

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2001 SPECIAL 301 REPORT

VENEZUELA

EXECUTIVE SUMMARY

Over the years, legislative and administrative changes taken by Venezuelan governments to address piracy issues have presented a mix of advances and obstacles. Unfortunately, Venezuela's efforts to fight copyright piracy have declined in the last two years. Budget reductions and changes in staff responsibility adversely affecting Venezuela's anti-piracy brigade COMANPI, once the model for the region, have undermined its ability to take action. The National Guard (Guardia Nacional) has attempted to fill this gap by conducting anti-piracy actions in conjunction with industry. An overburdened special intellectual property rights prosecutor and consistent and pervasive problems with the judiciary, particularly in criminal cases, continue to result in lengthy delays and the failure to impose penalties and civil remedies at levels sufficient to deter piracy. Border measures need to be improved to intercept infringing product. Longtime problems with customs duties on computer software remain unresolved. Piracy losses remain high. Sadly, economic instability in Venezuela also appears to be adding incentives to steal copyrighted materials. IIPA recommends that Venezuela remain on the Special 301 Watch List.¹

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	25.0	65%	30.0	65%	35.0	65%	40.0	70%	40.0	85%	30.0	65%
Sound Recordings / Musical Compositions	30.0	62%	30.0	62%	15.0	35%	15.0	35%	5.0	22%	5.0	25%
Business Software Applications ²	45.5	58%	46.4	60%	55.6	62%	44.2	64%	42.4	68%	42.9	72%
Entertainment Software ³	47.0	78%	50.9	70%	53.8	73%	54.3	74%	54.0	70%	50.9	68%
Books	22.0	NA	21.0	NA	20.0	NA	20.0	NA	23.0	NA	23.0	NA
TOTALS	169.5		178.3		179.4		174.5		164.4		151.8	

¹ For more information on the history of Venezuela under Special 301 review, see appendices D and E of this submission. Venezuela is also a beneficiary under the U.S. Generalized System of Preferences (GSP) trade program, which includes a criterion requiring beneficiary countries to afford adequate and effective intellectual property rights protection to U.S. copyright owners. In 1999, \$533.5 million of Venezuelan imports to the United States benefited from the GSP program, accounting for 5.1% of its total imports to the U.S. For the first 11 months of 2000, \$684.8 million of Venezuelan goods entered the U.S. under the duty-free GSP code, representing a 43.8% increase over the same time period last year.

² BSA estimates for 2000 are preliminary. In IIPA's February 2000 Special 301 submission, BSA's 1999 loss and level figures of \$45.7 million and 57%, respectively, were also reported as preliminary. These numbers were finalized in mid-2000, and are reflected above.

³ IDSA estimates for 2000 are preliminary.

COPYRIGHT PIRACY IN VENEZUELA

Piracy in Venezuela has remained at high levels for all the copyright industries. Estimated losses have been over \$150 million per year, for each of the last five years. Continuing economic instability in this country may be adding incentives to pirate copyrighted materials.

For the motion picture industry, the most significant audiovisual piracy problem in Venezuela during 1999 continued to be cable and television piracy because Venezuela is within the footprint of U.S. satellite signals. Pirate cable systems with large numbers of subscribers continue to operate in cities where no legal cable company yet exists. These pirate enterprises provide programming to otherwise legitimate subscribers. Private resorts, condominiums, hotels and other commercial and domestic establishments consistently retransmit unauthorized programming, with seasonal increases during special events or holidays. Subscription television piracy in Venezuela has decreased (now estimated at under 40%) due to raids and investigations carried out by the MPA Venezuela program in 2000.

Home video piracy is pervasive in Venezuela, supplied by large – scale laboratories with national distribution systems. Many of the estimated 400 “legal” retail video stores in Venezuela perform small-scale back-to-back copying of legal videos purchased. The overall level of video piracy (including video and other products) remains at 65%. Broadcast television piracy continues to affect the legitimate market. Regional television stations often broadcast unauthorized U.S. motion picture product before their video release, seriously impacting the viability of the theatrical and home video markets in Venezuela. Annual losses to the U.S. motion picture industry due to audiovisual piracy in Venezuela are estimated to be \$25 million in 2000. This is a slight drop, due in part to reductions in signal theft piracy as well as to some diminished expectations in the home video market due to Venezuela’s economic situation.

