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February 11, 2008

Jennifer Choe Groves  
Director for Intellectual Property and Innovation  
Office of the U.S. Trade Representative  
1724 F Street, N.W.  
Washington, D.C. 20508

Re: Special 301: Identification of Countries  
Under Section 182 of the Trade Act of  
1974: Request for Public Comment  
("Special 301"), 73 Fed. Reg. 2958  
(January 16, 2008)

**Re: The Czech Republic: Special 301 Review  
RIAA Comments on Copyright Protection and Enforcement**

Dear Ms. Groves:

This filing responds to the Request for Written Submissions appearing in the Federal Register on January 16, 2008. The request invites submissions from the public on policies and practices that should be considered in connection with designating countries as Priority Foreign Countries pursuant to Section 182 of the Omnibus Trade and Competitiveness Act of 1988, 19 U.S.C. § 2242 ("Special 301"). The Special 301 provisions call upon the United States Trade Representative to identify countries which, *inter alia*, "deny adequate and effective protection" to U.S. intellectual property or deny "fair and equitable market access" to U.S. persons who rely on intellectual property protection.

This filing is with respect to the Czech Republic. On February 12, 2007, the Recording Industry Association of America recommended that USTR place the Czech Republic on the Special 301 Priority Watch List. This recommendation was predominantly based on the presence of rampant piracy in the Czech Republic and serious deficiencies in its enforcement system, in particular concerning large-scale piracy of sound recordings in markets along the borders with Germany and Austria.

On April 27, 2007, USTR announced the results of the 2007 Special 301 Review and stated that an Out-of-Cycle Review of the Czech Republic would be conducted later in 2007 to monitor progress in addressing concerns regarding the lack of adequate protection and enforcement of intellectual property, especially with respect to sales of pirated and counterfeit goods in its “notorious markets”. During the autumn of 2007, USTR carried out the Out-of-Cycle Review and, based *inter alia* on submissions from the private sector, including the Recording Industry Association of America, placed the Czech Republic on the Special 301 Watch List on January 22, 2008.

### **RECOMMENDATION**

The Czech Republic has continued to fail to make meaningful progress in the implementation of a multifaceted legislative and enforcement campaign required to bring a definitive end to the ongoing trade in pirate and counterfeit goods at the many hundreds of sales points at its notorious border markets. Recognizing that the USTR placed the Czech Republic on the Watch List only within the past month, the Recording Industry Association of America recommends that USTR maintain the Czech Republic on the **Watch List** at this time. We urge the United States government to continue its dialogue with the government of Czech Republic about this matter and, if meaningful progress is not made by the Czech Republic by the summer of 2008, USTR should place the Czech Republic on the **Priority Watch List** at that time.

### **EXECUTIVE SUMMARY**

It is undisputed that the Czech Republic today hosts what may be the highest concentration and largest number of pirate out-door markets in the world. Over the past four to five years the private sector has increasingly called for measures to end the massive, open and unbridled trade in pirate and counterfeit goods in these markets. However, government denial, inaction, weak regulation, reluctant and uncooperative magistrates, and law enforcement agencies that are either understaffed or unwilling to address the problem have allowed these pirate markets to grow and to thrive.

The private sector presented the Czech government in June 2007 with a set of suggested measures, based on international experience, the implementation of which would bring the pirate border market phenomenon under control. We also tried to demonstrate to the Czech government that relying upon a practice of conducting occasional raids on the markets and confiscations of illegal goods in isolation would never lead to success.

Unfortunately, the Czech Government has limited its response to (1) issuing a general statement that piracy would not be tolerated, (2) publishing an action plan that falls short of that required and that lacks clear deadlines and deliverables, and (3) launching raids on certain markets. The reality in the field shows that, other than temporarily disrupting illegal trade in certain markets as a result of the raids, these measures have had no effect on this endemic and deeply entrenched problem. It appears that, without further political pressure, the Czech Republic is unlikely to do that necessary to eliminate or even to significantly reduce this string of black spots along its borders with Germany and Austria.

