

# INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

## 2003 SPECIAL 301 REPORT

# URUGUAY

## EXECUTIVE SUMMARY

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**Special 301 recommendation:** IIPA recommends that Uruguay be placed on the Special 301 Watch List this year, contingent upon adequate and effective implementation of the its recently amended copyright law and improved actions taken to reduce piracy in-country and at its borders. Effective implementation and enforcement of the amended copyright law is imperative because piracy levels remain high in Uruguay. Notwithstanding the fact that the amended law still falls short of fully meeting modern levels of copyright protection, IIPA proposes to withdraw our June 2001 petition to the U.S. Trade Representative which requested the initiation of a country practices review of Uruguay's intellectual property protection under the Generalized System of Preferences (GSP) trade program. IIPA requests that copyright issues remain high on the bilateral trade agenda.

**Overview of key problems:** After over a decade of efforts by the copyright industries and numerous government administrations, Uruguay finally amended its 65-year old copyright law. The new amendments entered into effect in -January 2003 and represent an improvement over the prior 1937 Law. While these amendments contain many provisions which do upgrade the prior Uruguayan copyright scheme, there remain several problematic provisions and omissions which leave the law short of modern standards.

In recent years, the major obstacle to copyright owners in Uruguay has been effective enforcement against widespread piracy. Simply put, more criminal raids and prosecutions are necessary, as are swifter judgments in civil infringement cases. Enforcement at the borders needs to be significantly improved, especially given the growth of optical media piracy throughout the Mercosur region and Uruguay's role in the transshipment of counterfeit goods into other countries in Latin America. The U.S. copyright industries lost at least an estimated \$10 million due to piracy in Uruguay in 2002.

### **Actions which could be taken by the government of Uruguay:**

- Actively enforce the recently amended copyright law
  - Improve police coordination on criminal anti-piracy actions
  - Instruct prosecutors to swiftly pursue investigations and bring prosecutions
  - Provide training to educate judges on the new copyright law as well as the importance of deterrent sentencing
- Improve border enforcement to intercept suspect shipments of piratical products
- Reduce unwarranted delays, costs and expenses associated with bringing civil copyright infringement litigation
- Ratify the WIPO treaties (WIPO Copyright Treaty and WIPO Performances and Phonograms Treaty).

**URUGUAY**  
**ESTIMATED TRADE LOSSES DUE TO PIRACY**  
*(in millions of U.S. dollars)*  
**and LEVELS OF PIRACY: 1998 - 2002<sup>1</sup>**

INDUSTRY	2002		2001		2000		1999		1998	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Motion Pictures	2.0	40%	2.0	40%	2.0	65%	2.0	65%	2.0	65%
Records & Music	1.4	60%	4.0	50%	4.0	35%	4.0	35%	3.0	25%
Business Software Applications <sup>2</sup>	5.2	60%	6.4	63%	7.9	66%	16.0	70%	13.1	72%
Entertainment Software	NA	NA	NA	NA	16.3	82%	6.9	70%	7.6	74%
Books	1.5	NA	2.0	NA	2.0	NA	2.0	NA	2.0	NA
<b>TOTALS</b>	<b>10.1</b>		<b>14.4</b>		<b>32.2</b>		<b>30.9</b>		<b>27.7</b>	

**Bilateral efforts:** Because of the lack of progress being made by Uruguay to amend its outdated copyright law and battle copyright piracy, IIPA filed a petition against Uruguay on June 13, 2001, responding to USTR's invitation for interested parties to "submit petitions to have the status of any eligible beneficiary developing country reviewed with respect to any of the designation criteria" in the 2001 Annual GSP Country Eligibility Practices Review.<sup>3</sup> IIPA's petition asked President Bush to (1) review the eligibility of Uruguay as a GSP beneficiary developing country, and, if Uruguay fails to make the necessary improvements in legislation and enforcement, then (2) the President should suspend or withdraw GSP benefits of Uruguay, in whole or in part, for its failure to provide adequate and effective copyright protection for U.S. copyright owners.<sup>4</sup> Action on this GSP petition has not yet been taken by the U.S. government; the delay was primarily due to the expiration of the GSP program (which has since been renewed through 2006).

