

ARGENTINA

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2011 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that Argentina remain on the Priority Watch List in 2011.

Executive Summary: Rampant piracy in Argentina remains a very low priority for the government and many of its enforcement authorities. The copyright industries report indifference on the part of national authorities in the face of continued growth in the organized production and distribution of pirated materials. The pervasive economic theft via piracy, both hard goods and online, is a huge challenge for the legitimate content industries. A comprehensive national strategy aimed at protecting and enforcing the Argentine Copyright Law is needed to solve longstanding problems and promote the development of the creative sectors.

Piracy of hard goods, especially those found at street fairs such as the public market in the Greater Buenos Aires area known as “La Salada,” remains high. End-user piracy of business software applications, especially in corporate settings, causes serious economic harm. Although the copyright industries appreciate the continued cooperation of the police with enforcement raids against piratical hard goods, only a small number of criminal cases result in final judgments with deterrent sanctions. Not surprisingly, Internet piracy continues to grow in Argentina. Rights holders are doing their best to take action, but the police corps and the judiciary lack the resources or the awareness to permit effective enforcement against copyright piracy. Furthermore, the government should reconsider its “hands off” approach and work with rights holders and Internet Service Providers (“ISPs”) to find solutions to halt the transmission of illegal copyrighted materials on telecommunications networks. Beyond criminal enforcement efforts, civil infringement actions remain ineffective because of extensive court delays and the lack of a statutory damages remedy. The Argentine government should review its agencies’ use and procurement of computer software in order to ensure that legal software is being used. On the legislative front, strengthened criminal sanctions and remedies to protect copyrighted materials in the digital age are sorely needed. Rights holders report positive cooperation with Argentine customs authorities.

PRIORITY RECOMMENDED ACTIONS FOR ARGENTINA IN 2011:¹

- Commit, at the highest levels of the Argentine government, to develop and implement a coordinated anti-piracy campaign that addresses hard goods and online infringements as a matter of national priority.
- Require that the federal and Buenos Aires provincial governments take appropriate measures to:
 - Identify major distributors of pirate products in public markets and promote the revocation of licenses to those points of sale.
 - Halt the distribution of pirate and counterfeit merchandise at the “La Salada” Fair and other large, public markets that distribute these infringing products.
- Provide more resources and high-level political support for police Internet crime units to address illegal downloading.
- Instruct prosecutors to seek deterrent criminal sentences on major piracy cases. Encourage judges around the country to resolve these cases expeditiously and to impose deterrent sentences.
- Improve border enforcement, partnering with Paraguayan and Brazilian officials to establish a program to inspect goods in-transit for potential pirate product.

¹For more details on Argentina’s Special 301 history, see IIPA’s “History” appendix to this filing at <http://www.iipa.com/rbc/2011/2011SPEC301HISTORICALSUMMARY.pdf>, as well as the previous years’ reports, at <http://www.iipa.com/countryreports.html>. For a summary of IIPA’s 2011 global issues, see our cover letter at <http://www.iipa.com/pdf/2011SPEC301COVERLETTER.pdf>.



- Push for legislation that will establish clear ISP responsibility for illegal content over their networks and a program to address the issue that includes deterrent level sanctions.
- Support efforts to issue an executive decree that would require government legalization of current business software programs, within a balanced and neutral system to select technical solutions and improve procurement practices.
- Submit legislation to increase the minimum penalty for criminal copyright piracy to two years (the current minimum is one month).

Argentina has been a beneficiary country of the U.S. Generalized System of Preferences (GSP) trade program, which provides Argentina with preferential market access to the U.S. market. Although the GSP program has lapsed for 2011, if it is restored it will presumably still require beneficiary countries to provide “adequate and effective” protection to U.S. copyrighted materials. During 2010, \$526 million in Argentine products entered the U.S. under the GSP duty-free code. Argentina has been under Special 301 scrutiny for many years.

COPYRIGHT PIRACY IN ARGENTINA

Argentina suffers from an increasingly high level of street piracy, much of it taking place in large flea markets across the country. Meanwhile, Internet piracy has become rampant, and Peer-to-Peer (P2P) piracy is now the most popular form of music piracy in the country. End-user piracy continues to limit the ability for legitimate business software to enter the Argentinean market. A combination of extremely high piracy and market access impediments makes Argentina one of the least hospitable markets for entertainment software publishers in the region.

