

# INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

## 2002 SPECIAL 301 REPORT

# ARGENTINA

## EXECUTIVE SUMMARY

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Growing problems with pirate optical media and the illegal use of CD-Rs and pirated cartridge-based software seriously undermine the ability of all the copyright industries to compete with legitimate product. Ineffective copyright enforcement remains at the top of the copyright industries' agenda in Argentina. In a year in which Argentina faced numerous political and economic crises, Argentine law enforcement agencies did support anti-piracy actions in 2001. While the results on criminal enforcement remain far from ideal, the willingness of these authorities to take initial actions was somewhat encouraging. However, raids and seizures did not translate into prosecutions and deterrent sentences, and the lack of efficient protection to the intellectual property right holders keeps the piracy levels in Argentina extremely high. Many elements of Argentina's enforcement regime violate its WTO TRIPS obligations, including non-deterrent 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, require immediate action. Outstanding customs duties issues must also be resolved. Argentina must also revise its draft legislation, which is aimed at revising the law to meet TRIPS as well as to implement the WIPO treaties. IIPA recommends that Argentina remain on the Priority Watch List.

### ARGENTINA: ESTIMATED TRADE LOSSES DUE TO PIRACY (in millions of U.S. dollars) and LEVELS OF PIRACY: 1996 – 2001

INDUSTRY	2001		2000		1999		1998		1997		1996	
	Loss	Level										
Motion Pictures	30.0	45%	32.0	45%	32.0	45%	30.0	45%	30.0	43%	35.0	43%
Sound Recordings / Musical Compositions	78.2	47%	76.0	46%	50.0	33%	50.7	35%	25.0	35%	20.0	30%
Business Software Applications <sup>1</sup>	139.9	60%	92.9	58%	156.7	58%	100.8	62%	84.7	65%	107.9	73%
Entertainment Software	NA	95%	141.4	94%	90.3	92%	87.1	94%	83.4	90%	86.0	86%
Books	8.5	NA	8.5	NA	8.0	NA	7.5	NA	7.0	NA	7.0	NA
<b>TOTALS</b>	<b>256.6</b>		<b>350.8</b>		<b>337.0</b>		<b>276.1</b>		<b>230.1</b>		<b>255.9</b>	

<sup>1</sup> BSA loss numbers for 2001 are preliminary. In IIPA's February 2001 Special 301 filing, BSA's 2000 estimates of \$151.7 million at 60% were identified as preliminary. BSA finalized its 2000 numbers in mid-2001, and those revised figures are reflected above.

## **COPYRIGHT PIRACY IN ARGENTINA**

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### **Optical Media Piracy, Including CD-R Production, Continues to Be a Threat to Legal Markets**

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 shift in the business practices of pirates. In the recent past, piracy in Argentina was part of an 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 were 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; in fact, the business has shifted toward a CD-R duplication model whereby blank CD-Rs are legally or illegally imported into Argentina and then replicated using "serial burners" that altogether produce a significant amount of pirate product. These pirates operated individually or in small groups but are very well coordinated, as if they were one single organization with perfectly known roles.

Local videogame representatives estimate that there are more than 1,000 outlets which routinely burn CD-Rs to order. The recording industry has conducted raids against small labs that at first sight seem harmless but have the capacity to erase the legal CD market from the commercial map. It is very difficult to stop such unlawful reproductions without committed involvement of the customs offices, the tax authorities and of course, the police. Given the domestic scale of this problem and the facts and evidence found in many cases, 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 addressing this IPR problem and, considering the organized crime scheme, obtaining judicial sentences that contribute to deter the high crime rate. Some progress is reported regarding business software CDs within the provinces of Santa Fe and Entre Ríos, where CD-R piracy of software has decreased as a result of the intensive legalization campaign conducted by BSA and Software Legal (BSA's local software association) during the last quarter of 2000.

Pirate CD duplication centers operate not only in major Argentine cities, but 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. In addition, some pirate organizations are now advertising through classified ads as well as the Internet, a home delivery service for custom pirate CDs.

