

# INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

## 2003 SPECIAL 301 REPORT

# PARAGUAY

### EXECUTIVE SUMMARY

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**Special 301 recommendation:** IIPA sadly notes that few elements of the 1998 Memorandum of Understanding (MOU) on intellectual property rights have been effectively implemented in Paraguay. IIPA recommends that Paraguay be placed on the Priority Watch List. In recent years, USTR has been monitoring Paraguay under Section 306 of the U.S. Trade Act of 1974.

**Overview of key problems:** Paraguay's 1998 Memorandum of Understanding (MOU) and Enforcement Action Plan should be renewed and remain in effect. Both the Paraguayan and the U.S. governments have invested years of effort to improve the Paraguayan system. Piracy levels in Paraguay remain high, and estimated losses due to copyright piracy were \$212.7 million in 2002. Unfortunately, enforcement efforts taken by Paraguayan authorities continue to be ineffective in deterring widespread piracy there. While there has been some progress in Paraguay over the years, the copyright industries report several trends and problems which have undermined most progress to date. These issues include: (1) the explosion of new forms of piracy in a market already overwhelmed by piracy (of both the home-grown and transshipment varieties); (2) the involvement of organized crime factions in copyright piracy; (3) few criminal investigations, raids and prosecutions against copyright pirates; (4) a judiciary unwilling to issue deterrent sentences (with rare exceptions); and (5) a copyright law that hinders the application of deterrent sentences because it treats intellectual property violations as minor offenses.

**Actions which the government of Paraguay should take in 2003:** Actions to improve the piracy and enforcement situation should include—

- Renew the 1998 Memorandum of Understanding;
- Fully implement the provisions of the 1998 MOU and its accompanying Enforcement Action Plan (see detailed analysis on enforcement and legislative deficiencies, below);
- Improve border enforcement, including the interception and seizure of piratical goods as well as the inspection of blank optical disc media;
- Audit for tax evasion large scale importers of blank CD-Rs who are suspected suppliers to pirate organizations;
- Improve training for prosecutors and judges, with the objective result being that the Paraguayan system provides deterrence to copyright piracy;
- Extend the July 2003 sunset of the criminal code law that makes copyright infringement a "public" action;
- Address the problem of widespread street vendors offering pirate product;
- Legalize its installed software base—pursuant to Decree No. 1524, the Government had to ensure that all ministries eliminated any and all pirate copies of software by December 31, 1999;

- Amend the criminal code to increase the penalty, in cases of unauthorized reproduction of protected works, to a minimum of one year and a maximum of seven years in order to elevate the violations to major crimes. The current penalty of six months to three years for IPR violations prevents any effective deterrent sentences.

**PARAGUAY**  
**ESTIMATED TRADE LOSSES DUE TO PIRACY**  
*(in millions of U.S. dollars)*  
**and LEVELS OF PIRACY: 1998 - 2002<sup>1</sup>**

INDUSTRY	2002		2001		2000		1999		1998	
	Loss	Level								
Records & Music <sup>2</sup>	204.4	99%	253.6	99%	200.0	90%	200.0	90%	280.0	90%
Motion Pictures	2.0	80%	2.0	80%	2.0	80%	2.0	80%	2.0	80%
Business Software Applications <sup>3</sup>	4.3	69%	3.5	72%	8.5	76%	6.7	83%	5.2	85%
Entertainment Software	NA	NA	NA	NA	9.7	99%	8.1	99%	8.4	99%
Books	2.0	NA	3.0	NA	3.0	NA	3.0	NA	2.5	NA
<b>TOTALS</b>	<b>212.7</b>		<b>262.1</b>		<b>223.2</b>		<b>219.8</b>		<b>298.1</b>	

## BILATERAL ENGAGEMENT ON IPR

### The 1998 Special 301 Investigation

Five 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 end of the investigation, 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

<sup>1</sup> The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA’s 2003 Special 301 submission, and is available on the IIPA website at [www.iipa.com/pdf/2003spec301methodology.pdf](http://www.iipa.com/pdf/2003spec301methodology.pdf).

<sup>2</sup> RIAA reports that its estimated piracy losses include both domestic piracy in Paraguay as well as estimated losses caused by transshipment.