Hard goods piracy, La Salada and end-user piracy: The sale of pirate product, including optical discs, by street vendors continues unabated throughout Argentina. La Salada Fair is an enormous central market in Buenos Aires that provides pirated and counterfeit merchandise to retailers and re-sellers from Argentina and neighboring countries. The physical area is growing and local industry representatives estimate that the total sales from La Salada are also on the rise. One report indicated that this market area covers about 2 million square feet, and approximately 50,000 consumers visit daily. There are organized groups operating around La Salada, providing raw materials for piracy and recording, storing and distributing pirate products. This untenable situation is well known by the police. Local government officials and flea market administrators simply do not cooperate with the private sector in raiding actions and refuse to close stands engaged in the sale of infringing works.

These kinds of flea market fairs are appearing in more and more cities across the country. The interior of the country remains plagued with street vendors selling pirate product (for example, in the cities of Tucuman and Santa Fe). Pirate stands are often seen around train stations and other high traffic areas. In general, the largest concentration of pirate product of films and music is in the greater Buenos Aires district, but the industries face serious challenges in larger cities throughout the provinces. In addition, blank optical media products, mostly from Southeast Asia, continue to enter the Argentine market via Uruguay and Paraguay. This media serves as the basis for the local “burning” of copyrighted materials on these discs, a widespread phenomenon that adversely affects the legitimate markets of almost all the content industries.

The Business Software Alliance (BSA) reports that physical commercial software piracy has nearly disappeared in Argentina, owing to the realization on the part of the business community of the costly risks involved in infringement suits, on one hand, and the rise in Internet piracy, on the other. Piracy of business software programs among end-users, the most damaging form of piracy, remains quite high, especially in small and medium-sized organizations. This problem involves the federal, provincial and municipal government offices as well as a number of private companies. According to a 2010 report issued by BSA-IDC called *The Economic Benefits of Reducing PC Software Piracy*, the information technology sector’s contribution to the Argentine economy could be even bigger if Argentina’s PC software piracy rate were to be lowered 10 percentage points over four years. This would create an additional 4,420 jobs, US\$949 million in local industry revenues and US\$202 million in additional tax revenues for

federal, regional, and local governments.² There was no positive news to report on any progress made by the government to legalize its software last year. It is still easy to find hardware dealers selling computers with illegal original equipment manufacturers (“OEM”) versions or simply illegal copies pre-installed on computer hard disks. Based on preliminary data, PC software piracy in Argentina increased by one percentage point to 72% in 2010. This represented a commercial value of US\$438 million worth of pirated U.S.-vendor software.³

Piracy of music and sound recordings in both the physical and online environment continues unabated in Argentina. Hard goods (physical) piracy of music accounts for 50% of the music market. The local recording industry group has noticed an increase in the number of fairs where pirate products are sold, and a slight decline in the level of non-fair-related street piracy. Buenos Aires and the surrounding areas are the most affected.

The independent sector of the film and television industry (IFTA) reports that Internet and physical piracy of DVDs remains a significant export constraint for independent producers and distributors, the majority of which are small to medium sized businesses. Independent producers partner with local authorized distributors to finance and distribute film and television programming. These authorized distributors find it nearly impossible to compete with pirates. Producers and distributors confirm that DVD sales have been particularly impacted since pirated digital copies are offered for free online and with a similar quality viewing experience as a DVD can provide. Unable to compete with free, legitimate distributors often cannot commit to distribution agreements or offer drastically reduced license fees which are inadequate to assist in financing of independent productions. Piracy undermines and may permanently damage legitimate distribution networks essential to reaching consumers, and leaves little confidence for investment in intellectual property.