With respect to industrial production, nine legitimate CD plants operate in Argentina. We are not aware of any underground plants at the moment.

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

## Copyright Piracy Levels in Argentina Remain High

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. While some of these products reach Argentina from Asian ports, many of them are transshipped through other ports in Canada, Europe and Latin America. 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 unilateral power, the resources, or sometimes, even the technical skills 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 the Asian exporter. Again, customs officials blamed this procedure on their lack of authority to seize these products. On the other hand, there have been some customs seizures involving PlayStation products.

A second source of videogame piracy involves 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. There is some degree of sophistication in copying techniques. For example, Playstation® software is produced and distributed on black plastic CDs as a security measure. The black-colored plastic CDs were intended to make pirate copies, usually on silver or gold CDs, more apparent. However, it appears that this technique has already been copied by pirates, as indicated by a police investigation seeking the seizure of black-colored CDs. 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.

Information gathered by the IDSA shows that videogame piracy remains rampant, in reputable malls and supermarkets, as well as in flea market-type venues where the vendor sets up small unmarked stalls to peddle their wares (both PC- and console-based games). The number of these mobile venues has been steadily on the rise. One such venue is Rivadavia Park, located in a Buenos Aires business district. Much like the practice of shops located in malls, the flea market vendor displays a small assortment of titles (about 50-60 of the top-selling CDs on the market) for customers to browse through. Once a customer places an order, the legitimate product is taken out of boxes located behind the counter or the customer is asked to wait while the item requested is obtained. These products are clearly pirate as evidenced by the poor quality of the packaging (i.e., the box labels are handwritten, or have only photocopies of the graphics that appear on the original boxes; the boxes themselves are plain plastic boxes without seals or stickers that identify the product; and they do not come wrapped in the clear cellophane wrapping of the legitimate products). Also quite telling is the fact that the products sell well below the cost of legitimate goods. Quite significant is the fact that game titles just recently released in foreign markets are already made available in advance of the legitimate Argentine release of these titles. Upon inquiry,

customers will be told that the vendor acquires "new stuff" every two (2) weeks, clearly long before the product is made available through the proper distribution channels for the country.

Of concern is the fact that so-called "Mod-Chip" circumvention devices are also available for purchase at 120 pesos. These devices defeat the security system of Playstation® consoles, thus allowing the use of illegal copies of Playstation® games.

A third source of concern for the videogame industry in Argentina is Internet piracy. IDSA and Camara del Software Digital Interactivo (CASDI) are monitoring this situation closely. A survey of a Buenos Aires daily newspaper and its Website showed advertisements for the sale of pirate videogame software. The advertiser lists the titles available, as well as his contact information. Although there is, as of yet, no known direct downloading of pirate software from such sites, the listed "for sale" sites allow customers to order products, which is then delivered to the customer's physical location (collect on delivery). Estimated trade losses due to videogame piracy in Argentina are not available for 2001.

The recording and music industry reports that the shift from analog to optical media-based piracy represents a long-term, alarming trend in Argentina which has caused much harm. Argentine pirates have been 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 47% for 2001. The estimated losses due to audio piracy in Argentina for 2001 also rose to \$78 million; this increase is mostly due to the market shift from cassettes to CD-Rs.

Perhaps the most disturbing trend is CD-R technology. Small replicators have a considerable cumulative effect on piracy, with bigger replicators most likely funded by organized crime. In most of these cases, domestic pirates use the same source to obtain raw material (blank CD-Rs) as well as inlay cards. They also use the same distribution system. Organized crime groups coordinate to import (legally and illegally) thousands of blank CD-Rs and burners into the country to keep the cost of raw materials low. Organized crime coordination is also needed in order to avoid customs or "jump" controls and also to produce the inlay cards. The industry has initiated raids against domestic CD-R labs and found some 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 in the absence of a strong commitment from the government's law enforcement agencies. The federal or local governments are not committed to fighting piracy and the judiciary seems to regard it as an insignificant crime. Moreover, customs authorities have not given any attention to the Argentina-Paraguay border, through which a significant quantity of Paraguayan pirate products come in to flood northern Argentina.