<sup>1</sup> The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2003 Special 301 submission, and is available on the IIPA website at [www.iipa.com/pdf/2003spec301methodology.pdf](http://www.iipa.com/pdf/2003spec301methodology.pdf).

<sup>2</sup> BSA's estimated piracy losses and levels for 2002 are preliminary, and will be finalized in mid-2003. In IIPA's February 2002 Special 301 filing, BSA's 2001 estimates of \$13.0 million at 74% were identified as preliminary; BSA finalized its 2001 numbers in mid-2002, and those revised figures are reflected above. BSA's trade loss estimates reported here represent losses due to piracy which affect only U.S. computer software publishers in this country, and differ from BSA's trade loss numbers released separately in its annual global piracy study which reflects losses to (a) all software publishers in this country (including U.S. publishers) and (b) losses to local distributors and retailers in this country.

<sup>3</sup> Section 502(c)(5) of the Trade Act of 1974, as amended, requires the President to "take into account the extent to which such country is providing adequate and effective protection of intellectual property rights." See 19 U.S.C. § 2462(c)(5).

<sup>4</sup> For the first 11 months of 2002, \$62.7 million worth of Uruguayan goods (or 35.9% of Uruguay's total imports to the U.S.) entered the U.S. under the duty-free GSP code, representing a 14% decrease from the same period in 2001. For more information on Uruguay's placement on the 301 lists, see Appendices D and E of this filing.

Notwithstanding the fact that the amended copyright law does not fully meet the high levels of copyright protection of the WIPO Treaties and those contemplated by the U.S. industry and U.S. government in FTAA and bilateral FTA negotiations, IIPA proposes to withdraw our June 2001 GSP IPR petition against Uruguay.

Copyright issues must remain high on the bilateral trade agenda. Intellectual property rights and copyright issues currently are on the bilateral agenda for the Joint Trade and Investment Commission (JTIC) discussions. Before the U.S. considers entering into Free Trade Agreement (FTA) negotiations with Uruguay, there must be tangible and significant improvement in criminal and civil copyright enforcement and tangible reductions in the piracy levels in Uruguay.

## **COPYRIGHT LAW**

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### **1937 Copyright Law Amended in 2003**

On January 10, 2003, President Jorge Batlle signed Law No. 17616, which amended Uruguay's 1937 copyright law. This achievement reflects over a decade of efforts by industry representatives and various Uruguayan governments to achieve this much-needed reform. Until late 2002, the basis for copyright protection in Uruguay was its 1937 copyright law. Separate but deficient anti-piracy legislation aimed at combating piracy of sound recording producers was passed in the 1980s. The prior copyright law contained numerous deficiencies, many of which fell far below Uruguay's multilateral obligations under TRIPS as well as its bilateral IPR obligations.<sup>5</sup>

Many legislators as well as representatives from the industry to the U.S. government worked hard to refine this legislation: The December 2002 legislation improves the Uruguayan copyright legislation in several positive ways.<sup>6</sup> The amendments correct most of the TRIPS deficiencies in the prior legislation and also incorporates several key elements of the WIPO treaties. Based on our initial review of the Spanish text, the new amendments accomplish the following positive developments:

- Properly expand the definition of the reproduction right to cover temporary copies;
- Refine the right of distribution (including importation) for authors' works;
- Afford authors with rights of adaptation and transformation;
- Add authors' right of communication to the public for "works" (including those done with the direct participation of performers), including "making available to the public";
- Extend the old 40-year term of protection up to the TRIPS minima of life plus 50 years and 50 years post-publication for works, and 50 years. The law also appears to return to the private domain those products which fell into the public domain due to expiry of the short 40-year terms (without prejudice to third parties who may have acquired copies of such materials during the lapse in time);