With respect to business software, pirate resellers continue to advertise openly in the major daily newspapers, and CD-ROM piracy has appeared in the market. Advertisements for pirate product through the Internet have been reported. Business software piracy can take many forms. Pirates advertise in the press, and sell compilation CDs for prices between \$7 and \$20. Pirates also act as assemblers, building computers and selling them pre-installed illegal software. Corporations use software programs without corresponding licenses. Universities and other educational institutions have high piracy levels, even among those which may have software licensing agreements with software companies. Government ministries also use unauthorized copies of business software. During 2000, the BSA conducted an aggressive enforcement campaign and was successful in deterring street vendors (*buhoneros*) from selling counterfeit and pirate compilation of business software CDs on principal streets and pedestrian ways. The estimated 2000 trade losses due to piracy of business applications software in Venezuela are \$45.5 million, with a piracy level of 58%.

The piracy situation for the book publishing industry in Venezuela remains as dismal as in prior years. There has been no improvement in reducing book piracy in Venezuela. Commercial piracy of college texts and English as a Second Language (ESL) materials and illegal photocopying are the major problems. Some professional books are now being pirated. No limits are placed on photocopying in and around universities. Estimated trade losses due to book piracy in Venezuela rose to \$22 million in 2000.

Like other Latin countries, the Venezuelan pirate sound recording market is shifting formats from cassette to CD piracy. Pirate CDs from neighboring countries easily enter Venezuela, with little to no action by the customs authorities to stop them. Basically, the problem of piracy has increased as a result of the populist approach that the Venezuelan government has taken: no government institution wants to go against street vendors. Last year, piracy in the CD-R format (recordable CDs) rose. The level of audio piracy in Venezuela remains at high levels, with an estimated 62% piracy level and losses of \$30 million in 2000.

Most of the pirate entertainment software in Venezuela is imported, notably from Taiwan, Hong Kong and China, usually transshipped through Paraguay. Clearly, improved border controls in Venezuela are needed to block the import of pirated entertainment software. There have been some seizures of counterfeit videogames at the border. Retailers openly sell piratical videogames in the main shopping arcades with little fear of reprisal. Estimated trade losses due to piracy of entertainment software (including videogame CDs and cartridges, personal computer CDs, and multimedia products) declined slightly to \$47.0 million in 2000. This decline is not due to declining piracy because piracy level estimates increased to 78% in 2000.

ENFORCEMENT IN VENEZUELA

Although Venezuela has taken structural actions to improve its enforcement mechanisms in recent years, the effectiveness of these organizations has declined dramatically. Furthermore, the possibility of effective deterrence has been diminished by the ineffectiveness of the Venezuelan judicial system. Deterrent penalties are rarely issued. It takes years for courts to issue a decision. As a WTO member, Venezuela is required under its TRIPS obligations to provide for effective action against copyright infringement across the board — in criminal, civil, administrative and customs measures. As discussed above, Venezuela also must meet its bilateral IPR obligations under U.S. trade law.

Venezuela Fails to Apply Deterrent Criminal Penalties.

COMANPI has lost its effectiveness as a copyright anti-piracy force

For several years, the enforcement arrangement Venezuela created with its police authorities in cooperation with the private sector was a relatively effective one, despite its chronic shortage of personnel and funding. However, cutbacks and reassignments of trained personnel are undermining what was once seen as a model for criminal intellectual property rights enforcement. In June 1996, an agreement was reached among the Ministry of Justice, directors of the Judicial Technical Police, the National Directorate of Authors' Rights, and representatives of the copyright industries which created an anti-piracy command known as COMANPI. COMANPI is a specialized brigade of the Judicial Technical Police, charged with making investigations and bringing criminal prosecutions of copyright infringers.

