INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE 2007 SPECIAL 301 REPORT ARGENTINA

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

EXECUTIVE SUMMARY

During 2006, internet piracy and optical disc piracy became major threats to what is left of the copyright industries' legitimate markets in Argentina. Despite cooperation with police on criminal raids, few prosecutions reach final judgment. Border enforcement remains weak. Legislative reform efforts to modernize the copyright law and improve enforcement measures have languished and must be invigorated in 2007.

PRIORITY ACTIONS IN 2007

Legislation

- Reinvigorate efforts to revise Argentina's 1933 copyright law and implement its WIPO Treaties' obligations into national law. Long overdue amendments to the current law should include, for example: (i) implement the "making available right to the public" as required by WIPO treaties in order to give legal background to digital businesses for authors, performers and phonogram producers; (ii) implement protection for technological protection measures (TPMs) and rights management information (RMI); (iii) increase the term of protection for sound recordings and performances up to 80 years; (iv) extend the scope of reproduction right to clearly cover temporary copies. (v) increase the minimum penalty for piracy (1 month) up to 3 years in order to apply deterrent sanctions; (vi) create statutory damages provisions for civil cases allowing judges to apply deterrent compensations; (vii) provide notice and takedown provisions and for ISP liability; and (viii) adopting provisions on border measures (ex officio).
- Support efforts to issue an executive decree that would require government legalization of current business software programs on computers and improve procurement practices.
- Select, at an appropriate moment in the near future, a method of protection against the unauthorized re-distribution of digital broadcast signals.

Enforcement

- Have the government, at the highest level, commit to a coordinated anti-piracy campaign as a matter of national priority.
- Enforce the current law by conducting raids on a periodic basis, and importantly, pressing for more criminal prosecutions.
- Duplicate the resources assigned to police Internet crime units to address the problem of illegal downloads.
- Instruct Argentine prosecutors and courts to make copyright piracy cases a priority.
- Improve border enforcement. Forge partnerships at the tri-border region with counterpart Brazilian and Paraguayan officials that would include establishing a program to inspect goods intransit for potential pirate product.

ARGENTINA¹ Estimated Trade Losses Due to Copyright Piracy (in millions of U.S. dollars) and Levels of Piracy: 2002-2006²

INDUSTRY	2006		2005		2004		2003		2002	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Sound Recordings &										
Musical Compositions ³	82.0	60%	69.5	60%	41.5	55%	30.6	53%	26.0	60%
Business										
Software ⁴	215.0	76%	109.0	77%	63.0	75%	44.0	71%	10.7	62%
Entertainment										
Software ⁵	NA	65%	NA	NA	NA	80%	NA	NA	NA	NA
Motion Pictures ⁶										
motion i lotares	NA	NA	318.0	90%	30.0	45%	30.0	45%	30.0	45%
Books	4.0	NA	4.0	NA	4.0	NA	4.0	NA	NA	NA
TOTALS	301.0		500.5		138.5		108.6		66.7	

COPYRIGHT PIRACY IN ARGENTINA

Optical disc piracy, "burning" and street piracy: Blank optical media products, mostly from Southeast Asia, including Taiwan, enter the Argentine market via Uruguay or Paraguay, and sometimes directly via the Argentine border. As a result of this influx of blank media, the phenomenon of "burning" is widespread throughout the country, and adversely affects the markets of almost all the content industries. According to statistics published by CAFMO, the Argentine trade organization for optical disc manufacturers, in 2006, 140 million CD-Rs and 53 million of DVD-Rs entered the country.

The recording industry reports that music piracy remains at 60% of total market with no signs of recovery. This rate of piracy amounts to 26 million units. The two major threats involve physical piracy (usually burned CD-Rs) and the Internet. In addition, MPA reports that street vendors and

¹ Argentina is a beneficiary country under the U.S. Generalized System of Preferences (GSP) trade program. During the first 11 months of 2006, \$597.6 million worth of Argentine goods (or 16.7% of Argentina's total exports to the U.S. from January to November) entered the U.S. under the duty-free GSP code, representing a 7.5% increase over the same period in 2005.

³ Estimated trade losses for the recording industry reflect the impact of significant devaluation during 2002. The levels of pirate product in 2004, 2005 and 2006 are based on a third-party survey to improve accuracy of the statistics.

