

PARAGUAY

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2013 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA files this Special Mention report on Paraguay to highlight the serious enforcement deficiencies that persist in the country, and that have been major objectives under the U.S.-Paraguay Intellectual Property Rights Memorandum of Understanding (IPR MOU). Despite years of work under this framework, Paraguay unfortunately has failed to: (1) implement a software legalization decree, followed by annual reports of government agencies complying with such a program; (2) significantly reduce the levels of copyright piracy; (3) increase *ex officio* actions at the border; (4) strengthen deterrence by actually imposing mandatory minimum prison sentences on offenders convicted of manufacturing, importing or distributing commercial quantities of pirated or counterfeit goods; (5) provide for the seizure of an infringer's assets upon conviction for commercializing pirate product; (6) find ways to work with the judiciary to promptly resolve pending cases; and (7) increase the terms of copyright protection for all copyrighted materials.¹

Executive Summary: The forms of piracy in Paraguay and the sectors affected by them are wide-ranging. Paraguay is a major source of manufactured and transshipped pirate products throughout the region. Unauthorized copies of software are common in businesses, and the government has taken no steps on its commitment to implement a software legalization program among its agencies. Internet piracy is also beginning to take root in Paraguay, affecting certain sectors in particular. But as surrounding South American citizens are largely moving online for content (bringing new enforcement challenges), Paraguay is still in the nascent stages in the typical progression of piracy from a physical problem to a digital one. Admittedly, Paraguay still in many ways lacks the means for a resource-intensive and robust IPR regime. Police and customs forces need a coordinated plan to focus more proactively on the steady piracy-based crimes occurring at the manufacturing sites, marketplaces, and borders of the country. IPR Prosecutors Units must be staffed with experienced and effective personnel. Courts need to receive training and would most benefit from judges specifically dedicated to IPR cases. IIPA urges USTR to ensure that Paraguay complies with the baseline commitments that were reflected in the MOU. Continued U.S. Government support and focused leadership within the Government of Paraguay is sorely needed.

PRIORITY RECOMMENDED ACTIONS FOR PARAGUAY IN 2013

- Implement a software legalization decree, and conduct an audit of public institution software to ensure full compliance (a long overdue obligation from the IPR MOU).
- Facilitate swift and deterrent convictions by ensuring the quality of 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 stepping up proactive enforcement actions and encouraging better communication with rights holders in 2013, including detailed reports of products seized and destroyed.
- Investigate and conduct raids against the large-scale distribution points operating in Ciudad del Este as well as the sources of local production, followed up by prosecution of those responsible.
- Continue to increase actions at the border to control the spread of pirate product across the region.

¹For more details on Paraguay's Special 301 history, see IIPA's "History" appendix to this filing at <http://www.iipa.com/pdf/2013SPEC301HISTORICALCHART.pdf>, as well as the previous years' reports, at <http://www.iipa.com/countryreports.html>. For a summary of IIPA's 2013 global issues, see our cover letter at <http://www.iipa.com/pdf/2013SPEC301COVERLETTER.pdf>.



Generalized System of Preferences: Paraguay is a beneficiary country under the U.S. Generalized System of Preferences program (GSP), which requires that a beneficiary country provide “adequate and effective” protection to U.S. copyrighted materials. During the first eleven months of 2012, \$61 million worth of Paraguayan goods entered the U.S. under the duty-free GSP code, or more than 36% of Paraguay’s entire imports into the U.S.²

COPYRIGHT PIRACY IN PARAGUAY

Few of Paraguay’s most pervasive piracy problems have changed. There continues to be large-scale production of pirate optical discs and illegally modified videogame consoles within Paraguay and a consistent traffic flow of illegal goods into Brazil. The software sector continues to suffer from widespread unlicensed software use by enterprises. The country supplies mass quantities of manufactured and transshipped pirate products throughout the region. Pirated physical goods appear in the principal markets of Paraguay, in the form of pirated optical media of videogames, movies, music and recordings, and software on CD-Rs and DVD-Rs, as well as videogames in cartridge format. Of particular concern are the large quantities of game consoles and PC computers modified in Paraguay to store or accommodate pirated software of all kinds, which are then transshipped to Brazil and other markets. Internet piracy is also beginning to take root in Paraguay, affecting certain sectors in particular.

