

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2006 SPECIAL 301 REPORT

PARAGUAY

EXECUTIVE SUMMARY

Special 301 Recommendation: Currently Paraguay is not on any USTR list; it is being monitored under Section 306 of the U.S. Trade Act of 1974. IIPA proposes that Paraguay remain under Special 306 monitoring, and calls upon the Government of Paraguay to deliver on some of the progress initiated this past year and to take actions that will effectively reduce piracy levels.

Despite their best efforts, the Paraguayan Administration has failed to create the legal environment to fight piracy due to the lack of deterrent level penalties. IIPA members report continued high levels of cooperation with the Paraguayan authorities, and commend the actions of the UTE in trying to address piracy. Unfortunately, these actions have thus far not had a meaningful impact on the amount of pirate product available in Paraguay, and especially in the city of Ciudad del Este, or on Paraguay's role as a transshipment point for the raw materials intended for pirate production. It is imperative that Paraguay adopt changes to its penal code so that deterrent sentencing is possible, and that it undertake judicial training and/or the adoption of sentencing guidelines so that judges impose deterrent sentences when cases come before them. We express our gratitude to the brave men and women involved in the fight against piracy, and hope that enhanced inter-agency cooperation and the provision of better tools (i.e., deterrent sentencing) will permit the UTE and other law enforcement agencies to succeed in reducing Paraguay's role as a major player in global pirate trade—a role that significantly impairs Paraguay's standing in the world community and which limits direct foreign investment.

Priority Issues in 2006: IIPA commends Paraguay for having adopted a new and meaningful approach to the protection of intellectual property over the last two years. Much, however, remains to be done. We continue to hope that the following initiatives will create positive results:

- Enact legislation to amend the criminal code to increase penalties for copyright infringement (designating IPR violations as major crimes), establish *ex officio* actions, and criminalize of the circumvention of technological protection measures;
- Improve border enforcement, including the interception and seizure of piratical goods and contraband PC hardware, as well as the inspection of blank optical disc media;
- Attack the large-scale distribution points operating in Ciudad del Este, including by addressing the role of landlords with respect to the open and notorious illegal activities taking place on their premises;
- Impose deterrent remedies against pirates, including criminal penalties;
- Audit large-scale importers of blank CD-Rs who are suspected suppliers of pirate organizations for possible tax evasion. Pursue audits of customers of those importers. Tax authorities may want to consider creating a specialized unit familiar with the business of optical media and other exportable products;
- Improve training for prosecutors and judges, with the objective result being that the Paraguayan system provides deterrence to copyright piracy;

- Improve training for officials in the UTE, the special IP task force;
- Request that the Supreme Court suspend and/or remove expert witnesses and judges reported to be involved in corruption cases from current dockets.

<p style="text-align: center;">PARAGUAY Estimated Trade Losses Due to Copyright Piracy <i>(in millions of U.S. dollars)</i> and Levels of Piracy: 2001-2005¹</p>										
INDUSTRY	2005		2004		2003		2002		2001	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Records & Music ²	128.0	99%	127.8	99%	154.6	99%	204.4	99%	253.6	99%
Motion Pictures ³	NA	NA	2.0	95%	2.0	80%	2.0	80%	2.0	80%
Business Software ⁴	7.3	83%	6.0	83%	5.0	83%	2.2	71%	3.5	72%
Entertainment Software ⁵	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA
Books	2.0	NA	2.0	NA	2.0	NA	2.0	NA	3.0	NA
TOTALS	137.3+		137.8		163.6		210.6		262.1	

Overview of Key Achievements/Problems: Both the Paraguayan and the U.S. governments have invested years of effort to improve the Paraguayan system. Officials in the new Paraguayan administration have shown a great interest in tackling copyright piracy in-country and at its borders. IPR issues are discussed regularly under the context of the 2003 Memorandum of Understanding on Intellectual Property Rights and at the JCTI (Joint Council on Trade and Investment) meetings. Draft laws have been submitted which would increase the penalties for violations of intellectual property rights. The Specialized Technical Unit, created by decree in 2003, is in charge of conducting raids and seizures, and, with the assistance package of \$320,000 contributed by the U.S. government, has established a Statistics Center to collect data on IPR cases.