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<sup>5</sup> The more obvious TRIPS deficiencies in the 1937 law (prior to 2003 amendment) included: an inadequate term of protection for works, phonograms and performances; no explicit protection in the law (as opposed to regulations) for computer programs, not expressly protected as literary works in the copyright law; unclear protection for compilations or other materials, whether in machine-readable or other form; an incomplete scope of retransmission rights; no express rental rights in the law (although some cases appeared to afford such protection as part of the distribution right); an overbroad broadcasting compulsory license; unclear application regarding full protection to pre-existing works, phonograms and performances.

<sup>6</sup> This discussion of the 2003 law is based on the Spanish text; an English translation is not yet available.

- Expressly incorporate computer programs and databases as protected subject matter à la TRIPS;
- Expressly incorporate rights of performers, producers of sound recordings and broadcasting organizations: for example, producers of sound recordings get exclusive rights to authorize reproduction, distribution (including the sale of parallel imported copies), rental and making available. Producers receive only a right of remuneration for broadcasting and communication to the public, per WPPT Article 15 (but this does not go far enough; see concerns, below);
- Permit tribunals (presumably both criminal and civil courts) to order confiscations, destructions and other dispositions of materials and equipment used in infringement;
- Allow criminal and civil judges to order judicial inspections (*ex parte* actions) and permit rightsholders to petition the court for injunctive relief;
- Expand provisions on the establishment of collecting societies, and leave implementation to future regulations. Continued monitoring of subsequent regulations will be necessary;
- Clarify that no formalities for copyright protection are required;
- Add language saying that the name of the author as well as those whose rights are protected under the law (presumably objects of neighboring rights) whose name appears on the work, phonogram or broadcaster are presumed as such.

Despite the improvements noted above, there are several problems and/or omissions remaining in the revised Uruguayan copyright law. IIPA and its members realize that no legislation is perfect. We would be remiss, however, if we did not identify provisions, with regard to many of which we expressed explicit concern during the 2002 legislative amending process but which were not adequately addressed in the final legislation. Furthermore, we note that several of these outstanding issues will have to be addressed again in the context of the FTAA (Free Trade Area of the Americas) negotiations. IIPA and its members expect that the FTAA IPR chapter will contain very high standards of copyright protection and enforcement. Therefore, with respect to Uruguay's 2003 amendments, we note the following issues. For example—

- Low levels of criminal penalties: The penalty for infringements in Article 46(C) provide for a low range of fines, ranging from 10 UR to 1,500 UR (adjustable units which are convertible to approximately US\$100–15,000). In some cases, a wrongdoer might find it cheaper to illegally reproduce the copyrighted materials and pay the fine rather than pay for the legal product; much will depend on whether the Uruguayan courts will issue deterrent level penalties (at the higher end of the statutory range). The penalties for the infringing acts outlined in Article 46(A) and 46(B) are three months to three years of jail. The sanctions should include deterrent levels of both fines and jail terms for infringing acts (not fines or jail). Another provision (Article 44) has been expanded to include infringing acts of reproduction, distribution, communication or other disposition of literary works, but no parallel amendments were made in that article regarding objects of neighboring rights (instead, sanctions involving those rights appear in the overhaul of Article 46). We want to make sure a similar scope of penalties is applicable to both works and objects of neighboring rights.
- Criminal intent and “unjustifiable harm”: Article 46(C) prescribes that anyone who reproduces or has reproduced protected works without authorization, by whatever method or procedure, without an intent to profit or without an intent to cause “unjustifiable harm,” shall be fined. It is imperative that this provision apply in the kinds of environment (like the

Internet and private businesses) where there is large-scale infringement and where sometimes a “for profit” motive is difficult to prove. Sadly, by its wording, this article does not succeed on that point. This “unjustifiable harm” standard could be a very hard one to prove before an Uruguayan court, as would the broad “*lucro*” standard. Finally, this article fails to mention jail time at all (as mentioned above). At the very least, jail time should be included in Article 46(C). Otherwise, what will likely happen is that Uruguayan judges will impose only minimal fines, a sanction which certainly does not deter piracy. It is essential that the law embodies and applies criminal sanctions to non-commercially motivated Internet offenses and to corporate end use.

