

# PARAGUAY

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

Special 301 Recommendation: IIPA recommends that Paraguay remain under Section 306 monitoring in 2011.

Executive Summary: In 2009, Paraguay and the United States renewed the bilateral Memorandum of Understanding on Intellectual Property Rights (IPR MOU) through 2011, but Paraguay's weak enforcement activity against high levels of the most basic forms of piracy remains unchanged. Following a year of mostly disappointing developments in the Paraguayan specialized anti-piracy unit, in 2011 the copyright industries seek national commitment and follow-through in the government's recently renewed focus to copyright enforcement.

The Paraguayan market is one still mired in physical piracy. There was no reduction in copyright piracy levels in Paraguay in 2010, either in the streets or at the borders. There continues to be large scale production of blank optical discs by plants operating in Ciudad del Este at a rate that far exceeds what the nation could consume, and these products are exported throughout the region. Border enforcement remains ineffective. Paraguay also remains the source of a steady flow of illegal and counterfeit games, modified consoles and game copiers that flow into Brazil and neighboring countries. The business software sector continues to suffer from end-user piracy, and the government has taken no steps on its commitment to implement a legalization program among its agencies. In 2009, the government withdrew political support for the special anti-piracy unit (known as UTE), after which the UTE was revived at a severely diminished capacity. Restructuring of the UTE in early 2011 provides some room for optimism that this one-time bright spot in Paraguayan enforcement authorities will regain its status as an effective and proficient law enforcement body. Corruption and an ineffective judicial system are deeply embedded problems that hinder effective criminal enforcement and prevent meaningful sentences. Finally, industry still seeks implementation of criminal code amendments to strengthen copyright sanctions.

### PRIORITY RECOMMENDED ACTIONS FOR PARAGUAY IN 2011:<sup>1</sup>

- Establish a specialized IPR Court with national competence, authorization to take independent actions across the country, and a staff of trained IPR judges and prosecutors.
- Facilitate swift and deterrent convictions by removing corrupt expert witnesses and judges, providing for the proper handling of pirate product evidence, and imposing deterrent level sanctions provided by the 2008 Criminal Code amendments.
- Support the restored authority of the special anti-piracy unit (UTE), by ensuring effective leadership and providing sufficient resources to hire, train and maintain its inspectors.
- Investigate and conduct raids against the large-scale distribution points operating in Ciudad del Este as well as the sources of local production.
- Continue to increase actions at the border to control the spread of pirate product across the region.
- Issue and implement a software legalization decree (a long overdue obligation from the IPR MOU).

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<sup>1</sup>For more details on Paraguay's Special 301 history, see IIPA's "History" appendix to this filing, at <http://www.iipa.com/pdf/2011SPEC301HISTORICALSUMMARY.pdf>, as well as the previous years' reports, at <http://www.iipa.com/countryreports.html>. To read IIPA's cover letter to our 2011 Special 301 submission, go to <http://www.iipa.com/pdf/2011SPEC301COVERLETTER.pdf>.



The IPR Memorandum of Understanding and Action Plan: Both the Paraguayan and the U.S. governments have invested years of effort to improve the laws and enforcement mechanisms in the Paraguayan intellectual property rights system. On December 19, 2003, both nations agreed on a Memorandum of Understanding on Intellectual Property Rights (IPR MOU), which will remain effective until December 31, 2011.

Despite years of work under this MOU framework, Paraguay unfortunately has not met many of the major objectives. It has failed to: (1) significantly reduce the levels of copyright piracy; (2) increase *ex officio* actions at the border; (3) strengthen deterrence by actually imposing mandatory minimum prison sentences on offenders convicted of manufacturing, importing or distributing commercial quantities of pirated or counterfeit goods; (4) provide for the seizure of an infringer's assets upon conviction for commercializing pirate product; (5) find ways to work with the judiciary to promptly resolve pending cases; and (6) increase the terms of copyright protection for all copyrighted materials.