<sup>3</sup> BSA’s estimated piracy losses and levels for 2002 are preliminary, and will be finalized in mid-2003. In IIPA’s February 2002 Special 301 filing, BSA’s 2001 estimates of \$11.5 million at 79% were identified as preliminary; BSA finalized its 2001 numbers in mid-2002, and those revised figures are reflected above. BSA’s trade loss estimates reported here represent losses due to piracy which affect only U.S. computer software publishers in this country, and differ from BSA’s trade loss numbers released separately in its annual global piracy study which reflects losses to (a) all software publishers in this country (including U.S. publishers) and (b) losses to local distributors and retailers in this country.

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. As a result, 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.<sup>4</sup> In the Special 301 context, USTR has been monitoring Paraguay’s implementation of the MOU under Section 306 of the 1974 Trade Act. However, now that the MOU has expired, there is in effect nothing to “monitor.” It is important that this MOU be renewed.

## **Unfinished Business: The 1998 MOU and Enforcement Action Plan**

The November 1998 MOU contains nine articles and an annex which comprises the “Enforcement Action Plan.”<sup>5</sup> 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, 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. IIPA and its members recommend that this agreement be renewed.

Although some of the specific action items listed in the MOU (and the Enforcement Action Plan) have been successfully completed by the Paraguayan authorities, most have been either completely disregarded or abandoned. Below is an illustrative list of several key MOU elements which the copyright industries believe the Paraguayan government has not implemented effectively—

- 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 also called “GAP” (*Grupo Anti-Pirateria*, or more 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 comprise 15 intelligence officers who were to perform investigations. Over three years have passed since the resolution was issued, but to date, the group has been formalized only on paper, not in practice. 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 any developments in the formation of this group. Since such an inter-institutional brigade (or any other Paraguayan enforcement agency, for that matter) is not even organized or functionally

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<sup>4</sup> For the first 11 months of 2002, \$11.5 million worth of Paraguayan goods (or 30% of Paraguay’s total imports to the U.S.) entered the U.S. under the duty-free GSP program, representing a 30.8% increase from the same period in 2001. For more information on Paraguay’s placement under Special 301, please see Appendices D and E of this report.

<sup>5</sup> The full text of the MOU is available on the U.S. Department of Commerce Website at <http://www.tcc.mac.doc.gov/cgi-bin/doiit.cgi?204:64:1:185>.

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. The streets of Asunción, Encarnacion and, of course, Ciudad del Este, continue to be overrun with vendors selling pirate music and software.

- “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 supposed 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 violate 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. Regardless of the red channel system, much more improvement in border enforcement is needed. The Paraguayan border remains porous. More training of customs inspectors is urgently needed. Customs should also monitor the border on a 24-hour basis in order to deter shipments that pass through customs checkpoints late at night.
- 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. Although five prosecutors have been assigned to intellectual property violations and other economic crimes, only two dedicate most of their time to this area.
- 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. For example, the recording industry has been involved in 53 cases that reached sentencing in 2002, with none of them imposing jail time. Most of these cases involve major warehousing and distribution centers as well as one case of an illegal CD plant with two production lines. The cases produced confiscation of thousands of pirate CDs and millions of inlay cards, but deterrent sentences were not issued. The business software industry assisted the Prosecutor’s Office in prosecuting four cases that reached sentencing in 2002. The defendants in these four cases did not serve any time in jail because the courts imposed sentences of less than two years and fines, thus making the defendants eligible for the suspension of their sentences.
- 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 in some cases. 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. Both the recording industry and the business software industry report that they have obtained improvements in this area, and search orders are being issued within a few days.

- 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 started, and the terms of the decree have not been implemented in practice. Since 1998, few government agencies have taken any significant steps to legalize their installed software base. Some government agencies have signed legalization agreements with BSA but, to date, they have yet to fulfill the obligations they assumed under those legalization agreements.
- 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. This problem continues despite the goodwill of some people within governmental agencies to address the piracy problem.

