

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2001 SPECIAL 301 REPORT

ARGENTINA

EXECUTIVE SUMMARY

IIPA recommends that Argentina remain on the Priority Watch List. Pirate optical media products continue to overrun the Argentine market. This phenomenon, compounded by the growing illegal use of CD-Rs and pirated cartridge-based software, seriously undermines the ability of all the copyright industries to compete with legitimate product. As a result of growing digital piracy and ineffective enforcement, estimated trade losses due to copyright piracy in Argentina jumped to \$409.6 million in 2000.

Ineffective copyright enforcement remains at the top of the copyright industries' agenda in Argentina. Many elements of Argentina's enforcement regime are incompatible with its WTO TRIPS obligations, including: nondeterrent criminal penalties applied in commercial piracy cases, lengthy delays in bringing and completing both criminal and civil infringement cases, and ineffective border measures. The Argentine court system is hampered by inadequate resources, a large volume of cases, and a formalistic procedural code. Concerted efforts by the Argentine authorities to improve enforcement, particularly at the borders and within its judiciary, are critical. Long-term outstanding customs duties issues must also be resolved.

ESTIMATED TRADE LOSSES DUE TO PIRACY (in millions of U.S. dollars) and LEVELS OF PIRACY: 1995 - 2000

INDUSTRY	2000		1999		1998		1997		1996		1995	
	Loss	Level										
Motion Pictures	32.0	45%	32.0	45%	30.0	45%	30.0	43%	35.0	43%	49.0	50%
Sound Recordings / Musical Compositions	76.0	46%	50.0	33%	50.7	35%	25.0	35%	20.0	30%	15.0	17%
Business Software Applications* ¹	151.7	60%	156.7	58%	100.8	62%	84.7	65%	107.9	73%	112.4	80%
Entertainment Software* ²	141.4	94%	90.3	92%	87.1	94%	83.4	90%	86.0	86%	64.7	84%
Books	8.5	NA	8.0	NA	7.5	NA	7.0	NA	7.0	NA	7.0	NA
TOTALS	409.6		337.0		276.1		230.1		255.9		248.1	

¹ BSA estimates for 2000 are preliminary. In IIPA's February 2000 Special 301 submission, BSA's 1999 piracy level of 57% was reported as preliminary. The BSA numbers were finalized in mid-2000, and are reflected above.

² IDSA estimates for 2000 are preliminary.

COPYRIGHT PIRACY IN ARGENTINA

Optical Media Piracy is Growing.

Argentina, like many of its neighbors, continues to be invaded by pirate optical media product. One of the primary reasons for this growth involves the international distribution of optical media product, emanating primarily from production facilities in Southeast Asia (as discussed in further detail below). Such optical media distribution networks are under the control of organized criminal enterprises including those of Chinese, Taiwanese, Paraguayan, Panamanian, Uruguayan and Brazilian nationals operating in Argentina and in the other Mercosur countries. CD pirate operations have grown. Traditionally, these pirates operated individually or in small groups. However, there are new organizations with many employees and an average of six to ten CD duplicators.

A second trend is the proliferation in the replication of illegal CD-Rs (recordable CDs). A cottage industry of people duplicating copyrighted materials on CD-Rs has developed. CD-R piracy has worsened throughout the country over the past year. Local videogame representatives estimate that there are more than 1,000 rental outlets which routinely burn CD-Rs to order. The recording industry has conducted raids against small labs. It is very difficult to stop such unlawful reproductions. There are some concerns that, given the domestic scale of this problem, there may be some organized crime elements and/or coordination involved. To compound matters, it is difficult to get the passive Argentine judiciary involved in address this IPR problem. Some progress is reported regarding business software CDs for the City and Province of Buenos Aires, where CD-R piracy has decreased as a result of the intensive legalization campaign conducted by BSA and Software Legal (BSA local software association) during the last quarter of 2000.

Pirate CD duplication centers operate not only in major Argentine cities, but also in small towns. In some cases, the illegal software is reproduced far from the major cities, offered through the Internet, and distributed in the major cities. CD duplicators have learned how to avail themselves of the Internet to increase their sales, and to hide from the authorities behind an anonymous Web page. The use of the Internet to sell pirate CDs is a growing trend among CD duplicators.