Generalized System of Preferences: Paraguay has been a beneficiary country under the U.S. Generalized System of Preferences program (GSP). Although the GSP program has lapsed for 2011, if it is restored it will presumably still require that a beneficiary country provide "adequate and effective" protection to U.S. copyrighted materials. During 2010, \$43.9 million worth of Paraguayan goods entered the U.S. under the duty-free GSP code.

## COPYRIGHT PIRACY IN PARAGUAY

There are a variety of forms of piracy impacting the copyright industries in Paraguay, ranging from widespread piracy of physical goods (such as movies, music and recordings, business software and entertainment software on CD-Rs and DVD-Rs, and videogames in cartridge format), to unauthorized copies of application software in businesses, to widespread photocopying, especially in and near universities. The country is a major source of manufactured and trans-shipped pirate products throughout the region. Internet piracy is also beginning to take root in Paraguay, and this affects different sectors in distinct ways.

Burned copies of CD-Rs/DVD-Rs full of pirated content and illegal cartridge-based video games are readily available in Paraguay. This is a very visible form of physical piracy found in Ciudad del Este. Street piracy remains steady, particularly in cities bordering Brazil, such as Ciudad del Este, Pedro Juan Caballero and Salto del Guaira. Pirated music and film products as well as unauthorized copies of business and entertainment software are easily found at the wholesale and retail levels, such as the San Blas municipal market at the foot of the Friendship Bridge. Significant piracy, mostly of music, movies, and videogames (CD-Rs and DVD-Rs), can be found on the streets of Asuncion.

Optical disc piracy levels remain high. Despite a decrease in overall importation of blank media, the amount of optical media legally imported into Paraguay continues to exceed possible legal use. Moreover, any decrease in imported blank media has been offset by the five large optical disc factories operating in the Province of Alto Parana, where Ciudad del Este is located. At the local level, there are hundreds of smaller burning labs in Ciudad del Este supplied by syndicates who coordinate their work and provide these labs with blank CD-Rs. Furthermore, Paraguay remains a significant source of transshipped pirate products and optical media to its neighbors, especially Brazil.

At last report, blank media plants in Ciudad del Este now produce upward of 400 million units a year, yet they have not been audited in several years. Several years ago, the Paraguayan government authorized and provided incentives under the law (Ley de Promocion Industrial) to set up four new industrial CD-R and DVD-R plants in Ciudad del Este. There remains a striking lack of oversight regarding the blank optical plants. There are five optical disc factories, and only one of the plants is believed to have the authorization to legally export their products to Brazil and Argentina.

The problems confronting the entertainment software industry in Paraguay have remained remarkably similar over the years. The Paraguayan market remains completely overwhelmed by counterfeit and pirated video games and circumvention devices, and continues to serve as a trans-shipment point for syndicates who bring in such goods from overseas with the intent of distributing them throughout South America. Circumvention devices, including modchips, game copiers and USB-based modification software, are freely imported into Paraguay, often declared as "parts." In addition, modification software is downloaded and used in modification labs to modify significant quantities of consoles so that they can play pirated games. Large scale, underground piracy targeting primarily wholesale buyers in Brazil, as well as domestic street vendors, continue to be the principal problems. The city of Ciudad del Este continues to be the focal point of piratical activities in Paraguay, largely due to ineffective enforcement on the Paraguay/Brazil border between Ciudad del Este and the Paraguayan city of Salto del Guaira. Three other commercial concentrations are increasingly prominent with respect to the flow of infringing products: Pedro Juan Caballero, Salto del Guaira, and Encarnación.

The business software industry reports that end-user piracy in businesses and government agencies continues to cause the most economic harm for this sector. Corporations place orders via email to receive pirate software from hired distributors. Pirate organizations offer illegal compilations of programs, including technical software for particular business sectors, for example, to engineers, architects, and accountants. Government implementation of a software legalization decree (required by the original IPR MOU) is long overdue. This sector is also affected by street piracy, and the growing availability of the Internet is starting to adversely affect the business software sector.