**Additional developments:** In addition to the MOU, IIPA members report several additional developments on the IPR enforcement front:

- Customs agreement with the recording industry: In October 2002, the Ministry of the Economy signed a customs anti-piracy agreement with the recording industry that calls for, among other items: (a) training of customs officials by anti-piracy experts; (b) the exchange of information regarding pirate CDs and CD-Rs; (c) participation of the industry's anti-piracy personnel, as deemed necessary by Customs, in the identification and inspection of suspect product; and (d) the implementation of an importers register that will prevent ghost companies from importing pirate CDs or CD-Rs. The effective implementation of this agreement is viewed by the recording industry as a fundamental part of Paraguay's ability to deal with piracy, and in its ability to curtail Paraguay's participation as a major transshipment point for pirates. We urge the U.S. government to closely monitor Paraguay's performance.
- Criminal penalties: The current penalty of 6 months to three years for IPR violations prevents any effective deterrent sentences. IIPA and its members suggest increasing the penalty to a minimum of one year and a maximum of seven years in order to elevate the violations to major crimes.
- Raw materials: Paraguay should adopt criminal provisions for the act of knowingly supplying raw materials to pirates.
- Tariffs on blank CD-Rs: It is becoming obvious that the importation of 104 million CDRs in 2001 and another 100 million in 2002 for a market that may absorb no greater than 10 million units per year is a mechanism that supports other activities, among which is piracy of music and software. As a preventive measure, Paraguay may want to consider raising tariffs for the importation of CD-Rs.

- Optical disc law: Although only one blank CD-R plant exists in Paraguay, the potential exists for more manufacturers to set up lines locally. The Paraguayan government may want to consider implementing optical disc legislation to control the installation of new plants and licensed production.
- Destruction of suspected infringing materials: Amendments to Paraguayan laws and procedures should be made to require that all suspected pirated goods be seized and not returned to the alleged owners until the status of the goods (as legitimate or piratical) can be determined with certainty. For example, the entertainment software industry reports that the return of pirated materials is a serious problem.
- Public vs. private action: The 1998 version of the Criminal Procedure Code stated that copyright infringement cases were “private” actions, and could only be brought by complaint of the right holder; the State could not take action *ex officio*. Under the MOU, the Republic of Paraguay agreed to amend the Criminal Code and the Criminal Procedures Code to make copyright piracy a “public” offense. This problem was temporarily resolved. In June 1999, the President signed into law an amendment to the criminal code which made copyright crimes public offenses, and, therefore, prosecutors were able to pursue these cases on their own initiative. Unfortunately, this law will sunset in July 2003 according to the interpretation of the Office of Implementation of the Criminal Procedure Code of the Supreme Court of Justice of the Republic of Paraguay. The Republic of Paraguay must provide a definitive solution to this problem to fulfill its obligations under the MOU.

## **COPYRIGHT PIRACY IN PARAGUAY**

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### **Optical Media Piracy: Transshipment and CD-Rs**

Paraguay continued to serve as a favored destination in 2002 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 also continued. Ciudad del Este businesses continue to boldly offer and sell obvious counterfeit optical media products from the gaming, music, software and video industries.

**Blank CD-Rs and CD-R burning**: The pirates have continued their strategic shift from pre-recorded OD product to importing blank recordable CD (CD-Rs) into Paraguay. In 2002, about 100 million units were imported, down slightly from the approximately 104 million units were in 2001, which was a significant increase from the 34 million units in 2000. Paraguay clearly does not have the market to absorb any of these amounts.

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-Rs. These “sprayed” plants serve Paraguayan, Argentine, Uruguayan and mostly Brazilian illegal CD-R duplicators.

**Local OD manufacture:** 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**

It is no secret that 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.

## **Domestic Piracy Remains Widespread in Paraguay**

The recording industry reports that piracy has wiped out the legitimate music market; the 2002 piracy level was 99%. As a result, estimated trade losses due to recording and music piracy in Paraguay were \$204.4 million in 2002 (slightly below 2001 levels due to devaluation); 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. Total legitimate sales in 2002 were approximately 200 thousand units when Paraguay, with significant local artist activity, has the potential to sell 20 million units. 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 business software industry reports two main problems. 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 since 1999, 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 \$4.3 million, with an estimated 69% piracy level in 2002. On a positive note, the BSA conducted a consumer protection campaign during May 2002 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 chips<sup>6</sup> from Taiwan. The videogame chips are assembled, along with other components, into completed counterfeit Nintendo videogame products. The industry continues to have some success working with local district attorneys and 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.

Annual losses to the U.S. motion picture industry due to audiovisual piracy in Paraguay are estimated at \$2 million in 2002. MPA initiated legal and commercial actions directed at the video store market in Asunción and has successfully reduced the incidence of piracy in that market through 2002, although video piracy remains high in peripheral areas and in rural areas—80% overall. Nevertheless, Paraguay remains a significant threat to other Latin American markets because of the large pirate transshipment operations in Ciudad del Este.