## **PIRACY AND TRADE LOSSES**

We estimate that as a result of physical and digital piracy, our member companies in 2007 lost over \$40 million to piracy in the Czech Republic with respect to their American repertoire, with a piracy rate of at least 60%.

### **Sound recording piracy in the Czech Republic**

This submission predominantly focuses on physical piracy at the border markets. However, it should be noted that the recording industry also continues to struggle with high levels of Internet piracy in the Czech Republic, which seriously threatens the development of a legitimate on-line market for recorded music. In relation to the fight against Internet piracy it should be mentioned that actions from the relevant Czech law enforcement agencies – mostly based in Prague - are substantially more effective than enforcement actions against the border markets.

### **The key players**

A number of Czech Government agencies and other authorities play or are supposed to play a key role in implementing an enforcement campaign against the pirate traders at the border markets. Most of these are represented on the Inter-ministerial Committee on IPR, which is led by the Ministry of Trade and Industry. The most relevant players are:

- Ministry of Trade and Industry
- Market Inspection
- Ministry of Finance
- Customs (in particular the IPR unit)
- Ministry of Justice
- Ministry of the Interior
- Magistrates and courts in the affected districts
- Local government in the affected areas
- Municipal police in the affected areas

### **Highlights of 2007**

- March 2007: the Czech Deputy Minister of Trade and Industry reassured the US Government that, under his leadership, the pirate border market problem would be solved.
- June 2007: the Czech Government received a detailed action plan submitted by a large group of affected rightholders and several meetings were held to explain the various points raised in the action plan.
- September 2007, the Czech Government issued its own action plan, which failed to address some of the key elements of the private sector action plan. There was no evidence, other than a temporary increase in raids, that the relevant Czech authorities had done anything substantial to implement their own action plan.
- October 2007: Following increasing US political pressure and a string of high-level letters from several European Governments to their Czech counterparts expressing concern over the pirate border markets, the US Ambassador and a number of his peers from Europe raised the matter with Czech Prime Minister Topolánek. The Prime Minister responded by referring to the Czech action plan.

- November-December 2007: coinciding with the Out-of-Cycle review, Czech Customs – which has been the most cooperative and effective law enforcement agency in the border market campaign – carried out an increased number of raids and posted personnel patrolling the markets for several weeks after the raids. This had a localized and temporary deterrent effect.

### **The Czech Government fails to respond to the private sector's action plan**

As noted above, in June 2007, the private sector recommended that the Czech government take a number of actions to address the growing problems that have been plaguing the sale of legitimate product in their country. These points are described in detail in the October 12, 2007 RIAA submission to USTR as part of the Special 301 Out-of-Cycle review conducted at that time, the relevant part of which is attached to this submission. The comments made in the Out-of-Cycle review are, given the lack of measurable improvement on any of the issues raised, still fully relevant and can be summarized as follows:

#### **Action 1: Existing market licensing rules are not properly enforced and the relevant Ministry refuses to strengthen these rules.**

Not only does the Ministry of Trade and Industry refuse to make the existing market licensing regime more stringent, its representatives have even announced that the Ministry intends to further weaken existing rules. It argues that it is obliged to do so under EU deregulation principles.

In any case, the existing licensing rules, which give Market Inspection – the enforcement body that is part of the Ministry of Trade and Industry – the power to close down sales outlets that have infringed these rules, are not properly enforced.

Market inspectors are afraid to patrol the markets and check the stalls due to the notoriously aggressive behaviour of the pirate sellers. A clear example of this is a recent fight between Customs officers and a group of pirate market sellers in Vojtanov near Cheb, which left a Customs officer badly hurt and fighting for his life. The absence of any reaction from Government and the local authorities to this event demonstrates a troubling indifference at political level towards this problem and injury to their own officer.