- Term of protection: While the law extends the term of protection by 10 years—now to 50 years (life of the author plus 50 years, or 50 years post-publication for producers of sound recording)—these terms still fall short of international standards and the standards which the industry and the U.S. are seeking in Free Trade Agreement (FTA) arrangements.<sup>7</sup>
- Exclusive rights for producers of sound recordings: While the 2003 law does afford producers of sound recordings with exclusive rights to authorize reproduction, distribution, rental and making available, it fails to include an exclusive right over all transmissions, and in particular those effected through digital means. Market developments indicate that the future “delivery” of recorded music will increasingly be accomplished through the licensing of music services rather than the sale of physical products, and non-interactive transmissions will compete with on-demand communications.<sup>8</sup> The law gives producers an unsatisfactory right of remuneration for broadcasting and communication to the public; the industry had urged that Article 13(D) be amended so that it would not apply to producers of sound recordings. Finally, we wonder whether the language in the amended final paragraph of Article 1 creates an objectionable hierarchy of rights in that “none of the provisions in this law in favor of [the objects of neighboring rights protection] shall be interpreted to harm/discredit protection [for authors]”; such hierarchies must be eliminated from the law.
- Technological protection measures (TPMs): The 2003 law makes it a crime for anyone who makes, imports, sells, rents or puts into circulation, products, or whatever service which has

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<sup>7</sup> IIPA believes that the term of protection of a work, performance or phonogram should be calculated on the basis of the life of a natural person; the term shall be not less than the life of the author and 70 years after the author’s death; and where the term of protection of these are calculated on a basis other than the life of a natural person, the term should be not less than 95 years from the end of the calendar year of the first authorized publication of the work, performance or phonogram or, failing such authorized publication within 25 years from the creation of the work, performance or phonogram, not less than 120 years from the end of the calendar year of the creation of the work, performance or phonogram.

<sup>8</sup> In fact, Uruguay recognized back in 1996 that such exclusivity was required. On February 2, 1996, Uruguay, along with Argentina, Bolivia, Brazil, Chile, Colombia, Cuba, Ecuador, El Salvador, Honduras, Jamaica, Mexico, Panama, Paraguay, Peru, Trinidad and Tobago, and Venezuela submitted a proposal to WIPO in consideration of the proposed Treaty for the Protection of Performers and Phonogram Producers (the treaty that was to be called the WPPT in December of that year). In that proposal (Doc. WIPO INR/CE/V/13), Uruguay called for the adoption of two provisions—an exclusive right with respect to “digital communications that allow the selection of the phonogram” and an exclusive right with respect to all digital transmissions, without prejudice to whether such a right was adopted at the national level as an “exclusive right of public communication,” or as a “right of distribution through transmission.” This group pressed for adoption of its proposal at the December 1996 Diplomatic Conference of the WIPO Performances and Phonograms Treaty. Ultimately their proposal did not advance. However, it makes no sense for Uruguay to refuse to accept a provision today that they championed more than six years ago.

the purpose or effect of preventing, deceiving, eliminating, deactivating or evading whatever technical measures that the rightsholders have used to protect their respective rights [draft Article 46(B)]. While this drafting could be read to cover services involved in the production, distribution, etc. of such devices, IIPA had requested that its scope be clarified in the statute itself. Also, it is not clear whether the provision covers components and tools; although that might be intended under the word “products” (this should be clarified to be the case). It is imperative that the provision applies to both access and copy controls. Finally, it is not clear from this draft itself whether any civil liability attaches for these acts; such liability should be afforded. Protection for TPMs is required under the new WIPO treaties, and the effective implementation and enforcement of TPMs are critical to the copyright industries.