Internet-based piracy in Paraguay has grown as local Internet access is becoming more and more affordable, although the growth in digital piracy is limited as broadband connections are few and slow in Paraguay. Many of the popular cyber cafés installed illegal games and software on their computers. Consumers use Internet forums to offer pirate products and upload links to free hosting sites such as Megaupload or Rapidshare, but also use websites to order hard copies of pirated goods (often in optical disc format). ESA has noted an increase in national and regional Internet sites offering the sale of hard copy of DVD format video games. In general, Paraguay's Internet piracy problem is a cause of concern, but is not yet at the level of severity reported in Brazil and Argentina.

## COPYRIGHT ENFORCEMENT IN PARAGUAY

Copyright anti-piracy actions taken by Paraguayan authorities continue to be largely ineffective in deterring widespread piracy. Government policies in 2010 derailed the ability for specialized law enforcement authorities to conduct anti-piracy actions. Meanwhile, incremental improvements in border enforcement have barely begun to tackle Paraguay's long-time status as the source of illicit products throughout the region. Within the judicial system, rights holders face poor engagement on the part of prosecutors, procedural obstacles regarding the retention of seized evidence and expert witnesses, long delays, and non-deterrent sentences. A specialized IPR court is needed to overcome enforcement hurdles resulting from an untrained, and often corrupt, judiciary.

The direction of the Specialized Technical Unit (UTE) is in flux: The Specialized Technical Unit (UTE) in the Ministry of Industry and Commerce suffered devastating setbacks between 2009 and 2010, and rights holders will be watching closely as efforts to revitalize the unit in early 2011 develop. Historically the one agency of the Government to independently investigate, collect evidence and seize products, the UTE was stripped of its ability to unilaterally pursue investigations and was forced to rely on leads provided by industry. 2010 saw further setbacks to the UTE. The original UTE team, in whom considerable training and experience had been invested, was replaced with a new coordinator and sub-coordinator along with a new three man team. While some of the members had an investigative background, none had experience in anti-piracy investigations. Moreover, the new coordinator is a political figure who also holds another position within the Ministry of Industry and Commerce. In addition, the US Embassy suspended funding provided to the previous unit, leaving the team with no means of mobility to investigate and conduct operations. In September, the sub-coordinator resigned from the unit as did the three other members, leaving only the coordinator to operate UTE. As a result of UTE's instability, many private sector entities who had

conducted joint operations with the previous UTE unit suspended cooperative efforts. ESA reports that UTE undertook very few raids on behalf of the video game industry, and that those that were undertaken were rendered ineffective by UTE's lack of resources and experience.

On a more positive note, President Lugo signed a decree in November reestablishing the UTE and, for the first time, providing it with government funding, an indication that the unit may finally have political support from the current administration. In January, Paraguay finalized its national 2011 budget, and allocated UTE an operational budget of approximately US\$459,603. At the close of 2010, polygraphs of potential new members of the unit, proposed by the Ministry of Industry and Commerce, Ministry of Finance and the Ministry of Interior, were being finalized. The members selected began training in early January, 2011, through the USAID coordinated Plan Umbral II, together with the U.S. State Department (INL). There has been no concrete movement, however, to replace the current coordinator with an individual with more experience in investigations and IPR operations.

Improvements in border enforcement: Cross-border piracy continues to be a significant problem that is subject to far too little effective action on the part of Paraguayan authorities. Brazilian traders pass easily over the Friendship Bridge to purchase counterfeit and pirate products. Brazilian authorities on the other side of the river are unable to sufficiently stem illegal trafficking, and very little is done on the Paraguayan side to curtail these activities. Sources inside the special riverine unit of the Brazilian Federal Police have indicated that the smugglers cannot operate freely unless they have support or assistance from the Paraguayan military and navy that control these clandestine routes. Improvement of border enforcement including the interception and seizure of pirate products and contraband PC hardware and the inspection of blank optical disc media, is critical to fulfilling Paraguay's obligations under its MOU with the United States.