#### **Action 2: The Czech government refuses to introduce criminal and civil vicarious liability for landowners and organizers of these markets.**

Even though, in the best of cases, they do not engage directly in pirate retail and distribution activity, landlords, owners and general exploiters of the open air markets are the main persons profiting from the illegal trade taking place on their premises. Many jurisdictions recognize either in specific legal provisions or through case law that landlords can be held liable for illegal activity taking place on their premises, in particular when these landlords have been made aware of such activity and have subsequently failed to take action.

It should be noted that, for example, case law specifically dealing with landlord liability for copyright infringement can be found in the US and the UK, where market operators have been held liable under various legal theories. In some jurisdictions there is also clear liability of landlords for other types of illegal actions by tenants, for

example violations of building codes and state law regarding drug dealing and other criminal tenant acts, in the US for example, or specific legislation in relation to certain illegal activities in Malaysia. Passage of specific legislation would bring the greatest certainty in this regard and this is what we suggest—which the Czech Republic should introduce at this stage to cope with the deeply entrenched pirate trade at the open air markets.

**Action 3: Local law enforcement authorities do not patrol the markets.**

Local governments, which are often the owners/landlords of the market places (see comments under Action 2 above), should take responsibility and ensure communal police officers receive training in detecting piracy and counterfeiting and are dispatched to permanently patrol the markets. Their presence in the markets— in combination with regular raids, stricter licensing rules and the closure of illegal outlets -- would undoubtedly lead to a substantial reduction in illegal trade at the border markets. Unfortunately, local police do not currently patrol the markets at all, thus reinforcing by their absence the sense of impunity among the pirate sellers.

**Action 4: Magistrates in the affected areas continue to be extremely reluctant to grant search warrants to law enforcement agencies and to initiate prosecution of persons involved in and/or profiting from pirate trade at the border markets.**

This is one of the main obstacles to a solution of the border market problem. Considering the abysmal record in terms of almost never granting warrants or prosecuting pirate traders, it is fair to say that the magistrates in the areas concerned are in effect encouraging the bold attitude and criminal behaviour of the pirates and their landlords.

Law enforcement urgently and desperately needs far-reaching search warrants that will allow them to go after the warehouses and underground illegal manufacturing and distribution sites that fuel this illegal trade. However, prosecutors consistently refuse to grant such warrants.

There are no official statistics of prosecution and sentencing of pirate traders. The fact that there is no known prosecution of any of the pirates caught even during the December raids in 2006 or those caught during more recent raids seems to demonstrate that prosecutors have little or no interest in playing their part in cleaning up these markets. It also shows that the Chief Prosecutor and the Ministry of Justice have not indicated to these magistrates that the pirate border markets are a matter of priority, once more underlining the continued lack of political will in the Czech government to seriously solve this problem.

**Action 5: Courts still have not imposed deterrent sentences on any person involved in and/or profiting from the pirate trade at the border markets.**

There have been some suspended sentences. However, the unbridled continuation of pirate trade at these markets illustrates perfectly that this has had no deterrent effect whatsoever.

**Action 6: No outlets where infringing goods have repeatedly been sold have been closed.**

To make things worse, virtually all outlets where pirated goods were found during raids and where goods were confiscated were rapidly restocked with illegal goods and resumed operating, usually within less than 24 hours.

**Action 7: After foreign political pressure became difficult to ignore, the Czech Government finally made a high-level political statement that piracy will not be tolerated.**

However and unfortunately, this statement and Prime Minister Topolánek's reassurances have had no effect, nor have these words resulted in stronger regulation, more consistent, sustained and comprehensive enforcement or deterrent punishment of persons involved in the massive illegal trade at the over 50 open air markets along the German and Austrian borders. In the meantime, US copyright holders continue to lose millions of dollars.

**Conclusion**

Despite increased US pressure, as well as pressure from the Czech Republic's European peers, the Czech Government and key parts of its enforcement apparatus have not taken meaningful steps to eradicate the widespread and deeply entrenched pirate trade in the many border markets. As a result, we request that the Czech Republic be maintained on the Watch List and we suggest the Czech Republic be moved to the Priority Watch List if, mid 2008, substantial improvement has not occurred in this unacceptable situation.