Another trend which surfaced within the last two years is VCDs (video compact discs) containing full-length motion pictures. These discs have begun to blanket the Argentine market, with both pirated versions from Asia as well as parallel imported copies.

Copyright Piracy Levels in Argentina Remain High.

Entertainment software piracy in Argentina got worse in 2000, moving up to an estimated 94% piracy level. For example, piracy levels of Playstation® products is at 99%, with PC-based products at 85% piracy. Console piracy has totally saturated the Argentine market, much being controlled by organized crime linked to Asian contacts. Estimated losses due to piracy of entertainment software (including videogame CD-ROMs and cartridges, personal computer CD-ROMs and multimedia entertainment products) skyrocketed over the last year to \$141.4 million in 2000.

The major problem in Argentina for the entertainment software industry continues to be the massive importation of CD-ROMs (especially from Malaysia, Hong Kong, the People's Republic of China, Thailand, Taiwan, Paraguay and Chile), often entering Argentina through Iquique, Chile or Colonia, Uruguay. This includes fake OEM (original equipment manufacturer) versions, compilation gold disks, and silver CDs and cartridge-based products such as Nintendo® *Game Boy* software. The infrequent efforts by the Argentine authorities to stop this importation, including judicial intervention and action by administrative authorities, have been unsuccessful. Customs officials do not have the power or the guidelines to stop the import of counterfeit products. If there is knowledge of counterfeit products being imported, a court order is required before products can be stopped. Unfortunately, counterfeit or pirate videogame products usually disappear from customs by the time a court order is obtained. For Nintendo, counterfeit products have been detained by Customs, only to be shipped back to its Asian exporter. Again, Customs officials blamed this procedure on their lack of authority to seized these products. On the other hand, there have been some customs seizures involving products of PlayStation product.

A second source of piracy continues to be reproduction on demand. Numerous shops have CD recorders and provide their customers with a copy of any entertainment software they ask for, copying it while the customers wait. The manufacture and sale of pirated videogames and cartridges at the retail level has increased considerably over the past year. Sometimes counterfeit hardware is bundled with counterfeit games, or pirated software is preinstalled. Pirated videogames, on all platforms, are sold openly in the most reputable malls for about \$15 each. Reports indicate that piracy of cartridge- and CD-ROM-based videogames is still very high.

With respect to business software, piracy among end users remains quite high, especially in small and medium-sized organizations, and with home users. Larger organizations may have some licenses to use software, but commonly these licenses only cover a small percentage of the software in use. Distributors are competing against pirate CD duplicators, which makes it very difficult for legitimate software distributors to conduct business on a profitable basis. Distributors are also very affected by computer resellers that load illegal software on computers to increase their sales. Counterfeit activities with respect to business software have been reduced through security devices such as company-specific "certificates of authority," holograms, etc., but remain a problem for entertainment and educational software. Internet use is growing in Argentina, and this has lead to an increase in the use of the Internet as a mean of advertising illegal software to a large audience, and the unauthorized electronic distribution of illegal software. The 2000 estimated business software piracy level in Argentina is 60%, with estimated losses at \$151.7 million. The Argentine Federal Government, which is a major end user, still has to legalize its software. Even though BSA has tried many times to convince the government to take serious steps toward complete software legalization, no positive results were obtained in 2000.

The shift from analog to optical media-based piracy represents an alarming trend in Argentina which is harming the recording and music industry. Argentine pirates are focusing more on CDs, which is a more expensive product (even at pirate prices) than cassettes. More pirate CDs were distributed and fewer legitimate CDs were sold. The estimated piracy level for sound recordings and music in Argentina has grown to 46% for 2000. The estimated losses due to audio piracy in Argentina for 2000 also rose to \$76 million.

Perhaps the most disturbing trend is CD-R technology, which the recording industry expects to worsen in 2001. This technique makes piracy extremely hard to attack. There are hundreds of

small replicators, students, and small pirates that duplicate conservative amounts but the cumulative effect is significant. In most of these cases, domestic pirates use the same source to obtain their raw material (blank CD-Rs) as well as the inlay cards. They also use the same distribution system. The recording industry believes that there may be organized crime coordination behind this apparent domestic-scale problem. The industry has initiated raids against domestic CD-R labs and found the labs to have 50 serial burners duplicating 50 CDs from the same matrix at the same time. This indeed represents a small industrial-sized installed capacity. This form of piracy makes both investigation and enforcement very difficult. There is no specific commitment from the federal or local governments to fight this piracy.