There have been significant positive developments in Paraguay during 2005, including:

- Seizure of over 12.7 million blank CD-Rs/DVD-R's and 3,819 burners;
- Convictions of 15 pirates (without prison sentences, however);
- Indictment of 14 people for organized crime violations;
- Indictment of 37 people for tax evasion in connection with piracy;

¹ The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2006 Special 301 submission at <http://www.iipa.com/pdf/2006spec301methodology.pdf>.

² RIAA reports that its estimated piracy losses include both domestic piracy in Paraguay and estimated losses caused by transshipment. The decrease in 2003 and 2004 estimates are due to lower average prices of recorded music and currency devaluation.

³ MPAA's trade losses and piracy levels for 2005 are available for a limited number of countries and are based on a methodology that analyzes physical or "hard" goods and Internet piracy. For a description of the new methodology, please see Appendix B of this report. As loss numbers and piracy levels become available for additional countries at a later time, they will be posted on the IIPA website, <http://www.iipa.com>.

⁴ BSA's 2005 statistics are preliminary. They represent the U.S. publishers' share of software piracy losses in Paraguay, and follow the methodology compiled in the Second Annual BSA/IDC Global Software Piracy Study (May 2005), available at <http://www.bsa.org/globalstudy/>. These figures cover, in addition to business applications software, computer applications such as operating systems, consumer applications such as PC gaming, personal finance, and reference software. BSA's 2004 piracy statistics were preliminary at the time of IIPA's February 11, 2005 Special 301 filing; the 2004 data has been revised and is reflected above.

⁵ ESA's reported dollar figures reflect the value of pirate product present in the marketplace as distinguished from definitive industry "losses." The methodology used by the ESA is further described in Appendix B of this report.

- Indictment of 21 people for forging import documents related to the importation of raw materials for piracy;
- Cancellation of 82 import licenses from companies found to have engaged in forgery and/or in predicate offenses related to piracy;
- Implementation of limited entry of blank media to seven customs ports;
- Maintained and monitored CD-R register to establish better controls on the importation of raw materials;
- Completed staffing of the special IP task force known as the UTE;
- In the first case involving Internet piracy, the defendant spammers were arrested, convicted and imprisoned for copyright infringement when they burned business software programs on CD-Rs and sold them.
- As noted in the number of seizures above, some actions have been taken against the illegal importation of blank optical media. However, Customs has done little to deter the exportation of “burned” CD-Rs and DVD-Rs.

The Government of Paraguay has shown resolve to address a problem that has for too long hindered the country’s economic development, and IIPA and its member associations recognize that effort. Nevertheless, despite the renewed energy by the Paraguayan government to combat piracy, the piracy situation remains relatively dire. Enforcement efforts taken by Paraguayan authorities, while well intended, continue to be largely ineffective in deterring widespread piracy there. Unchanged in recent years is the lack of deterrence — weak criminal penalties for IPR that deter judicial authorities from issuing sentences that require effective jail time. Organized crime elements remain intimately involved in the production and distribution of pirated products and/or raw materials for the manufacture of pirated products, thus making enforcement even more difficult. There are still too few criminal investigations and prosecutions against copyright pirates. Unfortunately, the copyright law and criminal code work to frustrate the application of deterrent sentences because they treat intellectual property violations as minor offenses. The borders remain porous, despite cooperative efforts between industry and border officials to halt suspect shipments and review false documents. Amendments to the criminal code to increase penalties are urgently needed

Need to extend the 2003 Memorandum of Understanding on IPR. On December 19, 2003, the Paraguayan Ministry of Foreign Relations and the U.S. Embassy in Paraguay announced the conclusion of the first meeting of the Joint Council on Trade and Investment (JCTI) and the completion of a new Memorandum of Understanding on Intellectual Property Rights (IPR MOU). The text of the IPR MOU was made publicly available in April of 2004,⁶ and contains an annex setting out the Government of Paraguay’s Action Plan for IPR improvement. The MOU includes elements on legislative, administrative, and enforcement issues designed to strengthen the government’s ability to effectively fight copyright piracy and trademark counterfeiting, and to improve its overall intellectual property system. The MOU requires Paraguay to implement TRIPS compliant legislation by “develop[ing] and implement[ing] effective enforcement mechanisms and practices to significantly reduce the levels of copyright piracy and trademark counterfeiting in its territory, including through the imposition of deterrent penalties.” One element of this is to increase criminal sanctions for those convicted of copyright and trademark violations. The MOU also requires regular review of Paraguay’s progress throughout the term of the agreement, which terminated on December 31, 2005. Ongoing bilateral discussions are underway to extend the MOU, possibly for a two-year period.