- Ex officio authority for customs officials: The law contains a provision which permits rightsholders to request a judge to issue an order to seize and sequester shipments containing suspected infringing products. However, the amendments do not provide the kind of *ex officio* actions that customs officials need to more efficiently do their jobs. IIPA believes that this measure is a critical tool necessary to improve border enforcement. So far some of the copyright industries have reported successes in working with Uruguayan customs on various investigations which the industry presents. *Ex officio* authority goes one step further and gives the border officials the authority to take action on their own initiative.
- Statutory damages: Article 18 of the 2003 law provides that an aggrieved party may recover damages and a “fine” of approximately ten times the value of the infringed product. For practical purposes, this provision will act as a statutory damages provision. Statutory damages increase judicial efficiency in that they simplify the difficult process of proving actual damages. We note that Uruguay’s neighbor Brazil has a very effective statutory damages provision which includes fines of up to 3,000 times the price of each work infringed.
- Compulsory license: The overbroad, TRIPS-incompatible broadcasting compulsory license in Article 45(10) remains unchanged in the law. Despite information indicating that this license has never been used, the industries remain concerned about the specter of its future use.
- Overbroad exceptions to protection: A lengthy list of amendments, apparently added toward the end of the legislative debate in 2002, permitting exceptions for the exploitation of works and sound recordings has been inserted (amended Article 46). For example, one overbroad provision allows the representation, performance or reproduction of works in whatever form and whatever media in theaters or public places.
- Arbitration: Article 58 revises the rules regarding the obligations of collecting societies. It also introduces troubling concerns to rightsholders. If an agreement cannot be reached between various parties (including rightsholders like authors and producers of sound recordings, performers, collecting societies and broadcasters) regarding rates of payment for the broadcast of this material, then an arbitration tribunal is to be convened within 20 days. The problem is that the composition of the arbitration tribunal is not based on the voluntary agreement of the multiple parties; it appears to be able to be requested by one party only. This severely reduces the ability of rightsholders to pursue private contractual negotiations. During the arbitration, users basically will be able to enjoy a statutory license for such use, even though the rightsholders have not been paid.

## WIPO Treaties

Prompt ratification and implementation of the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT) in as many countries as possible is an essential element in the strategy to foster the growth of global electronic commerce. Uruguay is a signatory to both of the 1996 WIPO “digital” treaties. On April 2, 1998, Uruguay’s Executive Branch submitted documentation for ratification of both treaties to the Chamber of Deputies that initially approved the treaties on December 12, 1998. A year later, the bills passed to the Senate on March 3, 1999, where they have been under consideration of the Foreign Affairs Commission. The ratification process has slowed as Congress waited for the approval of the new copyright law (which is now off track). Because Uruguay is eager to see itself as a high-tech economic center in the region, joining these two treaties would help foster Uruguay’s commitment to modern copyright development.

## COPYRIGHT PIRACY IN URUGUAY

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Copyright piracy levels and estimated losses due to piracy have remained consistently high in Uruguay for the last few years.

Over the last year, BSA has observed an increase in Internet piracy activity through the offering of illegal software on websites and auction sites. BSA has filed at least six criminal complaints against these software pirates, but the cases have either been dismissed for “criminal policy reasons” or have been pending for months without resolution. Most business software piracy in Uruguay revolves around illegal copying of computer programs. This type of piracy takes two forms: end user piracy and channel piracy. End user piracy occurs when an end user makes illegal copies of a particular software program for his own use. Channel piracy involves the illegal distribution and sale of illegal copies of software through the sale of counterfeit or otherwise illegal copies of software programs in optical disk or diskette form, or through the illegal loading of software programs onto the hard disk of personal computers that are then sold to the public without a user manual, certificates of authenticity, or other documentation that properly loaded software would include. Despite BSA’s efforts to reduce business software piracy during the past year, the estimated piracy levels in Uruguay remained at 60% in 2002, and estimated losses suffered by the U.S. software industry were approximately \$5.2 million.