Internet piracy: Argentina boasts a 965% growth rate in Internet usage between 2000 and 2010, but this new digital market has been so plagued by piracy that copyright industries are unable to take advantage of Argentina’s newly connected population. The country has 26.6 million Internet users, reflecting about 64.4% of the population (according to internetworldstats.com). The Argentine broadband market remains one of the most developed in South America. However, with the increased availability of pirated content via broadband in homes, Internet cafés, and public telephone call center/LAN houses, Internet piracy is having significant prejudicial consequences on the sale and distribution of legitimate materials. Increased broadband penetration has altered Argentina’s Internet piracy landscape, making the rapid proliferation of peer-to-peer (P2P) file-sharing services (including BitTorrent and eDonkey), and sites offering links to download movies and entertainment software from free file hosting sites, more problematic than traditional hard goods websites.

The recording industry reports that digital piracy represents 99% of the entire digital music market. The digital market remains the same in 2010 as in 2009. It represents the 7% of the local music market (including CD sales) and is made up of two segments: mobile (about 68%) and Internet (about 32%). Online music piracy occurs via illicit use of P2P file-sharing, hyperlinks, and cyberlockers. The latest estimate is that 1,293,809,517 million songs are being downloaded illegally in Argentina every year (according to a survey carried out by D’Alessio Irol Consultant for the local IFPI affiliate). The most popular “cyber locker-link-sharing” site in Argentina, called TARINGA, has more than 6,000,000 users. Taringa, notably, is also one of the top five most popular cyber locker-link sites in the world. This site is financed through revenue from banner ads, and fortunately, after significant engagement with the recording industry, it now responds positively to take-down notices. Rights holders are able to see that 31.94% of the links added daily are removed for reasons of pirate source content.

²This report is posted on BSA’s website at <http://www.bsa.org/idcstudy>.

³BSA’s 2010 statistics are preliminary, representing U.S. software publishers’ share of commercial value of pirated software in Argentina. They follow the methodology compiled in the Seventh Annual BSA and IDC Global Software Piracy Study (May 2010), <http://portal.bsa.org/globalpiracy2009/index.html>. These figures cover packaged PC software, including operating systems, business applications, and consumer applications such as PC gaming, personal finance, and reference software – including freeware and open source software. They do not cover software that runs on servers or mainframes, or routine device drivers and free downloadable utilities such as screen savers. The methodology used to calculate this and other piracy numbers are described in IIPA’s 2011 Special 301 submission at www.iipa.com/pdf/2011spec301methodology.pdf. BSA’s final piracy figures will be released in mid-May, and the updated US software publishers’ share of commercial value of pirated software will be available at www.iipa.com.

For the business software industry, the Internet offers local packages of pirated and counterfeit software, including compilations containing dozens of computer programs. The Business Software Alliance (BSA) notes the use of P2P sites is the favored method to access unauthorized copies of software programs; there are a few pirate websites but they are not the largest source of pirated programs. BSA does perform take-down operations with local ISPs and there is a high degree of success; however, for every site removed, more appear.

During 2010, entertainment software vendors detected 1.44 million connections by peers participating in unauthorized file sharing of select member titles on P2P networks through ISPs located in Argentina, placing Argentina in the top 20 countries in overall detections.⁴ Breakdowns by ISP show that Telefonica de Argentina and Telecom Argentina S.A. subscribers account for approximately 79% of this activity occurring in Argentina.

Internet-based piracy prevents the establishment of legitimate online distribution platforms and services for consumers, which independent film producers may use to finance future productions. For independent producers who license content country-by-country, online piracy instantly exports troubled marketplaces and high piracy rates to other markets. The independent production sector is limited in its ability to shift to technology-enabled new business practices that might limit piracy. For example, worldwide same day releases (referred to as “day-and-date” releases) may prove an effective method to curb or delay piracy for major studios that control their own worldwide distribution, but for independents, whose national distributors release on their own schedule, this technique is impossible.

COPYRIGHT ENFORCEMENT IN ARGENTINA

The limited training, resources, and human capital available to police forces and the judiciary in Argentina make effective enforcement of copyright in the country extremely difficult. Federal and state police forces lack sufficient resources to provide expert reports on seized products, which delays processing cases. There is no dedicated police force to handle piracy cases. The music and business software industries report continued good cooperation with the Argentina’s police forces, particularly the Gendarmería Nacional (the federal police agency) and border officials. While there also has been significant support from the Federal Police Cyber Crime division on Internet cases, few prosecutions are pursued and few criminal cases reach final judgment. The minimum penalty of one month is so low as to be considered negligible, deterring courts from issuing any prison terms at all. Anti-piracy enforcement actions rely entirely on private sector initiative, resources, and complaints. In addition, civil infringement actions, often brought by the business software community, also face roadblocks with long delays and non-deterrent damage awards.

