

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2005 SPECIAL 301 REPORT

VENEZUELA

EXECUTIVE SUMMARY

Special 301 Recommendation: IIPA recommends that Venezuela remain on the Special 301 Watch List in 2005.

Overview of Key Problems: Copyright protection in Venezuela is poor. To make matters worse, the copyright industries are particularly alarmed by proposed radical copyright legislation introduced into the National Assembly in November 2004. This legislation would severely undercut the current 1993 law and violate Venezuela's obligations under the Berne Convention. Furthermore, the proposed legislation fails to implement Venezuela's bilateral obligations as well as those required by the WTO TRIPS Agreement. If this law were to be adopted as originally drafted, the U.S. government should bring a TRIPS case against Venezuela.

Continuing economic and political instability in Venezuela has fostered a high level of copyright piracy. In recent years, the copyright industries' ability to engage in commercial distribution and conduct anti-piracy campaigns safely and effectively have been quite limited. The streets are flooded with pirated products. CD-R burning is widespread. As a result, the legitimate music industry in Venezuela has almost disappeared. The high piracy level, coupled with the proposed copyright legislation, creates the bleakest scenario the music industry has faced in its history. In fact, the Venezuelan market decreased by 87% in the last five years, going from 4.4 million units in 1999 to 700,000 in 2003. To add to this troubling situation, in December 2004, Venezuela's Congress passed a general broadcasting law that creates specific quotas for domestic music repertoire. The quotas require that at least 50% of all music being broadcasted be from local Venezuelan repertoire. The law represents a serious commercial barrier to all international music by limiting its exposure to consumers and restricting the potential revenues it can generate through broadcasting fees.

The rise in DVD-R and CD-R piracy in 2003-2004 has overtaken video piracy as the predominant form of hard-goods piracy harming the film industry. The audiovisual industry also is concerned that pay television and cable piracy may increase in the weak economic and legal environment. The business software industry reports that the most devastating form of piracy remains the use of infringing or unlicensed software by legitimate businesses and government agencies; pirated and counterfeit software is also easily available on the streets. Pirated videogames are widespread, with most imported from Taiwan, Hong Kong and China, transshipped through Paraguay. Book publishers continue to battle unauthorized photocopying, especially at secondary schools and universities. Estimated U.S. trade losses due to copyright piracy in Venezuela were US\$92 million in 2004.

Actions Which the Venezuelan Government Should Take in 2005

- Stop legislative consideration of the government's proposed copyright "reform" bill, the LDAADC, because its provisions would undermine Venezuela's TRIPS obligations as well as its bilateral copyright obligations with the U.S.;
- Repeal music quotas required by the recently passed general broadcasting law;
- Complete deposit with WIPO of the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT);
- Significantly increase enforcement against copyright piracy. Instruct the enforcement agencies to make anti-piracy enforcement a priority in order to foster the growth of local content industries and encourage local investment.

COPYRIGHT LAW

The 1993 Venezuelan copyright law, while relatively comprehensive in many respects, needs to be revised to reflect the modern standards found in the WIPO Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT). Unfortunately, Venezuela is taking backwards steps regarding even basic copyright reform.

On November 4, 2004, a group of deputies from President Chavez's political movement (*Cambio*) formally introduced a copyright "reform" bill, *Ley del Derecho del Autor y la Autora y Derechos Conexos* (LDAADC), into the Venezuelan National Assembly. This astonishingly radical reform bill was approved in the first reading on February 2, 2005, essentially without discussion and without ever having been first assigned to any committee. It has now been assigned to the Permanent Committee of Interior Politics, Justice, Human Rights, and Constitutional Guarantees, which will generate recommendations for the second reading in the National Assembly. Given current political dynamics there, it is possible that this bill could pass in 2005. This bill would reverse two decades of progress in copyright protection in Latin America as well as violate Venezuela's Berne Convention and TRIPS obligations and its bilateral IPR obligations.¹ In the legislative history section (*Exposición de Motivos*) of the bill, proponents state that this effort arises from the earlier "political distortions" and "state of social and economic injustice" that gave rise to the existing 1993 copyright law.

Among its many troubling deficiencies, the bill proposes the following:

- Deleting all rights for phonogram producers and broadcasters (violation of TRIPS, the WPPT, the Rome Convention and Andean Community Decision No. 351);
- Requiring mandatory registration for works and performances;
- Lowering the term of protection from 60 to 50 years;
- Removing presumptions of ownership in favor of movies and software producers;
- Lowering criminal penalties from one–four years to one–two years;
- Making it very difficult to assign or transfer works;
- Removing all *ex parte* injunctions and actions;

¹ Venezuela is a beneficiary under the U.S. Generalized System of Preferences (GSP) trade program, which requires beneficiary countries to afford "adequate and effective" intellectual property rights protection to U.S. copyright owners. For the first 11 months of 2004, \$746.8 million worth of Venezuelan goods (or 3.4% of Venezuela's total imports to the U.S.) entered the U.S. under the duty-free GSP code, representing a 33.1% increase from the same time period in 2003. For more information on the history of Venezuela under Special 301 review, see Appendices D and E of this submission.

