

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2001 SPECIAL 301 REPORT

PARAGUAY

EXECUTIVE SUMMARY

The good news is that Paraguay deposited its instruments of ratification to both the WIPO treaties – the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty – in November 2000. The dismaying news is that piracy levels remain high and enforcement by Paraguayan authorities remains generally ineffective in deterring the torrent of piracy. Estimated trade losses due to piracy amounted to \$221.3 million in 2000.

Paraguay still serves as a major transshipment point for pirated optical media product from Asia. In addition, industry-led raids in 1999 revealed Paraguay to be an industrial-capacity producer of pirated product. Organized crime elements continue to control aspects of production and distribution of pirated product. As in prior years, almost all of the anti-piracy actions which have been taken continue to be the result of industry-led, not government-led, investigative efforts. There is support from the government, but only after the industry conducts the investigation and presents the case to the authorities.

During 2000, the copyright industries were extremely dismayed to learn that members of the Paraguayan government had supported the construction of optical media plants in Ciudad del Este. Both plants were producers of blank CD-R's, destined solely for the pirate markets. In the case of one facility, the plant was authorized by the Vice Minister of Industry. When a second plant appeared, the defendants claimed to have Government's authorization. Industry has not been able to verify any such authorization but the GOP, through the Ministry of Commerce, has not been helpful to the industry investigation of the second plant.

There are hopes that the IPR prosecutors can improve matters, but they have not yet been effective or successful. The border remains porous; the various mechanisms Paraguay promised to implement to improve border checks have proven ineffective, though there have been some interdictions resulting in seizures involving substantial amounts of infringing product., Although small progress was achieved in 2000, the judiciary remains a hurdle to effective enforcement.

IIPA supports continued monitoring of copyright developments in Paraguay under Section 306 of the U.S. Trade Act of 1974.

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 | Loss | Level |
| Sound Recordings/ Musical Compositions | 200.0 | 90% | 200.0 | 90% | 280.0 | 90% | 130.0 | 90% | 100.5 | 68% | 20.0 | 72% |
| Motion Pictures | 2.0 | 80% | 2.0 | 80% | 2.0 | 80% | 2.0 | 85% | 2.0 | 85% | 2.0 | 85% |
| Business Software Applications ¹ | 6.6 | 82% | 6.7 | 83% | 5.2 | 85% | 4.1 | 87% | 4.6 | 89% | 14.2 | 95% |
| Entertainment Software ² | 9.7 | 99% | 8.1 | 99% | 8.4 | 99% | 8.3 | 99% | 7.5 | 97% | 6.4 | 95% |
| Books | 3.0 | NA | 3.0 | NA | 2.5 | NA | 2.5 | NA | 2.5 | NA | 2.0 | NA |
| TOTALS | 221.3 | | 219.8 | | 298.1 | | 146.9 | | 117.1 | | 44.6 | |

BILATERAL ENGAGEMENT ON IPR

Overview of 1998 Special 301 Investigation

Three years ago, USTR identified Paraguay as Priority Foreign Country under Section 301 of the U.S. trade law in January 1998, beginning a nine-month investigation in February 1998. Right before the statutory deadline, on November 17, 1998, USTR announced its determination that certain acts, policies and practices of the Government of Paraguay regarding the protection and enforcement of intellectual property rights were “unreasonable and discriminatory and constitute a burden or restriction on United States commerce.” The investigation was concluded when Paraguay and the U.S. signed a “Memorandum of Understanding and an Enforcement Action Plan” (MOU) in which the Paraguayan government committed to take a number of near-term and longer term actions to address these inadequate practices. USTR terminated both the Section 301 investigation as well as its review of Paraguay’s IPR practices under the Generalized System of Preference program, which had commenced in October 1996 as part of the 1995 GSP Annual Review. Presently, USTR is monitoring Paraguay’s implementation of this MOU under Section 306 of the 1974 Trade Act.³

Summary of the 1998 MOU/Enforcement Action Plan

The November 1999 Memorandum of Understanding and Enforcement Action Plan includes both near-term and long-term commitments made by the Paraguayan government. The MOU focuses heavily on concrete actions related to enforcement and commitments to make

¹ BSA estimates for 2000 are preliminary. In IIPA’s February 2000 Special 301 submission, BSA’s 1999 loss and level figures of \$6.2 million and 82%, respectively, were also reported as preliminary. These numbers were finalized in mid-2000, and are reflected above.