In addition to music CD piracy, audiocassette piracy continues to be a problem in Argentina, although of a lesser scale due to the effect of high and cheap CD-R piracy. Thousands of pirate audiocassettes from Paraguay, coming mainly from Encarnacion-Posadas, Formosa and the Parana river, blanket the northern part of Argentina. Piracy in the border towns is high. The legitimate industry definitely 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.

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 led to an increase in the use of the Internet as a means of advertising illegal software to a large audience, and the unauthorized electronic distribution of illegal software. Over the past year, the piracy levels for business software increased from 58% in 2000 to 60% in 2001. Estimated losses also rose over the past year, to \$139.9 million in 2001. 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 2001.

Video piracy continues to seriously impact the audiovisual industry, despite consistent MPA and police activity in investigations and raids. While new forms of optical disc and television piracy are appearing, the Argentine video market is still under attack from pirate activity. Joint anti-piracy and commercial efforts in the home video market have been hampered by a lack of deterrent sentences and a lack of government attention to the damage piracy causes. As a result, video piracy in Argentina is becoming an integral and perhaps inextricable part of the audiovisual market. Nearly half, 45%, of the total home video market is pirate despite improved enforcement. Argentina's home video market is replete with back-to-back, low quality copies. It is common practice for video outlets to produce low quantity copies on premise, and it is now a pervasive custom in greater Buenos Aires. In fact, some small outlets have become totally dependent on illegal supply. The Argentina Video Union (UAV) confirms that the use of pirate copies has become a standard industry business practice.

MPA reports that optical disc piracy (CD-Rs) has grown to occupy an estimated 15% of the optical disc market for audiovisual materials. In addition, television signal theft piracy also is a growing trend. 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 Zone 1 DVDs (DVDs programmed for playback and distribution in North America only) from the U.S. market. Losses to the U.S. motion picture industry due to audiovisual piracy in Argentina are estimated to be \$30 million in 2001.

The book publishing industry continues to report widespread photocopying of English language materials and computer books and texts in Argentina. Illegal photocopies make up the main losses, in copyshops located near the universities but mostly by the student unions and organizations in the universities. Most copying comprises collections of individual chapters of various texts, including, for example, reference books and chapters of English-language graduate titles. One local representative estimated that in 2001, some 35% to 40% of protected materials being used were illegal. There is much less copying in private universities (which has 20% of national enrollments). AAP has learned that some universities defray part of their financing through these photocopies, and that some departments have been trying to start a business copying entire books. This effort has been stopped, for now, due to firm representations by the local Book

Chamber, which has also managed to stop blatant photocopying in some copyshops outside universities.

There is some importation of pirated commercial books from Mexico, Bolivia and Paraguay (trade books and some texts). The overall market has diminished this year due to four years of recession. Piracy of American-produced CDs accompanying medical texts by private doctors has been reported, some involving door-to-door sales to hospitals and doctors. These CDs sell at \$35 compared to the \$300 price of the legitimate product. The situation is so extreme that the leading medical publisher in Argentina reports that all CDs accompanying medical treatises are pirated and he no longer publishes them. Estimated losses due to book piracy in 2001 remain at approximately the same level as 2000; the losses would be greater, but the market has declined due to the Argentine recession. Estimated 2001 trade losses due to book piracy in Argentina are \$8.5 million.

## **ENFORCEMENT IN ARGENTINA**

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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 contributing to Argentina's failure to provide adequate and effective protection to U.S. copyright holders.<sup>2</sup>

### **Criminal Raids Continue, But Piracy Has Not Declined**

There is some support from law enforcement agencies for anti-piracy actions. While this is commendable in some respects, it is far from adequate and ideal. The support and joint actions with the Gendarmeria Nacional (National Border Police Force) and Prefectura Naval (Coast Guard) have improved enforcement efforts in a limited manner for most of the copyright industries. However, enforcement efforts at both the federal and state level still need improvement because they do not come close to reflecting the gravity of the piracy situation.

