

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2008 SPECIAL 301 REPORT

ARGENTINA

Special 301 Recommendation: IIPA recommends that Argentina remain on the Priority Watch List in 2008.

EXECUTIVE SUMMARY

During 2007, growing Internet and optical disc piracy (primary CD-burning) continued to threaten the copyright industries' legitimate markets in Argentina. Street piracy, especially at the public market in Buenos Aires known as "La Salada," remains widespread. The industries again report that cooperation with the police remains good, and cooperation with border authorities improved last year. Unfortunately, despite raids and seizures, few criminal cases move forward for prosecution and fewer reach final judgment. Sorely missing is a national strategy to protect and enforce copyrights. Civil actions are ineffective because of the lack of a statutory damages remedy and extensive delays in the courts. The government needs to review its agencies to ensure that legal software is being used. On the legislative front, implementation of the WIPO Treaties' obligations is moving at a glacial pace. In addition, Argentina should strengthen criminal sanctions and remedies and provide measures to protect copyrighted materials in the digital age.

PRIORITY ACTIONS IN 2007

Legislation

- Reinvigorate efforts to revise Argentina's 1933 copyright law and implement its WIPO Treaties' obligations. Long overdue amendments should, 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 and remedies/sanctions for technological protection measures (TPMs) and rights management information (RMI); (iii) make uniform the protection term of all the copyrighted works regardless of genre; (iv) extend the term of protection for sound recordings to 95 years from publication as well as extend term for juridical persons; (v) extend the scope of reproduction right to clearly cover temporary copies, (vi) increase the minimum penalty for piracy (1 month) up to 3 years in order to apply deterrent sanctions; (vii) create statutory damages provisions for civil cases allowing judges to apply deterrent compensations; (viii) provide notice and takedown provisions and ISP liability; and, (ix) adopt provisions on border measures (*ex officio*).
- Support Bill 1546-S-05 which would address some of the issues above, in providing criminal sanctions for the circumvention of TPMs and modification or suppression of digital rights management, as well as statutory damages.
- Support efforts to issue an executive decree that would require government legalization of current business software programs within a balanced and neutral system to select the technical solutions 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.
- Take the necessary administrative and/or regulatory measures to clarify that the income tax withholding provisions such that royalties earned by juridical persons are "authors' rights" (copyright) of no different legal nature than the royalties earned by human authors.

Enforcement

- Have the government, at the highest level, commit to a coordinated anti-piracy campaign as a matter of national priority.
- Require that the federal and Buenos Aires provincial governments to take appropriate measures to halt the distribution of pirate and counterfeit merchandise at the “La Salada” Fair and other large, public markets.
- Promote cancellation of municipal operating licenses to any establishment or locale selling pirate product.
- Improve 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 in-transit for potential pirate product.
- Consider creating a special public prosecutors’ office devoted to all sectors of intellectual property (not only to trademarks, as is proposed currently).

ARGENTINA¹										
Estimated Trade Losses Due to Copyright Piracy										
(in millions of U.S. dollars)										
and Levels of Piracy: 2003-2007²										
INDUSTRY	2007		2006		2005		2004		2003	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Sound Recordings & Musical Compositions³	84.7	60%	82.0	60%	69.5	60%	41.5	55%	30.6	53%
Business Software⁴	226.0	77%	182.0	75%	109.0	77%	63.0	75%	44.0	71%
Motion Pictures⁵	NA	NA	NA	NA	318.0	90%	30.0	45%	30.0	45%
Books	NA	NA	4.0	NA	4.0	NA	4.0	NA	4.0	NA
Entertainment Software⁶	NA	NA	NA	65%	NA	NA	NA	80%	NA	NA
TOTALS	310.7		268.0		500.5		138.5		108.6	

¹ Argentina is a beneficiary country under the U.S. Generalized System of Preferences (GSP) trade program. During the first 11 months of 2007, \$587 million worth of Argentine goods entered the U.S. under the duty-free GSP code.

² The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA’s 2008 Special 301 submission at www.iipa.com/pdf/2008spec301methodology.pdf. For information on the history of Argentina under Special 301 review, see Appendix D at (<http://www.iipa.com/pdf/2008SPEC301USTRHISTORY.pdf>) and Appendix E at (<http://www.iipa.com/pdf/2008SPEC301HISTORICALSUMMARY.pdf>) of this submission. Prior IIPA reports on Argentina are also posted on the country reports page at <http://www.iipa.com/countryreports.html>.

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.

⁴ BSA’s 2007 statistics are preliminary. They represent the U.S. software publishers’ share of software piracy losses in Argentina, and follow the methodology compiled in the Fourth Annual BSA and IDC Global Software Piracy Study (May 2007), available at <http://w3.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 2006 piracy statistics were preliminary at the time of IIPA’s February 12, 2007 Special 301 filing and were finalized in June 2007 (see <http://www.iipa.com/statistics.html>) as reflected above.

