

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2006 SPECIAL 301 REPORT

VENEZUELA

EXECUTIVE SUMMARY

Special 301 Recommendation: IIPA recommends that Venezuela remain on the Special 301 Priority Watch List in 2006.

Actions Which the Venezuelan Government Should Take in 2006:

- 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 to the U.S.;
- 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.
- Improve border enforcement, including using the new law and the regulations against smuggling and the transit of pirated goods.
- Repeal music quotas required by the recently passed general broadcasting law.
- Congress passed an amendment to the 1993 Film Law in 2005 which contains a number of highly damaging provisions to the audiovisual sector and which may serve as a negative precedent for other countries. MPA is monitoring the draft of the implementing regulations and will intervene in this process, when necessary.
- Complete the deposit and ratification of the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT).

COPYRIGHT LAW AND RELATED REFORM IN VENEZUELA

Copyright Law of 1993: 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). In addition, ratification of the two WIPO "Internet" Treaties (WIPO Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT)) remains a priority for the copyright industries.

Objectionable Proposed Copyright Law Reform (2004): There appears to have been no movement in 2005 to halt or derail the very objectionable copyright reform package introduced in late 2004. 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 radical legislation was approved in the first reading on February 2, 2005, essentially without discussion and without ever having been first assigned to any committee. Later in 2005, the bill was then assigned to the Permanent Committee of Interior Politics, Justice, Human Rights, and Constitutional Guarantees, which will make recommendations for the second reading in the National Assembly. It is expected to be approved in 2006.

This legislation, if adopted as originally drafted, would severely undercut not only the current 1993 law, it would violate the IPR criteria in the Generalized System of Preferences (GSP) trade program,¹ the Berne Convention, and 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. As IIPA described in our 2005 Special 301 report, the legislative history section (*Exposición de Motivos*) of this bill indicates that this legislative effort arose from the earlier “political distortions” and a “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 1–4 years to 1–2 years;
- Making it very difficult to assign or transfer works;
- Removing all *ex parte* injunctions and actions;
- 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 other classes of works, such as artistic, musical and literary works. Transfers would also be limited in term based on whether the contracting party has made a financial investment in the project for which the transfer is sought.
- Providing very broad and expansive exceptions to protection;
- Providing an unclear making available right;
- Not covering point-to-point transmission, ISP liability, or providing notice and takedown provisions;
- Not establishing an importation right, and not providing statutory civil damages and criminal penalties for unauthorized parallel imports of copyrighted materials
- Not providing civil or criminal remedies against the alteration of electronic rights management information (ERMI) or against circumvention of technological protection measures (TPMs);
- Not providing effective 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.

These provisions would severely hamper any ability of national or international right holders to create exploit their works in Venezuela.

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. During the first 11 months of 2005, \$679.5 million worth of Venezuelan goods (or 2.2% of Venezuela’s total exports to the U.S. from January to November) entered the U.S. under the duty-free GSP code, representing an 8.8% decrease from the same period in the previous year. For more information on the history of Venezuela under Special 301 review, see Appendices D and E of this submission: Appendix D (<http://www.iipa.com/pdf/2006SPEC301USTRHISTORY.pdf>) and Appendix E (<http://www.iipa.com/pdf/2006SPEC301HISTORICALSUMMARY.pdf>).

Customs Regulations (2005): In October 2005, the Venezuelan Tax and Customs Superintendent (SENIAT, *Servicio Nacional Integrado de Administración Aduanera y Tributaria*) issued administrative rules applicable to the import and transit of IPR goods through customs. These regulations appear aimed at better implementing TRIPS' border provisions to enable customs authorities to deal (intercept and seize) with suspect shipments, including those in free trade zones and customs warehouses. Customs authorities may ask agents or consignees to show authorizations granted by the right holders in order to show the lawful nature of the goods. [good or bad?]

Law on the Crime of Smuggling (2005): Adopted at the end of 2005, the National Congress adopted a law penalizing smuggling. Sanctions for smuggling are imprisonment of 4 to 8 years. Fines and destruction of the seized goods and implements are also enumerated. The Attorney General's office has primary jurisdiction for investigation and prosecutorial decision-making, with the input of SENAT. The copyright industries hope that this law will be implemented effectively in practice in 2006.

Film Law Amendments (2005): In August 2005, Congress passed a comprehensive amendment to the 1993 Film Law, which contains a number of highly damaging provisions to MPA member company all-media operations in Venezuela and which may serve as a negative precedent for other countries. Its provisions superseded those included in Decree No. 2430 published in the Official Gazette on May 29, 2003. The damaging provision included, for example: (a) a 20% local theatrical printing obligation based on the number of imported prints; (b) a progressive screen quota that requires theaters with more than 5 screens to fulfill a 12-week quota per complex; those with 2 to 5 screens have a 6-week quota per complex; and those with one screen, a 3-week quota; (c) a 20% distribution quota of national films calculated on total annual title distribution; (d) mandatory registration of exhibitors, producers, importers, exporters, distributors, broadcasters, etc and national and foreign films. This could lead to the release of confidential information to competitors and government officials; (e) mandatory exhibition of short films without remuneration; (f) an obligatory control stamp for home entertainment products; (g) mandatory theatrical holdover; and (h) numerous and onerous taxes. Currently, the government is drafting the implementing regulations of the law, which will be subject to a process of public hearing. MPA is monitoring this process and will intervene.