² IDSA estimates for 2000 are preliminary.

³ In 1999, \$16.2 million in Paraguayan imports to the United States benefited from the GSP program, accounting for 34.5% of its total imports to the U.S. For the first 11 months of 2000, \$18.2 million of Paraguayan goods entered the U.S. under the duty-free GSP program.

maximum efforts to pass certain legislation and improve training of enforcement officials. For example, a "Special Enforcement Period" between November 17, 1998 and March 15, 1999 was established. A regular consultation mechanism through the year 2000 was scheduled, and the agreement will remain in effect until January 1, 2003. A brief overview is provided below to assist in placing 1999 developments in context.

Under the 1998 MOU, the Special Enforcement Period could be extended beyond March 15, 1999, if there was no significant reduction in piracy and counterfeiting. Paraguay agreed to take raids, seizures, investigations, prosecutions, border actions, and make timely disposition of cases. Paraguayan officials were to investigate all reports of judicial corruption. And the government promised to pursue persons and entities who fail to pay taxes. In addition, the MOU includes components related to education and training for judges, police, prosecutors and appropriate government officials, as well as cooperation and technical assistance between both governments

The MOU also addresses legislative reform needed to enhance criminal penalties for copyright infringement. The Supreme Court was to present to the Congress by November 30, 1998, amendments to the Criminal Code and the Criminal Procedure Code which would make copyright piracy a "public" offense (thus allowing the government to commence copyright cases on its own initiative). The Paraguayan government was to make maximum efforts to achieve enactment of this legislation by December 20, 1998 (the last day of the legislative session). It would also make maximum efforts to make trademark counterfeiting a public offense. If criminal penalties against piracy and counterfeiting were deemed insufficient to deter piracy, then maximum efforts were to be taken to achieve such deterrence, by further legislative reform. The Paraguayan government also agreed to take steps to ensure that civil *ex parte* remedies would be available.

The Paraguayan government also promised to issue a software decree by December 31, 1998, to require the use of legal software in all federal agencies. Rules and procedures on the use and acquisition of legitimate software were to be issued, and an inventory of existing software was to be prepared. The government was to ensure that all ministries eliminated all pirate copies of software by December 31, 1999. This executive decree (Decreto No. 1524) was issued on December 31, and entered into effect immediately. In addition, the government issued another decree on January 27, 1999 which apparently will place import controls on blank media (e.g., blank compact discs, audiotapes and videotapes).

The "Enforcement Action Plan" separately provides more detailed commitments and actions promised by the Paraguayan government which affect a wide range of activities, including conducting investigations, seizing and destroying infringing products, filing and bringing criminal prosecutions as permitted under law, revising customs procedures and increasing inspections, taking judicial efforts to resolve swiftly IPR cases, and improving public awareness.

One of the copyright industries' most frustrating issues was that it took many months for the MOU obligations to circulate throughout the Paraguayan agencies. A flurry of resolutions and plans were prepared in advance of the bilateral IPR consultations held in September 1999. One of the key results was that the Special Enforcement Period was extended to mid-February 2000, in recognition of the Paraguayan government's desire to achieve results under its new enforcement initiatives.

The copyright industries represented locally in Paraguay will continue to coordinate with Paraguayan enforcement officials, and the private sector is closely watching what actions are and are not being taken.

COPYRIGHT PIRACY IN PARAGUAY

Optical Media Piracy and Transshipment Remain Priority Problems.

Paraguay continued to serve as a destination for much of the pirated optical media product being produced in southeast Asia (e.g., Macau, Hong Kong, Singapore, Thailand, and Malaysia). Paraguay's dominant role in the region as a transshipper of pirate product to its neighbors continued last year. Ciudad del Este businesses continue to brazenly offer and sell obvious counterfeit optical media products from the gaming, music, software and video industries.