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<sup>6</sup> "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.

Within the country, video piracy continues to be the most significant piracy problem for the audio-visual industry. 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. MPA reports that the impact of Paraguay-based piracy on neighboring countries is far more troubling. There has been a renewal of illegal distribution and transshipment of pirate optical disc for export as contraband to neighboring markets such as Brazil and Argentina. In addition, Paraguay has long been a transshipment point for optical disc piracy (music, software and videogames), so as the market for DVDs grows in Latin America, Paraguay is likely to become the center for importation into South America of pirate DVDs as well.

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 2002 trade losses due to book piracy are \$2.0 million.

## **COPYRIGHT ENFORCEMENT IN PARAGUAY**

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As IIPA has stated before, 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, as much of this industry's losses is caused by infringing acts occurring within legitimate businesses and agencies. 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.

### **Police are generally helpful but only after industries' investigations.**

Even in 2002, the Paraguayan 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 the last two years 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 2002, the recording industry conducted 83 raids, which resulted in the seizure of over 1,494,087 units of infringing products (mostly music CDs) and the closure of 34 manufacturing facilities, most of the small to mid-sized CD-R replication facilities and 39 storage facilities of different sizes. Two major organized crime cases with international nexuses are currently under investigation. Shipments of contraband blank CD-Rs amounting to 18 million units, allegedly destined for the pirate market, were seized by Paraguayan authorities based on information provided by 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. Customs has been more cooperative (albeit it could help more); however, 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, during 2002, BSA conducted seven (7) civil end-user actions and assisted the Prosecutor’s Office in 17 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 and 2001. The majority of their merchandise was seized by the authorities. Most of the resellers raided would be open for business the following day, with a complete display of counterfeit software. Although BSA member companies have been filing criminal cases since 1999, few final decisions in any of these cases have ever been issued. There are two cases dated from 1999 that are still pending in the courts of Ciudad del Este.

The only actions the government has taken to combat video piracy have been a series of raids on video stores in Asunción, with no industry-coordinated action in Ciudad del Este. 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 five specialized IPR prosecutors in Paraguay, three in Asunción and two in Ciudad del Este. The prosecutors now have, temporarily, the ability to pursue copyright infringement cases as “public” actions, thanks to Law No. 1.444, 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. Also, suspicions of corruption continue to be part of the game, as the case in late December where one of the Ciudad del Este prosecutors released 1.5 million blank CDRs seized for contraband back into the hands of suspect importers.

The recording industry reported that in 2002, Paraguayan courts issued 53 criminal judgments against pirates of sound recordings. Sentences included imprisonment of 2.5 years but 24 were suspended, 20 became fines and the rest were benefited by probation. The recording industry initiated 48 actions but none included any type of preventive incarceration or effective jail sentences because of limitations in the current criminal code, it has proven impossible to obtain any type of deterrent-level sentences that involve jail time.

BSA reports that in 2002, the courts issued four convictions against resellers of illegal software. The defendants in these four cases did not serve any time in jail because the courts imposed sentences of less than two years and fines, thus making the defendants eligible for the suspension of their sentences. While these cases are steps in the right direction, the fact that the defendants received suspended sentences detracts from the deterrent effect that this news would otherwise have had. 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.

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

In 2002, BSA conducted seven (7) civil copyright infringement actions (compared to the 10 inspections conducted in 2001). 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 can take a minimum of 45 days to obtain a civil warrant search.

Litigating a case in the Civil Court in Paraguay could turn out to be a lengthy and risky 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. Sometimes decisions, in cases with strong evidence are uncertain. For instance, in a case decided in 2002, a panel of the Civil and Commercial Court of Appeals of Paraguay held that foreign copyright right holders must either have a domicile in Paraguay or post a security bond to seek damages in copyright infringement cases. In this case, BSA filed a civil *ex parte* measure against an end-user for alleged copyright infringement in 2001. The court issued the search order and BSA found extensive evidence that the raided company was using unlicensed software. BSA then filed a civil complaint seeking damages and the defendant moved to dismiss the case because the copyright right holders of the software infringed did not have a domicile in Paraguay. The court presiding the case denied the defendant's motion to dismiss. The defendant appealed, and the Civil and Commercial Court of Appeals of Paraguay revoked the district court's decision, holding that foreign copyright right-holders must either have a domicile in Paraguay or post a security bond to seek damages in copyright infringement cases. BSA has appealed the case to Supreme Court of Paraguay.

