

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE



1747 PENNSYLVANIA AVENUE, NW • SUITE 825 • WASHINGTON, DC • 20006-4604 • TEL (202) 833-4198 • FAX (202) 872-0546 • WWW.IIPA.COM • EMAIL: INFO@IIPA.COM

October 30, 2002

Ms. Kira M. Alvarez
Director for Intellectual Property
Section 301 Committee
Office of the U.S. Trade Representative
600 17th Street, NW
Washington, DC 20508

Re: Paraguay: Request for public comments
concerning identification of countries under
Section 182 of the Trade Act of 1974
67 Fed. Reg. 63186 (October 10, 2002)

Dear Ms. Alvarez and the Committee:

The Section 301 Committee recently published a notice seeking comment on the United States Government's 1998 Memorandum of Understanding (MOU) with Paraguay on intellectual property matters, including enforcement.

The International Intellectual Property Alliance (IIPA)¹ believes it is essential that the Paraguay's 1998 Memorandum of Understanding (MOU) and Enforcement Action Plan remain in effect. Both the Paraguayan and the U.S. governments have invested years of effort to improve the Paraguayan system. Unfortunately, key elements of the 1998 MOU have not yet been effectively implemented. As a result, piracy levels in Paraguay remain high, and estimated losses due to copyright piracy rose to \$262 million in 2001. Enforcement efforts taken by Paraguayan authorities continue to be ineffective to deter widespread piracy there.

The Paraguayan government has not fully implemented the provisions it committed itself to undertake back in 1998. While there has been some progress in Paraguay over the years, the copyright industries report several trends and problems which have undermined most progress to date. These issues include: (1) the explosion of new forms of piracy in a market already overwhelmed by piracy (of both the home-grown and transshipment varieties); (2) the involvement of organized crime factions in copyright piracy; (3) few criminal investigations, raids and prosecutions against copyright pirates; (4) a judiciary unwilling to issue deterrent sentences (with rare exceptions); and (5) a copyright law that hinders the application of deterrent

¹ The IIPA is a private sector coalition formed in 1984 to represent the U.S. copyright-based industries in bilateral and multilateral efforts to improve international protection of copyrighted materials. In February 2002, the International Intellectual Property Alliance (IIPA) submitted a detailed filing on Paraguay in the annual Special 301 review which is posted on our website at <http://www.iipa.com/rbc/2002/2002SPEC301PARAGUAY.pdf>.

sentences because it treats intellectual property violations as minor offenses. At the present time, IIPA supports the continued monitoring of copyright developments in Paraguay under Section 306 of the U.S. Trade Act of 1974.

Discussion of the 1998 MOU and Enforcement Action Plan

The November 1998 MOU contains nine articles and an annex which comprises the "Enforcement Action Plan," which includes both near-term and long-term commitments made by the Paraguayan government.² The MOU focuses heavily on concrete actions related to enforcement and commitments to make maximum efforts to strengthen enforcement efforts, pass certain legislation, improve training of enforcement officials, enhance public awareness, and provide deterrent penalties and civil remedies, among other important elements. A regular consultation mechanism was implemented to schedule meetings, and the agreement will remain in effect until January 1, 2003.³

Although some of the specific action items listed in the MOU (and the Enforcement Action Plan) have been successfully completed by the Paraguayan authorities, a good many have been either completely disregarded or abandoned. Below is an illustrative list of several key MOU elements which the copyright industries believe the Paraguayan government has not implemented effectively:

- The Inter-Institutional Brigade and frequent, unannounced raids. The MOU included the creation of a special anti-piracy police unit, the *Grupo Anti-Pirateria* (GAP) that reports to the Minister of Interior. On September 26, 1999, the Minister of Industry and Commerce (MIC) created an interagency anti-piracy group called "GAP" (*Grupo Anti-Pirateria*, or more formally, *El Consejo Nacional para la Protección de los Derechos de Propiedad Intelectual*). Decree No. 14870 provided that the selected federal ministries and the municipalities of Asunción, Ciudad del Este, and Encarnación will work together to implement the national anti-piracy campaign and coordinate their activities toward accomplishing this objective. The GAP was to be comprised of 15 intelligence officers who were to perform investigations. Over three years have passed since the resolution was issued, but to date, the group has been formalized only on paper, but not in practice. This group was to perform active investigations, especially post-raid, with access to intelligence files of other police agencies. Despite several requests, the private sector has never been kept apprised of any developments in the formation of this group. Since such an inter-institutional brigade (or any other Paraguayan enforcement agency, for that matter) is not even organized nor functionally operational, this certainly does not satisfy the MOU obligations to conduct frequent, unannounced raids of warehouses, distributions center and retail outlets and arrest persons engaged in copyright or trademark infringement. The streets of Asuncion, Encarnacion and, of course, Ciudad del Este, continue to be infested with vendors selling pirate music and software.