Over the last year, the pirates shifted their strategy and began importing blank recordable CD (CD-Rs) into Paraguay. Some 34 million units of CD-Rs were imported during 2000. These 34 million CD-Rs could cover 35% of the current legitimate CD market in Brazil. Pirates also began installing manufacturing plants to make blank CD-Rs in Paraguay. These plants serve both Paraguayan and Brazilian illegal CD-R replicators.

Paraguay's role as a substantial local manufacturer of pirated optical media was revealed in 1999. The recording industry found, with great surprise, that clandestine CD manufacturing companies had made their way into Paraguay via Brazil. These plants had the capacity to produce 40 million units per year (in comparison, the legal music CD market in Brazil was 85 million units for 1999). This discovery made clear the inadequacy of both Paraguayan and Brazilian customs. Moreover, when the pirates in Paraguay needed raw materials to operate these clandestine plants, these materials crossed the Brazilian-Paraguayan border very easily. These two CD plants were closed down, but now there are reports that there may be two more already in operation.

The Ministry of Industry and Commerce (MIC) authorized the two CD-R manufacturing plants that were founded under the Law de Maquila and the Investment Law. However, the government was obliged to inform – under several anti-piracy Memoranda of Understanding and agreements that have been signed – the industry about the existence of such plants. This did not happen.

Organized Crime Infiltrates and Controls Piracy in Paraguay.

Organized criminal groups are involved in the production and distribution of pirated and counterfeit product in Paraguay. Paraguay is key in the international distribution of optical media product, emanating primarily from production facilities in Southeast Asia. In Paraguay, organized crime elements from Taiwan, the Far East and the Middle East control much of the distribution in Ciudad del Este and in other cities. Much of the huge surpluses in the production capacity for the manufacture of audio compact discs, CD-ROMs, videogame cartridges and other optical media products in Southeast Asia is being devoted to pirate production and export, especially to Paraguay, for transshipment throughout Latin America. Organized groups from Korea, Lebanon, Libya, Brazil, Bolivia and Argentina are involved. Of course, Paraguayan groups also take part in these illegal activities.

The influence of organized crime pervades not only street distribution, but also affects the judiciary. In fact, both the recording industry and the business software industry, in cooperation with Paraguayan government officials, filed a request to the Supreme Court to place sanctions on a judge who summarily ordered the removal of seized goods that were under military guard at the Guarani Airport outside Ciudad del Este. In another case, the same judge seized 500,000 CDs from the jurisdiction of another judge, and then he tried to appoint the alleged pirate as the depositary of the merchandise. The Supreme Court of Justice did not condemn this judge, due to a technicality, but did privately reprimand him.

Piracy Remains Widespread in Paraguay.

The estimated level of recording and music piracy within Paraguay remains at 90%. Estimated trade losses due to recording and music piracy in Paraguay in 2000 are \$200 million, for both local piracy and estimated losses caused by transshipment. Transshipment and local manufacturing for export of CDs has the effect of devastating the legitimate market for sound recordings and music in other countries. Increasing amounts of pirate music CDs from Paraguay – up to 90% of all transshipments – are aimed for Brazil. Thousands of pirate CDs and CD-Rs are found in the streets and shopping centers in Ciudad del Este, which continues to be the major production and trade center for the export of pirated product going to Brazil and Argentina. In addition to CD piracy, audiocassette piracy continues to be rampant in Paraguay. The domestic Paraguayan market has basically been lost to the pirates, and the industry does not have any more direct representation in Paraguay. The piracy that affects Paraguay's national legal market is dwarfed by the piracy that involves production for export, or transshipment through Paraguay, of pirate product into Brazil, Argentina, and other countries.

The piracy situation for entertainment software has not changed much in the last year. The manufacture, sale, import and export of pirated videogames and cartridges in Paraguay is widespread, with the estimated level of piracy remaining at 99%. Estimated losses due to piracy of entertainment software (including videogame CD-ROMs and cartridges, personal computer CD-ROMs and multimedia entertainment products) in Paraguay increased to \$9.7 million in 2000. This statistic does not include estimated losses due to the transshipment of pirate and counterfeit entertainment software through Paraguay; if it did, this number would be much higher.

