

ARGENTINA

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

2014 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that Argentina remain on the Priority Watch List in 2014.

Executive Summary¹: The people of Argentina take pride in their rich cultural heritage and their history as one of the early countries to adopt strong laws to protect authors' rights, yet the Government of Argentina is oblivious to its current status as one of the world's least hospitable environments for producers of copyrighted works. Leaders have turned a blind eye to the piracy that pervades their highly promoted "La Salada" public market near Buenos Aires, while digital piracy continues to climb. Some of the weaknesses in Argentina's copyright enforcement regime can be attributed to a lack of resources, but many rest on failings in procedures and laws that should be addressed immediately. Market organizers should restrict licenses to vendors selling legitimate products. Criminal and Civil courts should move copyright cases through the system more rapidly. Copyright infringers should face deterrent penalties and be subject to statutory damages in cases involving infringing physical goods and digital piracy. The government should encourage ISPs to cooperate in anti-piracy efforts by bringing them together with rights holders in round table discussions to establish voluntary best practices or codes of conduct to deal with copyright piracy over Internet services, and by ensuring that the law establishes sufficient liability for known infringements and permits courts access to incriminating data regarding online piracy. IIPA urges the U.S. Government to increase its dialogue with Argentina about the severity of copyright piracy in Argentina's streets, businesses, and online communities.

PRIORITY ACTIONS REQUESTED IN 2014

- 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.
- Develop processes that enhance cooperation between rights holders and online intermediaries in ways that are likely to contribute to a decline in online piracy.
- Require that the federal, provincial, and city governments take appropriate measures to:
 - Prioritize cleaning up the "La Salada" fair and similar markets to demonstrate political will against the distribution of pirate and counterfeit merchandise.
 - Identify distributors of pirate products in public markets and revoke licenses to those points of sale.
- Issue an executive decree mandating legal software use in government agencies and implementing processes to achieve this based on software asset management best practices.
- 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.
- Provide more resources and high-level support for police Internet crime units to address illegal file-sharing.

¹For more details on Argentina's Special 301 history, see previous years' reports at <http://www.iipa.com/countryreports.html>. For the history of Argentina's Special 301 placement, see <http://www.iipa.com/pdf/2014SPEC301HISTORICALCHART.pdf>. For a discussion of IIPA's 2014 Key Initiatives and Challenges, see IIPA, *2014 Special 301 Submission*, at <http://www.iipa.com/pdf/2014SPEC301COVERLETTER.pdf>.



COPYRIGHT PIRACY IN ARGENTINA

The piracy culture is firmly rooted among the population of Argentina. With unrelenting online piracy of music, films, videogames, and software; hard goods piracy widely available in open markets; and the legitimate market for copyrighted works facing a steady challenge from the ready availability of pirate works, the state of piracy in Argentina has not changed in the past year. Music piracy rates remain steady at 99% of the digital market. Widespread use of unlicensed software by businesses remains a damaging form of infringement for the software industry. 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 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. It is clearly the most important center of manufacturing, distribution and selling of illegal products in Argentina. But as a result of its profitability, it has also been the most imitated business model in the last year. Thus, a number of “Saladitas,” or smaller versions of the Salada Fair market, have appeared across Argentina, including in the City of Buenos Aires and every town of the province of Buenos Aires. Although the Buenos Aires Autonomous City government has been making significant efforts, including recent actions resulting in the expulsion of over a thousand illegal street vendors from their habitual sites of sale, according to the Argentina Chamber of Commerce, there are 1,879 illegal markets in the city of Buenos Aires alone, contributing to an annual increase of hard goods piracy and counterfeiting of more than ten percent.² Other cities with high levels of piracy are Cordoba, Santa Fe, Mendoza, and Tucuman. Hard goods piracy accounts for 60% of the market for the recording industry.

As for La Salada Fair itself, the physical area continues to grow. It is made up of four markets – *Punta Mogotes*, *Urkupiña*, *Ocean* (indoor fairs) and *La Ribera* (open-air fair) – built up on the Riachuelo shore. It is a sprawling area with over 30,000 stands selling everything from music to bags, and it provides pirate and counterfeit merchandise to retailers and re-sellers from Argentina and neighboring countries. This market opens twice a week – on Tuesdays and Sundays – and is visited by approximately one million people each day. Although La Salada is mainly a physical market, it has its own websites where customers can check out information about the market hours and directions (official sites: <http://www.puntamogote.com.ar/>; <http://www.mercadolasalada.com>). Pirate and counterfeit merchandise is openly advertised and sold on such websites, though no CDs or movies are offered online. Police are well aware of the illegal activities taking place at the fair. 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.