Respectfully submitted,

--signed--

Joseph S. Papovich  
Senior Vice President International  
Recording Industry Association of America

## ANNEX I

### Excerpt of the October 12, 2007, submission of the Recording Industry Association of America within the framework of the Special 301 Out-of-Cycle review of the Czech Republic

Implementation by the Czech Republic of the private sector action plan submitted on June 19, 2007, to the Inter-ministerial IPR Committee headed by the Ministry of Trade and Industry:

- **Strengthen and consistently enforce market licensing rules.**

Market licensing rules should require any seller to first obtain a license that:

- ▶ includes an obligation to refrain from selling any infringing goods;
- ▶ requires proof of a Czech residence and valid work permit;
- ▶ requires placement of a bond;
- ▶ includes sanctions that provide for immediate withdrawal of the license, forfeiture of the bond and closure of the premise in case of breach of these licensing rules.

One of the main problems is that a large majority of the sellers are unknown to the authorities. This makes it extremely difficult to enforce any rules. Very strict identification and work-permit obligations, in connection with a financial bond, will strengthen the authorities' tools to fight wide-spread tax and social fraud and rights infringement at the markets, whilst securing at least a minimum financial security in case of breach of the licensing rules.

Carrying out regular raids and seizing pirate and counterfeit materials have proven to be insufficient to stop these massive and blatant IPR crimes, because barely any of the culprits get arrested and all outlets used in the course of illegal activity remain open. As a result, even after a raid the highly organised criminal gangs behind this pirate trade are capable of immediately re-manning and re-stocking the outlets. The only effective way to stop this is to definitively and unconditionally close down all outlets where pirate trade has taken place. Such a sanction will incite the landowners and exploiters of these markets to step up self-policing of the outlets, as their livelihood depends on functioning outlets, rather than a market full of closed shops and stalls with no turnover.

#### **Comment:**

The Czech authorities have failed to enforce existing market licensing rules, which could have led to some improvement in the situation. The Ministry of Trade and Industry also has expressly refused to consider strengthening of the rules. As a result, hundreds of market sellers continue to operate in complete illegality. No action has been taken to change this.

Customs officers and agents from Market Inspection have continued to carry out occasional raids, most recently on October 7. However, these raids have not had any measurable or sustained impact on the availability of pirate and counterfeit goods. Operators at the few smaller markets that have closed have moved their operations to bigger markets. Moreover bigger markets are taking on a look of permanence as their facilities are increasingly brick and mortar, continuing a trend that we had earlier reported.

- **Introduce criminal and civil vicarious liability for landowners and organizers of these markets.**

Each pirate market is exploited by a person, a group of persons or a company acting as a landlord, renting out the facilities in their market. These persons and companies are the first in line to profit from the illegal trade which takes place on the premises for they are responsible. However, these individuals and companies currently face no legal liability for the criminal conduct that they condone and from which they profit. Without any liability for the large-scale crime taking place on 'their' premises, these persons and companies have no incentive to enforce rules that would control this illegal activity. As a result, all enforcement rests on the shoulders of the Czech law enforcement authorities against the operators of the various stalls. Vicarious landlord liability has proven elsewhere to be one of the most effective tools in the fight against pirate trade taking place in markets (both open air and covered). It needs to be implemented here.

**Comment:**

The Czech Government, particularly the Ministry of Trade and Industry, has refused to consider introducing vicarious liability for those persons or legal entities that profit from the organised trade in infringing goods taking place at the markets.

- **Instruct local law enforcement authorities to permanently patrol the markets to ensure licensing rules are respected and closed kiosks are not illegally reopened.**

The current absence of local police and other law enforcement bodies at the markets (other than during or just after the occasional raids), gives the pirate sellers and landowners a strong sense that the risk of getting caught is low. Permanent patrols would also be crucial after kiosk/outlet closure sanctions are imposed.