On December 30, 2009, the President appointed a former anti-corruption prosecutor as Customs Director, who appears to have the will to combat corruption in Customs and take a strong handed approach to piracy and contraband. The business software industry reports that the new customs authorities are more efficient and produced improved procedures in 2010. The entertainment software industry, however, remains frustrated with Paraguayan customs, and reports that authorities failed to seize any piratical goods at the border relating to video games, circumvention devices, or modified consoles in 2010.

Other law enforcement bodies on the whole are ineffective: As a result of previous changes in UTE, ESA indicates that its relationship with the unit has worsened since 2009, and operations with UTE that had been conducted since 2007 halted in 2010. ESA also reports that, although it initiated raids of 14 targets involving hard goods in 2010, the principal police force responsible for IPR enforcement, the Economic Offenses Police, continues to be plagued with corruption; as a result, officers are used only as security support at the time of the raid.

Meanwhile, BSA reports that no major actions involving the massive imports of optical discs were publicized for 2010 by the Direction of Intellectual Property within the Ministry of Industry, nor were actions taken by the Ministry of Industry, the Ministry of Finance, or any District Attorneys regarding tax evasion on the imports of optical discs.

BSA also continues to report unnecessary enforcement delays in Ciudad del Este, as well as information leaks that lead to unsuccessful investigations. Requests for a warrant and a search and seize order involve lengthy waiting periods, during which informants within the court give notice to the targets in time to vacate the premises before a raid is conducted. In those cases in which the prosecutors of Ciudad del Este have conducted successful raids, they fail to seek deterrent sanctions.

A key priority in 2011, as has been for years, is the need for Paraguayan officials to investigate and conduct raids against the large-scale distribution points operating in Ciudad del Este, including addressing the role of landlords with respect to the open and notorious illegal activities taking place on their premises. Sanctions against landlords of pirate points of sale are not applied in Paraguay. According to sources, authorities feel they are not

authorized to take action against landlords; in the past, sources inside the UTE explained that attempts to apply landlord liability laws were denied by the Fiscalía (the district attorney's office).

**Government software regulation:** The government of Paraguay has taken no steps to issue or implement a software legalization program among its agencies, an important obligation under the country's MOU with the United States.

**New Structure of Specialized IPR Prosecutors Units:** Paraguay's specialized IPR prosecutor units, formerly known as the "Trademark Units," recently have undergone restructuring and were replaced by the UEPI- Unidad Especializada de Propiedad Intelectual. A new IPR Prosecutor has been placed in Encarnacion, a major land port for containers entering Paraguay from Argentina, and the Attorney General is expected to place two additional prosecutors there. The new specialized IPR unit will have "nationwide competence," an element that copyright industries have long sought. Specialized IPR Public Prosecutors are also now empowered to investigate tax evasion cases. However, under the new structure the prosecutors will still depend on judges in local jurisdictions to issue raid warrants, which could diminish the positive effects of nationwide prosecutorial jurisdiction.

ESA reports that in 2010, one particular IPR prosecutor in Ciudad del Este has proven to have a thorough understanding of the law as it relates to circumvention devices and has taken effective actions when presented with a seizure request generated by the private sector.

**The Courts:** Copyright industries express significant frustration with the state of the judiciary in Paraguay. Courts handling intellectual property cases are replete with deficiencies: Judges are inexperienced in IPR and have little appreciation for copyright enforcement; *ex officio* prosecutorial actions, already rarely if ever taken, have been called into question; evidence is poorly supervised and rarely destroyed after convictions (and in some cases has disappeared, with broken security seals left uninvestigated); corrupt expert witnesses are common; cases face years of delays; and sentences are not deterrent.