² The full text of the MOU is available on the U.S. Department of Commerce Website at <http://www.tcc.mac.doc.gov/cgi-bin/doi.cgi?204:64:1:185>.

³ After January 1, 2003, either country may give 60 days' written notice to the other to terminate the MOU.

- “Quick Response Team”: This team of prosecutors and officials from other ministries was to verify and investigate complaints submitted to it. While a decree was issued to establish this force (to be headed by the Ministry of Industry and Commerce), as a matter of practice this “team” does not exist.
- The “red channel” system at the border: Paraguayan Customs claims it has met the MOU requirement that it maintain its “red channel” system at Asunción Airport and extend such to the Ciudad del Este Airport and all other main customs checkpoints. Customs is to maintain a list of products which are commonly infringed, and officials are supposed to work with rightholders to add suspect products to this list. All shipments of products on this list are to be inspected to determine whether or not they violate copyright or trademark laws. However, industries report that this system has not been properly implemented, given that large shipments of infringing products have crossed into Paraguay.

The entertainment software industry reports that some of its members have conducted actions with Customs which have resulted in sizable seizures of pirated and counterfeit videogame packaging, PC boards and other merchandise, most shipped from Asia for importers in Paraguay. Regardless of the red channel system, much more improvement in border enforcement is needed. The Paraguayan border remains porous. More training of customs inspectors is urgently needed. Customs should also monitor the border on a 24-hour basis in order to deter shipments that pass through customs checkpoints late at night.

- Specialized IPR prosecutors: While these prosecutors were in fact finally appointed to their posts, the problem remains that they are constantly being re-assigned to work on non-IP cases and are frequently rotated. Although five prosecutors have been assigned to intellectual property violations and other economic crimes, only two dedicate most of their time to this area.
- Timely prosecution of all copyright cases and ensure that prosecutors seek deterrent penalties: Only since 2000 have there been any criminal sentences, and those have been very few, especially given the high levels of copyright piracy in Paraguay. For example, the recording industry has been involved in 19 cases that reached sentencing this year, with none of them imposing jail time. Most of these cases involve major warehousing and distribution centers as well as one case of an illegal CD plant with two production lines. The cases produced confiscation of thousands of pirate CDs and millions of inlay cards, but deterrent sentences were not issued. The business software industry assisted the Prosecutor's Office in prosecuting three cases that reached sentencing in 2002. The defendants in these three cases did not serve any time in jail because the courts imposed sentences of less than two years and fines, thus making the defendants eligible for the suspension of their sentences.
- Ensure the legal authority for rights holders to obtain civil *ex parte* search orders: While the law was amended to afford such authority on-the-books, as a matter of practice, it remains difficult to obtain and conduct an *ex parte* order in an expeditious manner. One major problem is that some courts are taking at least 45 days to issue such orders; by that time, it is

very likely that the evidence will have been moved or destroyed. Both the recording industry and the business software industry report that they have obtained improvements in this area, and search orders are being issued within a few days.

- Take actions to investigate and initiate legal actions against persons and entities which fail to pay taxes or report revenues on imports or sales of infringing products: This potentially useful enforcement tool has not been used to its full advantage. Meanwhile, copyright piracy depletes the Paraguayan economy of jobs, tax revenues and economic and cultural prosperity.
- Government software legalization: The Paraguayan government also promised to issue a decree governing the proper use and acquisition of computer software in its agencies by December 31, 1998, and to ensure that all ministries eliminated any and all pirate copies of software by December 31, 1999. This executive decree (*Decreto* No. 1524) was issued on December 31, 1998, and entered into effect immediately. The problem is that an inventory of software was never started, and the terms of the decree have not been implemented in practice. Since 1998, few government agencies have taken any significant steps to legalize their installed software base. Some government agencies have signed legalization agreements with BSA but, to date, they have yet to fulfill the obligations they assumed under those legalization agreements.
- Adequate resources: Paraguay fails to ensure that there are enough budgetary sources allocated for the officials and agencies involved in IPR enforcement. This is a constant struggle. This problem continues despite the goodwill of some people within governmental agencies to address the piracy problem.