Software actions: BSA reports cooperation on the part of the police and the courts in general, noting that preliminary measures are executed rapidly. However, BSA has experienced problems with confidential information being leaked to targets of investigation and a general slowness in resolving judicial procedures. The business software industry is unaware of any *ex officio* actions being taken against software piracy. The industry continues to support any effort by the Argentine federal, provincial or municipal levels of government to legalize business software programs currently installed on government computers and improve their procurement practices.

BSA takes a variety of actions in Argentina, ranging from civil claims to non-judicial procedures (such as cease and desist letters, notices to ISPs, and the like). During 2010, the BSA program in Argentina conducted 71 raids or court actions against commercial computer software end users, and obtained 72 case settlements. In the past, criminal copyright actions in the software area were not widely used by BSA. More recently, the various agencies (including the Federal Police, Gendarmería, etc.) are improving their technical capacities to support the courts in the investigation of computer crimes (including piracy) and the provision of technical reports, which is useful evidence in judicial cases. In smaller provinces, local police are not trained in computer crimes, and there have been

⁴These figures do not account for downloads that occur directly from hosted content, such as games found on “one-click” hosting sites, which appear to account each year for progressively greater volumes of infringing downloads.

problems caused by pre-raid leaks. In some cases, it is possible to replace local police with the better trained Gendarmería. In addition, preliminary injunctions and searches performed by court officers and the police under instructions from civil courts have been effective to obtain the legalization of commercial software in use and the payment of damages.

Criminal actions involving hard goods: The recording industry indicates that both the police and customs authorities do take *ex officio* actions and industry supports those actions. The recording industry focuses on investigating complex organized crime cases, and planning street piracy actions. They are careful in the selection of targets and work with the proper security forces to obtain the best results. They also cooperate in the performance of forensic analysis in order to speed up the process. Unfortunately, the recording industry reports that the number of raids during 2010 is 8% below levels for the same period in 2009. During 2010, rights holders assisted in 309 raids (including street vendors, warehouses, and labs), resulting in the seizure of 3,819,434 million copies of media with infringing content (most of which were CD-Rs) and 2,188 pieces of equipment. In 2010, only 4 new criminal prosecutions were initiated, resulting in two convictions. The poor results for new criminal cases and convictions are mainly due to the low priority that enforcement authorities assign to the piracy problem.

Actions in the Internet space: The recording industry continues to be very active in Internet piracy enforcement in Argentina. With the cooperation of ISPs in the removal of hosted content, in 2010 the local organization of the recording industry produced the following take-down results: 27,893 web pages and blogs posts, 851,379 links to cyberlockers containing infringing files, 92,406 forum posts, 10,994 P2P links to infringing content, and 38,545 pre-release copies of sound recordings.

Inter-industry cooperation on Internet piracy cases: As the preceding data illustrates, local ISPs are slowly beginning to collaborate in certain limited circumstances, such as taking down infringing sites in very specific instances. Since 2007, the local sound recording and film industry sectors have been trying to get broader voluntary cooperation with Argentine ISPs on Internet piracy matters. In the P2P file-sharing context, most ISPs are not cooperating with rights holders, claiming no responsibility for what users do on their networks. Despite appeals from the sound recording industry to the Ministry of Telecommunications and ISP trade groups, the Argentine authorities have refused to engage in industry talks, leaving rights holders unable to organize roundtable discussions with ISPs on a voluntary campaign to curb piracy. The disengaged attitude of the Argentine authorities has proven to be the most problematic in the region.

The local recording industry has as yet been unsuccessful in attempts to seek ISP liability in the courts. In early 2008, local recording industry filed for preliminary injunctions against two ISPs in Buenos Aires, asking the judge to order the ISP to adopt technical measures (port blocking) to impede the exchange of music files using P2P networks. Both injunctions were granted, but the ISPs appealed the first instance decisions and the injunctions got stuck in the judicial system, leaving no remedy in force. The local recording industry did not appeal one case, and the other case is still pending.

