



June 13, 2001

GSP Subcommittee  
Trade Policy Staff Committee  
Office of the U.S. Trade Representative  
1724 F Street NW, Room F220  
Washington, DC 20508

Re: Request for Review of the Intellectual Property Rights Practices of Uruguay in the 2001 GSP Annual Country Eligibility Practices Review, 66 Fed. Reg. 19278 (April 13, 2001)

To the Subcommittee:

The Trade Policy Staff Committee (TPSC) of the Office of the United States Trade Representative (USTR) published in the April 13, 2001 Federal Register a notice announcing the 2001 Generalized System of Preferences (GSP) Annual Country Eligibility Practices Review. USTR indicated that “[I]nterested parties may submit petitions to have the GSP status of any eligible beneficiary developing country revised with respect to any of the designation criteria listed in subsections 502(b) or 502(c) of the Trade Act (19 U.S.C. 2462(b) and (c)).” See 66 Fed. Reg. 19279.

The International Intellectual Property Alliance (IIPA) hereby submits its request that the eligibility of Uruguay as a GSP beneficiary developing country be reviewed, and that its GSP benefits be suspended or withdrawn, in whole or in part, if requisite improvements are not made by Uruguay to remedy the deficiencies (outlined below) which adversely affect U.S. copyright owners. In 2000, Uruguay exported goods valued at \$84.5 million to the U.S. which received preferential duty-free treatment under the GSP Program, which represented approximately 27% of its total exports to the U.S. First quarter 2001 statistics indicate a 29.9% increase in Uruguayan GSP-eligible exports compared to the same period in 2000, according to the U.S. International Trade Commission database.

On August 21, 2000, IIPA submitted a GSP country eligibility practices petition against Uruguay to this Subcommittee in the 2000 Annual Review process; our petition, however, was not accepted for review. Since August 2000, there has been no forward progress in Uruguay regarding copyright legislative reform and relative, albeit limited, progress in improving on-the-ground enforcement of an inadequate copyright law. For the last decade, Uruguay has been considering copyright reform with no tangible

results. In fact, substantive proposals in the comprehensive copyright bill worsened between May 2000 and now. Simply put, both the current Uruguayan copyright law and the two copyright bills blatantly fail to meet the GSP IPR criteria. Without a new, modern copyright law, it will remain virtually impossible to protect copyrighted materials or provide effective criminal enforcement in Uruguay and at its borders. Civil copyright enforcement is also ineffective. Given the lack of progress made in copyright matters which IIPA has identified over the years, IIPA requests that the Subcommittee accept our 2001 GSP petition against Uruguay in this 2001 GSP Annual Review.

### **Petitioner and its Interest: The International Intellectual Property Alliance**

IIPA is a coalition of seven trade associations that collectively represent the U.S. copyright-based industries -- the motion picture, music and recording, business and entertainment software, and book publishing industries. IIPA's member associations are the Association of American Publishers (AAP), AFMA (formerly the American Film Marketing Association), the Business Software Alliance (BSA), the Interactive Digital Software Association (IDSA), the Motion Picture Association of America (MPAA), the National Music Publishers' Association (NMPA) and the Recording Industry Association of America (RIAA).

These member associations represent approximately 1,500 U.S. companies producing and distributing works protected by copyright laws throughout the world -- all types of computer software including business software and entertainment software (such as videogame CD-ROMs and cartridges, personal computer CD-ROMs and multimedia products); motion pictures, television programs, home videocassettes and DVDs; music, records, CDs and audiocassettes; and textbooks, tradebooks, reference and professional publications and journals (in both electronic and print media).

According to Copyright Industries in the U.S. Economy: The 2000 Report, prepared for IIPA by Economists, Inc., the core copyright industries accounted for \$457.2 billion in value added to the U.S. economy, or approximately 4.9% of the Gross Domestic Product (GDP) in 1999 (the last year for which complete data is available). In the years since 1977, the core copyright industries share of GDP grew at an annual rate more than twice as fast as the remainder of the economy (7.2% vs. 3.1%). Employment in the core copyright industries more than doubled over the same time period to 4.3 million workers and grew nearly three times as fast as the annual rate of the economy as a whole (5.0% vs. 1.6%). In 1999, the U.S. copyright industries achieved foreign sales and exports of \$79.65 billion, a 15% gain from the prior year. The Executive Summary of this report is available on IIPA's website at [http://www.iipa.com/copyright\\_us\\_economy.html](http://www.iipa.com/copyright_us_economy.html).

We repeat that the U.S. creative industries represent one of the few sectors of the U.S. economy that regularly contributes to a positive balance of trade. It is essential to the continued growth and future competitiveness of these industries that our trading partners provide free and open markets and high levels of protection to the copyrights on which this trade depends. Inexpensive and accessible reproduction

technologies make it possible for U.S. copyrighted works to be pirated. The copyright industries represented in IIPA lose an estimated \$20-22 billion annually due to piracy outside the United States. To combat the problems of inadequate laws and poor enforcement, the U.S. copyright-based industries joined with the Administration and Congress to fashion new legislation and negotiating tools. Over the years, IIPA and its members have supported various trade tools with intellectual property rights ("IPR") provisions, including the GSP Program, Special 301, Section 301, the Caribbean Basin Economic Recovery Act, the Andean Trade Preferences Act, the U.S.-Caribbean Trade Partnership Act as well as the African Growth Opportunity Act.

### **Action Requested by Petitioner IIPA**

Pursuant to the Trade Act of 1974, as amended (19 U.S.C. 2461 *et seq.*), IIPA, on behalf of its seven trade association members, hereby petitions the President to review the eligibility of Uruguay as a GSP beneficiary developing country, and if requisite improvements are not made by Uruguay, then IIPA requests the President to suspend or withdraw GSP benefits of Uruguay, in whole or in part, for its failure to provide adequate and effective copyright protection for U.S. copyright owners.

### **Legal Authority for this Petition and Discussion of the IPR Criteria in the GSP Statute**

A full discussion of the legal authority for this petition, and the specific IPR provisions and legislative history of the GSP programs is found in Appendix A. To summarize, in the GSP Renewal Act of 1984, Congress specified conditions that GSP beneficiary countries must meet in order to gain and maintain their preferential trading status. In particular, one of these express conditions (which Congress also delineated as one "purpose" of the GSP Program) was to encourage developing countries "to provide effective means under which foreign nationals may secure, exercise, and enforce exclusive intellectual property rights."<sup>1</sup> The legislation required the President to apply mandatory and discretionary criteria with respect to IPR protection as a condition to a country achieving "beneficiary" status under the GSP Program. When the GSP Program was reauthorized in August 1996, the language of the IPR discretionary criterion for GSP eligibility in Section 502(c)(5) was simplified slightly and now requires the President to "take into account the extent to which such country is providing adequate and effective protection of intellectual property rights."<sup>2</sup>

### **Uruguay Fails to Provide "Adequate and Effective Protection" of U.S. Copyrights**

To the best of petitioner's knowledge, much of the information describing the deficiencies in Uruguay's legal and enforcement regime has been presented

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<sup>1</sup> See Section 501(b)(9)(B) of the GSP Renewal Act of 1984.

<sup>2</sup> GSP Renewal Act of 1996, Title I, Subtitle J, of the Small Business Job Protection Act of 1996, Pub. L. No. 104-188 (codified at 19 U.S.C. 2462(c)(5)).

previously to members of various U.S. governmental interagency groups, including the Special 301 interagency group, several members of the GSP Subcommittee, as well as the Trade Policy Staff Committee, in the context of USTR's Annual Special 301 Review. On February 16, 2001, IIPA presented its annual Special 301 submission to Assistant USTR for Services, Investment and Intellectual Property Joseph Papovich; this submission was widely distributed among the interagency for its internal consideration in the 2001 Special 301 Annual Review. IIPA's Uruguay country reports are available on our website, at <http://www.iipa.com/countryreports.html>. IIPA's entire 2001 Special 301 report can be accessed at <http://www.iipa.com/special301.html>.