The recording and music industries report that the unrestricted illegal replication of CD-Rs (recordable CDs) has become their major piracy. The number of CD burners in Uruguay has grown tremendously, as has CD-R piracy. In addition to affecting the Uruguayan market, shipments of pirated products for ultimate delivery in Brazil were found in Montevideo’s Free Zone, known as Florida. After the IFPI’s national anti-piracy group (known as CUD) conducted its initial investigations, it found that Uruguay is also being used as a transshipment center for pirate product and blank CD-Rs (to be used for piracy purposes) bound to Brazil via Paraguay. Uruguay is also serving as a center to send infringing products into Brazil via Rio Grande Do Sul/Santa Catarina. Enforcement by customs authorities continues to be inadequate and weak; in fact, no *ex officio* measures were conducted last year, according to the recording industry. There has been some positive change in the attitude of some police officers and judges, who are becoming convinced of the importance and the need to enforce copyrights. Estimated trade losses and levels of music and recording piracy in Uruguay were \$1.4 million with a 60% piracy level in 2002.

Video piracy continues to hamper the legitimate video market in Uruguay in 2002. The motion picture industry reports that back-to-back copying in individual video clubs continues to be the dominant piracy method. Pre-release video piracy appears to originate from the contraband Paraguayan production and distribution structure. In addition, television cable piracy continues to increase, particularly within the country's interior. The 2002 estimated video piracy rate remained at 40%. Losses to the U.S. motion picture industry due to audiovisual piracy in Uruguay are estimated at \$2 million in 2002.

The Interactive Digital Software Association (IDSA) reports that the pirated entertainment software (including videogame CD-ROMs and cartridges, personal computer CD-ROMs and multimedia products) is readily available in Uruguay.

The book publishing industry reports no improvement in reducing levels of book piracy in Uruguay in 2002. Photocopying remains the main source of piracy, especially within institutions of higher learning. Because of the difficulties with both the Uruguayan and Argentine economies, the Uruguayan book market shrunk. Estimated 2002 trade losses due to book piracy in Uruguay dropped to \$1.5 million.

## **COPYRIGHT ENFORCEMENT IN URUGUAY**

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### **Criminal copyright enforcement remains ineffective overall.**

The new challenge will be to effectively enforce the recently amended copyright law. Under the old copyright law, Uruguayan authorities did engage in some degree of criminal enforcement and some actions did take place (especially raids); however, there was room for much improvement. Increased attention by the police and prosecutors is needed to ensure that this is a long-term, positive change that provides an effective deterrent against piracy under current Uruguayan laws.

During 2001, BSA filed eight criminal complaints against resellers of illegal software. Six of these cases were summarily dismissed by the court for criminal policy reasons. The court never explained what the phrase "criminal policy reasons" meant. The dismissals and the lack of explanation for them clearly demonstrate a systemic failure to provide "adequate protection," and are also a violation of TRIPS Article 41.3, which requires member nations to issue "[d]ecisions on the merits of a case [that are] reasoned." The rest of the cases are still pending: the Prosecutor's Office has not even requested a search warrant. By the time the prosecutor requests that the court issue a warrant search in these cases, the evidence will probably have disappeared. One of these pending cases was filed in February 2001. In another case, one BSA member company filed a criminal complaint against a reseller for hard disk loading (HDL) in June 1999. BSA submitted as evidence of the crime two PCs that were purchased from the reseller loaded with illegal software. Despite several requests from BSA, the Prosecutor's Office took almost two years to request the court to issue an order to analyze the hard disks offered as evidence of the crime. To BSA's surprise, on September 10, 2001, the court issued an order stating that there were no expert witnesses available in Uruguay to analyze whether there was any software loaded on the hard disks. BSA even submitted a list of expert witnesses that the court appoints in civil copyright infringement cases, but the court ruled that the expert witnesses were not sufficiently qualified for the job. A few weeks later, BSA submitted a new list of expert witnesses and the court, once again, rejected the proposed expert witness and dismissed the



case on April 23, 2002. In 2002, BSA did not file any criminal complaints but participated in two legal actions brought by the Prosecutor's Office against street vendors of illegal software.