² The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2007 Special 301 submission at www.iipa.com/pdf/2007spec301methodology.pdf. For information on the history of Argentina under Special 301 review, see Appendix D at (http://www.iipa.com/pdf/2007SPEC301HISTORICALSUMMARY.pdf) of this submission. Prior IIPA reports on Argentina are also posted on the country reports page at http://www.iipa.com/countryreports.html.

⁴ BSA's 2006 statistics are preliminary. They represent the U.S. publishers' share of software piracy losses in Argentina, and follow the methodology compiled in the Third Annual BSA/IDC Global Software Piracy Study (May 2006), available at http://www.bsa.org/globalstudy/. These figures cover, in addition to business applications software, computer applications such as operating systems, consumer applications such as PC gaming, personal finance, and reference software. BSA's 2005 piracy statistics were preliminary at the time of IIPA's February 13, 2006 Special 301 filing; the 2005 data was revised and posted on the IIPA website in September 2006 (see http://www.iipa.com/statistics.html), and the 2005 revisions (if any) are reflected above.

⁵ ESA's estimated piracy rates for Argentina in 2006 reflect the piracy rate for handheld products, which may differ from and often underestimate overall piracy levels in-country. ESA's reported dollar figures reflect the value of pirate product present in the marketplace as distinguished from definitive industry "losses." The methodology used by the ESA is further described in Appendix B of this report.

⁶ MPAA's trade loss estimates and piracy levels for 2006 are not yet available. However, such numbers will become available later in the year and, as for 2005, will be based on a methodology that analyzes physical or "hard" goods and Internet piracy. For a description of the new methodology, please see Appendix B of this report. As the 2006 loss numbers and piracy levels become available, they will be posted on the IIPA website, http://www.iipa.com.

small black markets (often using burned products) are beginning to become a bigger issue as they are starting to appear in important areas/markets. Theatrical exhibitors and small video rental stores in the interior of Argentina are being harmed by illegal commerce of pirate DVDs. Pirates often have the new film releases more than a month in advance from local theatrical release, and an average of 6 months in advance of the official home video releases in Argentina. Unfortunately, video rental stores are also an important distribution channel for pirate products, especially in smaller cities.

Throughout the country, thousands of street vendors sell burned CD-Rs. Although some raids have taken place in downtown Buenos Aires, the interior of the country remains plagued with street vendors selling pirate product (like cities of Tucuman and Santa Fe). Pirate stands are often seen around train stations and other high traffic areas. There are some "kioscos" — newspaper and magazine kiosks or street stores — that have started using this channel to distribute pirate DVDs and music. MPA has been working with other IP groups, especially music, to identify and confront this particular problem.

Another major concern in 2005 and 2006 has been the widespread offering of "home delivery" for pirate product; these services advertise in newspapers, websites, and through e-mails, and offer custom replication of any music CD and direct delivery to a customer's home. The recording industry estimates that roughly 20% of all pirate products are being sold through this "home delivery" system.

Internet piracy grew in 2006: Over the last two years, internet piracy in Argentina has grown dramatically. With the increased availability of broadband both in homes and Internet cafés, industry concerns are escalating that illegal Internet downloads will become more of a threat to legitimate sales and distribution for all copyright-based sectors. The latest estimate based on a third party survey is that over 600 million songs were downloaded illegally during 2006. Given the street piracy and internet piracy situation, the recorded music industry reports that because of the dire piracy situation, there are very few legitimate music retailers left in the countries for consumers wanting to buy legitimate product. The recording industry has been taking action against internet cafés (see discussion below). MPA reports that most of its internet problem is still focused on the sales of hard goods via internet. Argentina does play an important role as a distributor of subtitled and dubbing for the rest of Latin America; in fact, some of the top visited websites in Argentina are subtitles sites. Furthermore, the entertainment software industry also faces problems with widespread piracy of its games in internet cafés.