⁵ MPAA’s trade losses and piracy levels for 2006 and 2007 are not available. MPAA did provide 2005 estimates for a select group of countries, using a new methodology that analyzed both physical/“hard goods” and internet piracy. Details regarding MPAA’s methodology for 2005 and prior years are found in Appendix B of this IIPA submission.

⁶ 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.”

COPYRIGHT PIRACY IN ARGENTINA

Internet piracy on the rise: Internet piracy in Argentina has grown dramatically over the last three years. This growth is not surprising considering that Argentina has over 1.5 million broadband connections (according to internetworldstats.com). With this increased availability of broadband both in homes and Internet cafés, the copyright industries' are worried that illegal Internet downloads will become even more of a threat to legitimate sales and distribution.

The widespread offering of "home delivery" for pirate product continues. Services advertise on the Internet and via email to offer copies of copyrighted content for direct delivery to a customer's home. For the business software industry, the Internet offers local packages of pirated and counterfeit software, including compilations containing dozens of computer programs, and hard copies are delivered directly to the consumer. The Business Software Alliance (BSA) notes that, in general, most of the local ISPs help to stop these kinds of offers from the various e-commerce websites, but for every site removed, more appear. The Motion Picture Association (MPA) adds that most of its Internet problem continues to be on the sales of hard goods via Internet; peer-to-peer and download piracy of films are increasing, however. Argentina plays an important role as a distributor of subtitled and dubbed films for the rest of Latin America; in fact, some of the top visited websites in Argentina are subtitle sites.

The recording industry reports that a third party survey performed between 2006 and 2007 places the total level of illegal downloads in Argentina at about 600 million songs per year. This number is up by 50% from 400 million songs discovered in a similar survey performed at the beginning of 2005. Cybercafés in Argentina contribute significantly to illegal downloads. In fact, a survey carried out by Knack Consulting at the request of the local industry group showed that about 38% of all downloads are taking place at these locations. This is a common occurrence around the region because it provides for many people a less expensive alternative to access broadband and the ability to download illegal files massively. The recording industry has been taking action against Internet cafés (see discussion below). But all this industry-led action is not a substitute for legislation that clearly outlines the liability for ISPs and provides clear take-down procedures.

Widespread street piracy and burning: Blank optical media products, mostly from Southeast Asia, enter the Argentine market via Uruguay or Paraguay. As a result, the phenomenon of "burning" is widespread throughout the country, and adversely affects the markets of almost all the content industries. According to official statistics provided by Argentine Customs, in 2007, 187 million CD-Rs and 104 million of DVD-Rs entered the country.

Thousands of street vendors sell burned CD-Rs. A very notorious street location distributing pirated and counterfeit materials is the "La Salada Fair." This market area is about 2 million square feet in size, and approximately 50,000 consumers visit this fair daily. The estimated annual sales of this retail fair is about US\$470 million, with real estate dealings amounting to more than US\$80 million annually. La Salada is a center of piracy, full of illegal copies from all copyright sectors. Some in the industry fear that La Salada is coming close to the organization and size of Ciudad del Este's piracy and counterfeiting. 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.

The recording industry reports that music piracy was at 60 % in 2007, causing an estimated \$84 million in losses due to piracy. Physical piracy in the form of burned CD-Rs still continues to plague the Argentine market for music, but the biggest negative impact has been Internet piracy. The most recent estimate shows about 27 million units of pirate product in the market, representing close to 60% of all sale units. The largest concentration of pirate product is in Buenos Aires (the capital and province) but with strong presence in all the states. The market is declining; unit sales increased by only 5% in 2007 compared to an 11% increase in 2006.

The film industry reports that the piracy for its products worsened in Argentina in 2007. MPA indicates that street vendors have increased their presence in important 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 prior to local theatrical release, and an average of six months

prior to the official home video releases. Unfortunately, video rental stores are also an important distribution channel for pirate products, especially in smaller cities.

BSA also reports that there was no major improvement in the software piracy situation in Argentina in 2007. Piracy of business software programs among end-users remains quite high, especially in small and medium-sized organizations. In qualitative and quantitative terms, the worst enemies of the commercial computer software copyright owners are the big organizations that ignore the use limits in their software licenses. This involves not only the federal, provincial and municipal government offices but also a number of private companies. It is not so easy now to find shops selling pirated copies of PC programs, but is still common to detect hardware dealers selling computers with illegal OEM versions or simply illegal copies pre-installed on the computer hard disk. Estimated U.S. trade losses due to business software piracy in Argentina in 2007 rose to \$226 million, with an estimated piracy rate of 77%. With respect to market legalization efforts, the industry continues to support any effort by the Argentine federal, provincial or municipal levels of government to legalize business software programs currently installed on government computers and improve procurement practices. According to a 2008 report issued by BSA-IDC, the information technology sector's contribution to the Argentine economy could be even bigger if Argentina's PC software piracy rate were to be lowered 10 percentage points over the next four years. This would create an additional 3,900 jobs, \$630 million in local industry revenues and \$81 million in additional tax revenues for federal, regional, and local governments.⁷

