

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2002 SPECIAL 301 REPORT

PARAGUAY

EXECUTIVE SUMMARY

IIPA supports continued monitoring of copyright developments in Paraguay under Section 306 of the U.S. Trade Act of 1974. Piracy levels remain high, and estimated losses due to copyright piracy rose to \$270 million in 2001. Enforcement efforts taken by Paraguayan authorities remain ineffective in deterring piracy. Sadly, few elements of the 1998 Memorandum of Understanding (MOU) which terminated USTR's Special 301 investigation against Paraguay have been effectively implemented.

Paraguay still serves as a major transshipment point for pirated optical media product from Asia. Paraguay also produces 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 taken have been the result of industry-led, not government-led, investigative efforts. There is limited support from the government, but only after the industry conducts the investigation and presents the case to the few judicial authorities who act independently and apply the law accurately. Despite high hopes that specialized IPR prosecutors could improve matters, prosecutions remain few. The Paraguayan border is open, and the various mechanisms Paraguay promised to implement to improve border checks have proven ineffective overall. The judiciary, as a whole, remains a hurdle to effective enforcement.

PARAGUAY 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										
Sound Recordings/ Musical Compositions	253.6	99%	200.0	90%	200.0	90%	280.0	90%	130.0	90%	100.5	68%
Motion Pictures	2.0	80%	2.0	80%	2.0	80%	2.0	80%	2.0	85%	2.0	85%
Business Software Applications ¹	11.5	79%	8.5	76%	6.7	83%	5.2	85%	4.1	87%	4.6	89%
Entertainment Software	NA	NA	9.7	99%	8.1	99%	8.4	99%	8.3	99%	7.5	97%
Books	3.0	NA	3.0	NA	3.0	NA	2.5	NA	2.5	NA	2.5	NA
TOTALS	270.1		223.2		219.8		298.1		146.9		117.1	

¹ BSA loss numbers for 2001 are preliminary. In IIPA's February 2001 Special 301 filing, BSA's 2000 estimates of \$6.6 million at 82% were identified as preliminary. BSA finalized its 2000 numbers in mid-2001, and those revised figures are reflected above.

BILATERAL ENGAGEMENT ON IPR

The 1998 Special 301 Investigation

Four years ago, USTR identified Paraguay as Priority Foreign Country under Section 301 of the U.S. trade law. A nine-month investigation began 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 on Intellectual Property Rights” (MOU) in which the Paraguayan government committed to take a number of near- and long-term term actions to address its inadequate practices. USTR terminated both the Section 301 investigation and 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.²

The MOU and Enforcement Action Plan

The November 1998 MOU contains nine articles and an annex which comprises the “Enforcement Action Plan,” which includes both near-term and long-term commitments made by the Paraguayan government.³ The MOU focuses heavily on concrete actions related to enforcement and commitments to make maximum efforts to strengthen enforcement efforts, pass certain legislation, improve training of enforcement officials and enhance public awareness, and provide deterrent penalties and civil remedies, among other important elements. A regular consultation mechanism was implemented to schedule meetings, and the agreement will remain in effect until January 1, 2003.⁴

Although some of the specific action items listed in MOU (and the “Enforcement Action Plan”) have been successfully completed by the Paraguayan authorities, a good many have been either completely disregarded or abandoned. Here is an illustrative (non-exhaustive) list of several key elements from the MOU which have not yet been met fully or satisfactorily, in the view of the industries:

- The Inter-Institutional Brigade and frequent, unannounced raids. The 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 (MIC) created an interagency anti-piracy group called “GAP” (*Grupo Anti-Pirateria*, or more

² In 2000, \$18.9 million in Paraguayan imports to the United States benefited from the GSP program, accounting for 45% of its total imports to the U.S. For the first 11 months of 2001, \$9.6 million of Paraguayan goods (or 33% of Paraguay’s total imports to the U.S. from January to November) entered the U.S. under the duty-free GSP program, representing a 47.5% decrease from the same period last year.

³ The full text of the MOU is available on the U.S. Department of Commerce Website, at http://199.88.185.106/tcc/data/commerce/html/TCC_Documents/ParaguayIPR.html

⁴ After the January 1, 2003 date, either country may give 60 days’ written notice to the other to terminate the MOU.

formally, *El Consejo Nacional para la Protección de los Derechos de Propiedad Intelectual*). Decree No. 14870 provided 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 was to be comprised of 15 intelligence officers who were to perform investigations. Its formation was formalized on paper, but not in practice until mid-2001. This group was to perform active investigations, especially post-raid, with access to intelligence files of other police agencies. Despite several requests, the private sector has never been kept apprised of the group's activities and we assume it does not exist. Since such an inter-institutional brigade (or any other Paraguayan enforcement agency, for that matter) is barely organized, not functionally operational, this certainly does not satisfy the MOU obligations to conduct frequent, unannounced raids of warehouses, distributions center and retail outlets and arrest persons engaged in copyright or trademark infringement (see discussion below, on enforcement).