## **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. The border with Brazil is completely open today and *sacoleiros*, individuals who come to buy counterfeit products to later sell in Brazil, are flooding Ciudad del Este. The Paraguayan authorities have taken no steps to prevent this activity.

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 conducted an internal investigation to determine the whereabouts of the shipment; as of this filing date (February 2002), the investigation remains open and the shipment was never found.

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 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. Even though customs has cooperated more with the industry in recent months the problem of enormous amounts of blank CD-Rs being imported for piracy purposes continues. 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 program of constant monitoring for undervalued imports and tax evasion audits of suspected large-scale blank CD-R importers may be effective in reducing the large scale of the problem.

The entertainment software industry notes that pirates are attempting a new mode of shipping counterfeit products into the country; specifically, whether large shipments of counterfeit video game software, and component parts, can be shipped by air courier without detection. In May 2002, Nintendo attorneys succeeded in having the local district attorney seize about 90 counterfeit PC boards for *Game Boy* cartridges shipped through an air courier. The interception is important, as it may be indicative of how pirates are looking for new ways to bring pirated and counterfeit product into the country. The early detection may also serve to deter future attempts at shipments done in this fashion. An official investigation is underway against the importer.

# COPYRIGHT LAW IN PARAGUAY

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## 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. Back then, IIPA applauded 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

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 reformed its criminal code 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. 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 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. The current penalty of 6 months to three years for IPR violations prevents any effective deterrent sentences. IIPA and its members suggest increasing these penalties in order to elevate them to major crimes.

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.

To mitigate these obstacles, APDIF/Paraguay has been working on a bill which calls for the following reforms:

- Increase criminal penalties for intellectual property rights violations to a minimum of 2 years and maximum of 8 years. Fines would be added to prison terms;
- Include knowingly supplying raw materials to pirate organizations as a punishable criminal offense;
- Provide penalties for violations of technical protection measures and rights management information;
- Ratify *ex officio* action for prosecution of intellectual property rights violations.

We encourage the Paraguayan government to support these amendments to create the necessary legal framework to fight piracy effectively.

## **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. 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 as soon as possible to meet its bilateral obligations under the MOU.

## **COPYRIGHT AND REGIONAL TRADE NEGOTIATIONS**

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The negotiation of bilateral and regional free trade agreements (FTAs) is assuming increasing importance in overall U.S. trade policy. These negotiations offer an important opportunity to persuade our trading partners to modernize their copyright law regimes so they can maximize their participation in the new e-commerce environment, and to improve enforcement procedures. The FTA negotiations process offer a vital tool for encouraging compliance with other evolving international trends in copyright standards (such as fully implementing WIPO treaties obligations and extending copyright terms of protection beyond the minimum levels guaranteed by TRIPS) as well as outlining specific enforcement provisions which will aid countries in achieving effective enforcement measures in their criminal, civil and customs contexts.

IIPA believes that the IPR chapter in the Free Trade Area of the Americas (FTAA) must be forward-looking, technologically neutral documents that set out modern copyright obligations. They should not be summary recitations of already existing multilateral obligations (like TRIPS). As the forms of piracy continue to shift from hard goods and more toward digital media, the challenges faced by the copyright industries and national governments to enforce copyright laws

grow exponentially. The Internet has transformed copyright piracy from a local phenomenon to a global wildfire. CD-R burning is fast becoming a pirate's tool of choice throughout this region. Without a modern legal and enforcement infrastructure, including effective criminal and civil justice systems and strong border controls, we will certainly see piracy rates and losses greatly increasing in this region, thus jeopardizing more American jobs and slowing the growth of the copyright sectors both in the U.S. and the local markets.

Therefore, the IPR chapter in the FTAA should contain the highest levels of substantive protection and enforcement provisions possible. At a minimum, the IPR chapter should: (a) be TRIPS- and NAFTA-plus, (b) include—and clarify—on a technologically neutral basis the obligations in the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty (WCT and WPPT), and (c) include modern and effective enforcement provisions that respond to today's digital and Internet piracy realities. Despite the existence of these international obligations, many countries in the Western Hemisphere region fail to comply with the TRIPS enforcement obligations, both in their legislation and in practice. It is in the area of enforcement that some of the greatest gains for U.S. and local copyright creators can be achieved.