IDSA has teamed up with CASDI (Camara del Software Digital Interactivo), an association of software publishers in Buenos Aires, 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 activities, very little is done to penalize 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.

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<sup>2</sup> Argentina participates in the Generalized System of Preferences (GSP) program in which "adequate and effective" protection of intellectual property rights is a discretionary criterion for eligibility. In 2000, \$218.4 million of goods from Argentina entered the U.S. under the GSP duty-free code, accounting for roughly 7% of its total imports to the U.S. For the first 11 months of 2001, \$108.8 million of Argentine goods (or 6.6% of Argentina's total imports to the U.S. from January to November) entered the U.S. under the duty-free GSP code, representing a 9.4% decrease 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.

In 2001, the IDSA, through CASDI, established a cooperative working arrangement with the customs authorities of Argentina. As part of the new procedures for inspections of goods entering the country, a representative from CASDI is summoned to view the inspection process as well as the goods under review. (It has been opined, though unofficially, by a customs official, that this has helped somewhat in decreasing the likelihood of illegal software entering the market.) While this is a significant improvement in the monitoring of border transactions, the current economic decline of Argentina may have adverse effects on the continuation of this project. It is essential that the Argentine government, particularly its customs officials, maintain their vigilance over the influx of pirate goods despite the economic setback.

According to IDSA information, an informal interview with a member of the Federal Police Force revealed the possibility that large organizations (perhaps related to organized crime) may be involved in the smuggling of significant amounts of illegal software products into Argentina. Although such an assertion has yet to be substantiated, the seizures of large amounts of illegal discs shows the large potential for market damage. Given that only a handful of CD replication plants exist in Argentina, it is quite likely that such an organization exists, particularly since these existing plants have not been suspect in any illegal copying. IDSA confirms that Paraguay continues to be the primary source of pirate items entering Argentina, particularly in the area known as the Tri-Frontera (Tri-International Border).

In 2001, BSA filed 14 private criminal suits against pirate software resellers. 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 (out of an annual total of 23), three case initiated in 2000 (out of an annual total of 22), and seven cases initiated in 2001 (out of an annual total of 14) came to trial. These unacceptable delays in criminal process are caused by lack of resources, the large number of pending cases, 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 Secretariat (Secretaría de Turismo), the Radio-Broadcast Commission (Comité Federal de Radiodifusión-COMFER), and the Pension and Retirement Control Office (Superintendencia de AFJP), for alleged use of illegal software. The courts are still reviewing the inspection reports in the cases filed against COMFER and Superintendencia de AFJP, and jurisdiction matters are being decided by the court of appeals in the case involving the Tourism Secretariat. These cases are still in a very preliminary stage of the process, even though more than a year has elapsed since the raids were conducted, demonstrating the unacceptable delays in criminal cases. 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. In 2001, MPA and the local anti-piracy association UAV initiated 220 investigations against video stores and labs, and conducted 221raids in addition to 2,173 inspections. Six reproduction laboratories with a total of 271 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. The trend continues with the growth of CD-R piracy and the lack of support by police agencies and the judicial system. In 2001, a total of 201 street operations were conducted and 59 replicating labs were dismantled, ranging in size from two burners to a large facility involved in organized crime. A total of 398, 000 CD-Rs and cassettes

were seized. These actions caused 406 persons to be arrested but only 34 were charged with copyright violations. Of these, only five proceeded to sentencing—all resulting in suspended sentences.

## **Argentine Courts Fail to Impose Deterrent Criminal Penalties**

Unfortunately, the Argentine judicial system continues to be a weak point even within a law enforcement structure that is itself fraught with difficulties and inadequacies. The Argentine penal code permits a term of one month to six years in jail for commercial piracy; maximum penalties are not imposed. As a result, true enforcement and consequent deterrence continues to fall far short of required levels. In addition, judges prolong excessively the process to obtain search warrants, which prevents effective enforcement.