⁶ The full text of Paraguay’s 2003 IPR MOU is available on the U.S. Department of Commerce’s website at <http://www.tcc.mac.doc.gov/cgi-bin/doiit.cgi?204:64:1:185>.

COPYRIGHT PIRACY IN PARAGUAY

Optical Media Piracy — Transshipment and CD-Rs: Again in 2005, Paraguay continued to serve as a favorite destination for much of the pirated optical media product being produced in Southeast Asia (e.g., Malaysia, Macau, Hong Kong, Singapore, and Taiwan). As a result of this sourcing problem, Paraguay remains a significant player as a transshipper of pirate product to its neighbors.

Pirates in Paraguay have continued to shift their products from pre-recorded optical disc product to importing blank recordable CDs (CD-Rs) into Paraguay. According to official Paraguayan statistics, there were 290 million blank CD-Rs and DVD-Rs imported into Paraguay in 2005. In comparison, there were 27.4 million units imported in 2000. Simply said, Paraguay does not have the legitimate markets to absorb these immense amounts of product. In addition to their clandestine industrial CD production capacity, the pirates of Ciudad del Este shifted their replication methods. Hundreds of labs using CD burners have replaced the previous underground illegal CD plants. Many of these burning facilities are supplied by pirate kingpins who coordinate their work and provide the small labs with blank CD-Rs. These “sprayed” plants serve Paraguayan, Argentine, Uruguayan and (mostly) Brazilian illegal CD-R duplicators.

Organized crime elements still control piracy in Paraguay. Organized criminal groups remain involved in the production and distribution of pirated and counterfeit product, and/or in the importation and distribution of raw materials. 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. Paraguay continues to be a transshipment point for areas throughout Latin America, for the large amounts of surplus optical media product manufactured in Southeast Asia. Organized groups from Korea, Lebanon, Libya, Brazil, Bolivia and Argentina are involved. Of course, Paraguayan groups also take part in these illegal activities. During 2005, some industries report that organized crime elements are working more with smaller labs, making it harder to identify their operations. The influence of organized crime is pervasive. Even INTERPOL has recently engaged the Triborder Area in law enforcement actions against criminal organizations involved in IP infringements. In November 2004, INTERPOL launched “Operation Jupiter,” aimed at disrupting the activities of organized criminals involved in transnational piracy and counterfeiting.

Domestic piracy remains widespread across all sectors. Copyright piracy remains pervasive in Paraguay, with little to no improvement in 2005. Industries also report that Internet-based piracy rose in 2005.

The entertainment software industry reports that Paraguay continues to be a hub for the assembly, sale, import and export of pirated entertainment software in all formats. Both CD-based piracy of videogames (which includes console CDs for PlayStation®) and cartridge-based piracy remain major problems. Counterfeit video game products continue to be imported largely from Asia, then to be exported to other countries in the region. In April 2005, a raid was conducted against three (3) locations in Ciudad del Este, resulting in the seizure of 47,557 pirated CDs of games for play on PlayStation consoles. About 60,000 inlay cards bearing a variety of video game titles for PlayStation consoles were also seized.

The business software industry reports that 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. BSA reports that in 2005, Internet-based piracy increased, and they have

found more suppliers of pirated products distributed their wares by Internet. BSA completed a successful case in 2005 against a spammer who offered counterfeit software which they burned for sale. Severe problems with end-user piracy in businesses inflict the most economic harm on the potential growth of a legitimate software base in Paraguay. Furthermore, the software industry is concerned about the increasing illegal importation of computer hardware parts and components, which are then assembled into computers and frequently loaded by system builders and assemblers with illegal software. Much of this contraband hardware arrives in Paraguay, and then enters Brazil, Argentina and Uruguay. Stronger border measures and much better border enforcement are necessary to combat this practice. Estimated trade losses in 2005 due to business software piracy amounted to \$7.3 million, with an 83% piracy level.

