

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2002 SPECIAL 301 REPORT

VENEZUELA

EXECUTIVE SUMMARY

Over the years, legislative and administrative changes taken by Venezuelan governments to address piracy issues have presented a mix of advances and obstacles. Unfortunately, Venezuela's efforts to fight copyright piracy have declined in the last three years. Budget reductions and changes in staff responsibility adversely affecting Venezuela's anti-piracy brigade COMANPI, once the model for the region, have undermined its ability to take action. The National Guard (*Guardia Nacional*) has attempted to fill this gap by conducting anti-piracy actions in conjunction with industry. An overburdened special intellectual property rights prosecutor and consistent and pervasive problems with the judiciary, particularly in criminal cases, continue to result in lengthy delays and the failure to impose penalties and civil remedies at levels sufficient to deter piracy. Border measures need to be improved to intercept infringing product. Longtime problems with customs duties on computer software remain unresolved. Piracy losses remain high. Sadly, political and economic instability in Venezuela also appear to be adding incentives to steal copyrighted materials. IIPA recommends that Venezuela remain on the Special 301 Watch List.¹

¹ For more information on the history of Venezuela under Special 301 review, see appendices D and E of this submission. Venezuela is also a beneficiary under the U.S. Generalized System of Preferences (GSP) trade program, which includes a criterion requiring beneficiary countries to afford adequate and effective intellectual property rights protection to U.S. copyright owners. In 2000, \$744.8 million in Venezuela's imports to the United States benefited from the GSP program, accounting for 4.3% of its total imports to the U.S. For the first 11 months of 2001, \$595.2 million of Venezuelan goods (or 4.5% of Venezuela's total imports to the U.S. from January to November) entered the U.S. under the duty-free GSP code, representing a 13.1% decrease over the same time period last year.

VENEZUELA: ESTIMATED TRADE LOSSES DUE TO PIRACY
(in millions of U.S. dollars)
and LEVELS OF PIRACY: 1996 – 2001

INDUSTRY	2001		2000		1999		1998		1997		1996	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Motion Pictures	25.0	65%	25.0	65%	30.0	65%	35.0	65%	40.0	70%	40.0	85%
Sound Recordings / Musical Compositions	54.0	62%	30.0	62%	30.0	62%	15.0	35%	15.0	35%	5.0	22%
Business Software Applications ²	19.7	58%	16.9	58%	46.4	60%	55.6	62%	44.2	64%	42.4	68%
Entertainment Software	NA	NA	47.0	78%	50.9	70%	53.8	73%	54.3	74%	54.0	70%
Books	20.0	NA	22.0	NA	21.0	NA	20.0	NA	20.0	NA	23.0	NA
TOTALS	118.7		140.9		178.3		179.4		174.5		164.4	

COPYRIGHT PIRACY IN VENEZUELA

Piracy in Venezuela has remained at high levels for all the copyright industries. Estimated losses have been over \$115 million per year, for each of the last five years. Continuing economic instability in this country may be adding incentives to pirate copyrighted materials.

With respect to business software, pirate resellers continue to advertise openly in the major daily newspapers, and CD-ROM piracy has appeared in the market. Advertisements for pirate product through the Internet have been reported. Business software piracy can take many forms. Pirates advertise in the press, and sell compilation CDs for prices as low as \$4. Pirates also act as assemblers, building computers and selling pre-installed illegal software. Corporations use software programs without corresponding licenses. Universities and other educational institutions have high piracy levels, even among those which may have software licensing agreements with software companies. Government ministries also use unauthorized copies of business software. The estimated 2001 trade losses due to piracy of business applications software in Venezuela are \$19.7 million, with a piracy level of 58%.

Home video piracy is pervasive in Venezuela, supplied by large-scale laboratories with national distribution systems. Counterfeit packaging is common. Pre-home video window release piracy is standard. An estimated 50% of the illegal videos seized in Venezuela are copied from prerelease video screener cassettes intended for use only in the U.S. Many of the estimated 400 "legal" retail video stores in Venezuela perform small-scale back-to-back copying of legal videos purchased.