Both CD-based piracy of videogames (which includes console CDs for PlayStation®) and cartridge-based piracy remain major problems. In the last year, Paraguayan authorities, with industry cooperation, conducted more raids and seized much pirate and counterfeit product. While such seizures are welcome, the Interactive Digital Software Association (IDSA) has had difficulties in obtaining samples from the seizures as evidence to use in criminal cases. Paraguayan authorities are so focused on destroying the illicit copies in public destruction ceremonies they forget that they are also destroying key pieces of evidence. Paraguayan pirates import counterfeit videogame components and cartridges from the People's Republic of China, Taiwan, Hong Kong and other countries. These components are assembled in Paraguay and then exported to other countries in the region. Official Paraguayan import records reveal large-scale importation of video game products and components into Paraguay in huge quantities, over relatively short time periods, by importers with no relationship to Nintendo®, Playstation, or other authentic game manufacturers.

Paraguayan assemblers of counterfeit video game products (i.e., counterfeit Nintendo cartridges) must import sophisticated counterfeit video game chips⁴ from Taiwan. The video game chips are assembled, along with other components, into completed counterfeit Nintendo video game products. The industry has had some success in working with Paraguay customs to seize shipments and destroy infringing product. However, the agreement between Taiwan and Paraguay to exchange information on suspected products is not being honored by the Taiwan government.

The problems for the business software industry are twofold. First, Ciudad del Este continues to be a major source of piracy for business software, primarily for distribution to other Latin American markets such as Brazil and Argentina. Despite repeated raids in 1999 and 2000, Ciudad del Este resellers continue to advertise brazenly and sell pirated software. In addition, the industry has severe problems with end-user piracy. As with channel piracy, the government of Paraguay did not take a leadership role in combating this type of piracy or in raising the public's awareness of this issue. Estimated trade losses due to business software piracy in Paraguay are \$6.6 million, with an 82 % piracy level in 2000.

Copyright piracy has nearly destroyed the local market for audiovisual product. Within the country, video piracy continues to be the most significant piracy problem for the audiovisual industry. The video market suffers from an estimated 80% rate of piracy. The majority of these illegal videos are back-to-back copying for individual use, but counterfeited labels, packaging and security stickers often appear in video stores, indicating the growth of a more organized black-market production system.

Paraguay is also a significant threat to other Latin American audiovisual markets, however, because it is the center for exporting pirate product. The increasing organization of illegal reproduction, distribution and transshipment of pirate videos for export as contraband to neighboring markets such as Brazil and Argentina is a serious concern. In addition, Paraguay has long been a transshipment point for optical disc piracy (music, software and videogames), so as the market for optical discs grows in Latin America, especially in Brazil, Paraguay may inevitably be the origin of much pirate VCD and DVD. The overwhelming majority of illegal VHS production for export takes place in Ciudad del Este, along the border with Brazil and Argentina. Blank videocassettes are imported from Asia through the Brazilian ports of Santos and Paranagua to Ciudad del Este, where they are used for reproduction of products for the Brazilian market, subtitled or dubbed in Portuguese. Recent investigations indicate an increase in VCD export in this area. Annual losses to the U.S. motion picture industry due to audiovisual piracy in Paraguay are estimated at \$2 million in 2000.

AAP reports that commercial piracy (full reprints) are available for trade book translations as well as English Language teaching materials used in schools and colleges. There are increasing amounts of photocopied materials being used in place of legitimate books in institutions of high learning. Trade losses due to book piracy were estimated at \$3.0 million for 2000.

⁴ "Counterfeit videogame chips" refers to (a) Read Only Memory (ROM) semiconductor chips which contain unauthorized copies of Nintendo videogame software, (b) counterfeit custom semiconductor chips containing Nintendo's copyrighted security code, and (c) illegal copies of Nintendo's custom microchip and picture processors.