MPA reports that police enforcement during 2002 was generally reliable. However, the Uruguayan system fails in that there has been general unwillingness by prosecutors to move forward expeditiously on cases. During 2002, MPA restructured its anti-piracy program in Uruguay to address the growth of audio-visual piracy in CD-R format, taking action against 29 small VHS-to-CD labs, several associated with internet sales, as well as taking action against four local internet sites selling CD-R pirate versions of MPA member company product. In all, MPA worked to conduct 61 criminal raids in which 60 cases were commenced, but only defendant was convicted (and received a suspended sentence).

The recording industry has invested heavily in building an anti-piracy program in Uruguay. Still, there are a number of problems in the anti-piracy fight. The police have not been formally instructed or motivated to take action against copyright pirates doing business in the main street markets (known as *ferias callejeras*) of Montevideo, Salto, Payson and Tacuarembó, where music, video, business software and entertainment software are easily found. However, the Ministry of Interior, the *Fiscal de Corte*, some police departments (such as the Director of Police of Montevideo) and a few other units began cooperating individually to conduct the first anti-piracy cases. Cooperation from police departments depends more on personal attitudes than a central plan from the government to attack the problem. Prosecutors are still hesitant to apply the law because they have not received specific guidelines from their superiors regarding these cases. The government needs to take this problem seriously and commits to prosecuting pirates, enforcing the laws and implementing stricter laws, which protect the investments of legitimate businesses.

## **Civil enforcement in Uruguay continues to be difficult.**

The business software industry is the only copyright industry to use civil enforcement measures as part of their overall anti-piracy campaign. Even though BSA reports that it has experienced an improvement in software copyright enforcement, there are still some significant problems that copyright holders face when enforcing their copyrights in Uruguay.

**Substantial delays:** The Uruguayan courts continue to incur substantial delays in copyright enforcement actions. In a typical case, after uncovering evidence of software piracy, the BSA requests the courts to schedule an inspection of the suspected pirate. The courts routinely delay granting judicial inspections of suspected copyright infringers' premises for over a month. Such delays have recently resulted in ineffective action because the evidence of piracy may be moved, or may have disappeared altogether, between BSA's investigation of a suspected software pirate and the actual date of the raid. These delays put software producers at a disadvantage when they try to enforce their rights in Uruguayan courts. During 2001, BSA filed 14 civil complaints and conducted 20 civil raids. Seven of these civil raids were cases filed back in 2000 and have been waiting for the court to issue a civil warrant search for several months. Seven of these cases were settled during 2001. In 2002, BSA filed ten civil complaints and only conducted civil inspections in five of these cases. One case was dropped and the remaining are still waiting for an inspection date.

**Expert witnesses availability and cost:** BSA has also encountered some problems with expert witness availability. In criminal cases, for instance, the *Fiscalía* currently does not have expert witnesses available to analyze the evidence found in the raids. The *Fiscalía* usually relies on the expert witnesses proposed by the parties. The fees for the services of these expert

witnesses are determined by the court and usually are prohibitive. In civil cases, courts require an aggrieved party to deposit the fees for the expert witness in a bank account before issuing the order for a search warrant. It is not uncommon to wait from four to eight weeks until the expert witness submits his report to the court. Such a cumbersome and costly procedure runs afoul of Uruguay's TRIPS obligations.