COPYRIGHT ENFORCEMENT IN ARGENTINA

The music, film and business software industries all report continued good cooperation and responsive actions from Argentina police forces regarding anti-piracy actions. However, federal and state police forces lack sufficient resources to provide expert reports on seized product, which delays processing of cases. Furthermore, there is no dedicated police force to handle piracy cases. While there has been significant support from the Federal Police Cyber Crime division on Internet cases, few prosecutions are pursued and few criminal cases reach final judgment in Argentina. Civil infringement actions fared no better. These all have been longstanding problems in Argentina and there was no marked improvement in 2007. Customs officials did show positive interest in 2007 and it is hoped that their cooperation with industry will grow in 2008.

Criminal raids: Criminal copyright enforcement in Argentina has been cumbersome, costly, time-consuming and lacking in deterrent impact.

The recording industry also has been active in Internet piracy enforcement. In fact, the first digital "HUB" in Latin America was shut down in Argentina last year. (A HUB is an operator who provides computer power to peer-to-peer systems to support the exchange of illegal files.) The first HUB (Digital Harbor) shut down for violations of intellectual property law took place recently in Argentina. This closure effectively shuts down a HUB with around 50 concurrent users per day that contained a structure of forums, blogs, and websites that supported the HUB's activities. This result could not have taken place without the support of the local Internet Service Providers (ISPs). In addition to the HUB, the local Internet anti-piracy team carried out sufficient actions to take down 384 web pages, 1,675 virtual auction offers of physical pirate product and over 10,000 links from forums, blogs and websites to illegal files.

The recording industry reports that the number of raids decreased slightly in 2007 over last year by two percent (832 versus 853) and the number of seized product also went up by 162% (4.6 million vs. 1.7 million units) mainly due to three opportune actions by Customs in seizing contraband blank media amounting to over two million units. 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. On the judicial side, six people were convicted of piracy related charges during the course of 2007 and another seven were arrested as part of major raids.

⁷ The Economic Benefits of Reducing PC Software Piracy, commissioned by BSA and conducted independently by International Data Corporation (IDC), released January 22, 2008, looks at the bottom-line economic benefits of reducing piracy in 42 countries that together account for more than 90 percent of global IT spending in 2007. It is available online at <http://www.bsa.org/idcstudy>.

The recording industry reports several actions at the notorious pirate flea market, La Salada. In October 2007, 300 officers from the Gendarmería Nacional and the Prefectura Naval Argentina from the Buenos Aires suburb of La Salada carried out a series of raids against music pirates over two days. This operation recovered enormous quantities of infringing material during the search of 13 homes that contained storerooms and burning sites. Product seized included 8.6 million inlay cards, 273 high speed burners, 136,067 master optical discs, 11,850 blank discs and 45,200 jewel boxes. Four people were detained pending further investigation. The group behind this illegal activity had divided their operations to minimize the risk of discovery by producing discs in some locations, printing the inlays in others, and packaging the product for distribution elsewhere. In another action, the Gendarmería in Buenos Aires conducted a very large operation on December 13, 2007, in which 30 locations were raided, five people were arrested and 500,000 music and film CD-Rs/DVD-Rs and 100 burners were seized.

During 2007, MPA carried out 285 raids, seizing more than 500,000 pirate discs. Moreover, authorities conducted five arrests for camcording and, at MPAA's initiative, 1,409 websites selling pirated product were removed from the Internet and more than 1,200 infringing auctions were cancelled. Forty-six convictions were handed down for audiovisual IP violations.

BSA reports 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. 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. However, preliminary injunctions and searches performed by court officers and the police under instructions from civil courts have been effective to obtain the legalization of the commercial software used as well as the payment of damages by a number of end user companies.

Border enforcement: Argentina should forge a working plan with Brazilian and Paraguayan customs officials to inspect goods in transit for potential pirate product.

MPA reports that, during 2007, Argentine Customs (*Administración Nacional de Aduanas*) authorities have been more supportive and alert to piracy and blank media imports. During 2007, Customs seized 1 million blank optical discs, a 122% percent increase over 2006. BSA reports that the Customs Service continues to provide very effective cooperation 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.