In 2001, MPA and the local anti-piracy association, UAV, coordinated 221 raids, which resulted in 38 prosecutions. In addition, there were 38 judicial resolutions in 2001 (from cases begun previously), 15 exculpatory and 23 condemnatory. Three people received jail terms of three 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. During 2001, only five recording industry cases reached final ruling stages, this despite almost daily raids conducted against record pirates. The recording industry must be selective in its prosecution of cases in order to concentrate the efforts of the prosecutors and the courts on the most important ones. In these five cases, the pirates were condemned to insignificant prison terms of six months, all of which were suspended. These few results can hardly be considered a deterrent to piracy.

For the business software industry, BSA reports that seven of the 14 cases filed in 2001 have come to trial (compared to only two of 23 private criminal cases initiated by its members in 1999, and three of 22 filed in 2000). 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. In a criminal action against the software reseller Cibersoft, the owner pleaded guilty to the software copyright violation charge and was sentenced to the minimum penalty of three months' imprisonment plus a \$500 fine, but the prison sentence was commuted and the defendant never served time.<sup>3</sup> Cases brought by the entertainment software industry are also moving slowly through the courts.

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<sup>3</sup> Under Argentine criminal law, sentences of up to three years of imprisonment can be commuted, and the defendants never have to serve time.

**COPYRIGHT ENFORCEMENT STATISTICS:  
ARGENTINA 2001**

CRIMINAL COPYRIGHT ENFORCEMENT STATISTICS 2001			
ACTIONS	MOTION PICTURES	BUSINESS APPLICATIONS SOFTWARE	SOUND RECORDINGS
Number of Raids conducted		14	355
Number of cases commenced		14	150
Number of defendants convicted (including guilty pleas)		1	8
Acquittals and Dismissals		2	62
Number of Cases Pending		43	112
Total number of cases resulting in jail time		0	3
Suspended Prison Terms		1	7
Maximum 6 months		1	1
Over 6 months		0	0
Over 1 year		0	0
Total Suspended Prison Terms		1	0
Prison Terms Served (not suspended)		0	0
Maximum 6 months		0	0
Over 6 months		0	0
Over 1 year		0	0
Total Prison Terms Served (not suspended)		0	0
Number of cases resulting in criminal fines	1	0	0
Up to \$1,000	0	0	0
\$1,000 to \$5,000	0	0	0
Over \$5,000	0	0	0
Total amount of fines levied		0	0

CIVIL COPYRIGHT ENFORCEMENT STATISTICS 2001	
ACTIONS	BUSINESS APPLICATIONS SOFTWARE
Number of civil raids conducted	39
Post Search Action	0
Cases Pending	48
Cases Dropped	58
Cases Settled or Adjudicated	24 (Settled)
Value of loss as determined by Rightholder (\$USD)	
Settlement/Judgment Amount (\$USD)	\$541,823 only damages

### **Border Controls Remain Weak**

Argentine border controls are weak and ineffective. There has been cooperation between Argentine customs and 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. The recording industry has evidence of either contraband, or under-declared (in value or tariff) imports, from Uruguay, Chile, or Paraguay coming into Argentina, or directly into Argentina using major airports.

## **Long 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 cases; 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.

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. BSA reported that in 2000 there was a serious lack of qualified software experts in the civil system, which led to delays and errors. At the end of 2000, the Argentine Supreme Court created a specialized software expert office, which is not yet operational. Software experts are still selected from general lists of experts kept by the court of appeals in every jurisdiction, and often these experts are not familiar with software copyright crimes.