- Requiring a mandatory royalty in favor of natural authors of 50% of all earnings from commercialization of work;
- Limiting all transfers of rights to commercialize a work to ten years for cinematographic, scientific, and technological works, and only two years in the case of certain classes of works, such as artistic and musical, audiovisual and literary works;²
- Providing very broad and expansive exceptions to protection;
- Providing an unclear making available right;
- Not covering point-to-point transmission, ISP liability, or notice and takedown provisions;
- Not establishing an importation right, which would provide statutory civil damages or criminal penalties for unauthorized parallel import of copyrighted works;
- No civil or criminal remedies against the alteration or circumvention of Electronic Rights Management Information (ERMI) or against circumvention of technological protection measures (TPMs);
- No efficient border measures;
- Giving the State the right to seize certain works by eminent domain for reasons of “collective benefit,” such as information related to public health, maps, artistic and musical works; and
- Eliminating work-for-hire provisions.

Provisions such as these also fail to further the legal exploitation of copyrighted products, either by national or international companies. In fact, SAPI (the Copyright, Patents and Trademarks Office) held a public seminar in October 2004, presenting this bill as focusing on the positive “social role of pirates in society.”

Full ratification of the two WIPO Internet Treaties remains a regional priority for the copyright industries. We urge President Chavez both to ratify the WCT and complete ratification of the WPPT.

PIRACY AND ENFORCEMENT

Enforcement of the copyright law by Venezuelan government authorities remains poor. Enforcement against street sales is non-existent and piracy there flourishes. COMANPI, the anti-piracy brigade which was once well regarded in the region, had its budget cut years ago and copyright actions declined dramatically. In 2003, the National Guard (*Guardia Nacional*) attempted to fill this gap by working with the copyright industries, but in 2004, the industries reported no anti-piracy actions. The Copyright Office (SAPI) has no real enforcement powers, but has helped the software industry by issuing administrative notifications to suspects and providing public support for the software industry enforcement campaigns. The single specialized IPR prosecutor is overburdened with both IP and human rights cases. Customs authorities do not have *ex officio* authority to inspect shipments on their own initiative; a judicial order is required. The courts continue to issue non-deterrent penalties and inadequate damages. A new system which distributes civil cases to judges randomly often delays the process because some judges are not familiar with the copyright law and its application. Frequent public demonstrations and court strikes and closings continue to make efforts to enforce the law difficult. The Special Law Against Electronic Crimes (*Ley Especial contra Delitos Informáticos*) passed in December 2001, but has not been applied in practice.

² We understand that transfers are also limited in term based on whether the contracting party has made a financial investment in the project for which the transfer is sought.

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Estimated Trade Losses Due to Copyright Piracy
(in millions of U.S. dollars)
and Levels of Piracy: 2000-2004³

INDUSTRY	2004		2003		2002		2001		2000	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Records & Music ⁴	31.0	80%	29.0	80%	29.3	75%	54.0	62%	30.0	62%
Business Software ⁵	36.0	75%	33.0	72%	27.1	52%	25.7	55%	16.9	58%
Motion Pictures	25.0	NA	25.0	50%	25.0	65%	25.0	65%	25.0	65%
Books	NA	NA	NA	NA	18.0	NA	20.0	NA	22.0	NA
Entertainment Software	NA	NA	NA	NA	NA	NA	NA	NA	47.0	78%
TOTALS	92.0		87.0		99.1		124.7		140.9	

³ The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2005 Special 301 submission at www.iipa.com/pdf/2005spec301methodology.pdf. For information on the history of Venezuela under Special 301 review, see Appendix D (<http://www.iipa.com/pdf/2005SPEC301USTRHISTORY.pdf>) and Appendix E (<http://www.iipa.com/pdf/2005SPEC301HISTORICALSUMMARY.pdf>) of this submission.

⁴ Estimated trade losses for the recording industry in 2002 reflect the impact of significant devaluation that year.

⁵ BSA's final 2003 figures represent the U.S. software publisher's share of software piracy losses in Venezuela, as compiled in October 2004 (based on a BSA/IDC July 2004 worldwide study, found at <http://www.bsa.org/globalstudy/>). In prior years, the "global" figures did not include certain computer applications such as operating systems, or consumer applications such as PC gaming, personal finance, and reference software. These software applications are now included in the estimated 2003 losses, resulting in a significantly higher loss estimate (\$55 million) than was reported in prior years. The preliminary 2003 losses which had appeared in previously released IIPA charts were based on the older methodology, which is why they differ from the 2003 numbers in this report.