Slow prosecutions and non-deterrent judgments: Very few criminal cases reach final sentencing. This problem is due in part to the very formalistic structure of Argentina's judicial system and to the lack of human resources and poor infrastructure in the courts. More importantly, there is a lack of will by both prosecutors and judges to push these cases through. Most copyright infringement cases finish with a suspension of judgment. The music industry reports that there were only two convictions for music piracy in 2010.

Furthermore, Argentina's current criminal provisions for copyright infringement are totally inadequate to address the piracy problem. The minimum penalty is only one month; this minimum penalty should be increased to a minimum of two years. While certainly some criminal sentences have been issued, the industries are not aware of any major, deterrent sentences issued last year. Finally, the average criminal piracy case takes two to four years to reach a verdict in the first instance, and usually results in no jail sentence, or a suspended sentence – because the judges do not consider intellectual property crimes to be serious offenses.

Delays and weak damages in civil infringement cases: The business software industry continues to rely on civil enforcement in Argentina, given the systemic problems with criminal enforcement. Even so, there remain problems in some provincial judicial jurisdictions, where there are procedural delays in obtaining and conducting civil searches in business software piracy cases. Civil actions are also weakened by the lack of statutory damages and extensive delays. BSA has achieved some positive results despite the problems with enforcement, relying primarily on the process of mediations required by the civil procedure, which facilitates the resolution of cases. Another problem is caused by the unavailability of deterrent civil damages; this important problem could be corrected if Argentina were to introduce an effective statutory damages system.

Border enforcement: The Customs Service, jointly with the military police and coast guard (the "Gendarmería Nacional" and "Prefectura Nava"), has border duties to stop counterfeiting and piracy. Last year, border enforcement was pretty good, and included the implementation of mobile scanners in some frontier/border crossings. The Argentina Customs Code currently provides for *ex officio* actions. There are reports that significant further progress was made with the Customs authorities in 2010, who now understand the damage that piracy causes, not only to the owners of intellectual property rights, but also to the State itself, since pirate products evade taxes and do not generate legitimate employment. The Argentine Customs, through the unit called "Fraude Marcario," has also seized shipments of blank CDs in activities directed against tax evasion. Given the extent of the piracy and counterfeiting problems in the tri-border area, Argentina should forge a working plan with Brazilian and Paraguayan customs officials to inspect goods in-transit for potential pirate product.

Industry trainings and public awareness efforts: The sound recording and business software sectors offer courses and seminars for the judiciary and commercial chambers in Argentina. The national affiliate of IFPI organizes a seminar for judges of various jurisdictions every year. It will also seek the involvement of the Argentine government to address Internet piracy in the coming year. To improve judicial awareness of intellectual property and end user software piracy, BSA has developed a training program for provincial judges, which is pending approval to be conducted in 2011. (For more information, see <http://www.jufejus.org.ar/>.)

COPYRIGHT LAW REFORM IN ARGENTINA

Argentina's Copyright Act (1933, as amended), while one of the oldest in the Western Hemisphere, has remained remarkably flexible over the years. Argentina is a member of the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty (the "WIPO Internet treaties"), and those provisions are self-executing, taking precedence over national law. Still, further refinements are needed. Specificity in national legislation helps to provide clear "rules of the road" for rights holders, consumers and enforcement authorities, including the courts.

IIPA and its members have identified the following important elements that would benefit from clarifications or express incorporation in the copyright law:

- Provide express protection for the "communication to the public" and "making available" rights as required by WIPO Treaties, to give legal background to digital businesses for authors, performers and phonogram producers;
- Extend the scope of the reproduction right to explicitly cover temporary copies;
- Protect against the act of circumvention as well as the manufacture or distribution of devices aimed at circumventing technological protection measures (TPMs)
- Protect against the removal or alteration of digital rights management information (RMI);
- Increase the minimum penalty for piracy (currently one month under Article 72*bis* of Act 11.723 of the Copyright Act) up to at least two years to apply deterrent sanctions;
- Establish statutory damages provisions in civil infringement cases;
- Explicitly provide for the seizures of infringing equipment;
- Provide clear guidelines regarding liability for ISPs, and include notice and takedown provisions;

- Provide equitable and balanced treatment for all rights holders, treating juridical entities no less favorably than natural persons.