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 eight years; arrest warrants were issued, but most of the defendants were never located. In 2001, Nintendo moved to close those cases in 2001 because there were no additional developments. With regard to Nintendo's activities in September 2000, complaints were filed and served upon the defendants. In one case, the defendant failed to answer the complaint and the case is currently pending the judge's consideration to hold defendant in contempt. In the other case, the defendant was served and the case is pending. Nintendo 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 either the defendants cannot be located to stand trial or the prosecutors fail to pursue further.

## **COPYRIGHT LAW AND RELATED ISSUES**

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### **WIPO Treaties**

Argentina was one of the first countries in this hemisphere to deposit its instruments of ratification to both the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT), accomplishing such on November 19, 1999. IIPA applauds Argentina for taking this action, which will raise the minimum standards of copyright protection, particularly

with respect to the network-based delivery of copyrighted materials. Implementation of the appropriate laws will protect against Internet and other forms of digital piracy, and encourage e-commerce, so these efforts are strongly encouraged by IIPA and its members. The WCT will enter into effect on March 6, 2002, and we hope the WPPT will enter into force shortly thereafter. Under the Argentine constitution, international treaties are self-executing into national law. Nevertheless, we believe many of the WIPO treaties' obligations should be implemented in national legislation (see discussion below).

## **The 1933 Copyright Act (as amended in 1998)**

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 have 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 in 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. IIPA also recommends that protection against parallel imports of copyrighted materials be provided in Argentina.

## **2001 Project to Amend the Copyright Law**

Since 1998, 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 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 were deeply 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) required further amendment and/or clarification. That draft legislation did not correct the many enforcement obstacles, including ineffective border measures, nondeterrent criminal penalties, and lengthy delays in bringing and completing infringement actions.

In July 2001, the Argentine Copyright Office (DNDA) circulated to some industry representatives a revised set of legislation to amend the 1933 Copyright Act.<sup>4</sup> The DNDA will be reviewing these comments and then submit its own proposal to the Ministry of Justice for its further consideration. The expected timeframe for such consideration is not known, but such processes are usually lengthy in the Argentine system, and since the drafting of this proposal, the Argentine government has changed leadership several times. Further revisions likely will be made to the July

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<sup>4</sup> DNDA extended its informal deadline for comments from August 30, 2001 to October 31, 2001. However, not all the local copyright industries were informed of this process. IIPA has obtained a copy of the legislation but a translation is not available in which to provide comprehensive comments at this time.

2001 proposal. Suffice it to say, separate comments filed by the motion picture, recording and business software industries identified numerous provisions (including the scope of exclusive rights, narrowing exceptions to protection, defining the ownership of copyrighted materials, contractual matters, extending the term of protection, including effective provisions on technological measures of protection, injunctive relief, seizure authority, the scope and level of criminal penalties, *ex officio* authority at the border, and onerous deposit requirements), all of which must be revised and refined if Argentina is to have a modern copyright law which promotes e-commerce and investment.

## **Bill on Statutory Damages and Seizures of Infringing Equipment**

IIPA has learned that there is a bill which would amend Article 82 of the Copyright Act to support the introduction of statutory damages, among other measures.<sup>5</sup> Bill No. 3205-D-01 was introduced by Representative Eduardo Román Di Cola and was approved by the Chamber of Representatives. The bill will be considered by the Senate, when it begins its ordinary sessions (March 2002). Reportedly the bill allows the courts to impose compulsory and progressive damages in copyright infringement cases and also the destruction of infringing material and reproduction equipment. It also foresees that the plaintiff in a copyright infringement case can be compensated for damages assessed as (a) the real damage suffered by the plaintiff or (b) a judicial assessment within a minimum of \$1,000 and a maximum of \$1,000,000 (punitive damages) for each infringement, whichever is higher. This bill promises to add much needed weaponry in the fight against piracy.

## **Bill on Illegal Broadcasting and Satellite Theft**

In June 2001, a bill (Bill 3670-D-01) was presented to Congress which establishes penalties for those persons who broadcast without authorization, or obstruct or interfere with authorized radio, TV, cable TV and satellite TV broadcasting.<sup>6</sup> The Telecommunication Commission approved the bill, and it is currently in the Penal Legislation Commission.

