difficult to work with the police.

**Prosecutions, court procedures and judicial sentencing remain ineffective.** Again in 2005, the bottleneck problems of problems in prosecutions (few cases, many delays) and judicial sentencing (non-deterrent penalties) continued. This means that the practical deterrent impact of all the raids is undercut.

- **Delays from police to prosecutors:** Unwarranted delays dominate criminal enforcement actions, in large part because of the time it takes to move a case from the police, through the magistrate investigator, and on through the prosecutor's office to the court. Although the Penal Proceedings Code provides for relatively short terms within which the investigation should be completed, cases are usually delayed for a much longer time due to incompetence, competing priorities, corruption, and/or heavy workload. 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.
- **Difficulties in pursuing prosecutions:** Both prosecutors and judges fail to appreciate the seriousness of IP crimes. To reduce the number of IP cases that are dropped by prosecutors and to speed up court decisions, more training is needed. No improvement was reported in 2005. 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 have occasionally attended specialized training in the field subsequently do not appear in the courtroom. 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 Criminal Procedures Code, such a claim can be filed only at the first court hearing; thus right holders are excluded from the whole preliminary investigation stage. Even at the court stage, no more than 20% percent of the civil claims submitted are accepted by the courts for consideration in the criminal trial. This deprives the right holders of the opportunity to participate actively in the court hearings, and hence in the entire proceedings.

- **Burdensome expert reports:** 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 Criminal Procedures 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.
- **Ownership rights in music cases:** One of the main problems in criminal prosecution of evident pirate operations is the fact that the Criminal Code does not cover the possession of pirate optical carriers for commercial purposes. For instance, in 2005 in Sofia a man was found in possession of over 50,000 discs but it has been impossible to file a criminal case against him. As a result, he will continue his activity in 2006.
- **Inadequate criminal procedure code:** The Criminal Procedures Code contains a number of gaps and other discrepancies that create pretexts for prosecutors and courts to drop cases on procedural grounds (see discussion above, and below). In sum, 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.
- **Non-deterrent sentencing:** Bulgarian courts fail to impose deterrent penalties in criminal cases. 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 reported that in 2005, only 5 cases were completed with a verdict and 1 civil judgment issued. Compared with the size of the damages to the right holders, the low fines imposed on the offenders are clearly not deterrent sanctions.
- **Difficulties in bringing civil infringement cases.** 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.

- Delays in injunctive relief. Courts are slow to issue injunctive orders.
- Delay in judicial resolutions. No improvement in expediting cases was noted in 2005; court cases in criminal proceedings can still take up to three years to complete.

**Border measures need strengthening.** Border controls must be significantly improved. 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. 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 industries report mixed results with Bulgarian customs. 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. In June 2005, the Customs Agency signed a Memorandum for IP Protection with the Ministry of Interior, the Ministry of Culture and the Patent Office based upon a template from the EU PHARE Programme.

**Trainings:** BullACT conducts regular training seminars for judges, police officers, Copyright Department inspectors and Customs officers. It has also pressed the Chief Secretary of the Ministry of Interior and the Rector of the Police Academy for the formal inclusion of lectures on IP crime in police training courses, and continues to have BullACT investigators deliver regular presentations at the Police Academy. For many years, BSA has suggested and provided training for law enforcement agencies and the judiciary. BSA has participated in all conferences and seminars organized by local or international governmental or non-governmental organizations, thus providing consistent training and information on software issues to the targeted groups. The biggest challenge for BSA to date has been the attempt to provide training for public prosecutors. For the past three years such efforts have been stonewalled by the unwillingness of the General Attorney's Office to permit the prosecutors to attend trainings that BSA organizes. A new attempt to organize and hold a training for public prosecutors will be made in the spring of 2006 with the hope that the new Prosecutor General would be more supportive. IFPI reports that, at the end of 2004 and in the beginning of 2005 with the co-operation of the Customs Agency and Crown Agents, training courses were provided for officials of the Custom Intelligence and Investigation Directorate. Officials from all customs departments were trained. Training courses were conducted as well for officials of the General Tax Directorate, Regional Tax Directorate, Sofia and Regional Tax Directorate, Varna.