Broadcast Quotas on Music (2004): In December 2004, Venezuela's Congress passed a general broadcasting law that creates specific quotas in favor of domestic music repertoire. The quotas require that at least 50% of all music being broadcast be 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.

COPYRIGHT PIRACY AND ENFORCEMENT IN VENEZUELA

Continuing economic and political instability in Venezuela has fostered a high level of copyright piracy. Furthermore, in recent years, the copyright industries' ability to engage in commercial distribution and conduct anti-piracy campaigns safely and effectively has been quite limited. For these reasons, the streets are now flooded with pirated products and CD-R burning is widespread. The legitimate music industry in Venezuela has almost disappeared. The audiovisual industry reports that optical disc piracy in retail and street markets in Caracas and in other urban centers has grown appreciably. Entertainment software companies also report that the piracy

situation has worsened for the industry, and it has also become increasingly difficult to pursue legal action.

VENEZUELA										
Estimated Trade Losses Due to Copyright Piracy										
(in millions of U.S. dollars)										
and Levels of Piracy: 2001-2005²										
INDUSTRY	2005		2004		2003		2002		2001	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Records & Music ³	33.0	83%	31.0	80%	29.0	80%	29.3	75%	54.0	62%
Business Software ⁴	40.9	78%	39.0	79%	33.0	72%	27.1	52%	25.7	55%
Motion Pictures ⁵	NA	NA	25.0	NA	25.0	50%	25.0	65%	25.0	65%
Books	NA	NA	NA	NA	NA	NA	18.0	NA	20.0	NA
Entertainment Software ⁶	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA
TOTALS	73.9+		95.0		87.0		99.1		124.7	

Demand for pirated discs of films has grown with the wide availability of low-cost DVD players. Consequently CD-Rs and DVD-Rs now dominate the counterfeit market by a four to one margin over VHS copies. Video store piracy remains pervasive in Venezuela, supplied by large-scale laboratories with national distribution systems. Three years ago, the DVD market was one of the region's most encouraging, the video store market had improved with a coordinated MPA anti-piracy effort and television piracy had been significantly reduced. In 2004-05, however, the legitimate DVD market is diminished significantly, with far fewer video stores, and television piracy is increasing once again. The situation was so difficult that MPA closed its anti-piracy program in Venezuela. Pirated videogames are widespread, with most imported from Taiwan, Hong Kong and China, transshipped through Paraguay. Book publishers continue to experience widespread unauthorized photocopying, especially at secondary schools and universities.

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. Lowering the business

² 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 www.iipa.com/pdf/2006spec301methodology.pdf.

³ Estimated trade losses for the recording industry in 2002 reflect the impact of significant devaluation that year.

⁴ BSA's 2005 statistics are preliminary. They represent the U.S. publishers' share of software piracy losses in Venezuela, 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 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>.

⁶ 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.

software piracy rate could contribute to the Venezuelan economy.⁷ During 2005, BSA undertook 19 judicial inspections and 15 administrative inspections, seizing 1.5 million copies of pirated CD-Rs of which 265,000 contained software programs of BSA member companies.

AAP reports continued high levels of illegal photocopying in and around universities, affecting a wide variety of academic books. In addition to enforcement by authorities against photocopy facilities making unauthorized copies, the publishing industry would like to see involvement by university administrations themselves in encouraging the use of legitimate materials on campuses.

Enforcement of the copyright law by Venezuelan government authorities remains poor. Enforcement against street sales is non-existent, which has allowed piracy to flourish. Frequent public demonstrations and court strikes and closings continue to make efforts to enforce the law difficult. Due to changes in the Special Prosecutor's Office for IP Crimes, cases have not gone smoothly. For example, when a criminal complaint is filed with the office, there is no certainty that a raid will ever take place. However, there are other divisions, such as the Electronic Crimes Division, which are able to move cases through the system more expeditiously. Finally, it should also be noted that cases languish too long in the courts. Both prosecutors and judges should be provided with additional training on IPR crimes so that sentences, when eventually meted out, are actually deterrent.

- The Copyright Office (SAPI) has no real enforcement powers, though it is able to impose minor administrative remedies. The industries report that their relationship with SAPI is not very strong or positive.
- COMANPI, the anti-piracy brigade which was once well regarded in the region, had its budget cut years ago and copyright actions declined dramatically, and it now focuses on trademark actions.
- 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 with the excuse that judges are not familiar with the copyright law and its application.
- The Special Law Against Electronic Crimes (*Ley Especial contra Delitos Informáticos*) passed in December 2001. We do not have any details as to whether or not this law has actually been applied in practice in 2005.

Training: BSA and other industries do interact regularly with the SENIAT Subcommittee on IPR crimes, and work together on joint public awareness projects as well as trainings. During 2005, BSA took part in 18 events, training more than 600 Venezuela officials.

⁷ BSA and International Data Corporation (IDC) released a new study on December 8, 2005, which illustrates global economic gains from reducing software piracy. This report, [Expanding the Frontiers of Our Digital Future: Reducing Software Piracy to Accelerate Global IT Benefits](http://www.bsa.org/idcstudy/pdfs/Venezuela.pdf), using 2004 data, found the following: a 10-point drop in Venezuela's piracy rate (from 79% to 69%) could add \$600 million to its economy, increase local industry revenues by more than \$400 million, and pump an additional \$45 million into Venezuela's tax coffers. The 10-point reduction could also create 2,400 new IT jobs. See <http://www.bsa.org/idcstudy/pdfs/Venezuela.pdf>.

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