USTR has consistently highlighted legal reform and enforcement issues in Uruguay. For example, in his April 30, 2001 2000 Special 301 announcement, Ambassador Robert Zoellick elevated Uruguay to the "Priority Watch List" and remarked:

We have been pressing Uruguay to reform its outdated patent and copyright legislation since 1997, and despite repeated engagement and consultations on the necessary amendments, serious deficiencies remain in its intellectual property rights regime. Uruguay's draft copyright legislation has been entangled in legislative wrangling and currently contains numerous shortcomings even in its draft form, most notably the separation from the comprehensive copyright bill of software protection into a stand-alone bill. Enforcement of both criminal and civil copyright cases is weak and sporadic. ... The United States urges Uruguay to fix these and other flaws in its intellectual property legislation as soon as possible.<sup>3</sup>

#### **1. Uruguay's Copyright Law of 1937 fails to provide "adequate and effective" protection to U.S. copyright owners.**

Copyright protection in Uruguay is afforded under its 1937 copyright law, Law No. 9739, as amended in 1938.<sup>4</sup> Separate but deficient anti-piracy legislation aimed at combating piracy of sound recording producers was passed in the 1980s.<sup>5</sup> It is important to note that Uruguay, as a member of the World Trade Organization, was obligated to provide TRIPS-level protection as of January 1, 2000. Uruguay has not fulfilled its TRIPS obligations. We repeat below our summary of the key legal, substantive copyright TRIPS deficiencies found in the current 1937 copyright law, and which fail to provide adequate and effective protection to U.S. copyright owners:

- Inadequate term of protection for works, phonograms and performances (TRIPS Arts. 12, 14.5): The term of protection for authors is life plus 40 years, well short of the basic TRIPS minimum of life plus 50 years. There is no specific term of

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<sup>3</sup> Press Release 01-25, Office of the United States Trade Representative, "USTR Releases Reports Emphasizing Enforcement Priorities," April 30, 2001.

<sup>4</sup> IIPA does not have any knowledge or text of any major subsequent amendments made to the law.

<sup>5</sup> See Law No. 15.289 of 1982; Law No. 541 of 1984

protection for sound recordings in the law, although they are likely considered to be "works."

- Protection for computer programs (TRIPS Article 10): Computer programs are not expressly protected in the copyright law, but by executive decree. Explicit integration in the copyright law as "literary works" is necessary. Despite this deficiency, BSA has been able to conduct anti-piracy operations, albeit with some procedural difficulties. The lack of express protection for software creates a risk of unfavorable court decisions which jeopardize these anti-piracy actions and expose the copyright owners to what otherwise would be baseless damages suits.
- Unclear protection for compilations of data (TRIPS Article 10): It is unclear whether the current copyright law adequately protects "compilations of data or other materials, whether in machine-readable or other form," as described fully in TRIPS. Such specific language (especially regarding the machine-readable element) does not appear in the 1937 law.
- Incomplete scope of retransmission rights (TRIPS Article 9.1): The "right to disseminate" in Article 2 of the law includes "dissemination by any mechanical means, such as the telephone, radio, television and other like processes." It is not entirely clear from the law whether this article encompasses the specific retransmission rights found in Article 11**bis** of the Berne Convention. IIPA is not aware whether other Uruguayan laws, such as communications or media laws, elaborate on whether or not such retransmission rights are covered. It is important that this Berne Convention/TRIPS right be afforded in the Uruguayan law.
- No express rental rights (TRIPS Articles 11, 14.4): The 1937 law does not have an express rental right for computer programs and sound recordings. Article 2 does contain a broad right of "alienation," along with the specific rights to reproduce, publish, translate, perform and disseminate works "in any form, or to authorize other persons to do so." It is possible, therefore, for the Government of Uruguay to argue that its broader right of "economic exploitation" (as mentioned in Article 33) does encompass a right of rental.<sup>6</sup> Nonetheless an express rental rights for computer programs and sound recordings should be included in Uruguay's copyright law.
- Overbroad broadcasting compulsory license (TRIPS Article 13): One article in the copyright law describes almost a dozen cases involving acts which are "not deemed to be unlawful reproductions." In particular, Article 45(10) permits the

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<sup>6</sup> MPA reports that, in the Spring of 1999, it finally obtained a judicial decision that the rental of pirate videos was a copyright infringement; the appellate court reportedly expanded the term distribution to include sale or rental. IIPA does not have the text of this case. Our point here is to show this rental issue remains of timely concern, and especially as it applies (will apply) to computer programs and sound recordings as required by TRIPS.

“transmission of sounds or images by broadcasting stations or any other means operated by the State, when such stations have no commercial purpose and operate solely for cultural purposes.” Nowhere does this provision mention anything about remuneration, which could have suggested a Berne-compatible outcome. It appears that this compulsory license may not have been invoked to date, but nevertheless, as written, this provision violates TRIPS. This provision also could adversely affect the rights of producers of sound recordings.

- Retroactivity (TRIPS Articles 9.1, 14.5, 14.6): Given the short terms of protection under the 1937 law (above), IIPA harbors concerns over Uruguay’s application of full protection to pre-existing works, phonograms and performances whose term of protection have not expired in the country of origin.

**2. Efforts to revise the proposed comprehensive copyright legislation in late 2000 undermined progress made by early 2000. As a result, the current proposed legislation represents unacceptable levels of copyright protection which clearly fails to afford adequate and effective protection to U.S. copyright owners.**

For much of the last decade, Uruguay has been working on copyright legislation reform. In fact, there have been numerous versions of copyright legislation over the years, first starting in the early 1990s, then followed by bills in 1995, again in 1996, 1997, 1999 and two in 2000. To varying degrees, those bills did address many of the basic TRIPS deficiencies. However, all the bills have required additional improvement and refinement on TRIPS issues. Nevertheless, despite these legal deficiencies in the copyright realm, Uruguay has continued to receive benefits of the GSP Program.

On January 1, 2000, Uruguay’s obligations under the WTO TRIPS Agreement entered into effect. The copyright industries cannot support legislation which fails, at the very minimum, to satisfy TRIPS. In addition, one of the copyright industries’ current challenges around the world is to elevate the levels of substantive copyright laws to account for changes in the digital environment. Modern copyright laws must respond to this fundamental change by providing that creators have the basic property right to control distribution of copies of their creations. Copyright owners must be able to control delivery of their works, regardless of the specific technological means employed. Many of these changes are contemplated by the two WIPO treaties -- WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT). In fact, Uruguay signed both these treaties in 1996, but has yet to pass instruments of accession to deposit with WIPO. There currently appears to be little to no political will to ratify these two important treaties. The Uruguayan government should be encouraged to ratify and deposit as soon as possible. Uruguay should include the basic rights afforded in both treaties in its new legislation.

IIPA remains extremely disappointed in the lack of tangible progress Uruguay has made in resolving deficiencies in the proposed legislation and passing a new law.

Last year, a comprehensive copyright bill was sent to the Congress on May 19, 2000,<sup>7</sup> and was considered by the Education and Culture Committee of the Chamber of Deputies during 2000. In sum, the May 2000 copyright bill, like its 1997 and 1999 predecessors, represented an improvement over the current 1937 copyright law (although additional revisions were needed). A detailed description of the legislation reform from 1995 through May 2000 is contained in IIPA's August 2000 GSP Petition against Uruguay, which is attached as Appendix C.

Further amendments were made to this bill in the Fall of 2000. Industry worked to improve the scope of this legislation. The Education and Culture Committee approved the comprehensive copyright bill and forwarded it to the Chamber of Deputies on December 29, 2000. This bill significantly weakened the scope of protection found in the May 2000 version, especially in that it removed computer programs as protected subject matter entirely and drastically cut key enforcement provisions. This December 2000 version of the comprehensive copyright bill was subsequently introduced to the Chamber of Deputies and approved by the full Chamber on March 22, 2001. Copyright industries' representatives again worked to make amendments to this legislation, but most of the proposals were not accepted. The March 2001 bill, however, appears to be almost identical to the TRIPS-deficient and GSP-incompatible December 2000 version. The copyright bill has been forwarded to the Education and Culture Committee of the Senate, where it is under consideration.