Paraguay continues to be the biggest supplier of blank media intended for export to Brazil for use with pirated content. Industrial plants operating from Ciudad del Este produce millions of CD-Rs, DVD-Rs and other types of media that cross the border by different means. The Paraguayan government has never conducted serious inquiries into these industrial facilities to identify clients and routes by which the massive production of blank media is smuggled into Brazil, in many cases as personal baggage. CD-R and DVD-R plants established in Ciudad del Este have obtained financial incentives from the Paraguayan government through the law to provide incentives to foreign investors. However, despite all complaints from copyright industries, the Minister of Industry and Commerce (responsible for the incentives) never disclosed detailed information about the commercial operations of those plants, and especially about the local consumption of blank media versus the flagrant smuggling operation established by the operators of the plants in coordination with several companies in Ciudad del Este.

The primary targets for enforcement in Paraguay have long been the markets of Asunción and Ciudad del Este, the latter having been a major concern for foreign governments because of the central role the city plays in transshipment activities in the tri-border region with Brazil and Argentina. The Uruguayan market is also directly implicated by Paraguayan piracy, given its geographical proximity and Montevideo’s longstanding role as a transit point for containers destined for Paraguay. The markets of both of these neighboring countries face long-term effects from Paraguay’s massive-scale production of physical pirate product. That said, commercial traffic in general in Ciudad del Este decreased significantly in recent years due to Brazilian controls on the Friendship Bridge and at other land transit points on Brazilian routes between Ciudad del Este and São Paulo, resulting in some positive trends against the flow of pirated products to Brazil. While Brazilian efforts are aimed primarily at stopping the flow of arms and narcotics from Paraguay to Brazil in preparation for global sporting events to be hosted in Brazil in the coming years, counterfeit and contraband products are also seized in these controls. As a result, wholesale Brazilian buyers have sought other sources of these products.

The prevalence of circumvention devices in Paraguay remains a crucial concern for the entertainment software industry; modchips and game copiers are principally only sold to laboratories using modchips to modify game consoles (“modlabs”) and known Brazilian buyers. Retail outlets send consoles to modlabs to be modified, and the modlab then supplies and installs the modchips. As the September 26, 2012 joint operation of Uruguayan authorities and U.S. agents reveals, the circumvention device industry in Paraguay is sophisticated, and Paraguay continues to serve as a transshipment point for syndicates who bring in such goods from overseas with the intent of

²During 2011, more than US\$77 million in imports to the U.S. from Paraguay enjoyed duty-free treatment under the GSP Program, or more than 70% of Paraguay’s entire imports into the U.S.

distributing them throughout South America. In that raid, Uruguayan authorities identified a shipment of containers destined for Ciudad del Este, Paraguay, from Uruguay, containing counterfeit Xbox, PlayStation and Nintendo gaming systems valued at US\$741,041.

The software industry reports a continued high level of software piracy in Paraguay. The software piracy rate was 83 percent in 2011, the same level as the year before, representing a commercial value of unlicensed software of \$73 million.³ This piracy includes widespread unlicensed software use by businesses and government agencies. Corporations place orders via email to receive pirate software from hired distributors, and PCs customized with illegal pre-installed software are produced in Paraguay to be sold in Brazil. 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 software sector.

Optical disc piracy is still a large-scale problem, distributed directly from warehouses to wholesale buyers. Burned copies of CD-Rs/DVD-Rs full of pirated content 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. Significant piracy, mostly of music, movies, and videogames (CD-Rs and DVD-Rs), can be found on the streets of Asuncion.

Internet-based piracy in Paraguay has grown in recent years 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.

COPYRIGHT ENFORCEMENT IN PARAGUAY

Paraguay's Specialized Technical Unit (UTE) underwent a number of structural changes in recent years that left the copyright industry uncertain that planned training and re-staffing in 2012 could result in renewed effectiveness in its enforcement efforts. To the knowledge of IIPA's members, since the original UTE staff has been replaced, no entity has attempted the same level of mass enforcement of street piracy in Paraguay that it had conducted in the past. While the Government of Paraguay maintains border enforcement cooperation efforts with Brazilian, Argentine, and Uruguayan authorities, these have not been effective. Like prosecutors and police units in Paraguay, customs officials lack the motivation to conduct *ex officio* enforcement actions. Within the judicial system in Paraguay, rights holders historically have faced poor engagement on the part of prosecutors, procedural obstacles regarding the retention of seized evidence and expert witnesses, long delays, and non-deterrent sentences. The Government of Paraguay has taken no meaningful steps to issue or implement a software legalization program among its agencies, an important obligation under the country's MOU with the United States.