² BSA loss numbers for 2001 are preliminary. In IIPA's February 2001 Special 301 filing, BSA's 2000 estimates of \$45.5 million at 58% were identified as preliminary. BSA finalized its 2000 numbers in mid-2001, and those revised figures are reflected above.

Television piracy in Venezuela has decreased due to raids and investigations carried out by the MPA Venezuela program in the last four years. Nevertheless, pay-TV piracy remains an MPA concern in Venezuela, because the generally deteriorating economic situation is expected to lead to an increase in cable piracy.

Pirate cable systems with large numbers of subscribers continue to operate in cities where no legal cable company yet exists. Resorts, condominiums, hotels and other commercial and domestic establishments consistently retransmit unauthorized programming, with seasonal increases during special events or holidays.

Broadcast television piracy continues to affect the legitimate market. Regional television stations often broadcast unauthorized U.S. motion picture product before their video release, seriously impacting the viability of the legitimate markets in Venezuela. Estimated U.S. trade losses due to audiovisual piracy in Venezuela remained at \$25 million for 2001.

The piracy situation for the book publishing industry in Venezuela remains dire. It is now mostly concentrated at the collegiate and university level. Illegal photocopying is a major problem, especially of texts and English language study materials. No limits appear to be placed on photocopying in and around universities. By some reports, an estimated 30-45% of the university market is supplied by infringing materials. In contrast, at the primary and secondary school level, piracy has declined as schools, especially private ones, insist on legitimate materials. Commercial piracy of some trade books are beginning to appear in locally pirated editions. Estimated trade losses due to book piracy in Venezuela dropped slightly, to \$20 million for 2001.

For the sound recording industry, the problem of piracy has increased as a result of the populist approach that the Venezuelan government has taken: No government institution wants to go against street vendors. Over the last year, piracy in the CD-R format (recordable CDs) rose and has taken over the market. As a result, while the level of music piracy in Venezuela remained at a high 62%, estimated losses due to piracy skyrocketed to \$54 million in 2001.

Most of the pirate entertainment software in Venezuela is imported, notably from Taiwan, Hong Kong and China, usually transshipped through Paraguay. Clearly, improved border controls in Venezuela are needed to block the import of pirated entertainment software. There have been some seizures of counterfeit videogames at the border. Retailers openly sell piratical videogames in the main shopping arcades with little fear of reprisal. Estimated trade losses due to piracy of entertainment software (including videogame CDs and cartridges, personal computer CDs, and multimedia products) and piracy are not available for 2001.

ENFORCEMENT IN VENEZUELA

Although Venezuela has taken structural actions to improve its enforcement mechanisms in recent years, the effectiveness of these organizations has declined dramatically. Furthermore, the possibility of effective deterrence has been diminished by the ineffectiveness of the Venezuelan judicial system. Deterrent penalties are rarely issued. It takes years for courts to issue a decision. As a WTO member, Venezuela is required under its TRIPS obligations to provide for effective action against copyright infringement across the board — in criminal, civil, administrative and

customs measures. As discussed above, Venezuela also must meet its bilateral IPR obligations under U.S. trade law.

Ineffective and Non-Deterrent Criminal Enforcement

Intellectual property protection agencies are hampered by political and economic limitations. Venezuela's economic situation has spawned severe social problems and has contributed to the degeneration of public safety, straining the resources of law enforcement. The government has not supported the fight against piracy, hampering copyright industries' ability to work with the *Guardia Nacional*, and the Judicial Technical Police has been reduced.

COMANPI has lost its effectiveness as a copyright anti-piracy force.

For several years after its creation in 1996, COMANPI, a specialized brigade of the Judicial Technical Police, charged with making investigations and bringing criminal prosecutions of copyright infringers, in cooperation with the private sector, was relatively effective, despite its chronic shortage of personnel and funding. However, cutbacks and reassignments of trained personnel are undermining what was once seen as a model for criminal intellectual property rights enforcement.