For illustrative purposes, below is a list of the major issues which IIPA has identified in the March 2001 copyright legislation<sup>8</sup>:

- **Computer programs**: All provisions affording protection for computer programs were deleted from this comprehensive copyright bill last year. The copyright industries continue oppose the separate *sui generis* software bill (see discussion below). IIPA continues to assert that protection for computer programs should be fully integrated into the comprehensive copyright reform legislation. While IIPA has heard some reports that the Uruguayans do intend to reincorporate

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<sup>7</sup> Derechos de Autor y Derechos Afines, Comisión de Educación y Cultura, Carpeta No. 255 de 2000; Perpartido No. 161, Junio de 2000. On the positive side, many of the amendments in the May 2000-version copyright bill reflect raising the levels of protection up to TRIPS level. For example, improvements included: expanding the scope of protected subject matter to include computer programs and databases; adding a distribution right (which includes both rental and importation); revising the rights of broadcasting and public communication; adding TRIPS-level protection for performers and producers of sound recordings. With respect to civil remedies, the May 2000 bill provided that a civil or criminal judge could authorize a judicial inspection without advance notice to the target; this is an essential tool for the industries. The May 2000 bill did appear to recapture those works and other "productions" (presumably including phonograms) which fell into the public domain by giving them the longer term of protection set forth under the bill.

<sup>8</sup> This discussion is based on an English translation of this December 2000 legislation which the IIPA received in April 2001. As mentioned above, IIPA has been informed that the March 2001 version closely tracks the December 2000 bill. We do not have any current information on whether additional proposals to amend this legislation have been made and/or are pending. If additional amendments have been made to the pending legislation, IIPA and its members reserve the right to provide additional comments on those proposals.

computer program protection in the comprehensive copyright bill, no actual action in this regard has yet taken place.

- **Criminal penalties:** The level of criminal penalties has been slashed. The 2001 bill has half the number of articles as the May 2000 bill.
  - Non-deterrent level of penalties: The maximum criminal penalty for unauthorized distribution, importation and exportation has been cut from three years to two years, and the relevant article has been rewritten to characterize these infringing acts as the unauthorized sale with intent to distribute by any means (Article 144). Also, the maximum penalties for unauthorized reproduction “with commercial intent” have been dropped from three to two years. Added to this article is the “commercial intent” language, an element for criminal infringement which should be removed (Article 145). The maximum for the unauthorized loading of works onto a data storage system with the intention to reproduce or distribute them also has been dropped to a two-year maximum (Article 146). These amendments are most troubling and should be revised.
  - Deleted articles: Articles in prior legislation which criminalized bootlegging, interception of a television broadcast, the decoding of encoded satellite signals or the circumvention of technical protection measures have been removed in their entirety. (See the discussion below regarding anti-circumvention and rights management information). In addition, there seems to result in a huge gap in penalties for unauthorized acts involving right of communication and performance. It is not clear whether this was an intentional or inadvertent amendment; nevertheless, it is an unacceptable result.
  - Publication: The provision allowing the judge to order the publication of the criminal sentence at the expense of the defendant has been removed.
  - Continuing silence on fines: The March 2001 bill continues to reflect Uruguay’s long silence regarding fines as criminal sanctions. There are no levels of criminal fines specifically included in the criminal penalty section of the copyright bill, and IIPA has no knowledge at this time whether other Uruguayan criminal codes may afford such fines. Ideally both jail terms *and* fines should be available for infringement.
- **Civil Sanctions:** The 2001 bill has halved the number of articles affecting civil sanctions present in the May 2000 bill. Among the more notable revisions are the following:
  - Damages/Profit: Article 138 now provides that copyright owners can claim a civil fine of up to 50 times the market value of the infringed work, in addition to damages. This article no longer contains provisions giving copyright owners the ability to claim all profits and income earned by the

infringer. Also eliminated was a provision resembling a statutory damages provision in which the copyright owner could choose between actual damages and a multiplier of damages in cases of willful misconduct. These should be reinserted to track the May 2000 proposal.

- Publication: Eliminated from Article 139 was a provision requiring the infringer to pay for the publication of the results of his civil case in one or more newspapers.
- **Precautionary measures**: The March 2001 continues to contain important provisions regarding civil *ex parte* measures which judges can grant without notice to the suspect. Other revisions have been made in several areas:
  - Article 135 has been revised to remove a provision in the May 2000 bill which would have permitted judges to order the alleged infringer to provide any evidence under its control; the failure to provide such evidence meant that the judge could take action based on available information. The elimination of such a provision clearly presents a major hurdle for copyright owners seeking to enforce their rights.
  - Article 136 on precautionary measures has been revised. First, the chapeau now requires that the judge shall act based on requests made by the titleholders; this requirement of rightholder requests did not appear in the May 2000 bill. Second, on a positive note the article now better outlines the specific kinds of actions contemplated – injunctive relief to stop infringing acts, confiscation of suspected infringing copies and equipment and unannounced inspections. These are important TRIPS elements. Third, what might be missing is the judge’s express ability to order the destruction of the infringing materials. Clarification would be helpful on this point. Fourth, a provision has been removed from the earlier bill which would have allowed the judge to place a lien on income from illicit activities or amounts which should have been paid to rightsholders. Fifth, also eliminated from the 2001 bill was a provision which provided that the petitioner-rightholder should be excepted from making a deposit when requesting an inspection. This element should be reinserted.
- **Border measures**: Article 137 on border measures has been revamped. Rightsholders can notify customs or judges about suspected shipments, presenting proof and other elements which support the request. The 10-day provision in TRIPS (permitting the release of unclaimed goods) has been added explicitly. Customs’ authority to act *ex officio* or seize and hold suspect shipments is, at best, unclear. IIPA has no information on whether the substantive provisions of Uruguay’s separate customs legislation currently and fully satisfies TRIPS; we do harbor serious concern that it does. Given the amount of pirated and counterfeited product which cross the Uruguayan border with ease, both for domestic consumption as well as for transshipment to major counterfeit

distribution centers such as Ciudad del Este in Paraguay, it is imperative that Uruguay's border measures be at least TRIPS-compliant and vigorously enforced. The availability of *ex officio* authority must be crystal clear. We do note that there have been a few cases where Uruguayan Customs has taken some initial, but limited, steps in border actions affecting the recording industry.

- **Exclusive right – reproduction:** In order to properly implement the two WIPO Treaties, it is vital that the bill clearly include temporary copying as part of the reproduction right (see Articles 26 and 106). This is critical for owners of copyrights and neighboring rights to enforce their rights in the digital environment.
- **Exclusive right – importation:** The March 2001 bill revised the May 2000 language in Article 30 which provided a broad exclusive right of importation. Now, an authorization to import an original or its copies must be provided to Customs in advance of the importation. It is possible that parallel import protection could still be provided here; again, clarity on this point is needed.
- **Exclusive right – arrangement:** The March 2001 bill deleted the word “arrangement” from Article 26.5 which also includes the rights of translation, adaptation and other transformation of the work. IIPA has been informed that the word “arrangement” was eliminated throughout the bill. The impact of this edit is not clear, either linguistically or substantively; further information is needed in order to evaluate its potential legal impact.
- **Exclusive rights for record producers:** First, in a piece of possible good news, the March 2001 bill appears to correct an omission in earlier drafts as Article 106 now seems to include a basic “making available” right for producers of phonograms. This right is missing, however, the clause in Article 14 of the WPPT which provides the right shall apply “in such a way that members of the public may access [the phonograms] from a place and at a time individually chosen by them.” Second, eliminated from Article 106 was the explicit importation right. It is arguable that importation (including parallel) could fall within the existing distribution right afforded sound recording producers; clarity on this point is needed. Parallel imports of music compilations disguised as imports of “cultural pirated goods” have been a form of unfair competition in Uruguay.
- **Term of protection:** The March 2001 bill reflects Uruguay's efforts to shorten terms of protection from life plus 70 years (or 70 years after publication/fixation) found in the 1997 bill, down to life plus 50 years (the TRIPS minima) (see Articles 46-49, 105, 109, 113). IIPA recommends that the longer terms, which reflect the international trend, be inserted into the May 2000 bill for all protected subject matter. In addition, term should be 95 years from first publication in cases where the author is a legal entity and for producers of phonograms.