## **COPYRIGHT LAW AND RELATED ISSUES IN BULGARIA**

**Optical Disc Law of 2005:** Enactment and implementation of a strong and enforceable optical disc law in Bulgaria has been a top priority for the copyright industries for years. Finally, after two years of legislative consideration, the Bulgarian Parliament adopted the Law on Administrative Control for the Manufacture and Distribution of Optical Discs in September 2005. This new law replaces the Title Verification Decree under which the OD plants were licensed. (From 1998 through

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.)

In sum, the only positive outcome was that blank discs produced in Bulgaria must also carry the SID Code. However, the new law is drafted in such a manner that the obligation does not cover the equipment used to produce the discs, but just the discs themselves; that is, under this new law, it is still possible to possess moulds without the SID Code. Unfortunately, despite the industries' best efforts over the years to improve the provisions in this legislation, the drafting team, headed by the Ministry of Economy, disregarded the bulk of recommendations made by the copyright industries. During the drafting of the law, the industries identified at least four specific areas where improvement was needed. These issues remain problematic now that the law has been adopted:

- Most important, a SID Code obligation is needed for all optical discs, including blank CD-R and DVD-R, produced in Bulgaria, and a SID Code should be engraved on all equipment used to produce masters/stampers in Bulgaria. This is essential for two reasons. 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, moulds, etc. In this way, a plant owner can not possess a clean mould and tell the authorities that it is only used for blank CD-Rs. Second, 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. There is a major problem, though, in that the Parliament at the last minute included an obligation that all imported optical discs carry a SID Code; that goes far beyond what the industry requested. (Industry does support the obligation that imported stampers should have SID Code). There are numerous record companies, software producers and other who have their perfectly legitimate optical discs manufactured at plants in another country which do not apply SID Code (after all, SID Code is a voluntary system). This added obligation is strongly opposed by the copyright industries.
- Private sector experts must at all times and unconditionally be permitted to participate in plant inspections.
- 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.

In IIPA's 2005 Special 301 report, we noted that if the above problems were not amended in the (then-draft) legislation, then the new OD legislation would contain very serious gaps and inconsistencies, even compared to the then-existing licensing regime. We noted that, "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." Industries' main concerns relate to the enforcement aspects of the law. Unfortunately, the law fails to introduce effective enforcement rules essential to ensure compliance. For example:

- The law does not require the control bodies to conduct inspections on a regular basis and upon receiving complaint from right holders;

- During the inspections, the powers granted to the relevant authorities are too narrow to enable meaningful control. For example, control bodies are not granted the powers to seize documents during inspections, resulting in limited possibilities to collect evidence crucial for future prosecution and further investigations;
- The law omits a reference to the participation of experts during inspections conducted by the control bodies. The lack of express provisions allowing for cooperation between right holders and the control bodies reduces the effectiveness of the law and significantly limits the ability of the control bodies to achieve meaningful application of the licensing regime;
- The law now contains an obligation for imported optical discs with content to contain an SID Code or comparable identification code. It has always been the industry position that such obligations seriously hinder the import of legitimate product while adding nothing to the fight against cross-border trade in pirate product (which is predominantly smuggled in). Imported stampers, however, should be subject to an SID Code requirement.

Unfortunately, industries' predictions appear to be coming true. The new OD law has serious gaps and inconsistencies which will make effective enforcement very difficult. The industries believe that the Bulgarian government must move forward to enforce the new law. The Ministry of Culture and Tourism is in charge of issuing the various registrations. The National Service for Combating Organized Crime (NSCOC) is involved in enforcing control over OD manufacturing, insofar as it is member of the licensing committee. At the same time, Bulgaria must undertake renewed efforts to correct their inadequacies in this legislation.

**Law on Copyright and Neighboring Rights (1993, amended through 2005):** In contrast to the industries' disappointment over the adequacy of the new 2005 Optical Disc Law, the industries were generally pleased with the refinements made in 2005 to the existing Copyright Law.