## **The Performers' Rights Bill**

In 2001, the Bill on Performers' Rights (S-1206/99), introduced by the Association of Argentine Performers (AADI) in 1999, was withdrawn and a new version was introduced and will be reviewed by the General Legislation and the Culture and Communications Commissions. This bill (0355-D-01) is virtually identical to the old one (S-1206/99), and would partially amend the current Argentine copyright law by granting economic and moral rights to audiovisual performers and recognize AADI as the sole and mandatory collection society for performers in Argentina. This bill was introduced by a representative who has since left the Chamber of Deputies, and the likelihood of any forward progress is uncertain. However, if passed in its current form, the bill would be detrimental to the distribution operations of U.S. audiovisual producers because:

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<sup>5</sup> IIPA does not have the text of this bill; this summary is based on industry reports.

<sup>6</sup> IIPA does not have the text of this bill.

- 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 the 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.

## **Government Software Management and Related Legislation**

**Progress of Government Legalization of Software:** Some progress in 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 unattainable in 2001. All BSA negotiations with the government regarding this matter failed in 2000, and in fact, 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. Unfortunately, no progress was made on this matter during 2001. BSA expects that none of the Federal, provincial or municipal governments will issue a legalization decree in the near future, in light of the present economic crisis. The cases filed in 2000 against federal government agencies are still pending, and are only in their preliminary procedural stages.

**Preference for Open Source Code Use:** BSA is concerned about the potential harm of a bill introduced into the Argentine Chamber of Deputies in September 2000, which would give preference to the use of open source software in the federal government. This bill, No. 5613-D-00, was proposed by national deputy Carlos Dragan, and would require that the federal government, autonomous federal agencies, and government-owned enterprises use and acquire only free open source software, excluding proprietary software. This bill is still pending in the Public Works and Communications and Technology committees of the Chamber of Deputies. BSA has information that a similar bill named "Proyecto de ley para la utilización de software libre en la provincia de Córdoba", No. 10,506, was introduced to the State Congress in the Province of Córdoba on May 23, 2001. This bill would require the use of open source technology at the provincial level

**Bill to Suspend Penalties for Copyright Infringement Withdrawn:** During the second half of November 2001, the Secretariat for the Production and Promotion of the Midsize and Small Companies ("Secretaría de Producción y Promoción para las Pymes") promoted and tried to pass a

harmful bill that would have suspended for a period of six months the application of penalties for copyright infringement, such as software piracy, as set forth in the Argentine Intellectual Property Law. This bill constituted a strong message against software legalization, and harmed BSA's software legalization in the province of Santa Fe (truce campaign). Fortunately, at the end of December, the federal government withdrew the bill. The Argentine government should avoid these types of initiatives in the future, which instead of promoting compliance with the local intellectual property legislation, seriously damage local and foreign copyright holders.

**Digital Signature Act:** BSA applauds the Argentine Congress for having passed "The Digital Signature Act." This Act, No. 25,506, was promulgated on December 11, 2001, and authorizes the use of electronic signature in all cases where handwritten signatures are required, with only limited exceptions. This Act also applies to digital signatures used for the Federal Government's internal purposes and the services the Government provides to the public. BSA believes that this Act is a major step toward the complete digitalization of the Government, and encourages the Government to take the next logical step and legalize its software.

## **CUSTOMS VALUATION ISSUES**

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### **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 favored, international practice of valuing intangible intellectual property of this kind solely on the value of the underlying media.<sup>7</sup> 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 serve as a form of double taxation because royalties are generally subject to withholding, income and/or remittance taxes. Such duties are a significant barrier to furthering the growth of the

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<sup>7</sup> 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.

audiovisual market in Argentina. To this end, MPA and RIAA seek a modification of the Argentine Customs Valuation Code and/or an exemption 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. With respect to non-software 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 where 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. 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 similar 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.