The motion picture and recording industries report that their primary concern is Paraguay's position as a transshipment and organization hub for optical disc piracy. Ciudad del Este is the central distribution point for an increasing amount of blank optical discs (CD-R and DVD-R) and locally reproduced CD-R and DVD-R. Not surprisingly, this product continues to be primarily exported to Brazil, Chile and Argentina. The recording industry reports 2005 losses of \$128 million based almost exclusively on the sale of pirate product with a nexus to Paraguay but intended for consumption outside the country. Despite many efforts by both industries to work with local authorities to control the volume of blank optical media coming into the country that surely is used for domestic piracy or exported to Brazil for the same purpose, the 290 million units imported in 2005 indicate that these efforts have been ineffective.

AAP continues to report that photocopied materials are being used in place of legitimate books in institutions of higher learning. Suspicions regarding the presence of pirated versions of trade books and English language teaching materials remain. Estimated trade losses due to book piracy remained at \$2 million for 2005.

COPYRIGHT ENFORCEMENT IN PARAGUAY

Despite longstanding enforcement challenges in Paraguay, new initiatives are underway to strengthen the fight against copyright piracy. In 2004, the U.S. State Department announced an allocation of \$320,000 to Paraguay to be used for "training and technical assistance" in support of Paraguayan IPR enforcement units.⁷

Paraguayan border measures should be strengthened. Not surprisingly, many piracy problems in Paraguay are centered in the border cities. While the Paraguayan Government has improved its efforts, much remains to be done, and the government needs to further its customs procedures to combat cross-border piracy and corruption of its agents. 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. In addition, tax authorities should conduct strict audits of businesses catering to the "sacoleiro" traffic in Ciudad del Este since tax evasion is rampant.

Customs operations and industry coordination with the Ministry of Industry and Commerce (MIC) have greatly improved during 2005. In September 2003, the recording industry reached an agreement with customs and the MIC which provides that no blank CD-R shipment will be released

⁷ See U.S. Department of State, Press Release, Intellectual Property Training Programs Funded (Aug. 10, 2004), available at <http://www.state.gov/r/pa/prs/ps/2004/35078.htm>. See also U.S. Department of State, Fact Sheet, Intellectual Property Training Programs (Oct. 6, 2004), available at <http://www.state.gov/g/inl/rls/fs/36830.htm>.

until these groups verify that the submitted invoices and documents are valid and accurate. As a result of this new system, over 12 million blank CD-Rs and DVD-Rs with false or questionable invoices have been seized during 2005. In addition, 82 import licenses were cancelled, 37 individuals were indicted for tax evasion and another 21 for providing false documentation on imports of blank media. In July 2005, two cargo containers allegedly carrying general merchandise were intercepted after false documentation was filed. These containers held over 2.2 million blank CD-Rs. This operation was conducted by the Special IPR Unit (UTE) – not customs -- along with industry representatives. Another matter of concern is that a specialized technical unit in Customs has not been set up as required by the MOU on IPR Annex.

Criminal enforcement by the government is still ineffective. 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. The more sophisticated criminals involved in music piracy groups have adopted the “cell” structure of operations. The recording industry has continued to provide information for prosecutors to conduct raids. In 2005, the recording industry conducted 163 raids, which resulted in the seizure of over 671,000 units of infringing products (mostly music CDs) and the closure of 33 manufacturing facilities, most of them small to mid-sized CD-R replication facilities, and 20 storage facilities of different sizes. Another two major organized crime cases with international nexuses are currently under investigation. Shipments of contraband blank CD-Rs amounting to 12.7 million units, allegedly destined for the pirate market, were seized by Paraguayan authorities based on information provided by APDIF Paraguay.

BSA reports that the authorities remain cooperative with industry officials on both criminal and civil cases. Last year BSA conducted one civil end-user action (fewer than in prior years) and three reseller actions. About two dozen cases are currently under investigation. In Asuncion, BSA is working with the Ministry of Industry and Commerce on Project CITI, which has the object of prohibiting street sales of pirated product, a difficult objective. UTE has also been working with BSA members on *ex parte* actions regarding investigations into suspected pirated and counterfeit product.

ESA reports that government enforcement activities increased in 2005, compared to 2004. In 2004, Customs authorities and police conducted 12 raids which resulted in the seizure of approximately 240,000 Nintendo video game items. In 2005, there were 27 raids that resulted in the seizure of about 395,000 products; 22 of these raids were conducted by the police, while in each of the five raids conducted by Customs authorities, an average of 30,000 infringing materials, both finished products and components, were found.