While COMANPI made great strides in its first years of operation, its pace has slowed considerably in recent years. COMANPI was reorganized in the spring of 1998, with the goal of creating a kind of exchange program between COMANPI and the other functionaries in the police technical unit. Unfortunately, this activity ended up siphoning off COMANPI personnel to functions other than copyright enforcement, such as conducting cases on industrial property (trademark and patent) matters. This reduced the staff available for copyright actions, which was why COMANPI was established in the first place. There are only eight agents, who specialize in copyright and industrial property issues. There has been no increase in the human resources made available, despite the dramatically increased caseload.

Additional funding, personnel and resources from the Venezuelan government would bolster COMANPI's ability to take additional action. BSA has relied on the judiciary to initiate search actions.

The *Guardia Nacional's* effectiveness has been blunted by resource constraints.

The *Guardia Nacional*, one of the administrative tax agencies, supports the BSA campaign and conducts actions. However, these actions are initiated for tax evasion instead of copyright infringement. This administrative procedure is not optimal for carrying out raids against resellers.

MPA's efforts to conduct video anti-piracy actions with the *Guardia Nacional* using tax evasion as the basis for actions (instead of copyright infringement) also have been blunted by the severely limited resources which the government of Venezuela has made available for the fight against piracy.

The recording industry reports little progress on the enforcement front in 2001. The few actions conducted in 2001 were the result of working with the *Guardia Nacional*. COMANPI is no longer a viable enforcement agency for these actions. The Venezuela judiciary is not close to

taking infringement cases seriously. APDIF Venezuela (the recording industry's anti-piracy organization) continues to work on music piracy cases that often are lost due to a lack of response from the Special Prosecutor, or because of the excessive amount of time it takes to obtain a search order.

SAPI has limited enforcement powers.

The Venezuelan government created a new intellectual property office, SAPI (*Servicio Autonomo de Propiedad Intelectual*) in 1997. SAPI has very limited powers: no ability to order seizures or close businesses, and its fines are very low. Despite this, BSA has a close working relationship with SAPI's Copyright Office (DNDA). DNDA has agreed to issue administrative notifications to pirates and has provided public support for the BSA's enforcement campaigns. SAPI shouldn't be considered as a part of the enforcement structure of Venezuela due to its lack of empowerment and resources.

The single specialized IPR prosecutor is overburdened.

In 1999, the Public Ministry created a special IPR prosecutor unit under the new Organic Code of Criminal Process to work with COMANPI after criminal raids are conducted and to oversee the ongoing investigations. In fact, the IPR prosecutor has delayed investigations, and prevented the retention of evidence and detention of infringers. This prosecutorial unit has delayed the time periods to take action on criminal complaints, exceeding established deadlines. Parties now wait at least 30-60 days for action on any complaint. It was hoped that a second prosecutor would be named before the new criminal procedures code went into effect in July 1999, but this failed to occur. In 2001, the situation remained unchanged: There is still only one overburdened prosecutor. Obviously, IPR cases are not a priority for the Public Ministry.

Unwarranted Delays in Criminal and Civil Cases

The judicial system in Venezuela continues to serve as a major hurdle in the fight against copyright piracy. Courts take years to complete infringement cases. Furthermore, strikes have resulted in the closure of courts, at times for over six months.

For example, one copyright company finally obtained resolution to its six-year litigation. In April 2001, Nintendo of America finally obtained resolution to a civil copyright infringement case

(originally filed in July 1995) when the Venezuelan Supreme Court rejected the defendants' appeal.³ The court also imposed a fine on the defendant's attorney, and found that he should be investigated because the numerous appeals were filed in a malicious manner for the purpose of delaying the execution of the decisions by the lower court.