While COMANPI made great strides in its first years of operation, its pace has slowed considerably in recent years. COMANPI was reorganized in the Spring of 1998, with the goal of creating a kind of exchange program between COMANPI and the other functionaries in the police technical unit. Unfortunately, this activity ended up siphoning off COMANPI personnel to functions

other than copyright enforcement, such as conducting cases on industrial property (trademark and patent) matters. This reduces the staff available for copyright actions, which was why COMANPI was established in the first place. There are only seven agents, three of which specialize in copyright issues. There has been no increase in the human resources made available, despite the dramatically increased caseload. MPA continues to use COMANPI for selected signal theft actions. For limited actions where immediate action is not necessary (e.g. the violation is recorded) and there is no need for storage, COMANPI, at least for the raid, is still a viable option.

Additional funding, personnel and resources from the Venezuelan government would bolster COMANPI's ability to take additional action. Copyright owners have begun to rely heavily on the Guardia Nacional to initiate investigations and actions. BSA has also relied on the judiciary as well to initiate search actions.

The Guardia Nacional is becoming the enforcement agency of choice

BSA's campaign in Venezuela includes actions against channel pirates for suspected tax evasion. The Guardia Nacional, one of the administrative tax agencies, supports the BSA campaign and conducts actions. In 2000, a total of 42 resellers inspections were initiated with this entity. However, these actions are initiated for tax evasion instead of copyright infringement. This administrative procedure is not optimal for carrying out raids against resellers.

Because of the recent reduced effectiveness of COMANPI, MPA has been conducting video anti-piracy actions with the Guardia Nacional, using tax evasion (not copyright infringement) by the pirates as the basis for these actions. The MPA has worked successfully with the Guardia Nacional and the Judicial Technical Police on anti-piracy efforts. The Guardia Nacional has become the more effective antipiracy agency, and private investment has started to flow more towards the Guardia Nacional than to COMANPI. In 1999, 55,000 pirate videos were seized, and 31,000 cases and stickers; 17 satellite antennae were confiscated.

The recording industry reports little progress on the enforcement front in 2000. Very few actions took place early in 2000, due in part to political uncertainties, no Congress, the downsizing of the Judiciary, and the like. Meanwhile, the recording industry worked to train staff and incorporate APDIF Venezuela, which opened its doors in September/October 2000. The Special Prosecutor has done her best to take actions related to IPR issues. In addition, the recording industry was able to work some few cases with the Guardia Nacional. The industry was able to conduct some raids thanks to the efforts of the Guardia Nacional and municipal enforcement personnel or inspectors. COMANPI is no longer a viable enforcement agency for these actions. The Venezuela judiciary is not close to taking infringement cases seriously. The music industry aired a radio campaign during December of 2000 against piracy but with no major centralized support from the government.

SAPI has limited enforcement powers

The Venezuelan government created a new intellectual property office, SAPI (Servicio Autonomo de Propiedad Intelectual) in 1997 which merged the copyright office (formerly DNDA, the National Copyright Directorate) and the industrial property office. This new office was supposed to become operational in June 1998 and focus on enforcement efforts. But because of the February 1999 change in government, it looked like SAPI would be naming new personnel which

may have slowed down its operations. SAPI has very limited powers: no ability to order seizures or close businesses, and its fines are very low.

The single specialized IPR prosecutor is overburdened

In 1999, the Public Ministry created a special IPR prosecutor unit under the new Organic Code of Criminal Process to work with COMANPI after criminal raids are conducted and to oversee the ongoing investigations. In fact, the IPR Prosecutor has delayed investigations, and prevented product retention and detention of infringers. This prosecutorial unit has delayed the time periods to take action on criminal complaints, exceeding established deadlines. Parties now wait at least 30-60 days for action on any complaint. It was hoped that a second prosecutor would be named before the new criminal procedures code went into effect in July 1999, but this failed to occur. In 2000, the situation remained unchanged; there is still only one prosecutor.