- “Quick Response Team”: This team of prosecutors and officials from other ministries was to verify and investigate complaints submitted to it. While a decree was issued to establish this force (to be headed by the Ministry of Industry and Commerce), as a matter of practice this “team” does not exist.
- The “red channel” system at the border: Paraguayan Customs claims it has met the MOU requirement that it maintain its “red channel” system at Asunción Airport and extend such to the Ciudad del Este Airport and all other main customs checkpoints. Customs is to maintain a list of products which are commonly infringed, and officials 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, industries report that this system has not been properly implemented, given that large shipments of infringing products have crossed into Paraguay. Furthermore, this system is subject to the influence of corruption (see enforcement discussion, below).
- Specialized IPR prosecutors: While these prosecutors were in fact finally appointed to their posts, the problem remains that they are constantly being re-assigned to work on non-IP cases and are frequently rotated.
- Timely prosecution of all copyright cases and ensure that prosecutors seek deterrent penalties: Only since 2000 have there been any criminal sentences, and those have been very few, especially given the high levels of copyright piracy in Paraguay.
- Ensure the legal authority for rights holders to obtain civil *ex parte* search orders: While the law was amended to afford such authority on-the-books, as a matter of practice, it remains difficult to obtain and conduct an *ex parte* order in an expeditious manner. One major problem is that some courts are taking at least 45 days to issue such orders; by that time, it is very likely that the evidence will have been moved or destroyed.
- Take actions to investigate and initiate legal actions against persons and entities which fail to pay taxes or report revenues on imports or sales of infringing products: This potentially useful enforcement tool has not been used to its full advantage. Meanwhile, copyright

piracy depletes the Paraguayan economy of jobs, tax revenues and economic and cultural prosperity.

- Government software legalization: The Paraguayan government also promised to issue a decree governing the proper use and acquisition of computer software in its agencies by December 31, 1998, and to ensure that all ministries eliminated any and all pirate copies of software by December 31, 1999. This executive decree (*Decreto* No. 1524) was issued on December 31, 1998, and entered into effect immediately. The problem is that an inventory of software was never completed, and the terms of the decree have not been implemented in practice.
- Adequate resources: Paraguay fails to ensure that there are enough budgetary sources allocated for the officials and agencies involved in IPR enforcement. This is a constant struggle.

In sum, the copyright industries remain very concerned that the Paraguayan government has not fully implemented the provisions it committed itself to undertake back in 1998. While there has been some progress in the 3½ years' existence of the MOU, the results which are most striking to the public eye are the explosion of new forms of piracy in a market already overwhelmed by piracy (of both the home-grown and transshipment varieties), the involvement of organized crime factions, few criminal investigations, raids and prosecutions, and a judiciary unwilling to issue deterrent sentences (with rare exceptions).

COPYRIGHT PIRACY IN PARAGUAY

Optical Media Piracy: Transshipment and CD-Rs

In 2001, 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 Latin American region as a transshipper of pirate product to its neighbors continued last year. Ciudad del Este businesses continue to boldly offer and sell obvious counterfeit optical media products from the gaming, music, software and video industries.

However, in 2000, 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. This situation worsened during 2001 as that amount climbed to a dramatic level of 104 million units. Paraguay does not have the market to absorb that amount, and these discs are found bearing illegal sound recordings, mainly throughout Brazil. These 104 million CD-Rs could supply 100% of the current legitimate CD music market in Brazil, however, it should be noted that not all blank CD-Rs are destined for music only.

In addition to their clandestine industrial CD production capacity, the pirates of Ciudad del Este shifted their replication method by spreading it out through the use of CD burners. Hundreds of labs have substituted the previous underground illegal CD plants, but it is obvious that those burning facilities source pirate kingpins who coordinate their work and provide the small labs with

the blank CD-R's. These "sprayed" plants serve Paraguayan, Argentine, Uruguayan and mostly Brazilian illegal CD-R duplicators.