Despite the efforts of the current government, corruption remains a major obstacle to effectively fighting piracy in the country. For example, in June 2005, a shipment of counterfeit video game products was identified and targeted for seizure. However, despite information provided regarding the shipment, authorities still failed to detain the shipment and the counterfeit goods were released to the importer without explanation or notice to the copyright owner. In other instances, counterfeit goods that had already been seized would be released to the infringer or the counterfeit merchandise would simply disappear from the storage facilities. The current government’s efforts to improve the manner in which it addresses copyright piracy should also address the issue of corruption that pervades the system. Otherwise, despite their best intentions, the piracy situation will remain dire.

MPA's anti-piracy enforcement actions in Paraguay, as of the second semester of 2005 began to be coordinated by the local recording industry anti-piracy association. In more than 20 raids in the last half of the year, more than 200,000 pirate movies were seized, 8 laboratories closed and millions of blank optical disks.

Effective prosecution and deterrent sentencing needed. There are six specialized IPR prosecutors (each unit usually consisting of one prosecutor and two assistants) in Paraguay, three in Asunción and three in Ciudad del Este. The prosecutors now have the ability to pursue copyright infringement cases as "public" actions (thanks to Law No. 1.444, which entered into effect in July 1999). One news report indicated that Ciudad del Este now has six prosecutors (although it is unclear whether they are all IPR prosecutors or have general assignments).

The recording industry reports that in 2005, Paraguayan courts issued 15 criminal judgments against pirates of sound recordings, but none resulted in effective incarceration. BSA reports that in 2005, two defendants in a spam case were arrested and imprisoned in the first case of Internet piracy in Paraguay; this case involved the seizure of 6,000 copies of pirated software. However, severe problems remain with the Paraguayan judiciary, especially related to corruption. In addition, experts appointed by the courts, especially in the trademark area, are not qualified and have not been removed from the list of experts. As a result, unfounded opinions by both experts and judges have been issued and seized merchandise returned.

Civil End-User Actions and Civil *Ex Parte* Searches: 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. It takes an average of three years to reach a decision from a district court and an additional year if the case is appealed.

COPYRIGHT LAW AND RELATED ISSUES IN PARAGUAY

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. After some delay, implementing regulations for this law were signed by the President on September 13, 1999 (Decree No. 5.159). IIPA has summarized deficiencies in the 1998 Copyright Law in prior Special 301 filings.⁸ Paraguay already has deposited its instruments of ratification to both the WIPO Treaties—the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty. In order to achieve the kind of comprehensive implementation desired by the copyright industries, further refinements to Paraguayan laws will be necessary.

Pending Legislation to Amend the Copyright Act: To mitigate the obstacles above, and in order to bring Paraguay into compliance with its MOU requirements, the copyright industries have been working on a bill which calls for the following reforms:

- Increase criminal penalties for intellectual property rights violations to between two years and eight years (ten years in some enumerated cases). Fines would be added to prison terms;
- Specifically make these criminal provisions "public" offenses;

⁸ For example, refer to IIPA's 2005 301 report on Paraguay at <http://www.iipa.com/rbc/2005/2005SPEC301PARAGUAY.pdf>.

- 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.

Unfortunately, legislative consideration of this bill stalled in 2005, and it remained pending in the Commission for the Reform of the Criminal System, which was created in 2004 by President Duarte Frutos for the purpose of drafting comprehensive amendments to the inadequate Criminal Code. We encourage the Paraguayan government to support these amendments to create the necessary legal framework to fight piracy effectively as rapidly as possible.

Criminal Code and Administrative Remedies: Paraguay reformed its criminal code in October 1998. This reform, however, has caused more problems, for several reasons (all of which IIPA has identified in previous 301 submissions). 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, few people go to jail, greatly undermining the deterrent effect of otherwise well intentioned law enforcement efforts. 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 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 six 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 mid-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. 1.444 of June 10, 1999) was signed on June 25, and entered into effect on July 9, 1999. In a positive move, this bill deleted language in the Criminal Procedures Act of 1998, which required that private parties initiate and bring prosecutions. Unfortunately, according to an interpretation issued by the Paraguayan office in charge of judicial training, this law was scheduled to sunset in July 2003. Despite this interpretation, the good news is that prosecutors continue to bring public actions in copyright infringement cases. To IIPA's knowledge, to date no judicial decision has contested this interpretation of the law.