- **Work for Hire:** The March 2001 bill provides that works created under contract will be ruled by the agreement of the parties; an earlier bill had provided that the employee assigns its economic rights to the employer (Article 15).
- **Overbroad exceptions to protection:** The March 2001 bill does not appear to make any changes to the various objectionable provisions IIPA has identified in prior draft legislation, and adds at least one new exception:
  - The catch-all provision for exceptions in Article 45 fails to track the exact terms of TRIPS Article 13.
  - There is an overbroad exception in Article 39(1) permitting photocopying of excerpts of legally published works for teaching or examination purposes in educational institutions, provided that no profit motive exists and such uses are consistent with 'honorable practices.' This exception would permit such photocopying without the copyright owner's authorization nor the payment of a royalty. A similar provision allowing the indiscriminate, unauthorized copying of software was included in the separate software-only bill that was approved by the Chamber of Deputies in October 2000. This exception would harm the publishing industry and eviscerate the educational software market and must be deleted.
  - Article 38(5) would require the Executive Branch to present a bill regarding a "moving image archive" within a year after the new copyright law enters into effect. In the interim while the copyright law has not yet entered into force, the National Archive of Images of SODRE and Cinemateca Uruguay shall be governed by the 1937 copyright law. The copyright bill should be revised to provide very clearly that the deposit of audiovisual works in any archive shall be voluntary.
  - The Article 42 ephemeral broadcasting exception allowing the archiving broadcast recordings of an "exceptional documentary value" is overbroad, and at the very least should be limited to a single copy.
  - Article 38(3) is new, and would provide an exception, permitting works performed in meetings of unions or political parties for non-profit purposes to be transmitted without authorization or payment to the author. This overbroad provision should be deleted.
- **Broadcast compulsory license:** The May 2000 bill properly removed the TRIPS-incompatible broadcasting compulsory license found in Article 45(10) of the 1937 law. There is, however, a new broadcasting compulsory license proposed in Article 43 of this bill (and in the May 2000 one) which provides that it is legal for a broadcaster, without authorization from the author (copyright owner) but with the previous payment of remuneration, may publicly retransmit or transmit publicly by cable a work originally broadcast by the broadcaster with the copyright owner's consent, as long as the retransmission or public transmission

was simultaneous with the original broadcast and that the work transmitted by broadcasting or public transmission was unaltered. In this case, our industries prefer that copyright owners and broadcasters negotiate terms of payment and uses of their works via contract. However, the Berne Convention/TRIPS does permit countries to determine conditions under which the right of broadcasting may be exercised, and this can include compulsory licenses. It is imperative, however, that any compulsory licenses follow the terms of Berne Article 11*bis*. A key concern with this provision is that it must in no way, shape or form be interpreted or applied in such a manner that would permit broadcasters to transmit or retransmit (via either rebroadcasting or via cablecasting) copyright-protected audiovisual programming over the Internet. Such "streaming" should not be subject to any compulsory licensing scheme. IIPA and our members harbor a concern that Uruguayan broadcasters who also happen to own cable systems may expand the scope of this compulsory license and use their cable infrastructure to transmit programming to the Internet.

- **Blank tape levy:** Articles 34-37 contain a private copy levy (which is linked to the private copy exception in Article 44). Article 34 has been revised to state that authors of works, along with producers, artists and organizations of 'transmission' shall be paid portions of a blank tape levy. The March 2001 bill appears to change the words "broadcasting" in broadcasting organizations to "transmitting" organization. IIPA has been informed that these two words have been changed throughout the bill. The impact of this revision is very unclear at this time. In addition, Article 36 has been revised to provide that the collection of these funds should be paid to the Ministry of Education and Culture, instead of to the collecting societies. Furthermore, it remains unclear whether the collection and distribution of the blank tape levies collected for reproduction of works in graphic form, by video and by sound recordings will be based on the principle of national treatment. While the bill does appear to provide for the general application of national treatment, it will be important to monitor the process for the collection of such levies, which will be established by regulation after the copyright law enters into effect.
- **Private copying levy and national treatment:** Article 43 of the bill should make clear that the exception for private copying does not apply to copying in digital or high definition analog formats.
- **New article affecting periodicals:** With respect to periodicals, Article 67 has been amended to provide that writers not affiliated with a publishing company and without a contract to the contrary, end up ceding rights to the use of their articles to that editor/publishing company.
- **Moral rights:** The scope of moral rights of attribution and integrity for performers have been expanded over current law (Articles 18-24, 101). In IIPA's view, moral rights should be waivable (or said another way, an author should be able to exercise his or her moral rights by consenting to acts that might otherwise violate moral rights). Because these are personal rights, they should not subsist

after the author's death, nor should they be transferred to other entities, including government agencies. The March 2001 bill deleted a phrase in Article 18 which would have allowed authors to dispose of their moral rights "except for a legal disposition to the contrary." Now it appears that the article permits absolutely no exception and all moral rights must be exercised by the heirs.

- **More Moral Rights:** Article 111.2 still explicitly states that the activities of editing, compacting, dubbing and impairing the sound or audiovisual fixations shall avoid "unjustified mutilation" of these performances. Activities like dubbing or editing a motion picture (which by definition consist of "mutilating" performances) are normal and reasonable practices of the audiovisual industry. Therefore, they should be explicitly excluded from the scope of the performer's moral right of integrity. In the 1997 bill, these activities were properly and explicitly excluded from the scope of the performer's moral right of integrity, and the current bill should be revised to track that language.
- **Administrative Remedies:** IIPA continues to request clarification from the Uruguayan government on how the "competent administrative authorities" will act in situations involving unauthorized public communication of works (Articles 148-150).
- **Anti-Circumvention and Rights Management Information:** The March 2001 bill continues to omit provisions for criminal and civil liability involving the protection of technological measures and rights management information, both of which are key elements of the two WIPO Treaties. In contrast, the 1999 copyright bill had contained a narrow provision which prohibited the manufacture, import, sale lease or circulation of devices or systems which would deactivate technical devices and encoded satellite signal-carrying programs. A more robust provision is necessary to implement the obligations of the WIPO Treaties.

This reflects a summary of the key issues which IIPA has highlighted publicly over the past few years. There may be additional comments and suggestions for legislative consideration which we and our member associations reserve the right to advocate.

### **3. The *sui generis* software legislation should not be passed by the Senate.**

In early September 2000, the Uruguayan government supported the development of a bill which was aimed at establishing copyright protection for computer programs only. The bill was adopted by the Chamber of Deputies by unanimous vote on October 10, 2000, and was forwarded to the Senate.<sup>9</sup> The bill remains pending before the Education and Culture Committee of the Senate and is expected to be considered during the next few weeks. The local and foreign software industry have expressed their opposition to the software-only bill to the Senate on

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<sup>9</sup> Proyecto de Ley sobre Derechos de Autor sobre Programas de Ordenador (Comisión de Educación y Cultura, Carpeta No. 568 de 2000) ("Proyecto de Ley de Soporte Lógico").

several occasions. Unconfirmed reports indicate that the Senate's Education and Culture Committee might be working on an alternative bill that would do away with the software-only bill and protect a computer program as a literary work under the traditional copyright regime of the 1937 Copyright Law.

Unfortunately, this software-only bill contains very troubling provisions and should not be adopted by the Senate, as its enactment would represent a major setback in copyright protection for the software industries. If approved by the Senate, this bill would in effect discriminate against the software industry by providing it less protection than other copyrighted works are afforded under the 1937 law now in effect.

First, this bill takes a *sui generis* approach to protecting computer software, establishing a separate legal regime from other copyrighted materials. If this bill passes the Senate, there is a high likelihood that the Supreme Court of Justice of the Republic of Uruguay might overturn the only conviction for software copyright infringement that was obtained in Uruguay.<sup>10</sup> That conviction stemmed from a criminal complaint that the BSA filed in 1992 against a software reseller. During a raid at the reseller's place of business, the police found and seized hundreds of diskettes containing illegally reproduced software. During the course of his trial, the reseller admitted that he copied the software without authorization and with the intention to distribute it. In his defense he argued that: (1) software was not a copyrightable work; and (2) the unauthorized reproductions were for educational purposes only. On November 20, 1997, the Juzgado de Primera Instancia en lo Penal No. 15 (Criminal Court), found software, although not expressly recognized as a protected work in the 1937 Copyright Law, was a literary work and that its unauthorized reproduction and distribution was a crime. The Court convicted the reseller to eight months of imprisonment for "illegally reproducing a literary work." The defendant appealed and the Tribunal de Apelaciones (Court of Appeals) upheld the decision on May 14, 1999. He appealed again and the case is currently under review of the Supreme Court of Justice of the Republic of Uruguay. This appeal is still pending.

Because of the way it addresses the matter, if the software-only bill were to become law, there is a distinct possibility that the Supreme Court will determine that software was not protected under the Copyright Law of 1937, thus overturning the Court of Appeals' decision. Furthermore, there have been reports that this person is expected to give testimony before the Education and Culture Committee of the Senate during the hearings scheduled to consider passage of the bill.