Another problem continues to be the influx of pirate CDs from the Far East. Pirated products enter Argentina daily from Paraguay (at Encarnacion and Foz de Iguazu/Ciudad del Este). Pirate imports also enter from Bolivia (Yacuiba), several points along the Uruguayan border, and at unknown points in Chile. Infringing audio CD products enter Argentina in most cases by the use of false statements on Customs papers.

In addition to music CD piracy, audiocassette piracy continues to be a problem in Argentina. Thousands of pirate audiocassettes from Paraguay, coming mainly from Encarnacion-Posada, Formosa and the Parana river, blanket the northern part of Argentina. Piracy in the border towns is high. The legitimate industry has lost the battle against cassette piracy in northern Argentina, in particular, Formosa, Tucuman, Salta, Jujuy, Santiago del Estero, Chaco, and Corrientes y Misiones, due to a lack of customs enforcement at the borders with Bolivia and Paraguay. To a lesser degree, the western states (like Mendoza) are also threatened by the influx of piracy product from Chile and Bolivia. The source of the pirate product from Bolivia (which enters Argentina primarily via Yacuiba) is illegal bulk imports which appear to originate in Iquique, Chile.

Video piracy in Argentina is on the edge of becoming an integral and perhaps inextricable part of the audiovisual market. Nearly half, 45%, of the total home video market is piracy product. Despite significant industry funding for legal actions over a number of years, the rate of piracy has remained virtually unchanged. The majority of pirate videos comes from back-to-back copies reproduced in small numbers, but in many video stores. Most video clubs illegally reproduce these back-to-back copies, and it is a pervasive practice in greater Buenos Aires. The practice is so prevalent that some of these small businesses have grown dependent on illegal copies. Statistics provided by the Argentina Video Union (UAV) indicate that the use of pirate videos has become a standard business practice. Only a strong commitment by the Argentine government, with exemplary action, can break this trend.

Video optical disc piracy (VCDs) and television signal theft are growing trends. Investigation by MPA's Argentina Program indicates a small increase in Direct-to-Home (DTH) satellite piracy. Parallel imports continue to present a concern, with the increasing appearance in the Argentine market of unauthorized Region 1 DVDs from the U.S. market. Losses to the U.S. motion picture industry due to audiovisual piracy in Argentina are estimated to be \$32 million in 2000.

The book publishing industry continues to report widespread photocopying of English language materials and computer books, and in particular, Spanish language translations of American book titles, in Argentina. Wide-scale photocopying occurs, in part, as a reaction to the high prices of books and university texts, the fact that all imported English titles incur a high mark-up locally on each imported copy, and the general economic effects of last year's recession. Such

photocopying is reported both within universities and by photocopying stores near universities. There is also commercial piracy involving computer book titles. Recently, translations of U.S. best-selling trade books (fiction) have entered the market, with some reports attributing these to be imported from Mexico. Argentina represents one of the worst cases of book piracy in South America. Estimated 2000 trade losses due to book piracy in Argentina are \$8.5 million.³

ENFORCEMENT IN ARGENTINA

The copyright industries have continuously faced enforcement obstacles in Argentina, despite concerted efforts by industry anti-piracy actions. Many elements of Argentina's enforcement regime are incompatible with its current obligations under the WTO TRIPS Agreement, including: the failure to impose deterrent criminal penalties in commercial piracy cases; lengthy delays in bringing and completing both criminal and civil infringement cases; ineffective border measures; and the lack of availability of deterrent civil damages. These deficiencies are simply not working to provide adequate and effective protection to U.S. copyright holders.⁴

Criminal Raids Continue, But Make Hardly a Dent in Piracy Levels.