Regarding business software civil actions, the inspections are carried out before filing the legal suit, and the BSA is usually able to inspect the defendant and conclude a fast settlement. However, when the case is not settled, BSA has to follow the slow civil process, which can take two to five (or more) years until the case is finally resolved. On the end-user piracy front, BSA initiated 34 civil actions in 2001. The majority of these targets, 23 in all, settled with the BSA; 10 targets were clean; and BSA filed damages actions against one target.

Judicial Failure to Impose Deterrent Penalties

In 1999, Venezuela adopted a new Code of Criminal Procedure (CCP). This law established specialized courts (*tribunales colegiados*) in Venezuela. These courts are to address special issues of law, including the creation of IPR courts in which cases will be heard by three lawyers trained in intellectual property issues. Unfortunately, these courts cannot rule in software infringement cases, as their decision-making authority is restricted to cases where the maximum penalty exceeds four years of prison, which exceeds applicable penalties in software infringement cases.

Other provisions of the CCP ensured that the criminal process might be initiated by the state prosecutor; provided the possibility of settling criminal cases after they are initiated; and lifted the very restrictive judicial secrecy provisions which had prevented effective publicity of criminal cases, including copyright matters. Nevertheless, cameras are still prohibited in the courtroom, defendants' photographs may not appear in the paper, and their names are to be withheld. The rationale is to protect the individual until he/she is proven guilty.

³ Here is the detailed procedural history of this case. In 1995, Nintendo® requested the Court to inspect the retail store's premises to inventory the counterfeit products. The Court held its judicial inspection on June 20, 1995; 556 video games were seized, and many hardware systems. Nintendo filed for a preliminary injunction, whereby Atari Mundial and its retail outlets and other associates would be ordered to cease distributing infringing products. The Court issued the preliminary injunction on June 30, 1995. On September 28, 1995, the Court issued a judicial form requesting payment for the action, which was paid on behalf of NOA on October 2, 1995. On December 18, 1995, Atari Mundial filed a brief requesting dismissal of the case for failure to pay the appropriate fees. NOA requested the Court to issue the accurate payment form and paid the corrected fees on December 21, 1995. On January 17, 1996, the Court granted the dismissal and NOA appealed on January 24, 1996. On July 29, 1996 the Court ruled in favor of Nintendo. Nintendo also prevailed in its effort to have additional judicial inspections held, proving that Atari Mundial continued to distribute counterfeit Nintendo video game products. On February 14, 1997, the Court seized over 2,500 counterfeit Nintendo hardware and software products. By March 1998, all of the evidence had been presented by both parties to the case. The defendants used all steps possible to delay the decision. On April 5, 1999, Judge Zambrano of the Fifth Court of First Instance Mercantile ruled in favor of Nintendo of America, Inc. Part of the recent decision orders the defendants to immediately cease the manufacture, distribution and any type of commercialization of video game cartridges which are recognized by the law as belonging to Nintendo of America, Inc. In addition, the judge ordered the destruction of all of the seized goods, as well as any other object that violates the exclusive rights of Nintendo. The case was again appealed by the defendants. In July 2000, the Superior Civil and Mercantile Court of Caracas issued a 46-page decision in favor of Nintendo of America (NOA) against Atari Mundial, a retail outlet store, and a number of its retailers, for distributing counterfeit hardware and software. This court upheld Nintendo's copyrights in a long list of game titles, ordered the seizure and destruction of infringing games, and issued an injunction against all the defendants on the manufacture or sale of the identified games. This judgment was appealed to the Supreme Court.

Ineffective Border Measures

With the growing problem of pirated and counterfeited goods crossing its borders, Venezuela is faced with a major challenge to improve its border measures. Customs is a key element in the effort to control the contraband of legal and illegal product.