COPYRIGHT ENFORCEMENT IN PARAGUAY

The key to effective enforcement in Paraguay is straightforward and has been clearly articulated and agreed to in the not-so-recent 1998 MOU: conducting raids against major distributors and facilities, seizing all infringing products and equipment, making arrests, and actually conducting criminal prosecutions. Administrative authorities in the various ministries should seize infringing product from streets and public venues. For the business software industry, raids against end-users who illegally copy and use software are key. Customs authorities must implement an effective IPR border control system by taking actions to stop both the import and export of pirated and counterfeit products and contraband. Prosecutors must press the cases, and judges must issue search orders and deterrent sentences. Effective judicial procedures must be adopted to expedite copyright cases through the legal system, and deterrent penalties must be imposed on defendants found guilty of infringing acts.

Police are Helpful but only after Industry Conducts the Investigations.

Part of this MOU included the creation of a special anti-piracy police unit, the Grupo Anti-Pirateria (GAP) that reports to the Minister of Interior. On September 26, 1999, the Minister of Industry and Commerce (MOIC) created an interagency anti-piracy group called "GAP" (*Grupo Anti-Pirateria*, or more formally, *El Consejo Nacional para la Protección de los Derechos de Propiedad Intelectual*). Decree No. 14870 provides that the selected federal ministries and the municipalities of Asunción, Ciudad del Este and Encarnación will work together to implement the national anti-piracy campaign and coordinate their activities toward accomplishing this objective. The GAP is comprised of 15 active intelligence officers who will perform investigations. The political and economic situation of Paraguay interrupted the formation of the GAP, which was formalized on paper but not in practice, reportedly until mid-2001. This group was to perform active investigations, especially post-raid, with access to intelligence files of other police agencies. It accomplished nothing in 2000. The government stated a requirement for private sector funding as a prerequisite for this agency. Private sector confidence has not reached the point where such a funding decision could be accepted. Effective investigation and enforcement has not been fully accepted by the private sector.

By Decree No. 2146 of March 9, 1999, the MOIC established an Inter-institutional Brigade, a specialized unit, to fight copyright piracy and trademark counterfeiting. This brigade was somehow substituted by the GAP, which is police-oriented. The Brigade was rife with corruption and the elements that were working on it are now dedicated to other matters. The recording industry conducted four actions with the Brigade, but then decided not to continue working with it because the Brigade's purpose was more political than operational.

The legitimate recording industry in Paraguay (represented by APDIF Paraguay) continues to be very active in conducting investigations and filing cases mainly against pirates operating in Ciudad del Este and Encarnación. The recording industry has continued to conduct raids based on its own investigations. In 2000, it conducted 77 raids which resulted in the seizure of over 2,960,000 units of infringing products (mostly music CDs) and the closure of 40 manufacturing facilities, most of the small-cottage CD-R replication facilities.⁵ 116 cases have commenced.

⁵ These 2000 statistics compare to 1999's results of 38 raids with 3.2 million CDs seized and the closure of 8 big manufacturing facilities.

The Interactive Digital Software Association (IDSA) initiated an anti-piracy program in Paraguay in mid-1999, resulting in 22 raids that year. Eleven cases are in process. In 2000, 19 raids involving game software were conducted, resulting in the seizure of 128,000 pieces of infringing product. Six criminal cases have been commenced and remain pending. As a result of IDSA's local anti-piracy training efforts and investigations with APDIF Paraguay, a group of police and judicial officers led a successful raid against what had been the largest clandestine CD manufacturing plant in Latin America. Two CD lines were hidden in a luxurious residence owned by the purported head of the Chinese mafia, and these lines were manufacturing pirate PlayStation videogames. In September 1999, Nintendo obtained a judicial seizure by Customs of 5,000 counterfeit Nintendo videogame chips in Ciudad del Este. Destruction of the chips was planned, as was a criminal lawsuit against the importer. In December 1999, raids were also conducted at the Galeria Page and Galeria Esperanza in Ciudad del Este, which resulted in the seizure of some 98,000 PlayStation games, memory cards, game controllers and game enhancers, valued at approximately \$325,000. In June 2000, Nintendo also had a big seizure in Ciudad del Este which resulted in destruction of the infringing products (see Customs discussion, below). The discouraging news is that cases filed more than four years ago are still pending.