Internet piracy: As in the past, online piracy in Argentina occurs predominantly via direct download, for example from cyberlockers that host infringing content. Users locate infringing files via Argentina-based web sites, such as *Cuevana.tv*, which provide well-organized links to hundreds of U.S.-produced sound recordings, movies, and TV shows stored on notorious cyberlockers. Peer-to-peer (P2P) file sharing services (including BitTorrent and eDonkey) are also increasingly popular among Argentina’s growing base of broadband-connected Internet users, particularly for the download of pirate software programs and video games.

There are multiple legal web sites offering digital music in Argentina, including most recently Spotify and Rdio, along with existing services Personal Música, Ideas Musik, Tienda de Música Movistar, Sonora, BajaMúsica.com, Faro Latino, iTunes, and Deezer. Still, online piracy overwhelms legitimate content providers, leaving the legal digital market at only 12% of total legitimate music sales. Of that 12%, mobile downloads account for 96%.

²See http://www.cac.com.ar/noticia/AUMENTO_UN_3.13_LA_VENTA_ILEGAL_CALLEJERA_EN_LA_CIUADAD_DE_BUENOS_AIRES_4699.

The year 2013 witnessed the continued growth of piracy rates in Argentina, which ranked eighth in terms of the number of connections by peers participating in the unauthorized file sharing of select Entertainment Software Association (ESA) member titles on public P2P networks, up significantly from its 12th place ranking in 2012 and 21st place ranking in 2011.

Piracy of software programs: BSA | The Software Alliance (BSA) reports that the software piracy rate in Argentina was 69% in 2011, representing a commercial value of unlicensed software of \$657 million.³ Since that time, local representatives see no change in the overall situation for commercial software in Argentina. This piracy includes widespread unlicensed software use by business enterprises, especially in small- and medium-sized organizations, and government agencies. Increasingly, users are downloading pirate copies of business software from the Internet as the distribution of physical copies of pirate software becomes less popular. Such widespread piracy has caused the legitimate market for software, including from local vendors, to shrink. Often, unauthorized versions of newly released software reach the local pirate market before a localized version of the software is available from legitimate Argentinian distributors.

COPYRIGHT ENFORCEMENT IN ARGENTINA

Copyright enforcement in Argentina is, as a practical matter, limited to communicating with a cooperative segment of the country's ISPs, and seeking preliminary remedies in civil proceedings. According to local industry representatives, criminal enforcement measures for copyright infringement are virtually nonexistent. With the exception of a string of raids against a major book piracy organization in December 2013,⁴ *ex officio* police actions are unheard of in the initiation of cases regarding copyright crimes, prosecutions do not move forward, and infringers are never issued deterrent sentences. Civil remedies in the form of preliminary injunctions or other urgent initial procedural remedies are available, particularly in relation to software infringement, but judicial proceedings in any of Argentina's 24 provincial court systems or in the Federal court system are far too time consuming. Information about customs actions is no longer available since the customs authorities discontinued the Anti Piracy Custom Forum, though rights holders report good cooperation with customs officials generally.

Inter-industry Cooperation on Internet Piracy Cases: Local ISPs in Argentina have gradually begun to collaborate in certain limited circumstances, such as taking down infringing sites in very specific instances. Some ISPs have established special procedures to process infringement claims from rights holders, but others require a judicial order before taking down infringing material. Successes in take-down requests are limited to e-commerce sites, hosted content, or links found on major search engines or forums. ISPs refuse to cooperate with rights holders on any copyright actions within P2P networks, claiming to have no responsibility for the activities of users on their networks. However, under Argentinian law, ISPs may be held liable for infringements committed through their services. The difficulty lies in the need to establish joint and several responsibility of both the ISP and the user, which requires evidence of user infringement. Unfortunately, Argentina's privacy laws restrict access to the user data (critical to establishing that evidence against the ISP) in cases involving intellectual property crimes. New technologies, such as piracy via variable "magnetic" links (identified by the .Torrent extension), make locating infringing activity even more difficult. Government assistance is sorely needed to facilitate cooperation across the spectrum of the Internet community.

³Data on software piracy rates and commercial values are taken from the 2011 BSA Global Software Piracy Study at www.bsa.org/globalstudy. This study assesses piracy rates and the commercial value of unlicensed software installed on personal computers during 2011 in more than 100 markets. The study includes a detailed discussion of the methodology used. BSA plans to release an updated study in the second quarter of 2014.

⁴See the local news coverage at <http://www.infojusnoticias.gov.ar/nacionales/decomisaron-100-mil-libros-truchos-y-detuvieron-al-jefe-de-la-organizacion-2708.html>.