Paraguay's role as a substantial local manufacturer of pirated optical media was revealed in 1999 when 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 (for comparison's sake, 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, and as of this report no real evidence has surfaced regarding any new plants. Nevertheless, the Ministry of Industry and Commerce (MIC) authorized (in violation of agreements arranged with the recording industry) the importation into Paraguay of one CD-R manufacturing plant under the Law de Maquila and the Investment Law. The record industry found this CD-R facility during one of its routine investigations. Additionally, the music industry found another CD-R manufacturing plant that was ready to be assembled in Ciudad del Este. The first, SCA Technologies based in Ciudad del Este, is currently operational and producing approximately 40-50,000 blank CD-Rs daily. Much of its product has been found bearing illegal sound recordings in investigations in Brazil. The second plant was never opened due to a major fire that destroyed most of the machinery and the infrastructure. The Paraguayan government has not kept industry informed of SCA's production output, nor have they maintained regular audits of the plant as mandated by law. The government was obliged to inform the recording industry – under several anti-piracy Memoranda of Understanding and agreements that have been signed – about the existence of such plants. This did not happen.

Organized Crime Elements Control Piracy in Paraguay

Organized criminal groups remain involved in the production and distribution of pirated and counterfeit product 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 surplus in 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.

During 2001, several cases of official corruption were highly noted in the press. Corruption is widespread in Paraguay, and the media has done a great job informing about it. For example, the Prosecutor's Office executed a warrant search in a store of a software retailer in Ciudad del Este in April 2001. There was evidence to suggest that this store was owned by an individual with ties to organized crime. In fact, during the last two years, BSA member companies have filed at least three different criminal complaints against this individual and his partners. During the raid, the prosecutor found and seized substantial evidence of software piracy on a commercial scale. Over 13,000 CDs burned with illegal software were confiscated. The prosecutor also arrested two individuals, one of them with two previous indictments for software piracy. The Paraguayan Criminal Procedure Code prescribes that a defendant can not be released on bond (*libertad provisional*) if there is likelihood that he might flee the country. After being arraigned, both defendants were released on a bond which was not properly issued and therefore was not valid.

The judge who granted the order to release the defendants and the clerk of the Court who drafted the judge's resolution knew that both of these individuals have their domiciles in Brazil. They also knew that one of the defendants had two other indictments for copyright piracy in the last two years. It remains to be seen whether these defendants will appear for their trials scheduled for later this year. The Prosecutor's Office has appealed the judge's decision. The appeal is still pending. The Clerk of the Court handling the case has been publicly accused by another judge for taking bribes in another matter before her docket.

Domestic Piracy Remains Widespread in Paraguay

The recording industry reports that level of piracy of its products in Paraguay have swept away the legitimate market; the music piracy level in 2001 was 99%. As a result, estimated trade losses due to recording and music piracy in Paraguay rose to \$253.6 million last year; this figure includes both losses due to local piracy as well as that caused by transshipment. 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 domestic Paraguayan market has basically been lost to the pirates. 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 at 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 and CD-R piracy, audiocassette piracy continues to be rampant in Paraguay.

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, 2000, and 2001, Ciudad del Este resellers continue to advertise brazenly and sell pirated software. Second, 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 violating the MOU. Preliminary estimated trade losses due to business software piracy in Paraguay are \$11.5 million, with an estimated 79% piracy level in 2001. On a positive note, the BSA conducted a massive legalization campaign during November and December 2001 which was sponsored by the Ministry of Industry and Commerce (MIC).

The piracy situation for entertainment software appears not to have changed very much over the past year. The manufacture, sale, import and export of pirated videogames and cartridges in Paraguay are widespread; at last report, the estimated level of piracy was 99% in 2000. 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. Paraguayan assemblers of counterfeit videogame products (i.e., counterfeit Nintendo®

cartridges) must import sophisticated counterfeit videogame chips⁵ from Taiwan. The videogame chips are assembled, along with other components, into completed counterfeit Nintendo videogame products. The industry has had some success in working with Paraguayan customs to seize shipments and destroy infringing product. Estimated losses due to piracy of entertainment software (including videogame CD-ROMs and cartridges, personal computer CD-ROMs and multimedia entertainment products) in Paraguay for 2001 are not available.

Highly integrated copyright piracy has nearly destroyed the local market for audiovisual product. Paraguay is also a significant threat to other Latin American markets because of the large pirate market in Ciudad del Este. 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. The overwhelming majority of illegal VHS production for export takes place in Ciudad del Este, along the border with Brazil and Argentina. Recent investigations indicate an increase in VCD export in this area. The impact of Paraguay-based piracy on neighboring countries is far more troubling. 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 VCDs and DVDs. 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 higher learning. Estimated 2001 trade losses due to book piracy are \$3.0 million.