Regarding business software enforcement, the BSA formally launched its anti-piracy campaign in Asunción in August 1999.⁶ The launch was conducted at a judicial/prosecutorial seminar cosponsored by the judicial college and by the U.S. Embassy. Shortly thereafter, the BSA promoted two successful raids against pirate software resellers in Ciudad del Este. One of the store's owners was arrested and spent several days in jail. Seized during the raids were approximately 1,700 pirated CD-ROMs and a CD burner. Since then, the BSA has also intervened in several actions initiated by IFPI in that city. One BSA member company is a co-complainant in the August/September 1998 raids which resulted in the seizures of hundreds of thousands of pirate audio CD and CD-ROM product in Paraguay.

In 2000, the BSA conducted eight criminal channel (retail) raids. Seven of these channel raids were concentrated in two shopping centers in Ciudad del Este, and yielded a total of 19,000 pirated CDs. Some of these establishments were repeat offenders. While previous channel raids in these shopping centers had concentrated on the establishments that sold the illegal software, this latest batch of actions also targeted the storage deposits on the top floor of one of these centers. Most of the CDs seized were found behind secret compartments in these storage rooms. Information gathered at these raids pointed to the existence of manufacturing facilities in neighboring Foz de Iguazu, Brazil. These cases are moving very slowly.

Hope for More Prosecutions Remains Dim.

There are three specialized IPR prosecutors in Paraguay, all in Asunción. The prosecutors now have the ability to pursue copyright infringement cases as "public" actions, thanks to Law No. 1.44, which entered into effect on July 9, 1999. The prosecutors began working hard on IPR cases, but the National Prosecutor then gave orders to them to devote all their time to other cases.

⁶ Because computer programs were not protected under Paraguay's old copyright law, it was impossible to bring copyright infringement actions. Since the copyright law passed in October 1998, BSA stepped up its enforcement activities in 1999.

BSA Conducted Its First Civil End User Action In 2000.

On the positive news side of the issue, a September 4, 2000 raid against an Asunción-area reseller resulted in the first-ever conviction for software piracy under the new, oral trial system. The accused in that case, Mr. Milton Camacho, was sentenced to a suspended sentence of two years of incarceration, payment of costs, compensation to the copyright holders for the damages caused, and the publication of newspaper ads in two general circulation newspapers. While certainly a step in the right direction, the fact that the accused received a suspended sentence detracts from the deterrent effect that this news would otherwise have had. The BSA's first foray into end user actions occurred in 1999 in a case against an automobile distributorship. Due to an information leak sourced at the courthouse, the raid was aborted. In February 2000, the BSA carried out its second end-user action of the campaign against a well known, and well connected, Asunción banking institution. Because of the number of personal computers to be inspected, the raid had to be continued a second day. However, after the bank's legal counsel had an *ex parte* meeting with the case judge on the morning of the second day, that judge recused himself for unspecified reasons and halted the inspection. Quick action by the BSA's local counsel achieved the immediate transfer of the case to another judge who authorized the continuation of the raid. That case is still pending before the court. In total, the BSA brought six end-user civil raids during 2000.

Paraguayan Border Measures Are Not Effective.

Because many piracy problems in Paraguay are centered in the border cities, the government should improve its Customs procedures to combat cross-border piracy and corruption of its agents. Pirates are adopting new methods to avoid the border, such as importing smaller shipments. The 200-kilometer border, which has no checkpoints, is also used by smugglers to avoid detection. As presently structured, the Customs system is an ineffective enforcement authority which cannot conduct searches without a court order.

Paraguayan Customs claims it has met the MOU requirement that it maintain its "red channel" system at Asunción Airport and extend this system to Ciudad del Este Airport and all other main Customs checkpoints. However, industries report that this system has not been properly implemented. Customs should maintain a list of products which are commonly infringed, and are supposed to work with rightholders to add suspect products to this list. All shipments of products on this list are to be inspected to determine whether or not they infringe the copyright or trademark laws. However, the fact that the two huge CD manufacturing plants, 34 million CD-Rs and tons of polycarbonate (the raw material used to produce CDs) entered Paraguay strongly suggests the lack of effectiveness of the "red channel."