Police Enforcement: The Entertainment Software Association (ESA) reports that police enforcement efforts have decreased in the past year, partly due to the decrease in commerce in Ciudad del Este described above. Still, *ex officio* enforcement actions are not a priority for police authorities. No *ex officio* enforcement actions involving pirated game products were known to have been conducted by the National Police Economic Crimes Unit.

³BSA | The Software Alliance's 2012 Global Software Piracy Study, conducted with two leading independent research firms, IDC and Ipsos Public Affairs, measured the rate and commercial value of unlicensed PC software installed in 2011 in more than 100 markets. In 2011, the software piracy rate in Paraguay was 83%, representing a commercial value of unlicensed software of US\$73 million. These statistics follow the methodology compiled in the Ninth Annual BSA and IDC Global Software Piracy Study (May 2012), <http://portal.bsa.org/globalpiracy2011/index.html>. The BSA study covers piracy of all software run on PCs, including desktops, laptops, and ultra-portables, including netbooks. It includes operating systems, systems software such as databases and security packages, business applications, and consumer applications such as games, personal finance, and reference software. It also takes into account free software, open source software, and software as a service if it is paid for. It does not cover software that runs on servers or mainframes and routine device drivers, free downloadable utilities such as screen savers, and software loaded onto tablets or smartphones. The methodology used to calculate this and other piracy numbers are described in IIPA's 2013 Special 301 submission at <http://www.iipa.com/pdf/2013spec301methodology.pdf>.

Problems Within the Judiciary: On the whole, the primary enforcement problems in Paraguay are the judicial and administrative personnel involved in the IPR prosecutor's office and the courts. 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. In Ciudad del Este, the selection of judges is a lottery system, rather than assignment of IP cases to specialized judges as in the past. A 2010 resolution of the Supreme Court has created a judicial hurdle, requiring a judge to accompany all IPR and tax raids and container inspections in Ciudad del Este. Problems such as information leaking prior to enforcement actions and dismissals regarding seized infringing product continue. 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.

Landlord Liability for Large-scale Street Piracy: The copyright sectors report no progress in 2012 on the need for Paraguayan officials to address the role of landlords at large-scale distribution points operating in Ciudad del Este, including 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.

Specialized IPR Prosecutors Units: To the knowledge of IIPA's members, Paraguay's Unidad Especializada de Propiedad Intelectual (UEPI or IPR Prosecutor's office) does not have the in-house investigative resources necessary to identify potential targets, leaving the responsibility to the private sector to signal criminal activities for action. The existing IPR prosecutors and an IPR Prosecutor's unit now in place in Encarnación, a major land port for containers entering Paraguay from Argentina, should 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.

A trained and dedicated specialized IPR court that works effectively with specialized IPR prosecutors is badly needed in Paraguay. New courts with exclusive jurisdiction for intellectual property infringements, and a specialized IPR judge with national jurisdiction, would be beneficial for the entire industry, and specialized IPR training for these judges could be offered.

Supervision and Destruction of Seized Evidence: In 2010, Paraguay passed penal code reforms that proscribe the distribution of circumvention devices. Some prosecutors, however, have been 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 have often been left in the custody of the defendant, allowing them to be removed and altered. Judges, however, take no notice of the blatant violation of the judicial orders, making prosecution futile.

Expert Witnesses: There has been little improvement in the area of experts and judges in Paraguayan courts. Rights holders have experienced problems coming up against expert witnesses that are paid by defendants but have little or no qualifications. The problem is massive and widespread. Judges have had 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.

Internet Enforcement: To date there have been very few developments in Internet piracy enforcement. The local Internet service providers (ISPs) are cooperating responsively to protect copyright, but only in the limited circumstances when they are required to provide information by judicial order. Paraguay lacks specific laws 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.

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. Judges in Paraguay, in particular, are in dire need of training in the importance and operation of intellectual property enforcement.

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.

COPYRIGHT LAW AND CRIMINAL CODE ISSUES IN PARAGUAY

Copyright Law of 1998: 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. At the end of 2012, a bill to increase the term of protection for sound recordings and music performances up to 70 years was submitted to the House. Clear support from the government is needed to prioritize this bill during 2013.

Cybercrime Law: A draft Cybercrime Law was recently presented to the government, but has not moved forward. 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.

Criminal Code Reform in 2008: After a comprehensive effort, amendments to the Criminal Code 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 and increasing maximum penalties for copyright infringement. The reform also broadened the law's scope to cover more infringing acts, and included 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 leads prosecutors and judges to refuse to seek and issue jail sanctions, instead issuing only fines.