IDSA commenced an anti-piracy program in Argentina in August 1997, when it launched a series of raids on distributors and retailers of pirated entertainment software, including the largest importers of fake OEM versions and almost a dozen retailers.⁵ The IDSA campaign got off to a good start by striking at three of the largest importers of pirated videogame product. In the summer of 1999, counterfeit Nintendo videogame consoles were found in various supermarkets in Buenos Aires. Working with the local distributor, Nintendo sent cease and desist orders to the supermarkets, which withdrew the infringing products from their shelves. In one case, a raid was conducted and 500 consoles with built-in counterfeit software were recovered. In September 2000, Nintendo raided two prominent retail stores, seizing counterfeit *Game Boy* software. The actions remain pending in the criminal courts, with very little chance the defendants will actually be penalized for their illegal activities. In some cases, several entertainment software companies are teaming up with a local association (known as CASDI) to conduct raids, seize infringing products, support customs actions, and press for criminal prosecutions. The IDSA has also provided anti-piracy training for judges, police and prosecutors. Despite all these enforcement

³ AAP reports that its 1999 estimate of \$10 million in trade losses due to book piracy in Argentina was high. The revised estimate for 1999 is \$8.0 million, and is reflected in the chart at the beginning of this report.

⁴ Argentina participates in the Generalized System of Preferences (GSP) program, and the adequate and effective protection of intellectual property rights is a criterion to participate in that trade program. In 1999, \$182.3 million in Argentine imports to the United States benefited from the GSP program, accounting for nearly 7.1% of its total imports to the U.S. For the first eleven months of 2000, \$199.5 million of goods from Argentina entered the U.S. under the GSP duty-free code, a 19% increase over the same time period last year. For more detail about Argentina's history with Special 301, see Appendices D and E of this filing.

⁵ It is important to note that in November 1998, legislation was passed clarifying that computer software (which includes entertainment software and business applications) and databases are protected subject matter under the copyright law. This reform, years in the making, was extremely important to both the business software and interactive entertainment software industries, which rely on criminal enforcement. After the new law entered into effect, many bootleggers and hard-disk loaders simply closed their businesses or discontinued the sale of illegal products.

activities, very little is done to the counterfeiter for his illegal acts. The pirates believe that the seizure of their fake goods is only a cost of doing business, and continue with their very lucrative ventures.

In 2000, BSA filed 22 private criminal suits against pirate software resellers and end users. All cases filed or reported by BSA resulted in search and seizure actions, which were carried out in accordance with the new copyright law. Only two cases initiated in 1999 (for an annual total of 23), and one case initiated in 2000 (for an annual total of 22), came to trial, due to unacceptable delays in the criminal process caused by lack of resources, the large number of cases pending a hearing, and a lack of understanding of IPR issues by the criminal courts. In December 2000, BSA filed criminal complaints against three federal agencies, the Tourism Secretary (Secretaría de Turismo), the Radio-Broadcast Commission (Comité Federal de Radiodifusión), and the Pension and Retirement Control Office (Superintendencia de AFJP), for alleged use of illegal software. It is very important that the government set an example and take the lead against software piracy.

For the motion picture industry, support from law enforcement agencies for anti-piracy actions, although still far from ideal, has improved. The Gendarmeria Nacional (Police Force) has coordinated anti-piracy actions in the interior of the country with limited, but encouraging, results. Total pirate videos seized over the years has improved from 38,000 in 1997, to over 50,000 in 1998, over 194,000 in 1999, and over 230,000 in 2000. In 2000, MPA and the local anti-piracy association UAV initiated 257 investigations against video stores and labs, and conducted 255 raids in addition to 2,200 inspections. Thirteen reproduction laboratories with a total of 340 VCRs were also shut down last year.

The recording industry has waged its anti-piracy campaign in Argentina since the early 1990s. Until 1998, the level of piracy had been kept at a relatively controllable level, but with the advent of CD piracy, any semblance of control was lost. During 1999, the recording industry was overpowered by the piracy problem as well as (with few exceptions) the lack of commitment from Argentine enforcement authorities and judiciary to take swift action. The industry filed more than 95 criminal complaints in 1999. After much pressure, ten cases were taken in late December 1999. The only significant cases were two seizures, in February and August 1999, of counterfeit CDs bound for Brazil. Not one person was indicted for recording piracy in 1999. Cases got bogged down in the bureaucracy of the Argentine process. During 2000, the recording industry was able to overcome the slowness of the process by being selective, meaning that only the most significant cases were prosecuted in order to get the most from the few agencies and judges that consider cases important. All the other cases are filed but, generally, they have not made progress. Leaks and lack of commitment by the Argentine authorities continues to be a regular problem.