In the experience of the entertainment software industry, the border authorities have only conducted a few random searches at the Paraguay/Brazil border. However, there is some good news to report. One of the largest single seizures of counterfeit videogame chips in Paraguay took place in Ciudad del Este on June 1, 2000. Private sector counsel working with Customs officials stopped a shipment of almost 215,000 Nintendo® game chips plus related materials for game assembly entering Paraguay. The value of this seizure was placed at \$2.8 million. The shipment originated in China, passed through Frankfurt, Germany, Sao Paulo, Brazil, and Foz de Iguacu, Brazil, before seizure in Ciudad del Este. These materials were destroyed on July 18. Also in June, Customs agents seized more than 5,000 disassembled counterfeit Nintendo videogame cartridges at the Silvio Pettrossi airport customs house in Luque, Paraguay. This shipment also originated in China.

Judges Slowly Start To Issue Sentences In Copyright Piracy Cases.

Over the last year, there has been some small improvement in the judicial system. In 2000, the courts, for the first time, issued nine judgments against pirates of sound recordings. Three decisions were issued. Sentences included imprisonment of 13 months and fines up to \$36,900 were imposed. The recording industry initiated 77 actions, and 39 remain pending.

A September 4, 2000 raid against an Asunción-area reseller resulted in the first-ever conviction for software piracy under the new, oral trial system. The accused in that case, Mr. Milton Camacho, was sentenced to a suspended sentence of two years of incarceration, payment of costs, compensation to the copyright holders for the damages caused, and the publication of newspaper ads in two general circulation newspapers. While certainly a step in the right direction, the fact that the accused received a suspended sentence detracts from the deterrent effect that this news would otherwise have had.

COPYRIGHT LAW IN PARAGUAY

WIPO Treaties

The one major legislative success in the past year has been Paraguay's ratification and deposit of its instruments of ratification to both the WIPO treaties – the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty. These instruments were deposited with WIPO on November 29, 2000. IIPA applauds Paraguay 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.

Copyright Law of 1998

For much of the 1990s, IIPA's primary legislative goal was the passage of a new copyright law to replace the old and inadequate 1951 copyright law. The new copyright law entered into effect on October 21, 1998 (Law No. 1.328/98). This 1998 law represents a much-needed improvement over the old 1951 copyright law. For the first time, computer programs are protected as literary works. Compilations of facts and databases are now protected subject matter. Audiovisual works also are protected, regardless of the medium in which they are fixed. The scope of exclusive rights was expanded, and includes distribution (including rental), a broad right of communication to the public (for authors only), and importation. After some delay, implementing regulations for this law were signed by the President on September 13, 1999 (Decree No. 5.159).

This report would be incomplete, if it did not continue to summarize the disappointments contained in the 1998 Copyright Law of Paraguay, despite concerted efforts by IIPA members and companies and the U.S. government to achieve a different legislative result. A brief summary of the major deficiencies in the 1998 copyright law follows:

- The final law contains a shorter term of two to three years' imprisonment (with levels of fines remaining unchanged). Earlier drafts of the bill had contained significant levels of criminal penalties, including a term of two to five years of imprisonment.