Update on Developments in Paraguay

In addition to the MOU, IIPA members report several additional developments which we call to your attention.

- Customs Agreement with the recording industry: In October 2002, the Ministry of the Economy signed a customs anti-piracy agreement with the recording industry that calls for, among other items: (a) training of customs officials by anti-piracy experts; (b) the exchange of information regarding pirate CDs and CD-Rs; (c) participation of the industry's anti-piracy personnel, as deemed necessary by Customs, in the identification and inspection of suspect product; and (d) the implementation of an importers register that will prevent ghost companies from importing pirate CDs or CD-Rs. The effective implementation of this agreement is viewed by the recording industry as a fundamental part of Paraguay's ability to deal with piracy, and in its ability to curtail Paraguay's participation as a major transshipment point for pirates. We urge the U.S. government to closely monitor Paraguay's performance.

- Criminal penalties: The current penalty of 6 months to three years for IPR violations prevents any effective deterrent sentences. We suggest increasing the penalty to a minimum of 1 year and a maximum of 7 years in order to elevate the violations to major crimes.
- Raw Materials: Paraguay should adopt criminal provisions for the act of knowingly supplying raw materials to pirates.
- Tariffs on Blank CD-Rs: It is becoming obvious that the importation of 104 million CDR's in 2001 for a market that may absorb no greater than 10 million units is a mechanism that supports other activities, among which is piracy of music and software. As a preventive measure, Paraguay may want to consider raising tariffs for the importation of CDR's.
- Optical Disc Law: Although only one blank CD-R plant exists in Paraguay, the potential exists for more manufacturers to set up lines locally. The Paraguayan government may want to consider implementing optical disc legislation to control the installation of new plants and licensed production.
- Destruction of suspected infringing materials: Amendments to Paraguayan laws and procedures should be made to require that all suspected pirated good be seized and not returned to the alleged owners until the status of the goods (as legitimate or piratical) can be determined with certainty. For example, the entertainment software industry reports that the return of pirated materials is a serious problem.
- Public vs. Private Action: The 1998 version of the Criminal Procedure Code stated that copyright infringement cases were "private" actions, and could only be brought by complaint of the right holder; the State could not take action *ex officio*. Under the MOU, the Republic of Paraguay agreed to amend the Criminal Code and the Criminal Procedures Code to make copyright piracy a "public" offense. This problem was temporarily resolved. In June 1999, the President signed into law an amendment to the criminal code which made copyright crimes public offenses, and, therefore, prosecutors were able to pursue these cases on their own initiative. Unfortunately, this law will sunset in July 2003 according to the interpretation of the Office of Implementation of the Criminal Procedure Code of the Supreme Court of Justice of the Republic of Paraguay. The Republic of Paraguay must provide a definitive solution to this problem to fulfill its obligations under the MOU.

Since the 1998 MOU, the copyright-based industries have suffered approximately \$700 million in estimated trade losses over the last three years (not including 2002). Below is a chart tracking the last five years' of estimated trade losses and piracy levels in Paraguay.

PARAGUAY: 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
Sound Recordings/ Musical Compositions	253.6	99%	200.0	90%	200.0	90%	280.0	90%	130.0	90%	100.5	68%
Motion Pictures	2.0	80%	2.0	80%	2.0	80%	2.0	80%	2.0	85%	2.0	85%
Business Software Applications ⁴	3.5	72%	8.5	76%	6.7	83%	5.2	85%	4.1	87%	4.6	89%
Entertainment Software	NA	NA	9.7	99%	8.1	99%	8.4	99%	8.3	99%	7.5	97%
Books	3.0	NA	3.0	NA	3.0	NA	2.5	NA	2.5	NA	2.5	NA
TOTALS	262.1		223.2		219.8		298.1		146.9		117.1	

Conclusion

IIPA appreciates this opportunity to comment on the status of Paraguay's implementation of its 1998 IPR MOU with the United States.

It is essential that the 1998 MOU remains in effect. Paraguay needs to take more actions to improve and strengthen its IPR enforcement regime to combat copyright piracy. IIPA supports the continued monitoring of copyright developments in Paraguay under Section 306 of the U.S. Trade Act of 1974 at this time.

Respectfully submitted,



Eric H. Smith,
President
International Intellectual Property Alliance

⁴ In IIPA's February 2002 Special 301 filing, BSA's preliminary trade loss estimate of \$11.5 million and a 79% piracy level in Paraguay were both identified as preliminary. BSA finalized its 2001 numbers in mid-2002, and the final figures (both lower than originally reported) are reflected above.