COPYRIGHT ENFORCEMENT IN PARAGUAY

The key to effective enforcement in Paraguay is straightforward and was clearly articulated in the 1998 MOU: cooperation between the Paraguayan government and the IPR Industries by providing the latter with information, figures and allowing the specialized anti-piracy groups to participate in meetings; 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 important. Prosecutors must press the cases, and judges must issue search orders and deterrent sentences. 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. 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.

⁵ "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.

On June 4-8, 2001, the U.S. Embassy helped coordinate an IPR training program for government officials and expert witnesses. While this training was effective, it did not translate into concrete action on the ground. High-level political support from senior Paraguayan authorities is necessary to reinvigorate effective enforcement against this endemic piracy.

The police are generally helpful, but only after the industries conduct the investigations.

The police have not shown any proactive efforts to enforce intellectual property rights in Paraguay. The Prosecutor's Office relies on the police only for physical protection during the criminal raids. The Division of Economic Crimes of the Police, the department in charge of enforcing IPR laws in Paraguay, has been publicly accused of requesting bribes to different retailers in Ciudad del Este. Most if not all of the investigations are carried by private investigators paid by the industry. The results of these investigations is later submitted to the Prosecutor's Office with a criminal complaint.

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. However, since the business model for pirates has changed from large-scale operations to loosely knit, small-scale groups, the tasks of identifying and immobilizing these organizations has become more difficult. In 2001, the pirating organizations with ties to terrorists and organized crime groups in Lebanon and Southeast Asia compartmentalized their operations to minimize losses and prevent total disruption of their operations. It is clear, due to recent events, that the more sophisticated criminals and terrorists involved in music piracy groups have adopted the "cell" structure of operations. In most cases, no one of significance appears or is present at any replicating facility. The recording industry continued to conduct raids based on its own investigations. In 2001, it conducted 64 raids, which resulted in the seizure of over 1,574,760 units of infringing products (mostly music CDs) and the closure of 30 manufacturing facilities, most of the small- to mid-sized CD-R replication facilities and 30 storage facilities of different sizes. Two major organized crime cases with international nexuses are currently under investigation. A 5-million-unit shipment of contraband blank CD-Rs, allegedly destined for the pirate market, was seized by Paraguayan authorities based on information provided APDIF/Paraguay. Several other multimillion-unit blank CD-R shipments are under investigation for under declaration of tax levies. It should be noted that the Paraguayan government has never started any big investigation on its own initiative. The absence of the Finance Ministry is total; Customs helps (albeit it could help more), and the Ministry of Industry and Commerce does exactly the opposite of what has been agreed to in the various bilateral MOUs with the U.S. government.

Regarding business software enforcement, the BSA formally launched its anti-piracy campaign in Asunción in August 1999.⁶ 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

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.

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 Iguazú, Brazil. During 2001, BSA conducted 12 criminal raids against software resellers in Ciudad del Este and Asunción. Several of these raids were conducted against the same resellers that were raided during 2000. The majority of their merchandise was seized by the authorities. Most of the resellers raided would be open for business the next day, with a complete display of counterfeit software. Although BSA member companies have been filing criminal cases since 1999, no final decision in any of these cases has ever been issued. There are two cases dated from 1999 that are still pending in the courts of Ciudad del Este.

In 2001, the MPA took its first enforcement actions in two years in Paraguay. Following the June training session organized by the U.S. Embassy, MPA coordinated with the Ministry of Commerce and Industry to raid 32 video stores involved in video piracy. Neither the results nor the process were impressive, despite large promises made by upper level government officials during the June training sessions. A key frustration for MPA is the serious lack of resources given administrative copyright enforcement, and the ministry's opinion that MPA should provide financial incentives for action.

Lack of Effective Prosecution and Deterrent Sentencing

There are four specialized IPR prosecutors in Paraguay, all in Asunción. The prosecutors now have, temporarily, 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. At present, only one of these prosecutors is assigned full-time to IPR cases. The prosecutors are constantly being removed from their official duties and being assigned to other criminal areas.

The recording industry reported last year that, in 2000, Paraguayan courts issued nine criminal judgments against pirates of sound recordings. Sentences included imprisonment of 13 months, and fines up to \$36,900 were imposed. The recording industry initiated 77 actions, and 39 remain pending. In 2001, the courts issued three convictions against pirates of sound recordings; however, no one was imprisoned. All of the prison sentences were under one year and all were suspended. Community service of some kind was the usual mandate from the judge. There are a total of 43 actions pending in the courts. No fines were levied against infringers in 2001.

The unreasonable delay of the courts in prosecuting the cases and the lack of any exemplary judgments against pirate software resellers have turned this illegal activity into a very lucrative one. In a worst-case scenario, a pirate software reseller can expect to be raided once or twice a year; lose some of the illegal merchandise that is seized during the raid; and pay a bond and attorney fees, to be back in business.