**Specialized IPR Court:** A trained and dedicated specialized IPR court that works effectively with specialized IPR prosecutors is badly needed in Paraguay. Local representatives indicate that the composition of the IPR court in Ciudad del Este is questionable, and that a number of cases have been plagued by "irregularities." In February, the Supreme Court issued a resolution requiring a judge to accompany all IPR and tax raids and container inspections in Ciudad del Este. A second resolution, issued in April, designated two specific judges as the only judges allowed to issue raid warrants or authorize container inspections in trademark and Customs cases, and directed that the judges must personally attend these actions. While the text of the second resolution only covers trademark cases, in practice this power was immediately extended to cover copyright cases as well. The outward goal of the two resolutions was to increase transparency and coordinate actions; unfortunately, the designated judges have no additional training in IPR. However, in practice, this has become the IPR court in Ciudad del Este. An unfortunate result of the resolutions has been the reduced role of the IPR Prosecutors, some of whom have specialized IPR training, in carrying out the raids.

BSA has met with the President of the Supreme Court to suggest that new courts with exclusive jurisdiction for intellectual property infringements be created (like those courts that exist for Drug Corruption and Terrorism). The creation of such a court would be beneficial for the entire industry and specialized IPR training for these judges could be offered. The creation of a specialized IPR judge with national jurisdiction would also be helpful

***Ex officio* prosecutorial actions:** The Supreme Court is now reviewing the decision of an appeals chamber declaring that, in IP infringement cases, each action must be individually initiated. If affirmed, the decision would undo the ability of prosecutors to take *ex officio* actions, a crucial element in anti-piracy activities.

**Supervision and Destruction of seized evidence:** In 2010, Paraguay passed penal code reforms that proscribe the distribution of circumvention devices. Some Prosecutors have begun to embrace the penal code

reforms, and now conduct raids without hesitation. Others, however, are reluctant to seize the entirety of illegal merchandise in a given raid, limiting seized goods to only those products of companies represented by the attorneys in the instant case. Furthermore, due to poor security in the prosecutors' warehouse, modified consoles are normally left in the custody of the defendant. On several occasions, consoles retained under judicial orders and in the control of defendants have been removed and altered. Judges, however, take no notice of the blatant violation of the judicial orders, making prosecution futile. Many judges simply do not believe that modified consoles should be destroyed due to their high value, and believe that circumvention devices may have legitimate uses. Others have taken more inexplicable steps: in one case of pirate merchandise discovered within the defendant's store and home, the evidence was proven to be illegal but the defendant was found to be innocent, and the court ordered the seized merchandise to be returned to the defendant. (That case is currently undergoing further review.)

Meanwhile, despite numerous ESA seizures, to date, no modified consoles have been destroyed in Paraguay. Current destruction procedures require high court fees from the complainants for each individual case, instead of pooling them together. Current provisions in the criminal procedure code do not allow judges to destroy seized merchandise before final ruling. Destructions are expensive because the petitioner must cover all costs related to storage, transport, destruction, attorneys and court fees. In 2008, the Supreme Court issued a decree regulating the amount to be paid to judges for destructions. Initially, judges refused to act on cases where attorneys refused to pay higher sums in accordance with the new decree; however, the reduced fees appear now to have been accepted. Despite this, one ESA member reports that it continues to be charged destruction fees from seizures that were conducted 4-5 years ago.

Expert witnesses: There has been little improvement in the area of corrupt experts and judges in Paraguayan courts. Rights holders have recently experienced problems coming up against expert witnesses that are paid by defendants but have little or no qualifications. The problem is massive and widespread. In 2008, the Supreme Court suspended authorizations of new expert witnesses, but the problem persists. In a recent court case involving consoles that had previously been verified as modified (i.e. the technological protection measures circumvented), a judge permitted additional exams by a "neutral" expert who then convinced the judge to release the consoles to the defendant. Judges continue to use a long standing "2 to 1" practice, citing to two expert witnesses hired by defendants to report that product is authentic against one expert declaring the product not authentic. In this manner, judges are able to wash their hands in cases in which pirated product is returned. The inclusion of an IP Expert witness in the UEPI unit may be a step in the right direction if honest, competent individuals are appointed. Local business software representatives highlight that promising expert witness regulations have been endorsed by the Supreme Court, and are now under review.