Second, the software-only bill is poorly drafted in several respects. It lacks clear definitions and uses nonstandard terms to refer to complicated legal issues. The bill

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<sup>10</sup> "G.M.H.D. s/ Edición, venta y/o reproducción ilícita de una obra literaria (Art. 46 Ley 9.739, Art. 23 ley 15.913), Juzgado de Primera Instancia en lo Penal de 15º Turno Sentencia N° 65 November 20, 1997, upheld by Tribunal de Apelaciones en lo Penal de 1er. Turno, Sentencia N° 84 May 14, 1999, Ficha N° 210/98.

does not establish what the copyright holder's exclusive rights are and it fails to incorporate by reference the rights found in the copyright law now in effect.

Third, its proposed remedies and sanctions are inadequate. If approved, the bill would reduce criminal penalties for copyright infringement and, in some cases, it would completely decriminalize certain infringing acts such as the unauthorized reproduction of software by end users. In fact, the bill expressly exempts end users from criminal liability for copyright infringement through the use of unauthorized copies of software, unless they then resell those pirated copies. .

Fourth, it contains very broad exceptions to protection which are clearly TRIPS-incompatible. The bill also fails to include a civil *ex parte* search remedy.

Fifth, while there are additional copyright-related concerns, the bill includes onerous consumer protection measures and establishes compulsory warranty and service provisions. These proposed consumer protection measures go beyond those contained in the Uruguay Consumer Protection Act. Thus, the bill discriminates against the software industries by placing more onerous requirements than those imposed on any other commercial entity.

BSA is working with the local software association to stop this bill from being adopted by the Senate. Legislative attention should be placed on passing the long overdue, comprehensive copyright package. Both BSA and the local Uruguayan Software Chamber (CUS) have expressed their opposition to the software-only bill and have reiterated the need to obtain a new comprehensive copyright law. To that end, on January 7, 2001, Roni Lieberman, the President of CUS, stated that "...it is necessary to leave behind so many delays so that Uruguay will finally have a copyright law solid enough to protect copyrights in general, and software in particular."<sup>11</sup> These efforts, however, may not be enough. Unless the Uruguayan government feels its economic benefits under the GSP program are threatened, it may continue on its course of enacting inadequate copyright reform legislation.

#### **4. Criminal copyright enforcement in Uruguay remains ineffective and fails to deter piracy.**

Amendments to the Criminal Procedure Code make copyright infringement a "public" action by which the Uruguayan authorities can initiate actions. Although amendments in 1997 changed criminal copyright enforcement from a public to a private penal system, new amendments to the Criminal Procedures Code were passed on December 21, 1999 (Law 17.221), and published in the Official Gazette on January 13, 2000. The law amended the 1997 Criminal Procedures Code to provide the following: (a) Article 91 of the Criminal Procedures Code now establishes a "public" penal action for copyright infringements, and (b) Article 339.8 of the Criminal Procedures Code now permits the extradition of copyright infringers. These

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<sup>11</sup> El País, Electronic Version, Sunday January 7, 2001. Internet Year 5, No. 1644, Montevideo, Uruguay.

amendments are very positive. Having a "public" action is essential to involving the state in protecting copyrights. Allowing the extradition of copyright infringers is particularly important because piracy is a multinational enterprise, and not all pirates doing business in Uruguay are Uruguayan nationals. These 1999 amendments were accomplished before the February 1, 2000 deadline, the date on which the new Criminal Procedures Code entered into effect. The Code now provides that litigation will proceed in a hearings format instead of using a code-pleading system; that the prosecutor will play a more active role since his office will handle the complaint; that the Supreme Court of Justice will be required to appoint official experts to assist judges in inspecting suspected premises; and that raids will be conducted by either police or court officials.

While this law is finally in force on the books, there is a great need for improvement on the application of this criminal law to the state of piracy in Uruguay. Piracy continues to be widespread, and adversely affects the development of a market for legitimate copyrighted materials. BSA has witnessed an increment improvement in prosecutorial activity in the law few weeks. This activity, however, is very recent and may be nothing more than a token effort to show that the government of Uruguay is doing something to fight piracy. Increased attention by the police and prosecutors is needed to ensure this is a long-term, positive change that provides an effective deterrent against piracy under current Uruguayan laws.

During 2000, BSA filed eight criminal complaints against individuals who offer pirated software in the newspapers at a discount. Three of these cases were summarily dismissed by the Court due to criminal policy reasons. The Court never explained what the phrase "criminal policy reasons" meant. The dismissals and the lack of explanation for them clearly demonstrate a systemic failure to provide "adequate protection" under GSP and is also a violation of TRIPS Article 41.3, which requires member nations to issue "[d]ecisions on the merits of a case to be [...] reasoned." Four of these cases have been pending for over a year with no progress, and in only one case has the Court decided to indict the defendant. That case is also still pending resolution. In another case, one of BSA member companies filed a criminal complaint against a reseller for hard disk loading (HDL) in June 1999. Almost two years have passed and the Court has yet to issue an order to analyze the hard disk offered as evidence of the crime.

The recording industry conservatively estimates that the level of piracy is 35% of the market. The piracy situation remains dark, given the growth of CD burners and CD-R replication in Uruguay. The police have not been formally instructed nor motivated to take actions against copyright pirates doing business in the main street markets (known as *ferias callejeras*) of Montevideo, Salto, Payson and Tacuarembó, where music, video, business software and entertainment software are easily found. However, in recent months, the Ministry of Interior, the Fiscal de Corte, some police departments (such as the Director of Police of Montevideo) and a few other units began cooperating individually to conduct the first anti-piracy cases. This does not mean, however, that an overall official attitudinal change has been made by the Uruguayan government. The police departments (*seccionales de policia*) continue to request

search warrants in order to act (even in streets and other public places) despite the fact that the new Criminal Code allows them to take “public actions” at their own initiative.

The recording industry has invested heavily in building an anti-piracy program in Uruguay. It initiated 84 actions in 2000 and relative progress continued to be achieved in the first months of 2001. In comparison, no criminal actions were taken against record pirates in Uruguay during 1999. This represents an initial positive trend but is still far away from the overall official attitude that is needed to deter the impact of piracy. Prosecutors are still hesitant to apply the law because they have not received specific guidelines from their superiors regarding these cases. Out of the 84 cases conducted in 2000, 38 were against street vendors, 11 against small laboratories reproducing CD-Rs and 5 cases were conducted by Customs. Almost 24,000 pirate CD-Rs were seized as well as 13,000 cassettes. The bad news is that the above-mentioned figures represent a drop in the ocean of piracy that can easily increase in Uruguay unless the Government takes this problem seriously and commits to prosecute pirates, enforce the laws and implement stricter laws which protect investments of legitimate businesses. The recording industry is keeping a close watch on the 61 people that are subject to investigation, and the 10 that were indicted under Law 15.289. One person is being processed under contraband charges and the industry is monitoring the will of the Uruguayan Judiciary to move these cases forward. Still, any decisions are distant due to the slowness of the legal processes in Uruguay.

In 2000, MPA discontinued its anti-piracy program in Uruguay because of the inability to effectively address piracy. MPA intends to restructure the program with more limited expectations, primarily focusing on retail piracy in Montevideo. The entire market continues to be important to the industry, however.

**5. Uruguay’s customs system is ineffective to control piracy crossing its borders.**

With its proximity to Paraguay and Brazil and the growing problem of pirated and counterfeited goods crossing its borders, Uruguay is faced with a major challenge to improve its border measures. In fact, recent customs seizures of presumably counterfeit goods in Paraguay have identified Uruguay as one of the countries through which these goods enter Latin America. Uruguay is also serving as a center to send infringing products into Brazil via Rio Grande Do Sul/Santa Catarina. Customs is a key element in the effort to control the contraband of legal and illegal product. Enforcement at the Uruguayan borders and in Zona Florida needs to be significantly improved, especially given the growth of optical media piracy in the Mercosur region.