Criminal Enforcement – Slow Prosecutions and Non-deterrent Judgments: The Argentine judicial system is formal and heavy on written submissions, which means that the process of administering justice is time-consuming. Very few criminal cases reach final sentencing, and most copyright infringement cases close with a suspension of judgment. While the lack of human resources and poor infrastructure in the courts contribute to the problem, clearly prosecutors and judges lack the will to push these cases through. Criminal sanctions are mere formalities; copyright crimes in Argentina do not carry a threat of jail sentences on any practical level.

Civil Enforcement – Delays and Weak Damages: Rights holders report positive responses from the National and Provincial Civil Courts, but the shortages in resources and capacity create delays and additional costs in civil cases. The software industry continues to rely on civil enforcement in Argentina, but there are significant procedural delays in some provincial jurisdictions in obtaining and conducting civil searches in software piracy cases. Civil actions are also weakened by the lack of deterrent civil damages; this important problem could be corrected if Argentina were to introduce an effective statutory damages system.

Border Enforcement: The Argentina Customs Code currently provides for *ex officio* actions. Customs authorities have a good understanding of 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. Since the customs authorities discontinued the Anti Piracy Custom Forum, rights holders have less information about customs seizures that have taken place.

Industry trainings and public awareness efforts: In 2013, BSA organized a panel session on software use and licenses during a conference of government lawyers, with 1,500 participants in attendance.

COPYRIGHT LAW REFORM IN ARGENTINA

Proposed Internet Legislation: Rights holders are monitoring two separate initiatives currently being reviewed by Argentina’s lawmakers.

First, during 2013, six different bills were introduced in Argentina’s legislature to regulate Internet neutrality. These bills were consolidated by the Senate Committee on Communications Systems, Media and Freedom of Expression, and a new draft is now being discussed in the House of Representatives. The proposed legislation seeks to ensure that communications operators and ISPs do not restrict the free use of the Internet by third parties. The present drafting of the consolidated bill could limit the ability of rights holders and ISPs to take measures, without a judicial order, to remove or restrict access to infringing content online. The definitions and implementation of such legislation could significantly impede cooperative anti-piracy efforts among rights holders and ISPs.

Second, Bill No. 1508-D-2013 was introduced in 2013 regarding ISP Liability. Under this legislation, an ISP would be considered to have effective knowledge for purposes of liability for the violation of laws or the rights of third parties only after the issuance of a final (i.e., not subject to appeal) judicial order. This definition could severely restrict the incentives for any ISP to cooperate with rights holders to remove infringing material or links, and thus would make responses to quickly developing Internet piracy a lengthy and resource-intensive process.

In IIPA’s 2013 Special 301 submission we reported on Bill No. 2995-D-2012, introduced in Argentina’s legislature in 2012. Fortunately, this bill, proposing to eliminate any criminal or civil liability for unauthorized downloading or accessing of copyright material over the Internet, is no longer active.

Copyright Law Reform: 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 Internet Treaties, to give legal support for the digital businesses of 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 only one month imprisonment under Article 72bis of Act 11.723 of the Copyright Act) up to at least two years to apply deterrent sanctions;
- Establish effective statutory damages provisions in civil infringement cases;
- Explicitly provide for the seizures of equipment used in the manufacture of infringing goods;
- Provide clear guidelines regarding liability for ISPs, and include effective notice and takedown provisions; and
- Provide equitable and balanced treatment for all rights holders, treating juridical entities no less favorably than natural persons.

Government Software Legalization: Unfortunately, no progress was made on this important issue last year. With respect to government legalization efforts, the 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 mandate legal software use in government agencies and implement processes to achieve this based on software asset management best practices. While several “standards” have been issued by the Subsecretaría, the Argentine Government has not taken meaningful action toward legalizing its software inventories.

MARKET ACCESS ISSUES

Tax Exemptions for the Local Culture Industry: During 2011, two important and positive tax exemptions were passed for the local culture industry. The first was adopted by the Government of the Province of Buenos Aires, establishing an exemption from payment of gross receipts taxes for revenue from CD/DVD publishing and sales in the territory of the province of Buenos Aires. The second was adopted by the Government of the City of Buenos Aires, establishing an exemption from payment of gross receipts taxes for revenue from DVD publishing and sales in the territory of the City of Buenos Aires. The recording industry supports such tax exemptions as an important benefit for the proliferation of cultural products. Exemptions of this kind should be extended to other provinces, and all formats and devices.

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. The Motion Picture Association (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 2013.

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.

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.” In 2011, AFIP’s position was upheld by the Argentinian National Supreme Court of Justice, resulting in a considerable increase in the international license cost for end users. 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. There is also a clear need for the U.S. and Argentina to reach agreement on a treaty to avoid double taxation.