Business software piracy and the need for software management: The Business Software Alliance (BSA) reports that there was no major improvement in the software piracy situation in Argentina in 2006. Piracy of business software programs among end-users remains quite high, especially in small and medium-sized organizations. Larger organizations may have some licenses to use software, but commonly these licenses only cover a small percentage of the software in use. The industry remains concerned about the increasing illegal importation of computer hardware parts and components, which are then assembled into computers and frequently loaded by system builders and assemblers with illegal software. With respect to market legalization efforts, the industry continues to support efforts by the Argentine government (in particular, the Subsecretaría de la Gestion Publica — the Undersecretariat for Public Administration) to issue an executive decree that would require government legalization of current business software programs on computers and improve procurement practices. While several "standards" have been issued by the Subsecretaría, the Argentine government has shown no indication that it is legalizing its software use.

Book piracy: The book publishing industry reports photocopying, especially in and around university campuses. Commercial copyshops located near the universities, as well student unions and organizations within the universities, are the primary venues for this illegal photocopying.

Entertainment software piracy: During 2006, the entertainment software industry continued to suffer from the combined forces of piracy in Argentina including: (a) widespread piracy at flea markets; (b) reproduction-on-demand whereby entertainment software is burned onto blank CD-Rs; (c) Internet piracy, where websites offer pirated videogame software for sale; and (d) the importation of cartridge-based videogames (primarily from the People's Republic of China and Hong Kong). Pirated video games on optical disc appear to mostly be of the burned variety, with very little replicated product appearing in the market. While pirated video games are no longer being sold in mainstream retail outlets, the flea markets where they continue to be widely available appear to be very well organized. An ESA member company also reports that PlayStation 2 consoles with pre-installed mod chips are being sold directly through established retail chains, though these stores do not appear to be selling pirated entertainment software.

COPYRIGHT ENFORCEMENT IN ARGENTINA

Cooperation on criminal raids: Criminal copyright enforcement has always been cumbersome, costly, time-consuming and lacking in deterrent impact. While criminal enforcement remains far from ideal, the willingness of the Argentine authorities to take initial raiding actions remains somewhat encourage in 2006. For example, the recording and film industries worked with the police in the Province of Santa Fe to raid two businesses in Rosario, which resulted in the dismantling of an illegal "home delivery" organization in July 2006. These businesses ran two websites which were major suppliers of pirate film and music products at the wholesale and retail levels. Four people were arrested and were in prison, pending trial; the head of the organization was charted with running a criminal organization, tax evasion, money laundering and other criminal charges.

On internet cases, MPA reports that there has been a lot of support from the Federal Police Cyber Crime division. The recording industry also has been active in internet piracy enforcement for the last two years. For example, in November 2005, the international recording industry initiated actions against major uploaders using peer-to-peer (P2P) operations in several countries, including for the first time, Argentina. There the recording industry identified 20 cases involving sizeable uploads of music files using P2P technology, and pursued civil actions. In 9 cases, the defendants paid compensation to recording companies of around US\$1,500 each. Another 3 cases were sent to mediation. 23 new cases were filed in October 2006 and at present 20 court orders have been issued against the ISP's to disclose the names and personal data of the P2P users. More recently, Phase II of "Operation Cyber Shutdown," an initiative of the international recording industry, resulted in coordinated raids of 1,000 law enforcement officers in six Latin American countries, raiding 213 internet cafés. The recording industry reports, unfortunately, that the enforcement program against cyber cafés ended in 2006 with poor results (only 12 locations raided) because a criminal judge in Buenos Aires ruled against the recording companies stating that offering "P2P" downloading services and blank CD-Rs to customers is not a crime. The appeal is still pending in this case.

BSA reports that that the various agencies (including the Federal Police, Gendarmería, etc.) are improving their technical capacities to support the courts in the investigation of computer crimes (including piracy) and the provision of technical reports, which is useful evidence in judicial cases. Enforcement is too cumbersome to be used effectively in practice against end-users, so BSA did not rely on it during 2005. BSA does not generally use the criminal process in Argentina because criminal copyright enforcement has consistently proven to be ineffective. In small provinces in particular, the police do not cooperate in civil actions or do not have police officers trained in computer crimes.