- The law does not include an express provision to make copyright infringement a “public action,” in which police and prosecutors can take action on their own initiative (as is found in the new trademark law). Amendments to the Paraguayan criminal code to make copyright infringement a public crime were needed to correct this gaping deficiency in the enforcement regime (this problem was corrected by legislation in mid-1999; see below).
- Neither the public communication right (for authors) nor the digital communication right (for producers) track the WIPO treaties’ concept of “making available.” In a digital age, it is critical that producers of sound recordings are provided with the exclusive right to control digital services, including on-demand or subscription services, consistent with WIPO treaties.
- A hierarchy established between authors and neighboring rights is contrary to international norms (including the WIPO treaties) and should have been deleted.
- The TRIPS element on the machine-readability of databases is missing from the final law.
- A Berne/TRIPS-incompatible provision permitting third parties to edit or translate works 20 years after the author’s death is still in the law.
- The general term of protection is life of the author plus 70 years, a term consistent with international trends. However, duration issues for other works varied wildly during the bill’s debate. Terms of protection, which had been proposed to be as high as 90 years, were lowered. Currently, the law affords a term of protection for producers of sound recordings of 50 years after first publication; this is consistent with TRIPS, but disparate from other copyrighted works under this law. The term of protection for collective works, computer programs, and audiovisual works is now 60 years after publication in the law. In recognition of the growing global marketplace and the need for harmonization of duration in order to ensure smooth functioning of the marketplace, industry had argued for longer terms for these works, such as 95 years from first publication.
- Onerous provisions which interfere with music publishers’ ability to negotiate freely over the allocation of rights and other issues related to the exploitation of a work must be deleted. One provision allows that the author/composer has the “irrevocable right to terminate” the agreement if the publisher fails to publish or print the work. This statutory requirement interferes with the right to contract and should have been deleted. Another provision provides a statutory payment formula for the author’s assigning profits and remuneration for certain uses of the work to the publisher, which interferes with the right to contract as well, and should have been removed.
- Administrative authority for the National Copyright Office to carry out surprise inspections and seizures was removed, and there does not appear to be any guidance on which a government entity actually does have such authority. This lack of investigative authority by Paraguayan government officials has been a major enforcement problem over the years.

Criminal Code Revisions

Paraguay approved reform of its criminal code, and the revised law entered into effect in October 1998. This reform, however, has caused more problems. First, Article 184 of the Criminal Code identifies cases involving acts infringing the author’s right. But it does not contain any

provisions regarding the infringement of neighboring rights, the rights which protect producers of sound recordings (*fonogramas*). The Criminal Code therefore does not protect against acts of piracy involving sound recordings. This new law in fact abrogated the penalties provided under an 1985 law (Law No. 1.174 of 1985) which established relatively strong criminal prohibitions for piracy of sound recordings, and also clearly provided that the State could proceed *ex officio* against infringers. The recording industry has been using the copyright law as its basis for enforcement efforts. The problem there is that the sanction is an alternative one: fines or imprisonment.

Second, the new criminal code provides a penalty of up to three years or a fine. Unfortunately, this allows judges to impose either a fine or a prison sentence. This kind of choice will likely limit the deterrent effect of the law because convicted defendants could buy out, or convert, their jail time into fines.

Third, the criminal code continued to state that copyright infringement cases are “private” actions, and can only be brought by complaint of the right holder; the State cannot take action *ex officio*. Under the MOU, the Supreme Court was to present to the Congress by November 30, 1998, amendments to the Criminal Code and the Criminal Procedures Code which will make copyright piracy a “public” offense. The Paraguayan government was to make maximum efforts to achieve enactment of this legislation by December 20, 1998, but sadly, that deadline was not met. Six months passed before there was good news to report on this issue. In June 1999, the President signed into law an amendment to the criminal code which made copyright crimes public actions, and therefore prosecutors can pursue these cases on their own initiative. This law (Law No. 1.44 of June 10, 1999) was signed on June 25, and entered into effect on July 9, 1999. This bill deleted language in the Criminal Procedures Act of 1998, which required that private parties had to initiate and bring prosecutions.

Government Software Management

In compliance with the MOU, the Executive Branch issued Decree No. 1524 of December 31, 1998, which includes provisions regarding the use and acquisition of legitimate software, and the taking of regular software inventories. This decree provides that all software in use by Executive Branch institutions must be legalized by December 31, 1999. A software inventory of programs on all executive agencies’ computers is to be completed annually in March. Importantly, all unauthorized programs must be legalized or removed from government computers by December 31, 1999. The Paraguayan government missed this end-of-the-year deadline and also failed to do an inventory on installed software.

In August 1998, the City of Asunción and the Business Software Alliance signed a software legalization agreement, in which the city committed to completely legalize its installed base within two years, and to start to purchase legitimate product in 1998. In August 2000, the Ministry of Industry and Commerce executed a legalization agreement that it had independently negotiated with a BSA member company. The agreement provides for the legalization of that member company’s software in use at the Ministry and at each of the four administrative agencies that report the Ministry.