For example, BSA reported last year that 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 defendant 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 that case was 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.

Civil End-User Actions and Civil *Ex Parte* Searches

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. In total, the BSA brought six end-user civil raids during 2000. In 2001, BSA conducted 10 civil inspections. Three of these cases have been settled, while the rest are still pending resolution. One of the main problems that BSA faces with civil enforcement is the sometimes unreasonable delay of some courts in granting *ex parte* search orders. In many cases, it could take a minimum of 45 days to obtain a civil warrant search.

In addition, litigating a case in Civil Court in Paraguay could turn out to be a lengthy process. It takes an average of three years to reach a decision from a District Court and an additional year if the case is appealed.

Paraguayan Border Measures Remain Ineffective

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 Paraguayan Customs system is an ineffective enforcement authority which cannot conduct searches without a court order. This notorious problem has been unresolved for years.

Paraguayan customs has also done an inadequate job of allowing the importation of legitimate products into Paraguay. For example, in December 2001, one BSA member company sent a shipment of CDs containing software worth approximately \$70,000 to a reseller. The container disappeared a few days later while it was in customs' custody waiting for clearance. According to customs officials, the container was stolen. Paraguayan Customs is currently conducting an internal investigation to determine the whereabouts of the shipment.

The recording industry reports that the situation with customs continues as *status quo*, although there has been improvement in the flow of information based on leads developed by APDIF/Paraguay. The fact that customs still needs court orders to perform thorough inspections hinders their enforcement capability and gives the pirates more time to corrupt public officials outside of the customs jurisdiction. In terms of the "red channel" operations, these may be successful, depending on the information the music industry provides. However, this system continues to be highly corruptible, depending on the personal contacts of the smuggler. A typical example of this situation was the December 2001 seizure of 5 million blank CD-Rs in Ciudad del

Este. The shipment should have been caught under the “red channel” procedure because it was being taxed on the lower scale of magnetic recordings, instead of the scale for optical discs. The difference here amounted to more than \$30,000 in lost taxes to the Paraguayan government, probably destined for a corrupt official and a rogue dispatcher.

In the experience of the entertainment software industry, the border authorities have only conducted a few random searches at the Paraguay/Brazil border, some with success. For example, in several cases involving seizures of pirated videogames, Paraguayan customs did confiscate suspect shipments. In September 2001, customs authorities conducted several seizures. In Asuncion, 4,000 counterfeit Nintendo® videogame products, including multiple variations of videogame hardware systems and accessories, were seized. All the products originated in China and were transhipped through Chile before reaching Paraguay. The products were taken to the District Attorney's warehouse for evaluation. A second customs seizure took place at the Chaco-i Customs House, where over 4,000 units of N64 controllers and “Polystation” hardware were confiscated. Each “Polystation” system is incorporated with built-in Nintendo® videogame software. The shipment again came through the Iquique, Chile free zone. Seizures were also made at the Ciudad del Este Customs House, where approximately 18,000 products (including "Super Power Kits," protection shells, and accessory lights), in violation of the Nintendo® *Game Boy Advance™* trademark, were confiscated. The seized products were taken to the District Attorney's warehouse, and an official investigation was initiated against the importer.

COPYRIGHT LAW IN PARAGUAY

WIPO Treaties

Paraguay already has deposited 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). The 1998 law represented 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). IIPA has summarized disappointing elements and deficiencies in the 1998 Copyright Law in prior Special 301 filings:

- 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 temporarily corrected by legislation in mid-1999; see below).
- Neither the public communication right (for authors) nor the digital communication right (for producers) tracks 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 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 materials 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

- 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) 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 continues to bring cases based on the copyright law, but all the general provisions regarding penalties follow the criminal code. As a result, nobody goes to jail and there is no real application of the criminal sanctions. The recording industry has been forced to bring cases for different violations (such as contraband, tax evasion, etc.) rather than violation of copyright.

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, 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. Unfortunately, we understand that this law will sunset in July 2003; the Paraguayan office in charge of judicial training has issued a public statement to that effect.

Government Software Management

The Paraguayan government missed its 1999 deadline and also failed to do an inventory on installed software. 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 was to be completed annually in March. Importantly, all unauthorized programs must be legalized or removed from government computers by December 31, 1999. The government has failed to meet its obligations under the MOU. Up to date, the only ministry that has finished its audit and legalized most of its installed software base is the Ministry of Industry and Commerce. The rest of the ministries and government agencies have not even started the audit process. BSA urges the Paraguayan government to resume and finish this legalization process before the end of 2002 to meet its bilateral obligations under the MOU.