The recording industry reports that some anti-piracy actions are being carried out in metropolitan Buenos Aires; but more is needed to reduce the amount of product being offered in high traffic areas. Flea markets and street vendors are easy targets in Buenos Aires since they operate in the open, with impunity. Overall in 2006 the recording industry reports: 482 raids conducted, resulting in seizures of 85,300 VCDs, 322,294 DVDs, and 1.33 million CD-Rs. There were 570 investigations and 250 cases initiated, resulted in 1,103 indictments. 14 defendants were convicted (11 had a maximum of 6 months and 2 were sentenced for over 2 years). 27 cases resulted in criminal fines; 20 of those were fined less than US\$1,000. In addition, 92 cases were acquitted or dismissed, and 755 cases remaining pending.

But few criminal prosecutions are secured and copyright enforcement overall remains ineffective: Despite good cooperation from police, few prosecutions are pursued and there are few criminal cases that reach final judgment in Argentina. This has been a longstanding problem in Argentina. The recording industry reports that the average case take two years to reach a verdict in the first instance, and that usually results in no jail time or jail time is suspended because the judges do not consider intellectual property crimes as serious offenses. However, there was a breakthrough in 2006, when an Argentina court in September 2006 issued a two-year prison sentence against two major music pirates who were arrested in September 2003 when a raid on their business resulted in the seizure of 11 CD-R burners, 10,000 CD-Rs and a gun. The defendants controlled a piracy organization distributing product at the infamous flea market known as "La Salada" and the complaint was originally brought by the industry to the police. As mentioned above, the recording industry obtained 14 convictions and the situation regarding the slowness of the judicial system remains the same.

Border authorities are cooperative but more results are needed: Given its triborder geography, Argentina should forge a working plan with Brazilian and Paraguayan customs officials to inspect goods in transit for potential pirate product. No coordinated actions were taken in 2006, at least not to the knowledge of the industries.

MPA reports that, during 2006, Argentine Customs authorities have been more supportive and alert about piracy problems and blank media imports. The recording industry worked with the border authorities and, in August 2006, Argentine customs officials at the Port of Buenos Aires seized approximately 1 million blank CD-R/DVD-Rs (valued at over US\$300,000) manufactured in Hong Kong; this shipment's documentation was falsely labeled "heat reflecting tiles." The discs contained two brand names commonly found in the pirate music markets of Greater Buenos Aires; an investigation has commenced against the importer. BSA reports that the Customs Service (Administración Nacional de Aduanas) is cooperating in an effective way to improve enforcement at the borders. BSA has not pursued interdiction of border entry of blank media or components; however, both problems are reported to continue at least at the same level as in recent years. Usually, customs authorities seize shipments of blank CDs, but their activities are directed mostly at tax evasion rather than copyright infringement.

In 2006 it can be said that, in general, Customs authorities improved *ex officio* inspections of suspicious shipments and started actions not only based on "Philips" injunction. The industries continue recognize that Argentine Customs is inspecting all shipments of blank optical discs coming into the country based on a court order issued in 2004. Philips Argentina works with Customs to identify those importers who are current with patent licenses for blank CD-Rs and DVD-Rs. In fact, the recording industry reports that Argentine Customs started 2007 with a major seizure of 3 million blank CDRs/DVDs at the Port of Buenos Aires. This investigation took off when Custom officials noticed a significant difference in the declared weight of the targeted shipment versus its actual weight. The goods that had been declared as "general electronics & optical media" showed some "risk factors" such as origination from Taiwan that prompted Customs to conduct a more thorough

review. With the help of industry (Apdif Argentina), it was determined that the declared importers had nothing to do with the electronics and or optical media business. Customs officials summoned the declared importers to provide original importation documents. However, the original importers never appeared and the entire shipment, that included three containers, was seized as suspected contraband. The investigation is continuing but preliminary intelligence indicates that the declared importers were fronting for a third party that Customs suspects was going to provide the blank optical media to the pirate market. The estimated retail value of the optical media seized was almost 25 million pesos (US\$8 million).

Delays and no deterrent damages in civil infringement cases: In 2006, the business software industry continued to rely on civil enforcement in Argentina, given the difficulties with criminal enforcement. However, the industry reports that they face procedural delays before being able to obtain and conduct civil searches in business piracy cases. Civil actions are still weakened by the lack of statutory damages and extensive delays. BSA achieves some results despite the problems with enforcement, relying primarily on the process of mediations required by the civil procedure, which facilitates the resolution of cases under BSA's model. Civil actions which are brought all the way through to final judgment are too protracted to be effective. Another problem is caused by the unavailability of deterrent civil damages. This problem could be remedied if Argentina were to introduce an effective statutory damages system.