Unwarranted Delays Occur in Criminal and Civil Cases.

The judicial system in Venezuela continues to serve as a major hurdle in the fight against copyright piracy. Courts take years to complete infringement cases. Furthermore, strikes have resulted in the closure of courts, at times for over six months.

In July 2000, one copyright company finally obtained resolution to a civil copyright infringement case which was originally filed in July 1995.⁴ The Superior Civil and Mercantile Court of Caracas issued a 46-page decision in favor of Nintendo of America (NOA) against Atari Mundial, a retail outlet store, and a number of its retailers, for distributing counterfeit hardware and software. While the initial court decisions was in Nintendo's favor, numerous appeals were filed by Atari Mundial. As a result of this decision, the court upheld Nintendo's copyrights in a long list of game titles, ordered the seizure and destruction of infringing games, and issued an injunction against all the defendants on the manufacture or sale of the identified games.

Regarding business software civil actions, the inspections are carried out before filing the legal suit, and the BSA is usually able to inspect the defendant and conclude a fast settlement. However, when the case is not settled, BSA has to follow the slow civil process, which can take

⁴ Here is the detailed procedural history of this case. Nintendo® requested the Court to inspect the retail store's premises to inventory the counterfeit products. The Court held its judicial inspection on June 20, 1995; 556 video games were seized, and many hardware systems. Nintendo filed for a preliminary injunction, whereby Atari Mundial and its retail outlets and other associates would be ordered to cease distributing infringing products. The Court issued the preliminary injunction on June 30, 1995. On September 28, 1995, the Court issued a judicial form requesting payment for the action, which was paid on behalf of NOA on October 2, 1995. On December 18, 1995, Atari Mundial filed a brief requesting dismissal of the case for failure to pay the appropriate fees. NOA requested the Court to issue the accurate payment form and paid the corrected fees on December 21, 1995. On January 17, 1996, the Court granted the dismissal and NOA appealed on January 24, 1996. On July 29, 1996 the Court ruled in favor of Nintendo. Nintendo also prevailed in its effort to have additional judicial inspections held, proving that Atari Mundial continue to distribute counterfeit Nintendo video game products. On February 14, 1997, the Court seized over 2,500 counterfeit Nintendo hardware and software products. As of March 23, 1998, all of the evidence had been presented by both parties to the case. The defendants used all steps possible to delay the decision. On April 5, 1999, Judge Zambrano of the Fifth Court of First Instance Mercantile ruled in favor of Nintendo of America, Inc. Part of the recent decision orders the defendants to immediately cease the manufacture, distribution and any type of commercialization of video game cartridges which are recognized by the law as belonging to Nintendo of America, Inc. In addition, the judge ordered the destruction of each one of the seized goods, as well as any other object that violates the exclusive rights of Nintendo. The case was again appealed by the defendants.

two to five (or more) years until the case is finally resolved. On the end-user piracy front, BSA initiated 39 civil actions in 2000. The majority of these targets, 25 in all, settled with the BSA, four targets were clean, and BSA filed damages actions against five of the targets

In 2000, no sentences were issued in any of MPA's pending cases. No sentence has been imposed for an audiovisual copyright infringement offense. The lengthy period of time it takes to bring and complete these actions only compounds the difficulty in obtaining deterrence. Again, the overloaded special prosecutor has not been able to take action on MPA cases.

The Venezuelan Judiciary Fails to Impose Deterrent Penalties.

Venezuela adopted a new Code of Criminal Procedure (CCP), published in the *Official Gazette* on January 23, 1998, and which entered into effect on July 1, 1999. This law established specialized courts (*tribunales colegiado*) in Venezuela. These courts are to address special issues of law, including the creation of IPR courts in which cases will be heard by three lawyers trained in intellectual property issues. Unfortunately, these courts cannot rule in software infringement cases, as their decision-making authority is restricted to cases where the maximum penalty exceeds four years of prison, which exceeds applicable penalties in software infringement cases.