**6. Civil enforcement in Uruguay is ineffective because of procedural delays, including substantial delays, lack of clarity regarding unannounced civil *ex parte* searches, and high bond requirements for copyright litigation.**

In addition to criminal cases, BSA also conducts civil actions. Due in part to Uruguay's outdated copyright law, business software producers have encountered great difficulties in protecting their products. During the last several years, the BSA has sought to conduct an aggressive anti-piracy program in Uruguay. Unfortunately, BSA has run into significant obstacles to software copyright enforcement and, if anything, the legal situation has deteriorated over the last two years. In addition to criminal cases, BSA also conducts civil actions.

The Uruguayan courts continue imposing substantial delays in copyright enforcement actions. In a typical case, after uncovering evidence of software piracy, the BSA requests the courts to schedule an inspection of the suspected pirate. The courts routinely delay granting judicial inspections of suspected copyright infringers' premises for three or more months. Such delays have recently resulted in ineffective actions because the evidence of piracy may be moved or may have disappeared altogether between BSA's investigation of a suspected software pirate and the actual date of the raid. These delays put software producers at a disadvantage when they try to enforce their rights in Uruguayan courts. BSA filed 14 civil complaints in 2000, of which it obtained search orders in only 7 cases; the other 7 still await action.

Concerning *ex parte* searches in civil actions, the BSA has encountered a legal obstacle when trying to procure judicial searches and/or inspections. The Uruguayan Civil Procedure Code is silent as to whether an *ex parte* search may be carried out without the prior notification of the defendant. BSA has experienced that in 20% of the cases, the courts will reject such a preparatory proceeding. Failure to conduct such actions reflect inadequate protection under GSP as well as running afoul of TRIPS Article 50.2 (judicial authority shall have the authority to conduct *ex parte* searches *inaudita altera parte*.)

Onerous bond requirements -- ranging from \$50,000 to \$100,000 per case -- were imposed in the last half of 1998 and early 1999 in several separate legal actions brought by member companies of the BSA against Montevideo companies suspected of engaging in software piracy. Such onerous bond requirements are "unnecessarily complicated or costly," in contravention of Uruguay's obligations under TRIPS Articles 41 and 50.3. These bonds impose substantial obstacles to the effective enforcement of intellectual property rights by creating an expensive barrier for software producers who are trying to enforce their rights in Uruguayan courts. Although in practice some courts have recently diminished their bond requirements, it is still within the judge's discretion as to whether the court will require bonds before a BSA raid. High bonds continue to pose a serious obstacle to the BSA's enforcement campaign in Uruguay.

Other obstacles are also routinely encountered. In a case filed in May 1998, BSA raided an academic institution that was suspected of using illegal software. After the search order was executed and several unlicensed products of BSA members were found, BSA and its members filed a civil complaint with the Court. During trial, defendant's counsel requested plaintiffs to demonstrate that they were in fact the copyright holders of the unlicensed software found during the raid. BSA and its members objected, but the Court agreed with the defendant and ordered plaintiffs to

produce evidence that they owned the copyright in the relevant software programs. Under Uruguayan law, an author's notice of authorship is sufficient evidence to be regarded as such and the burden is on the defendant to challenge such a presumption. In compliance with the court's order, the software publishers submitted the requested evidence. BSA is still waiting for a resolution of this case. The court's imposition of onerous and "unnecessarily complicated" evidentiary requirements illustrates the existing defects in the Uruguayan legal system.

**7. Because of the inadequate legal protection and high levels of copyright piracy, U.S. copyright owners suffer economic harm.**

Copyright piracy levels and estimated losses due to piracy have remained consistently high in Uruguay for the last few years.

The majority of business software piracy in Uruguay revolves around illegal copying of computer programs. This type of piracy takes two forms: end-user piracy and channel piracy. End-user piracy occurs when an end user makes illegal copies of a particular software program for their own use. Channel piracy involves the illegal distribution and sale of illegal copies of software through the sale of counterfeit or otherwise illegal copies of software programs in optical disk or diskette form, or through the illegal loading of software programs onto the hard disk of personal computers that are then sold to the public without user manual, certificates of authenticity or other documentation that properly loaded software would include. The legal and educational campaign of the BSA in Uruguay contributed to a reduction in the piracy rate and corresponding loss estimates, over the past year. BSA's estimated levels of piracy in Uruguay for 2000 were \$7.9 million, with a 66% level of piracy.

The motion picture industry reports that video piracy continues to hamper the legitimate video market in Uruguay, registering a 65% video piracy rate in 2000. Back-to-back copying in individual video clubs continues to be the dominant piracy method. The MPA Uruguay Program investigations have not yet uncovered evidence of organized pirate video duplication laboratories. Prerelease video piracy appears to originate from the contraband Paraguayan production and distribution structure. Since 1998, television cable piracy has increased, particularly within the country's interior. Some cable services continue to offer a dedicated film channel employing edited videos with advertisements. Unauthorized public performance of videos continues to present a seasonal problem, primarily over closed circuit cable systems in the tourist hotels in Punta del Este. Limited cable television piracy also exists in Uruguay, primarily in the interior, where small cable operators offer their subscribers unauthorized video transmissions. Losses to the U.S. motion picture industry due to audiovisual piracy in Uruguay are estimated to be \$2 million in 2000.

Despite the change of attitude of some police officers that were finally convinced to enforce copyright, for the recording and music industries the main piracy problem continues to be the unrestricted importation of pirate CDs and bootleg recordings. In addition to affecting the Uruguayan market, shipments of pirated

product for ultimate destination in Brazil were found in Montevideo's Free Zone, known as Zona Florida. After the national anti-piracy group (known as CUD) conducted its initial investigations, it found that Uruguay is also being used as a transshipment center for pirate product bound to Brazil via Paraguay. Uruguay is also serving as a center to send infringing products into Brazil via Rio Grande Do Sul/Santa Catarina. Estimated trade losses and levels of piracy in 2000 due to recording and music piracy were \$4.0 million, with a 35 % level of piracy, reflecting no progress over the 1999 estimates.

IDSA reports that the estimated level of entertainment software piracy in Uruguay escalated from 70% in 1999 to 82% in 2000. Like its neighbors, Uruguay is being affected by the influx of pirate optical media product from Asia which is pounding the Mercosur region. Piracy of entertainment software (including videogame CD-ROMs and cartridges, personal computer CD-ROMs and multimedia products) inflicted an estimated \$16.3 million for 2000, more than doubling estimated losses from the prior year.

The book publishing industry reports no improvement in reducing levels of book piracy in Uruguay over the past year. Photocopying remains the main source of piracy, especially within institutions of higher learning, and hence trade loss estimates are \$2.0 million in 2000.

**ESTIMATED TRADE LOSSES DUE TO COPYRIGHT PIRACY OF U.S. PRODUCTS  
(in millions of U.S. dollars) and LEVELS OF PIRACY IN URUGUAY: 1995 – 2000**

INDUSTRY	2000		1999		1998		1997		1996		1995	
	Loss	Level										
Motion Pictures	2.0	65%	2.0	65%	2.0	65%	2.0	75%	2.0	65%	3.0	43%
Sound Recordings / Musical Compositions	4.0	35%	4.0	35%	3.0	25%	2.0	25%	2.0	25%	0.1	19%
Business Software Application <sup>12</sup>	7.9	66%	16.0	70%	13.1	72%	11.0	74%	13.9	80%	14.0	84%
Entertainment Software <sup>13</sup>	16.3	82%	6.9	70%	7.6	74%	7.0	70%	7.2	73%	6.9	71%
Books	2.0	NA										
<b>TOTALS</b>	<b>32.2</b>		<b>30.9</b>		<b>27.7</b>		<b>24.0</b>		<b>27.1</b>		<b>26.0</b>	

<sup>12</sup> BSA estimates for 2001 have been finalized and appear above. In IIPA's February 2001 Special 301 submission, BSA reported that its 2000 estimates of \$15.4 million and 67% were preliminary. BSA's estimates above reflect losses experienced by U.S. copyright owners, and does not include losses which may occur along the rest of the retail chain. This explains the difference between the \$7.9 million in estimated losses reported in the GSP and Special 301 context, and those global estimated losses that BSA reports in its separate publications. For example, BSA reports in its Sixth Annual BSA Global Software Piracy Study (May 2001) that the estimated global losses due to business software piracy in Uruguay were \$9.688 million for 2000.

<sup>13</sup> IDSA estimates for 2000 are preliminary.

## **CONCLUSION**

For the reasons stated in this submission, IIPA requests that the GSP Subcommittee initiate a review the GSP country eligibility of Uruguay for its failure to provide adequate and effective copyright protection for U.S. copyright owners.