COPYRIGHT LAW AND RELATED ISSUES IN ARGENTINA

1993 Copyright Act, as amended: Argentina has already acceded to the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT). Argentina's 1933 Copyright Act (as amended) has been under review for many years, and full implementation of the WIPO Treaties is still needed. There have been a number of legislative attempts in recent years to improve various Argentine laws related to copyright protection and enforcement. Some bills have the support of the industries while one in particular threatens to undercut protection, below:

Proposed criminal code amendment coming in 2007: MPA and IFPI have drafted an amendment to the Criminal Code and expect the amendment to be presented in Congress in 2007. This bill will increase penalties for copyright piracy, and would provide criminal sanctions for the circumvention of technological protection measures and modification or suppression of digital rights management, and include statutory damages. Two years ago the recording industry supported the introduction of a similar bill which would expand the scope of criminal copyright infringement (Bill No. 1546-S-2005, June 1, 2005), but it fell off the legislative agenda. The two industries do not know what the future holds for its proposal given that the current Government does not seem to have a very strong pro-copyright perspective.

Bill to extend the term of protection for sound recordings: This is an important initiative to ensure protection of the vast and rich catalog of Argentine music. The Argentine Senate approved a bill in November 2004 which would increase the term of protection for phonograms. The bill was introduced to the House of Representatives in March 2005, and the bill was expected to return to the Senate. The bill is still on the legislative docket with no political support to get passed.

⁷ For example, IIPA has identified in prior 301 reports that legal deficiencies in the copyright law which still need to be addressed include: express protection of temporary copies, and the communication to the public/making available right; protection against the circumvention of technological protection measures and removal or alteration of electronic rights management information; establishment of ISP liability and procedures for notice and takedown; establishment of *ex officio* border measures, statutory damages and the seizures of infringing equipment; increasing criminal penalties for piracy; and extend the term of protection for phonograms to 95 years from publication.

Opposition to the Draft Law of the Musical Performer: (Bill No 3447/05): As a result of a very aggressive lobbying campaign developed by the local and international recording industry, with the support from performers groups and U.S. Embassy, the Senate left out the bill from its agenda and the ordinary sessions ended in 2006 without considering the bill. IFPI's national group, CAPIF, is preparing a new bill to comprise implementation provisions for both groups (record producers and performers) on a more balanced way. Submission of this bill is expected in the first half of 2007. To recap, this draft law was introduced to the Senate in November 2005, and in late 2006, legislative consideration at the committee level moved forward. There was an open hearing on the subject in September 2006 at which CAPIF, the chamber representing music producers, complained strongly, objecting to the bill's elimination of individual artists' ability to negotiate contracts and called the clause ordering 10% of revenue to go to support cultural events an "expropriation." The law not only assigns responsibility to the association representing performers, but also fixes revenue sharing formulas between performers and producers. In other words, this bill rejects the fundamental proposition that parties should be free to contract as they wish for the use of their works. First, it would recognize a particular collecting society (performers) as having the mandate to collect on behalf of parties (record companies) that have not vested their rights with that particular society. Second, it would entrust administration of the "right of making available" to a collecting society, thereby depriving copyright owners of the ability to determine how they wanted to exercise digital distribution. Further, the proposal to vest the administration of the right of making available to this collective also is objectionable, and would violate Argentina's obligations under the WPPT to provide an exclusive right of making available to producers (and performers). Removing the ability to license this on an individual basis would violate this treaty.

Border enforcement measures: (Bill No. 1340-D-2006, April 3, 2006): This Bill creates a new department under the supervision of AFIP (Argentine custom and taxes authority) named the *Registro de Marcas y Derechos de Autor*, which is in charge of registration of copyright. This registration is completely voluntary and is different from the registration of copyright at the Copyright Office. If the registration is made before custom authorities, each time a shipment is exported or imported, the authorities give notice to the copyright holder, in order to have the chance to control and stop the shipment. Also, shipments can be seized *ex officio*. If in fact this proposal facilitates enforcement but does not condition copyright on a second registration, it might garner industry support.