Courts Fail to Impose Deterrent Criminal Penalties.

Unfortunately, this improvement in field actions from law enforcement does not continue in the court system. What is most disturbing is the nondeterrent level of penalties imposed. The Argentine penal code permits a term of one month to six years in jail for commercial piracy. As a result, true enforcement and consequent deterrence continues to fall far short of required levels. The court system is hampered by inadequate resources, a large volume of cases, a lack of qualified experts, and a formal Code of Procedure, which adds to the length of cases. For example, Article 196 of the Criminal Procedural Code allows the courts to delegate the preliminary investigation of

cases to the prosecutors, who are required to seek court authorization each time they make important decisions in a case; this process leads to unacceptable delays.

In 2000, MPA and the local anti-piracy association, UAV, coordinated 255 raids, which resulted in 29 prosecutions. In addition, there were 33 judicial resolutions in 2000 (from cases begun previously), five exculpatory and 28 condemnatory. Two persons received effective jail terms of one year and eight persons received jail terms of four months, the remaining sentences were suspended. No fines were ordered because the IPR law does not specify any type of fine for this crime.

Although in 1998 the recording industry reported that there were some improvements with the judiciary, any improvements in this area stopped in 1999. The excuse given was that 1999 was an election year. In 1998, judgments were issued in 30 cases (compared to none in the prior three years). In 1999, the number of judgments was reduced to four. In 2000, no sentences were issued even though several cases were pending and awaiting sentencing.

The BSA reports that only one of the 22 private criminal cases it initiated in 2000 has yet come to trial. Furthermore, BSA's civil cases have not yet reached judgment, so it is premature to present any evaluation regarding the deterrent level of damages and remedies issued. Similarly, cases brought by the entertainment software industry are moving slowly in the courts. For example, a pirate reseller was sentenced to three months of imprisonment, and a fine of U.S.\$ 500, in the only BSA-related criminal case decided in 2000. Under Argentine criminal law, sentences of up to three years of imprisonment can be commuted, and the defendants never have to serve time. This is certainly not a deterrent penalty as provided by TRIPS.

Border Controls Remain Weak.

Argentine border controls continue to remain weak. Over the last two years, Argentine customs began to cooperate with the copyright industries. However, as discussed above, there is still a large amount of infringing material entering Argentina. Concerted attention by senior customs officials continues to be needed to make improvements in effective border controls.

Lengthy Delays in Civil and Criminal Copyright Infringement Cases.

The Argentine court system is hampered by inadequate resources, a large volume of cases, few qualified experts, and a formal code of procedure, which increases the delay in obtaining resolutions. For example, Article 196 of the Criminal Procedural Code allows the courts to delegate the preliminary investigation of case to the prosecutors, who are required to seek court authorization each time they make important decisions in a case; this process leads to unacceptable delays. This systematic backlog suggests that there is a great need for specialized intellectual property courts to expedite criminal copyright prosecutions. Unfortunately, there has been no movement toward that goal by the legislative or judicial branches.

On average, criminal cases take between three and four years to be decided by the district courts. The trial takes about three years, plus an additional year for the oral procedure. A judge receives an average of 1,500 criminal claims per week. This systematic backlog suggests that there is a great need for specialized intellectual property courts to expedite criminal copyright prosecutions, but there has been no legislative or judicial movement in that direction.

BSA civil cases can be assigned a summary procedure (procedimiento sumario) or a more extensive ordinary procedure (procedimiento ordinario). It takes at least three years to obtain a final decision in a summary procedure, and four years in an ordinary procedure. Civil cases take approximately three years for the district courts to reach a decision, and another year if these decisions are appealed. As the business software uses civil remedies, BSA reports that in 2000 there was a real lack of qualified software experts in the civil system, which leads to delays and incorrect assumptions in cases. By the end of 2000, the Argentine Supreme Court created a specialized software expert office, but no experts have been appointed so far.

The judicial resolution of criminal cases remains interminably slow. For example, four cases brought by Nintendo in 1993 have been pending in Argentina for over seven years, and there is no end in sight. In January 1997 through June 1997, Nintendo conducted a series of raids against retailers, seizing hundreds of counterfeit video game products. Again, the actions remain pending while the defendants are free to continue their activities. With regard to Nintendo's most recent activities in September 2000, the company is not optimistic that the defendants will finally be punished. Actions were initiated, products destroyed, but defendants basically were released. Arrest warrants were issued later, but the defendants cannot be located to stand trial or the prosecutors fail to pursue further.