If requisite improvements are not made in Uruguay to remedy these deficiencies in the near future, then IIPA requests that the U.S. suspend its eligibility or withdraw GSP benefits of Uruguay, in whole or in part.

Respectfully submitted,

Eric H. Smith  
President  
International Intellectual Property Alliance



## **APPENDIX A**

### **Statutory Basis for the Country Eligibility Practice Review of the Intellectual Property Rights Practices of URUGUAY under the Criteria of the Generalized System of Preferences (GSP) Program**

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The Generalized System of Preferences (GSP) program of the United States provides unilateral, non-reciprocal, preferential duty-free entry for over 4,650 articles from approximately 140 countries and territories designated beneficiary countries and territories for the purpose of aiding their economic development through preferential market access. The GSP program was instituted on January 1, 1976, and authorized under Title V of the Trade Act of 1974 (19 U.S.C. 2461 et seq.) for a 10-year period. Since 1997, an additional 1,770 items are eligible for GSP treatment for specified least developing beneficiary developing countries.

The GSP program has been renewed several times since its establishment. Most recently, in 1999 Congress reauthorized the GSP program through September 30, 2001.<sup>14</sup> What was unique about this extension was that, for the first time in several years, Congress extended the GSP Program for more than a single year. IIPA has supported a multi-year extension of this program to support the use of the GSP program as a tool to protect the interests of U.S. copyright owners around the world.

Provisions tying intellectual property protection to trade benefits were first added to the Trade and Tariff Act of 1984 [hereinafter "TTA 1984"]. Title V of the TTA 1984, known as the GSP Renewal Act of 1984,<sup>15</sup> renewed the GSP Program and specifically required the President to consider intellectual property protection in determining whether to designate a developing country as eligible for GSP benefits. While there has been a minor change in the statutory language between the GSP Renewal Act of 1984 and the GSP Renewal Act of 1996, the GSP provisions as related to IPR remain essentially the same as in 1984. The legislative history of the 1984 Renewal Act is particularly instructive on the important link between GSP benefits and strong IPR protection.

#### The GSP Renewal Act of 1984

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<sup>14</sup> See Extension of Duty-Free Treatment under Generalized System of Preferences, Section 508 of the Ticket to Work and Work Incentives Improvement Act of 1999, Pub. L. No. 106-170 (codified at 19 U.S.C. 2465).

<sup>15</sup> See the Generalized System of Preferences Renewal Act of 1984, Title V, Pub. L. No. 98-573 (1984) (codified at 19 U.S.C. 2461-2465).

In the GSP Renewal Act of 1984, Congress specified conditions that GSP beneficiary countries must meet in order to gain and maintain their preferential trading status. In particular, one of these express conditions (which Congress also delineated as one “purpose” of the GSP Program) was to encourage developing countries “to provide effective means under which foreign nationals may secure, exercise, and enforce exclusive intellectual property rights.”<sup>16</sup>

The legislation required the President to apply mandatory and discretionary criteria with respect to IPR protection as a condition to a country achieving “beneficiary” status under the GSP Program. The mandatory criterion prohibited the designation of a country from becoming a “beneficiary developing country” if, for example, “such country has nationalized, expropriated, or otherwise seized ownership or control of property, including patents, trademarks, or copyrights, owned by a United States citizen or by a corporation, partnership, or association which is 50 percent or more beneficially owned by United States citizens.” See Section 503(b)(4) of the GSP Renewal Act of 1984, now codified at 19 U.S.C. 2462(b)(2)(D).

The GSP Renewal Act of 1984 added as a discretionary criterion, in determining whether to designate a developing country as eligible to receive GSP duty-free trade treatment, that

the President shall take into account ... the extent to which [each] country is providing adequate and effective means under its laws for foreign nations to secure, to exercise, and to enforce exclusive rights in intellectual property, including patents, trademarks, and copyrights.

Section 503(c)(5) of the GSP Renewal Act of 1984, codified at 19 U.S.C. 2462(c)(5). The Senate Finance Committee Report explained that:

To determine whether a country provides “adequate and effective means,” the President should consider the extent of statutory protection for intellectual property (including the scope and duration of such protection), the remedies available to aggrieved parties, the willingness and ability of the government to enforce intellectual property rights on behalf of foreign nationals, the ability of foreign nationals effectively to enforce their intellectual property rights on their own behalf and whether the country’s system of law imposes formalities or similar requirements that, in practice, are an obstacle to meaningful protection.

S. Rep. No.98-485, 98<sup>th</sup> Cong., 2d Sess. At 11 (1984). The Senate Report also noted:

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<sup>16</sup>See Section 501(b)(9)(B) of the GSP Renewal Act of 1984.

In delegating this discretionary authority to the President, it is the intent of the Committee that the President will vigorously exercise the authority to withdraw, to suspend or to limit GSP eligibility for non-complying countries

....

Where valid and reasonable complaints are raised by U.S. firms concerning a beneficiary country's market access policy or protection of intellectual property rights, for example, it is expected that such interests will be given prominent attention by the President in deciding whether to modify duty-free treatment for that country.

Id. at 12-13 (emphasis added). The House Ways and Means Committee stated that "countries wishing to reap the benefits of preferential duty-free access to the U.S. market must fulfill international responsibilities" in the intellectual property area. House Rep. No. 98-1090, 98<sup>th</sup> Cong., 2d Sess. at 12 (1984).

The IPR criteria are a condition, not only for obtaining GSP benefits in the first place, but also for retaining them. The 1984 Act authorized the President to "withdraw, suspend, or limit the application of the duty-free treatment accorded under Section 501 of this title with respect to any article or any country" and requires the President, when taking any such action, to "consider the factors set forth in Sections 501 and 502(c)." TTA 1984 Section 505(a)(1); TA 1974 Section 504(a)(1), as amended; 19 U.S.C. 2464(a)(1) (emphasis added). The Act also created a system of "general reviews" to ensure that these statutory criteria are met. TTA 1984 Section 505(b); TA 1974 Section 504(c)(2)(A), as amended; 19 U.S.C. 2464(c)(2)(A); see also 15 C.F.R. 2007.3.

IIPA requests that this GSP Subcommittee follow the explicit intent of Congress, and advise the President to "vigorously exercise" his authority to withdraw, suspend or limit GSP eligibility of Uruguay for its non-compliance with the statutory criterion on IPR in the GSP Program.

#### The GSP Renewal Act of 1996

When the GSP Program was reauthorized in August 1996, the language of the IPR discretionary criterion for GSP eligibility in Section 502(c)(5) was simplified slightly and now requires the President to "take into account the extent to which such country is providing adequate and effective protection of intellectual property rights."<sup>17</sup> The expired law specified (as discussed above) that each beneficiary country provide "adequate and effective means under its laws for foreign nationals to secure, to exercise and to enforce exclusive rights in intellectual property, including patents, trademarks, and copyrights." Otherwise,

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<sup>17</sup> GSP Renewal Act of 1996, Title I, Subtitle J, of the Small Business Job Protection Act of 1996, Pub. L. No. 104-188 (codified at 19 U.S.C. 2462(c)(5)).

the GSP Renewal Act contains identical IPR provisions, including “mandatory” criteria denying GSP status to countries that directly or indirectly expropriate U.S. property (including intellectual property), and authorizing the President to withdraw, suspend or limit GSP privileges based on failure to meet the IPR criteria.

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## APPENDIX B

### Methodology Used to Estimate Trade Losses due to Copyright Piracy And Levels of Piracy

Estimated trade losses due to piracy are calculated by member associations of the International Intellectual Property Alliance (IIPA). Since it is impossible to gauge losses for every form of piracy, we believe that our reported estimates for 2001 actually underestimate the losses due to piracy experienced by the U.S. copyright-based industries.

Piracy levels are also estimated by IIPA member associations and represent the share of a country's market that consists of pirate materials. Piracy levels together with losses provide a clearer picture of the piracy problem in different countries. Low levels of piracy are a good indication of the effectiveness of a country's copyright law and enforcement practices. IIPA and its member associations focus their efforts on countries where piracy is rampant due to inadequate or non-existent copyright laws and/or lack of enforcement.

#### BUSINESS SOFTWARE APPLICATIONS

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The Business Software Alliance (BSA)'s calculation method compares two sets of data -- the *demand* for new software applications, and the legal *supply* of new software applications.