2009 Copyright Act amendment: On November 25, 2009, the term of protection for phonograms and performances was extended to 70 years from publication. Law 26.570 signifies the expansion of 20 years for the protection of juridical entities such as phonogram producers; the recording industry is pleased with this development as it has been working to pass this legislation for several years, and the term is now comparable to that of many other copyrighted works in Argentina.

Need to increase scope of infringements and criminal sanctions: Legislative efforts to strengthen criminal enforcement measures in Argentina have not gained much traction in recent years. In 2005, a bill to amend the criminal chapter of the Copyright Act (Bill 1546-S-05) was introduced in the Senate, but it fell off the docket at the end of 2007. In 2007, the recording industry submitted a new bill (1987-S-2007) to the Senate, and meetings were held in 2008 along with the motion picture industry to expand some provisions of that bill (e.g., adding a provision on criminal conspiracy); this bill also fell off the docket at the end of 2008. Since then, no new legislative vehicle has been proposed (and appears unlikely to be proposed this year) that would address the following issues that were in the prior legislation, such as:

- providing for criminal sanctions for the circumvention of TPMs, including the manufacture or distribution of circumvention devices, and the modification or suppression of RMI;
- creating statutory damages by creating a minimum (1,000 pesos, US\$260) and maximum (1,000,000 pesos, US\$259,240) level for each infraction, depending on a number of factors;
- clarifying the existing remedy of preliminary injunctions by eliminating the onerous requirement to produce evidence before presenting a full case based on arguments of merit; and,
- empowering the courts to impose fines to force the execution of the sentences issued.

Government software legalization: Unfortunately, no progress was made on this important issue last year, and it is clear that the current government is not going to make any effort in this area. With respect to government legalization efforts, the business software industry continues to call upon the Argentine government (in particular, the Subsecretaría de la Gestión Pública—the Undersecretariat for Public Administration) to issue an executive decree that would require government legalization of current business software programs on computers and improve procurement practices. While several “standards” have been issued by the Subsecretaría, the Argentine government has not taken action toward legalizing its software inventories.

MARKET ACCESS ISSUES

Customs duties affecting audiovisual works: The Argentine Customs Valuation Code requires that all audiovisual works, excluding computer software, must pay an *ad valorem* customs duty based on the value of the “authors’ rights,” that is, on the potential royalty generation of the film, rather than solely on the value of the physical materials which are being imported. MPA opposes this burdensome practice, which is a form of double taxation since royalties are subject to remittance, withholding and income taxes. Customs duties should be based on specific fees, such as weight or length, or, if *ad valorem*, be based on the value of the carrier medium only. Because of this duty, MPA member companies import negative prints on a temporary basis and copy positive prints locally. There have been no new developments in this matter in 2010.

Withholding taxes and royalties on computer software: The software industry continues to report a problem regarding the withholding that local licensees must perform when wiring royalties to foreign licensors. The local tax collection authority, AFIP, refuses to apply the special rules that the Income Tax Law provides for “authors’ rights” international transfers. AFIP contends that the legal nomenclature “author” is limited to physical persons, and that a legal person (e.g., a corporation) cannot be an author and, as a result, cannot hold these “authors rights.” The issue has been presented to courts of second instance in five cases: in two cases, the Court agreed with AFIP, and

in three the Court rejected AFIP's position. Decisions on each side are pending before the Federal Supreme Court (Corte Suprema de Justicia de la Nación). This creates much uncertainty, and could create high economic liability for taxpayers if the AFIP position prevails. This problem could be solved by amending the Income Tax Act to establish a concrete withholding rate for software license payments, similar to what was done for music and motion pictures several years ago.

Audiovisual Communications Services Law: In September 2010, Argentina's Federal Authority on Audiovisual Communication Services passed a bill that limits advertising on pay TV to six minutes per hour and discriminates against foreign pay TV networks by disallowing advertisers to write off investments in these networks, yet permitting advertisers to write off investments in Argentine pay TV networks.