**Evidentiary burdens:** Other obstacles are also routinely encountered. For example, in November 2002, BSA filed a civil search and seizure request against an end-user on behalf of its members. On December 3, 2002, the court ordered the plaintiffs to produce evidence that they owned the copyright in the relevant software programs. Under Uruguayan law, an author's notice of authorship is sufficient evidence to be regarded as such, and the burden is on the defendant to challenge such a presumption. In compliance with the court's order, the software publishers submitted the requested evidence. BSA is still waiting for an inspection date. The court's imposition of onerous and "unnecessarily complicated" evidentiary requirements illustrates the existing defects in the Uruguayan legal system. BSA faced similar situations in cases filed in May 1998 and May 2001.

### **Customs measures are ineffective in controlling piracy at the border.**

With its proximity to Paraguay and Brazil and the growing problem of pirated and counterfeited goods crossing its borders, Uruguay is faced with a major challenge to improve its border measures. In fact, recent customs seizures of presumably counterfeit goods in Paraguay have identified Uruguay as one of the countries through which these goods enter Latin America. Uruguay is also serving as a transshipment center to send infringing products into Brazil via Rio Grande Do Sul/Santa Catarina. Customs is a key element in the effort to control the contraband of legal and illegal product. Enforcement at the Uruguayan borders and in Zona Florida needs to be significantly improved, especially given the growth of optical media piracy in the Mercosur region.

With respect to videogames, there has been some cooperation from Customs with an IDSA member company. The company reports that in April 2002, a Customs raid of a warehouse yielded over 2,000 counterfeit video game products. The warehouse, apparently owned by a repeat offender, was used to store counterfeit video game products before they were shipped to numerous retail stores across the country. The retailer/warehouse owner was previously implicated in raids initiated by the company in August 2001, which resulted in the seizure of tens of thousands of counterfeit videogame products, reportedly the largest action carried out in Uruguay.

## **COPYRIGHT AND REGIONAL TRADE NEGOTIATIONS**

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The negotiation of bilateral and regional free trade agreements (FTAs) is assuming increasing importance in overall U.S. trade policy. These negotiations offer an important opportunity to persuade our trading partners to modernize their copyright law regimes so they can maximize their participation in the new e-commerce environment, and to improve enforcement procedures. The FTA negotiations process offers a vital tool for encouraging compliance with other evolving international trends in copyright standards (such as fully implementing WIPO treaties obligations and extending copyright terms of protection beyond the minimum levels guaranteed by TRIPS) as well as outlining specific enforcement provisions

which will aid countries in achieving effective enforcement measures in their criminal, civil and customs contexts.

IIPA believes that the IPR chapter in the Free Trade Area of the Americas (FTAA) must be forward-looking, technologically neutral documents that set out modern copyright obligations. They should not be summary recitations of already existing multilateral obligations (like TRIPS). As the forms of piracy continue to shift from hard goods and more toward digital media, the challenges faced by the copyright industries and national governments to enforce copyright laws grow exponentially. The Internet has transformed copyright piracy from a local phenomenon to a global wildfire. CD-R burning is fast becoming a pirate's tool of choice throughout this region. Without a modern legal and enforcement infrastructure, including effective criminal and civil justice systems and strong border controls, we will certainly see piracy rates and losses greatly increasing in this region, thus jeopardizing more American jobs and slowing the growth of the copyright sectors both in the U.S. and the local markets.

Therefore, the IPR chapter in the FTAA should contain the highest levels of substantive protection and enforcement provisions possible. At a minimum, the IPR chapter should: (a) be TRIPS- and NAFTA-plus, (b) include—and clarify—on a technologically neutral basis the obligations in the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty (WCT and WPPT), and (c) include modern and effective enforcement provisions that respond to today's digital and Internet piracy realities. Despite the existence of these international obligations, many countries in the Western Hemisphere region fail to comply with the TRIPS enforcement obligations, both in their legislation and in practice. It is in the area of enforcement that some of the greatest gains for U.S. and local copyright creators can be achieved.