Demand: PC shipments for the major countries are estimated from proprietary and confidential data supplied by software publishers. The data is compared and combined to form a consensus estimate, which benefits from the detailed market research available to these member companies.

Two dimensions break the shipments into four groups. Splitting the PC shipments between Home and Non-Home purchasers represents the market segments of each country. The PC shipments are also compared to the change in the installed base of existing PCs. The part of PC shipments which represents growth of the installed base is called "new shipments" and is separated from the "replacement shipments" which represent new PCs that are replacing older PCs.

A scale of the installed base of PCs by country compared to the number of white-collar workers was developed. PC penetration statistics are a general measure of the level of technological acceptance within a country. The level of penetration, for a variety of reasons, varies widely from country-to-country.

This level is then ranked and each country is assigned to one of five maturity classes.

The number of software applications installed per PC shipment is provided by member companies, and the following ratios for the four shipment groups are developed:

Home-New Shipments  
Non-Home - New Shipments  
Home - Replacement Shipments  
Non-Home - Replacement Shipments

For each shipment group, ratios are developed for each of five maturity classes. U.S. historical trends are used to estimate the effects of lagged technological development by maturity class.

Piracy rates can vary among applications. Grouping the software applications into three Tiers and using specific ratios for each Tier further refined the ratios. The Tiers were General Productivity Applications, Professional Applications, and Utilities. These were chosen because they represent different target markets, different price levels, and it is believed, different piracy rates.

Software applications installed per PC shipped are researched and estimated using these dimensions:

1. Home vs. Non-Home
2. New PCs vs. Replacement PCs
3. Level of Technological Development
4. Software Application Tier

From this work, a total software applications installed estimate was calculated for each country.

Supply: Data was collected by country and by 26 business software applications. Shipment data was limited in some instances, hence, uplift factors were used to estimate U.S. and world-wide shipments.

Piracy Estimates: The difference between software applications installed (demand) and software applications legally shipped (supply) equals the estimate of software applications pirated. The piracy rate is defined as the amount of software piracy as a percent of total software installed in each country.

Dollar Losses: The legal and pirated software revenue was calculated by using the average price per application. This is a wholesale price estimate

weighted by the amount of shipments within each software application category.

To develop the wholesale dollar losses for U.S. software publishers, the wholesale dollar losses due to piracy were reduced by the ratio of the software shipped by U.S. software publishers as a percent of software shipped by all software publishers.

#### **ENTERTAINMENT SOFTWARE**

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The Interactive Digital Software Association (IDSA) draws piracy rates from numerous estimates provided by member and non-member company representatives, distributors and enforcement personnel based on local market conditions. Separate estimates of piracy rate pertaining to console- and PC-based software are calculated, and then averaged into a single piracy rate based on the prevalence of each platform in the market.

Trade loss figures reported (in both the IIPA's February 2001 Special 301 Report and this GSP petition) are preliminary and are based only on partial data samples. These figures are likely to underestimate those to be reported upon completion of our review.

This year's dollar loss figures rely in part on estimates provided by member companies. These estimates are generated using proprietary methodologies that integrate market data of dedicated platform and PC entertainment software in both compact disc and cartridge formats and hardware shipments. These methodologies take into account market conditions including but not limited to the installed base of a given platform (console, PC-based, handheld, etc.) and actual distribution and sales figures.

Dollar loss figures also incorporate inferences from seizure statistics that result from border and other enforcement actions in the countries of production, export and import. These losses are attributed to the country of production where such is known. This aspect of the methodology relies on conservative estimates about the total number of piratical goods produced based on the numbers seized.

The methodology also assumes that piratical goods in the marketplace displace to some degree legitimate product sales. In these instances, displaced sales are multiplied by the wholesale price of legitimate articles rather than the retail price of the pirate goods.

#### **MOTION PICTURES**

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Many factors affect the nature and effect of piracy in particular markets, including the level of development of various media in a particular market and

the windows between release of a product into various media (theatrical, video, pay television, and free television). Piracy in one form can spill over and affect revenues in other media forms. Judgment based on in-depth knowledge of particular markets plays an important role in estimating losses country by country.

Video: As used in the document the term encompasses movies provided in video cassette as well as in all optical disc formats. Losses are estimated using one of the following methods:

1. For developed markets:
  - a. The number of stores that rent pirate videos and the number of shops and vendors that sell pirate videos are multiplied by the average number of pirate videos rented or sold per shop or vendor each year;
  - b. The resulting total number of pirate videos sold and rented each year in the country is then multiplied by the percent of those pirate videos that would have been sold or rented legitimately and adjusted to reflect the US producers' share of the market.
2. For partially developed markets:
  - a. The number of legitimate videos sold or rented in the country each year is subtracted from the estimated total number of videos sold or rented in the country annually to estimate the number of pirate videos sold or rented annually in the country;
  - b. The resulting total number of pirate videos sold and rented each year in the country is then multiplied by the percent of those pirate videos that would have been sold or rented legitimately and adjusted to reflect the US producers' share of the market.
3. For fully pirate markets:

The estimated number of pirate videos of U.S. motion pictures sold or rented in the country each year is adjusted to reflect the wholesale price of legitimate videos which equals losses due to video piracy.

TV, Cable and Satellite: Losses are estimated using the following method:

1. The number of TV and cable systems that transmit U.S. motion pictures without authorization is multiplied by the average number of U.S. motion pictures transmitted without authorization by each system each year;
2. The resulting total number of illegal transmissions is multiplied by the average number of viewers per transmission;
3. The number of viewers of these illegal transmissions is allocated among those who would have gone to a theatrical exhibition or who would have rented or purchased a legitimate video. The number of legitimate transmissions of the motion picture that would have been made is also estimated;
4. These figures are multiplied by the producers' share of the theatrical exhibition price, the wholesale share of the video cost or the license fee per legitimate transmission, as appropriate, to estimate the lost revenue from the illegal transmissions.

Public Performance: Losses are estimated using the following method:

1. The number of vehicles and hotels that exhibit videos without authorization is multiplied by the average number of viewers per illegal showing and the number of showings per year;
2. The resulting total number of viewers of unauthorized public performances is allocated among those who would have gone to a theatrical exhibition or who would have rented or purchased a legitimate video. The number of legitimate TV and cable transmissions that would have been made of the motion pictures is also estimated;
3. These figures are multiplied by the producers' share of the theatrical exhibition price, the wholesale share of the video cost or the license fee per legitimate TV, cable and satellite transmissions, as appropriate, to estimate the lost revenue from the illegal performances.

## **SOUND RECORDINGS AND MUSICAL COMPOSITIONS**

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RIAA generally bases its estimates on local surveys of the market conditions in each country. The numbers produced by the music industry generally reflect the value of sales of pirate product rather than industry losses,

and therefore undervalue the real harm to the interests of record companies, music publishers, performers, musicians, songwriters and composers.

Where RIAA has sufficient information relating to known manufacture of pirate recordings that emanate from a third country, this loss data will be included in the loss number for the country of manufacture rather than the country of sale.

In certain instances where appropriate, RIAA employs economic data to project the likely import or sale of legitimate sound recordings, rather than merely reporting pirate sales. In these instances, projected unit displacement is multiplied by the wholesale price of legitimate articles in that market rather than the retail price of the pirate goods.

## **BOOKS**

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The book publishing industry relies on local representatives and consultants to determine losses. These experts base their estimates on the availability of pirate books, especially those found near educational institutions, book stores and outdoor book stalls. A limitation here is that experts can only gauge losses based on the pirated books that are sold; it is impossible to track losses for books which are pirated but not available for public purchase. The trade loss estimates are calculated at pirate prices which are generally (but not always) below the prices which would be charged for legitimate books. Also included are conservative estimates of losses due to unauthorized systematic photocopying of books.

## **APPENDIX C**

Copy of

The International Intellectual Property Alliance's  
August 21, 2000 Request for Review  
of the Intellectual Property Rights Practices of Uruguay  
in the 2000 GSP Annual Country Eligibility Practices Review

This petition is also available on  
the IIPA's Website at  
[http://www.iipa.com/gsp/2000\\_Aug21\\_GSP\\_Uruguay.pdf](http://www.iipa.com/gsp/2000_Aug21_GSP_Uruguay.pdf)