COPYRIGHT LAW AND RELATED ISSUES

WIPO Treaties

Argentina was one of the first countries in this hemisphere to deposit its instruments of ratification to both the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty, accomplishing this deposit on November 19, 1999. IIPA applauds Argentina for taking this action which will raise the minimum standards of copyright protection, particularly with respect to network-based delivery of copyrighted materials, and foster the growth of electronic commerce.

Amendments to the 1933 Copyright Act

Amendments to the 1933 copyright act made in late 1998 clarified that computer software and databases are protected subject matter under the copyright law (Law No. 25.036 of November 11, 1998). As a result, criminal penalties are now available for the infringement of computer software and resolved the longstanding problems which developed after the *Roggio* case. In another positive development, Argentina also passed a provision permitting it to ratify the Paris (1971) text of the Berne Convention in the same legislative package which ratified the WIPO treaties. For decades, Argentina had been a member of the Brussels (1948) text of the Berne Convention. Argentina's membership to the Paris text became effective on February 19, 2000.

Even with the 1998 amendments, the current Argentine copyright law continues to contain deficiencies which need to be addressed in order to bring the law up to international standards. For example, the law lacks an express provision affording producers of sound recordings (who are currently treated as authors under the law) with the exclusive right to authorize or prohibit the rental of sound recordings. While these acts are not specifically enumerated in the law as illegal, some courts have held that they are illegal under a general provision in the copyright law; other

courts have held they are not. IIPA recommends that protection against parallel imports of copyrighted materials be provided in Argentina.

For the last two years, the Argentine government has been working, on and off, on a draft bill which would amend the Copyright Act to improve its scope of protection up to the international standards found in Berne, TRIPS and the two new WIPO “digital” treaties. A drafting commission, composed of leading copyright experts and government officials, was tasked with drafting such amendments in early 1998. Its recommendations were submitted to the Minister of Justice in the summer of 1998. Although reports indicate that those proposals would appear to remedy some of the existing problems in the 1933 act and implement some of the provisions in the WIPO treaties, the copyright industries are concerned that certain proposed provisions (such as work-for-hire, the scope of exclusive rights, presumptions, levels of criminal penalties, and the need to provide statutory damages) will require further amendment and/or clarification before final adoption. That draft legislation does not correct the many enforcement obstacles, including ineffective border measures, nondeterrent criminal penalties and lengthy delays in bringing and completing infringement actions. We understand some internal revisions were made to incorporate the provisions of 1998 computer software-related amendments and also to increase penalties. At last report, the proposal remains under study within the Ministry of Justice, which must review the draft with the National Copyright Office.

Because it was proposed during the prior government and was never submitted to Congress, reports indicate that this specific proposal has no legislative future. This draft legislation must be revised substantially to correct these deficiencies before it is forwarded for legislative consideration. It is important that whatever proposals are developed satisfy with the obligations found in the WIPO treaties.

The Performers’ Rights Bill

In 1999, the Association of Argentine Performers (AADI) introduced to the Commission of Culture of the Senate a Bill on Performers’ Rights (S-1206/99). This bill would partially amend the current Argentine copyright law by granting economic and moral rights to audiovisual performers and recognizing AADI as the sole and mandatory collection society for performers in Argentina. If passed in its current form, the bill would be detrimental to the distribution operations of U.S. audiovisual producers because:

- the bill would require authorization from AADI for the commercialization of any and all audiovisual products, and AADI would be granted a legal monopoly to collect new royalties on behalf of national and foreign performers.
- while the bill does grant several new economic rights to audiovisual performers, it excludes public communication as a right that should be transferred automatically to the producer, as is common international practice.
- the bill grants performers the right to obtain an “equitable additional remuneration” for the public communication of audiovisual works, which would be entirely managed by AADI. The concept of “equitable additional remuneration” as proposed in the bill is too vague, and interferes with the ability of both the performer and the producer to negotiate fair compensation, thus introducing unnecessary uncertainty in the contractual process and producers’ determination of the risks and financial rewards of production and distribution.