Bill to afford statutory damages and destruction of infringing materials: The IFPI/MPA proposal (above) will include statutory damages provisions and anticipated destruction of seized merchandise. The Government of Argentina should reintroduce and pass a bill which would address the difficulties in obtaining deterrent damages and destroying infringing copies and implements. In 2001, a bill was introduced and approved by the Chamber of Deputies which would allow the courts to impose compulsory damages in copyright infringement cases and also the destruction of infringing material and reproduction equipment.

Reform of the Penal Code: Software industry colleagues report that proposed legislation to reform the Penal Code (File No. 5864-D-2006), which has advanced in the Chamber of Deputies, contains some troubling provisions. The incorporation of certain intangibles as object of protection in the damage is welcomed since current law does not provide for the punishment for damage to

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⁸ Clause 12 of this bill states: "the following should be added to clause 183 from the National Penal Code as second and third paragraphs: that who, in any way, destroyed in whole or in part, erased, temporarily or permanently modified, or in any way prevented the use of data or programs, whichever the support in which they are contained, during a process of electronic communication may be sentenced to prison for a term of one month to two years. The same sanction will be applied to those who sold, distributed or in any way disclosed or introduced in an IT system any program destined to cause damage like the ones described in the previous paragraph, in the computing programs or in the data contained in any kind of IT and telecommunications system." (emphasis added).

intangible assets. However, the second part of the proposed clause (underlined) does not appear to be compatible with the WIPO Treaties to which Argentina has joined. There Argentina undertook to provide legal protection and effective legal resources against the action of circumventing effective technological measures used by copyright holders to prevent copyright violations. The serious concern here is that the proposed reform would render illegal the behavior of those who distribute software that contains a security measure that impedes the access to a program or to data contained in a program. This clause improperly neglects to distinguish between legal and illegal use of such devices, a distinction that is made by the WIPO Agreements (as well as by the Council of Europe's Convention on Cybercrime).

Protecting works in digital format: (Bill No. 0719-S-2006, March 28, 2006): This bill would amend the 1933 Copyright Act to explicitly include works codified in digital format (such as CD-ROMs, DVDs, VHS and other support materials). It would also require that copies be deposited with the National IP Registry. It is unclear to some IIPA members as to why this bill has been proffered, given that the copyright law already protects works fixed in a tangible medium of expression.

Digital TV: MPA reports that in 2006, Argentina announced that it will adopt and implement a digital terrestrial TV system. Although Argentina has not yet announced which system will adopt, MPA calls attention to the need to select a method which will protect against the unauthorized redistribution of digital broadcast signals, as this is critical to guaranteeing the future viability of this sector.

Customs Valuation: Argentina bases its customs duties on audiovisual works and sound recordings on an assessment of potential royalties. Customs duties should be based on the value of the physical carrier medium only. Customs duties, based on royalties or income, serve as a form of double taxation because royalties are generally subject to withholding, income and/or remittance taxes. The film and recording industries seek a modification of the Argentine Customs Valuation Code and/or an exemption from the *ad valorem* duty. In 2005, Customs authorities filed criminal legal action against broadcasting networks and TV distributors for importation of films and programming based on the price of physical media rather than licensing contracts.

IPR TRAINING AND PUBLIC AWARENESS

BSA reports that, through its local colleagues, the business software community in Argentina organizes and participates in a variety of events, workshops and seminars aimed at improving public awareness and training of local officials. For example, the business software community cooperated with IT Chambers and Universities in holding various events in 2006, including the Primer Congreso Mercosur de Derecho Informatico held in Córdoba in August 2006. BSA's local counsel also provides training for judges at the *Escuela Judicial del Consejo de la Magistratura* (Judicial School of the Council of Judges). Recording Industry conducted 4 IPR seminars with the government of the City of Buenos Aires to public officers, one seminar to the criminal and civil judges in the Provincia of Santa Fe, and with the support of the Ministry of Education one educational campaign called "Todo empieza con una cancion" (everything starts with a song) intended for public schools and universities in Buenos Aires and Provincia of Buenos Aires. MPA reports that its local program also offered several training sessions to different law enforcement groups, such as Federal Police, Customs, Gendarmeria and others, during 2006.