Other provisions of the CCP ensured that the criminal process might be initiated by the state prosecutor; provided the possibility of settling criminal cases after they are initiated; and lifted the very restrictive judicial secrecy provisions which had prevented effective publicity of criminal cases, including copyright matters. Nevertheless, cameras are still prohibited in the courtroom, defendants' photographs may not appear in the paper, and their names are to be withheld. The rationale is to protect the individual until he/she is proven guilty.

Border Measures are Ineffective.

With the growing problem of pirated and counterfeited goods crossing its borders, Venezuela is faced with a major challenge to improve its border measures. Customs is a key element in the effort to control the contraband of legal and illegal product.

COPYRIGHT LAW AND RELATED ISSUES

Copyright Law of 1993

The 1993 Venezuelan copyright law is relatively modern in most respects. In April 1995, the President approved implementing regulations to the copyright law and Decision 351 of the Andean Pact on copyright and neighboring rights. It is this interplay among the copyright law, its regulations and the Andean Pact decision which affords copyright protection close to the level required by the TRIPS Agreement.⁵

⁵ Some preliminary discussion took place regarding the modification of Decision 351 to make it TRIPS- and WIPO treaties-compatible, but no resolution has been taken at this point by the Andean Community Copyright Office directors.

WIPO Treaties

Venezuela is a signatory to both of the digital treaties of the World Intellectual Property Organization, the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty. Legislation which would permit Venezuela to ratify both treaties was presented to the Congress on August 21, 2000. IIPA encourages Venezuela to approve this legislation and deposit instruments of ratification with WIPO in Geneva. These treaties raise the minimum standards of copyright protection, particularly with respect to network-based delivery of copyrighted materials, and foster the growth of electronic commerce.

Government Legalization of Business Software

There are no negotiations with the government underway to legalize its software use. Only a few agencies, like SENIAT, the Central Bank, and the Ministry of Education have legalized their software. Unfortunately, the government appears to be the main infringer of copyrights.

Customs Law Reform

The Venezuelan Senate passed new customs legislation in 1998 which reportedly included measures to strengthen border measures. Although regulations have been issued and the law is in effect, the copyright industries report at least two problems. First, no container can be opened without judicial approval. This adds another level of difficulty in inspections. Customs officials should have *ex officio* authority to inspect suspicious containers. Second, apparently there is no administrative mechanism for rights holders to take actions through Customs. As a result, everything must go through the courts. One interim reform would be to empower SAPI to have such administrative authority. As a result, these border actions are not being conducted.

IPR in the Organized Crime Bill

A bill on organized crime was presented to Congress during the first half of 1998, and is being studied in the Interior Policy commission of the House of Deputies. This bill reportedly would include certain categories of intellectual property infringement (like commercial-scale piracy) as organized crime. Proposed prison terms for certain categories of copyright infringement could range from three to six years. The copyright-based industries in Venezuela support this bill. For example, BSA member company representatives met with the DNDA Director to recommend modifications to the pending legislation which would ensure, among other things, that the prosecution of copyright under the Organized Crime Law is in addition to other civil, criminal and administrative remedies available to a right holder, and does not displace these pre-existing remedies. This bill is still pending, and is not among the priorities to be considered by Congress.

Customs Duties on Computer Software

In May 1995, the government modified the application of its import duties on computer software to assess the 15% import duty on prepackaged computer software over the entire value of the software package, and not just the value of the physical media. This change in the valuation methodology represented a marked increase in the cost of commercializing software in Venezuela. It also represented a backward step from the overwhelming international trend toward assessing

duties only over the value of physical media. BSA has worked to rectify this situation, and has met with limited success. The Venezuelan government's petition to reduce the import tax of computer software from 15% to 5% was accepted by the governmental body of the Andean Community on a provisional basis in June 1997 (although the tax would still be applied over the entire invoice value of the product). This 5% rate expired on January 1, 1998, and reverted back to 15%, where it has remained to date.