- the bill grants broad and unwaivable moral rights to audiovisual performers, giving them the authority to control and interfere with the normal commercialization of audiovisual works. These rights do not correspond with international audiovisual industry standards.
- the bill may be used as a model by other rightsholder groups, (e.g., audiovisual directors), thus constituting a negative precedent for similar legislation for other collecting societies in Argentina, in other countries in the region and elsewhere.

Software Legalization Efforts

Some progress on the business software industry's efforts to support legalization of software in government agencies is expected at the municipal level. Unfortunately, it appears that complete legalization of the federal government would appear not to be attainable in 2001. All BSA negotiations with the government regarding this matter failed in 2000, and last December, Software Legal filed criminal complaints against three federal agencies for presumed use of illegal software. It is unlikely that President De La Rúa will issue an executive decree that would require government legalization of current software programs on computers and improve procurement practices.

CUSTOMS VALUATION ISSUES

Customs Duties on Audiovisual Works, Sound Recordings and Software

Since 1995, Argentina has assessed customs duties on audiovisual works and sound recordings based on the value of the authors' rights (for example, the potential royalty generation of a film) and not solely on the value of the physical materials which are being imported (i.e., the film negative, the tape cassette). Argentina's valuation practices are at odds with the international, and favored, practice of valuing intangible intellectual property of this kind solely on the value of the underlying media.⁶ Nothing in this practice has changed in recent years.

Argentina and Brazil fixed a higher extra-Mercosur import duty of 23% on computer software (based on the value of the physical media). However, Argentina levies a total of 31% to 41% in various value-added taxes on the value of the physical media and an additional 3% to 6% prepaid income tax on the entire commercial value of the software, despite the change in valuation method for the imposition of the import duty. Despite the fact that Argentina imposes the standard Mercosur CET for software, the application of this 3% duty on the value of the software, combined with the 30% VAT, significantly increases the cost of importing software into Argentina, and poses a significant barrier to trade. High value-added taxes also burden the filmed entertainment industry in Argentina.

Customs duties should not be based on assessments of potential royalties. Customs duties should be based on specific fees, such as by weight or by foot, or be *ad valorem* based on the value of the physical carrier medium only. Furthermore, customs duties based on royalties or income

⁶ For example, if a 12.5% duty were levied on the value of the film negative, U.S. companies would pay approximately U.S.\$200 in duties per copy. If, however, this duty were levied on the potential revenue generated by the film, the duties could exceed \$800,000.

serve as a form of double taxation, since royalties are generally subject to withholding, income and/or remittance taxes. Such duties are a significant barrier to furthering the growth of the audiovisual market in Argentina. To this end, MPA and RIAA seek a modification of the Argentine Customs Valuation Code and/or an exemption, such as computer software, from the *ad valorem* duty. A Ministerial Resolution clarifying the matter was drafted more than a year ago and was favorably received by the governmental agencies intervening in the respective procedure. Notwithstanding, the Ministerial Resolution is still pending and the import barrier remains in place.

Since 1995, computer software has been exempt from the *ad valorem* tariff (Resolution 856/95) and is being assessed based on the value of the physical support only (diskettes and accompanying literature). With respect to nonsoftware media, the Argentine government has taken to no action to correct this trade barrier.

Retrospective Collection for Duties on Computer Software

This issue regarding the retrospective collection of software duties continues to be a problem in Argentina. More than 300 cases are still pending in the Customs Tribunal (dating from 1993-94) against Argentine distributors of computer programs in which customs officials are seeking a retrospective collection of duties. A significant quantity of computer programs imported prior to March 1995 were imported on a split-invoice basis, despite the official Argentine position taxing the entire invoiced value of the software. Only one case has been resolved; the Customs Tribunal held in favor of the Argentine government, and this case is still on appeal to the federal administrative courts. It is unclear when a resolution of this appeal could be expected. In 1998, there was a resolution in the Customs Service in favor of the Service's position and against importers. This was followed by other resolutions using the same criteria. The software industry appealed every resolution before the Tribunal Fiscal de la Nación. Almost all of the cases have been resolved against the software distributors. Most of the cases appealed to the Fiscal Tribunal have also been decided in favor of the Customs Service's position. Some of these cases are also on appeal.