COPYRIGHT LAW AND RELATED ISSUES

Copyright Law of 1993

The 1993 Venezuelan copyright law is relatively modern in most respects. In April 1995, the President approved implementing regulations to the copyright law and Decision 351 of the Andean Pact on copyright and neighboring rights. It is this interplay among the copyright law, its regulations and the Andean Pact decision which affords copyright protection close to the level required by the TRIPS Agreement.⁴

Putting aside the substantive provisions, the Venezuelan copyright law needs an urgent update of its penal sanctions. The provisions contained in articles 119 to 121 do not provide deterrent penalties for piracy. Sanctions for piracy should be increased to five years to get effective jail-time sentences.

WIPO Treaties

Venezuela is a signatory to both of the digital treaties of the World Intellectual Property Organization, the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty. Legislation which would permit Venezuela to ratify both treaties was presented to the Congress on August 21, 2000. IIPA encourages Venezuela to approve this legislation and deposit its instruments of ratification with WIPO in Geneva. These treaties raise the minimum standards of copyright protection, particularly with respect to network-based delivery of copyrighted materials, and foster the growth of electronic commerce.

Government Legalization of Business Software

There are no negotiations with the government underway to legalize its software use. Some agencies, like SENIAT, the Central Bank, and the Ministry of Education, have legalized their software. Unfortunately, the government appears to be the main infringer of business software.

Customs Law Reform

⁴ Some preliminary discussion took place regarding the modification of Decision 351 to make it TRIPS- and WIPO treaties-compatible, but no resolution has been taken at this point by the Andean Community Copyright Office directors.

The Venezuelan Senate passed customs legislation in 1998 which reportedly included provisions to strengthen border measures. Although regulations have been issued and the law is in effect, the copyright industries report at least two problems. First, no container can be opened without judicial approval. This adds another level of difficulty in inspections. Customs officials should have *ex officio* authority to inspect suspicious containers. Second, apparently there is no administrative mechanism for rights holders to take actions through customs. As a result, everything must go through the courts. One interim reform would be to empower SAPI to have such administrative authority. As a result, these border searches and seizures are not being conducted.

Customs Duties on Computer Software

In May 1995, the government modified the application of its import duties on computer software to assess the 15% import duty on prepackaged computer software over the entire value of the software package, and not just the value of the physical media. This change in the valuation methodology represented a marked increase in the cost of commercializing software in Venezuela. It also represented a backward step from the overwhelming international trend toward assessing duties only over the value of physical media. BSA has worked to rectify this situation, and has met with limited success. The Venezuelan government's petition to reduce the import tax of computer software from 15% to 5% was accepted by the governmental body of the Andean Community on a provisional basis in June 1997 (although the tax would still be applied over the entire invoice value of the product). This 5% rate expired on January 1, 1998, and reverted back to 15%, where it has remained.

ENFORCEMENT STATISTICS IN VENEZUELA

CRIMINAL COPYRIGHT ENFORCEMENT STATISTICS 2001	
ACTIONS	SOUND RECORDINGS
Number of Raids conducted	103
Number of cases commenced	6
Number of defendants convicted (including guilty pleas)	0
Acquittals and Dismissals	0
Number of Cases Pending	0
Total number of cases resulting in jail time	0
Suspended Prison Terms	N/A
Maximum 6 months	N/A
Over 6 months	N/A
Over 1 year	N/A
Total Suspended Prison Terms	N/A
Prison Terms Served (not suspended)	N/A
Maximum 6 months	N/A
Over 6 months	
Over 1 year	
Total Prison Terms Served (not suspended)	0
Number of cases resulting in criminal fines	0
Up to \$1,000	0
\$1,000 to \$5,000	
Over \$5,000	
Total amount of fines levied	

CIVIL COPYRIGHT ENFORCEMENT STATISTICS 2001		
ACTIONS	BUSINESS APPLICATIONS SOFTWARE	SOUND RECORDINGS
Number of civil raids conducted	34	0
Post Search Action		N/A
Cases Pending	1	N/A
Cases Dropped	10	N/A
Cases Settled or Adjudicated	23	N/A
Value of loss as determined by Rightholder (\$USD)	N/A	N/A
Settlement/Judgment Amount (\$USD)	N/A	N/A