Internet enforcement: To date there have been very few developments in Internet piracy enforcement. The local ISPs are cooperating responsively to protect copyright, but only in the limited circumstances when they are required to provide information by judicial order. Currently there is no specific legislation regarding ISP liability. Many providers assume that they are subject to general liability principles in the Civil Code, though this has not yet been tested.

Anti-corruption measures: The Supreme Court has displayed unwillingness to investigate allegedly corrupt judges, even though Plan Umbral I created mechanisms to file a complaint and request an investigation against judges involved in cases of corruption. In practice, the Supreme Court has disregarded the findings of investigations and failed to sanction or remove corrupt judges. As there is no mechanism for anonymous filings, rights holders fear that filing a complaint will prejudice judges in pending cases.

Criminal sanctions are not deterrent: Despite reforms to the Criminal Code, prosecutors do not press for deterrent level sanctions, and judges similarly do not impose deterrent sanctions in criminal copyright cases. As a result, the relatively low fines that can be expected, should a defendant be convicted, have become a simple business expense for IP criminals.

Delays and low damages in civil cases: BSA faces ongoing difficulties in its civil *ex parte* actions, including excessive delays and low damages awarded by the courts. 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, a problem that creates a danger of leaks.

IPR Training Programs: Judges in Paraguay, in particular, are in dire need of training in the importance and operation of intellectual property enforcement. In August 2010, ESA co-sponsored training for officials from the Asuncion Prosecutor's office, Customs, the UTE, and Treasury; however, not a single Prosecutor or assistant attended. Training should be required for Judges and Prosecutors, who should not be permitted to send their assistants to attend as their replacement. BSA reports that it has conducted several seminars in the past two years for the benefit of public prosecutors forensics officials, public prosecutors, and judges.

## COPYRIGHT LAW AND CRIMINAL CODE ISSUES IN PARAGUAY

Cybercrime law: A draft Cybercrime Law was recently presented to the government, and should be adopted and implemented in the near term. As Internet piracy rates gradually increase in the country, so do cases of identity theft. Paraguay should consider updating its laws to deal with illicit activities online.

Copyright Law of 1998: Paraguay adopted a new copyright law in 1998 (Law No. 1.328/98), and later deposited its instruments of ratification to both the WIPO Treaties—the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty. Although the copyright law in general is quite good, further refinement would be needed in order to fine-tune the legislation up to modern standards. In recent years, the copyright industries have focused on enforcement objectives, including reform of the criminal code. One major concern for the recording industry is the term of protection for sound recordings which is only 50 years from publication. Paraguay must increase the term of protection up to 70 years to adapt its legislation to current trends in the region.

Criminal code reform in 2008: Paraguay achieved important reforms to its criminal code that have not been fully implemented in practice. IIPA and its members worked with the government for years to try to fill the troubling gaps in the criminal code and strengthen enforcement remedies for copyright infringement. After a comprehensive effort, amendments to the Criminal Code (formerly Law No. 1160/97) were approved in Law No. 3440 of July 16, 2008, and entered into force in July 2009. This legislation makes copyright infringement a major crime, upgrading infringement to a felony. The amendment significantly increases the maximum penalties of copyright infringement up to five years, and in special and serious cases the penalty could be extended to eight years of prison. Furthermore, the reform of Article 184 (which addresses copyright and related rights) has been expanded to include more infringing acts, including prohibitions against circumvention devices. The legislation unfortunately keeps a minimum penalty of one month for some infringing acts, and as the industries have long complained, this discretionary low minimum penalty may lead judges to refuse to issue jail sanctions, instead issuing only fines. Now that the criminal code has been amended, prosecutors and judges must impose these deterrent penalties in-practice. In addition, the 2008 reforms also expand the existing money laundering provision (Article 196) to include copyright violation (as defined in Article 184a) as a crime used to facilitate money laundering.

## MARKET ACCESS ISSUES IN PARAGUAY

In a concerning development, the Executive Branch is now attempting to mandate the use of open source software in public offices. Such a policy would undermine the principle of technological neutrality in government IT acquisitions.