The *Registro de Marcas y Derechos de Autor*, under the supervision of AFIP (Argentine custom and tax authority) is in charge of copyright registration, which is completely voluntary. If the registration is made before customs authorities, each time a shipment is exported or imported, the authorities give notice to the copyright holder, in order to have the chance to monitor and block the shipment. While the recording industry's national group maintains contact with Customs, they have not yet seen any results coming out of this program. The motion picture industry, however, reports that the system is functioning well, that it has improved the detection of blank media imports, prevented the importation of illegal merchandise, and has enhanced cooperation between Customs and the private sector. MPA reports that during 2007, no imports of illegal cinematographic materials were identified. An MPA representative attends monthly meeting at Customs to discuss how to improve the system. Currently, the register is being used primarily for trademarks but it is anticipated that its application to copyright will expand in 2008. BSA does not use this registration system.

Few criminal prosecutions: Industry reports that the average case takes 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. The industries are not aware of any major sentences issued in 2007.

Delays and low damages in civil infringement cases: In 2007, 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. While the situation has improved in the courts of the city of Buenos Aires, 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 important problem could be corrected if Argentina were to introduce an effective statutory damages system.

COPYRIGHT LAW AND RELATED ISSUES IN ARGENTINA

IIPA members remain concerned about the breadth and scope of various pieces of legislation that create exceptions to protection in the digital age. On the enforcement front, there is a bill that proposes the creation of a special public prosecutor devoted to trademark protection; perhaps a similar proposal should be developed for copyright, or expanding to include all IPR sectors.

1993 Copyright Act, as amended: Argentina's Copyright Act has been under review for many years and full implementation of the WIPO Treaties is still needed. Legal deficiencies in the copyright law include:

- express protection for the communication to the public/making available right;
- explicitly extend the scope of the reproduction right to clearly cover temporary copies;
- protect against the circumvention of technological protection measures and removal or alteration of electronic rights management information;
- establish provisions on ISP liability and procedures for notice and takedown;
- increase criminal penalties for piracy (including increasing the minimum level of criminal penalties up to deterrent levels);
- establish *ex officio* border measures;
- provide for statutory damages;
- explicitly provide for the seizures of infringing equipment;
- extend the term of protection for phonograms to 95 years from publication. This also would include making the term of protection uniform for all genres of copyrighted materials;
- provide equitable and balanced treatment for all rightsholders, including those who are juridical entities.

Pending Copyright Law amendment to increase sanctions and expand infringements: The film and recording industries drafted an amendment to the Criminal Chapter of the Copyright Law, which was presented in the Senate in 2007 and is expected to be discussed in 2008. This bill (Bill 1546-S-05) would provide criminal sanctions for the circumvention of technological protection measures (TPMs) and modification or suppression of digital rights management (RMI), and include statutory damages. The legislation covers the following: it provides criminal sanctions for the circumvention of TPMs and RMI; it includes preliminary injunctions; it empowers courts to impose fines to force the execution of the sentences; and it creates statutory damages that currently do not exist in Argentine law. This bill is pending in the criminal and justice legislation committee of the Senate.

Bill to extend the term of protection for sound recordings off-the-docket: 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, but has since been removed from the docket. Without any government effort to increase the term of protection, no progress will be made on this issue.

Other Criminal Code reform: Software industry colleagues report that proposed legislation to reform the Criminal Code (File No. 5864-D-2006), which has been approved by the Chamber of Deputies and is now before the Senate, contains some troubling provisions.⁸ The incorporation of certain intangibles as object of

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

protection in the damage is welcomed since current law does not provide for the punishment for damage to intangible assets. However, part of this proposal does not appear to be compatible with the WIPO Treaties to which Argentina has joined. The 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. The problematic clause improperly neglects to distinguish between legal and illegal use of such devices, a distinction that is made by the WIPO Treaties (as well as by the Council of Europe's Convention on Cybercrime).

Digital television: Argentina announced that it will adopt and implement a digital terrestrial TV system. MPA again calls attention to the need to select a method which will include specifications for protection against the unauthorized redistribution of digital broadcast signals, as this is critical to guaranteeing the future viability of this medium.

Government software legalization: With respect to market legalization efforts, the industry continues to support efforts by the Argentine government (in particular, the *Subsecretaría de la Gestión Pública*—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 not shown any recent interest in formally legalizing its software inventories.

Withholding taxes and royalties: There is a recent disturbing problem regarding the withholding that local licensees must perform when wiring royalties to foreign licensors. The local tax collection authority, AFIP, refuses to apply the special rules that the Income Tax Law provides for “authors rights” international transfers. AFIP contends that the legal nomenclature “author” is limited to physical persons, and that a legal person (e.g. a corporation) cannot be an author and, as a result, cannot hold these “authors rights.” Only two cases so far have been presented to courts: in one case, the Court agreed with AFIP, and in the other, the Court rejected AFIP's position. This creates much uncertainty, and could create high economic liability for taxpayers if the AFIP position prevails. This problem could be solved by amending the Income Tax Act to establish a concrete withholding rate for software license payments, similar to what was done for music and motion pictures several years ago.

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).