**Comment:**

No such sustained action has been undertaken, and the border markets remain lawless places with no sustained police control.

- **Instruct relevant magistrates to grant farther-reaching warrants to law enforcement agencies and to initiate swift prosecution of all persons involved in and/or profiting from pirate trade at the border markets.**

Law enforcement agencies are consistently hampered by the lack of warrants that would allow them to raid and inspect **all** premises suspected of being used in the course of infringing activity. The criminal gangs behind this illegal business have numerous underground manufacturing, storage and hiding places, which are not necessarily directly connected to the sales outlets in the markets. These places, which contain huge stocks of infringing materials, are not publicly accessible. Therefore, law enforcement agencies should get, as a matter of course, wider ranging powers to search and raid such places.



The number of prosecutions is low and local prosecutors either seem to be under-equipped or lacking motivation to pursue post-raid prosecution of the persons involved in pirate trade. This should also be substantially improved.

**Comment:**

Prosecutors have played a highly counterproductive role in any attempt to make progress in addressing the commercial crime taking place at the markets. Prosecutors in the relevant jurisdictions have been unwilling to provide broad search warrants which would have allowed law enforcement officers to raid warehouses and underground manufacturing and storage places. Furthermore, these prosecutors have dropped (with very few exceptions) any criminal prosecution cases against offenders caught during raids. This reinforces the sense of impunity of the pirate markets sellers. In November and December of 2006, a series of major raids took place and literally millions of pirate and counterfeit items were seized. Today, there is still no sign of any prosecution of those caught during these and previous raids. Worse, some prosecutors have recently announced the cases will be dropped, despite a huge number of official complaints filed by copyright and trademark owners! Based on this history, we reluctantly assume that the very recent raids also will fail to lead to meaningful deterrent prosecutions.

- **Ensure Courts/Judges impose deterrent sentences on any person involved in and/or profiting from the pirate trade at the border markets.**

Courts and judges who are confronted with piracy cases seem to completely underestimate the seriousness of this commercial crime and the significant damage suffered by rightholders. The Czech Supreme Court should issue sentencing guidelines to local courts. The relevant Czech authorities should initiate a training programme for judges and prosecutors to educate them of the importance of intellectual property crime, to increase their expertise in IP crime cases and to teach them how to properly apply the sanctions foreseen in the Czech laws.

**Comment:**

No results.

- **Definitively close any and all outlets where infringing goods have repeatedly been sold.**

The number of persons involved in pirate trade in the Czech border markets runs in the hundreds of thousands. This trade will not be stopped or even reduced by merely taking action against the sellers. Experience has shown that for each arrested seller, there are numerous replacements waiting in the wings and/or underpinning the sellers' activities. It is, therefore, of prime importance to close down the selling points as such. A selling point where pirate and/or counterfeit materials have been found should be closed for a minimum of three months. A repeat offence taking place at the same selling point, regardless of who commits the offence, should automatically result in the definitive closure of the outlet irrespective of whether this is a temporary construction (market stall type) or a definitive brick and mortar outlet.

**Comment:**

No results.

- **Make a strong public political statement at the highest level that the Czech Government will not tolerate blatant piracy and counterfeiting at markets, which is tarnishing the reputation of the Czech Republic.**

<p>The Czech government must finally publicly acknowledge the magnitude of this problem and send a strong signal that it will no longer be tolerated. This should be combined with unambiguous instructions to local authorities to take every possible action to eradicate infringing activity at border markets.</p>
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**Comment:**

To date, the Czech government has paid only lip-service about its will to address this problem which is costing rightholders hundreds of millions of US Dollars annually. There is awareness among certain ministers and deputy-ministers, but it is clear that the Czech government at the highest level has not made a decision to effectively address this problem. The Czech government issued a general public statement and action plan in recent days stating that intellectual property piracy and counterfeiting will not be tolerated. However, the statement did not include instructions to local authorities to take sustained actions to eradicate infringing activity at the border markets.