To summarize, Bulgaria's Law on Copyright and Neighboring Rights entered into force on August 1, 1993.<sup>11</sup> Further amendments to the copyright law were made in 1994, 1998, 2000, 2002 and, most recently, in 2005. Bulgaria deposited its instruments of accession to both the WIPO Copyright Treaty and the WIPO Performance and Phonograms Treaty in March 2001. The 2002 amendments, which entered into effect on January 1, 2003 and were aimed at implemented various EU directives, contained several improvements, including a requirement for obligatory licensing of CD manufacturers to be outlined by the Council of Ministers. However, the 2002 amendments included several troubling provisions and left significant gaps, including shortfalls in proper implementation of the WIPO Treaties.<sup>12</sup>

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<sup>11</sup> 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.

<sup>12</sup> Among the more troubling features of the 2002 amendments were the following: (1) 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. (2) 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. (3) 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. (4) Fines provided under administrative and criminal sanctions are too low and not deterrent. (5) The term of protection for sound recordings remains at only the TRIPS minimum level and should be extended. 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. (6) Another troubling problem is the maximum ten-year duration of agreements for the transfer of rights, which was originally introduced in the

Further amendments to the copyright law were made in 2005, again aiming at addressing existing shortcomings and looking forward to possible EU accession in 2007. The copyright industries believe these 2005 amendments represent good progress. Amendments included issues such as: expanding the scope of civil remedies; revising the scope of provisions on criminal and administrative sanctions, seizures and damages; and amending existing provisions on resale royalties, transmissions by satellite, and rental and lending rights.

There are, however, continuing concerns about several issues:

- **Injunctive relief:** Article 96a aims to implement Article 8(3) of the EU Copyright Directive. However, the wording of the current provision is incorrect. The Directive obliges Member States to grant injunctive relief against intermediaries whose services are used to infringe copyright by third parties. This means that an injunction can be obtained against intermediaries such as mere conduits, access providers, possibly caching providers, and hosts, even in the absence of a copyright infringement. The new Article 96a offers an injunctive relief against third parties on the condition that they have willingly assisted to commit the infringement. This is inconsistent with the Directive, and must be modified.
- **Protection of technological measures:** The Bulgarian Copyright Law already had a basis for the protection of technological measures at the standard created by Article 6 of the EU Copyright Directive. The industries welcome the good definition of the technological protection measures in Article 2(14) of the Additional Provisions. However, the current Paragraphs (6) and (7) of Article 97 fail to comply with the Directive by not implementing properly: (a) the prohibition on the act of circumvention and (b) the full list of circumventing devices and, in particular, services as established in Articles 6(1) and 6(2) of the Directive respectively. Consequently, we recommend revising current Articles 97(6) and (7).

**Criminal Code:** The levels of fines for copyright piracy fall far short of deterrent levels. The fines in the Criminal Code have not been increased since 1997, and range from 1000-3000 BGN (US\$612-1836) for a first offense, and 3000-5000 BGN (US\$1836-3060) 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 Criminal 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.”

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1993 Copyright Law. Proposals to eliminate this transfer provision were made twice (in 2000 and 2002), but were not accepted. (7) There is an exception from the importation and exportation right for amounts of less than commercial quantities. (8) 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. (9) 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. (10) 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.

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

- (1) introduce a presumption of rights ownership in criminal infringement cases;
- (2) allow rights holders or their representative organizations to assist in preparing expert opinion reports concerning infringement of their IP rights;
- (3) improve existing procedures to reflect the specifics of the digital environment with regard to the investigation and prosecution of Internet-related crimes;
- (4) provide for criminal liability of the managers of entities where IP crimes are committed;
- (5) re-establish the option for rights holders to file civil claims at any stage of the criminal trial; and
- (6) refine the definition of "injured party" in the criminal trial to cover rights 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.

**The Tax Procedure Law of 2002:** 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. 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. BSA reports that the tax authorities, using tax law violations as the basis for action, did make some seizures of pirate OD products containing business software, in the streets in Sofia during 2005.