



July 17, 2000

Ms. Gloria Blue
Executive Secretary
Trade Policy Staff Committee
Office of the U.S. Trade Representative
600 17th Street NW
Room 122
Washington, DC 20508

Re: Public Comments Regarding Eligibility
Criteria for Beneficiaries of the U.S.-Caribbean
Basin Trade Partnership Act (CBTPA), 65 Fed. Reg.
38023 (June 19, 2000)

Dear Ms. Blue:

The International Intellectual Property Alliance (IIPA) submits these comments in response to the June 19 request for public comments circulated by the Caribbean/Central America Subcommittee of the Trade Policy Staff Committee, chaired by the U.S. Trade Representative.

These comments outline our views on the eligibility of certain countries with respect to their compliance with the intellectual property rights (IPR) criteria which the President must consider when designating these Caribbean Basin countries as eligible beneficiary countries under the new United States--Caribbean Basin Trade Partnership Act (CBTPA).

DESCRIPTION OF THE IIPA AND ITS MEMBERS

The International Intellectual Property Alliance (the "IIPA" or "Alliance") is a coalition formed in 1984 consisting of seven trade associations, each of which represents a significant segment of the copyright industry in the United States. The IIPA consists of AFMA (formerly the American Film Marketing Association), the Association of American Publishers (AAP), the Business Software Alliance (BSA), the Interactive Digital Software Association (IDSA), the Motion Picture Association of America (MPAA), the National Music Publishers' Association (NMPA) and the Recording Industry Association of America (RIAA).

The IIPA represents more than 1,450 U.S. companies producing and distributing works protected by copyright laws throughout the world: all types of computer software, including business software and entertainment software (such as videogame CD-ROMs and cartridges, personal computer CD-ROMs, and multimedia products); motion pictures, television programs and home videocassettes, video CDs and DVDs; music; records, CDs and audiocassettes; and textbooks, tradebooks, reference and professional publications and journals (in electronic and print media).

The U.S. copyright-based companies are the leading edge of the world's high technology, entertainment, and publishing industries. According to Copyright Industries in the U.S. Economy: The 1999 Report, prepared for IIPA by Economists, Inc., the core copyright industries accounted for \$348.4 billion in value added to the U.S. economy, or approximately 4.3% of the Gross Domestic Product (GDP) in 1997 (the last year for which complete data is available). In 1997, the total copyright industries accounted for \$529.3 billion in value added, or approximately 6.53% of GDP. The "total" copyright industries include the "core" industries plus those that, under conservative assumptions, distribute such products or other products that depend wholly or principally on copyrighted materials. The "core" copyright industries are those which create copyrighted materials as their primary product.

The U.S. copyright industries are also among the nation's most dynamic and fast-growing economic sectors. The core copyright industries' share of the GDP grew more than twice as fast as the remainder of the U.S. economy between 1977 and 1997 (6.3% vs. 2.7%). Employment in the core copyright industries grew three times the rate of national employment growth between 1977 and 1997 (4.8% vs. 1.6%). More than 6.9 million workers were employed by the total copyright industries, about 5.3% of the total U.S. work force, in 1997. The core copyright industries generated an estimated \$66.85 billion in foreign sales and exports in 1997, an 11.1% gain over 1996 and larger than the foreign sales and exports of the food, tobacco, apparel, textile, and aircraft industries combined. Preliminary estimates for foreign sales and exports for 1998 are \$71.0 billion. For more detailed information on the IIPA and its members, visit www.iipa.com.

INTELLECTUAL PROPERTY RIGHTS CRITERIA AND THE CBTPA

Title II of the Trade and Development Act of 2000 contains provisions for enhanced trade benefits for Caribbean and Central American countries.¹ Specifically, the United States-Caribbean Basin Trade Partnership Act (CBTPA) amends the Caribbean Basin Economic Recovery Act (CBERA)² to authorize the President to designate select countries in this region to be eligible for preferential tariff treatment for certain articles, including duty-free and quota-free treatment for certain textile and apparel goods.

In order to qualify for these benefits, the countries must meet the designation criteria. To be a "CBTPA beneficiary country," a country must meet the original CBERA criteria which include two IPR criteria, one mandatory and one discretionary.

¹ Trade and Development Act of 2000, Pub. L. 106-200 (May 18, 2000).

² Caribbean Basin Economic Recovery Act (CBERA) , 19 U.S.C. 2701 et seq. This act is also known as the Caribbean Basin Initiative, or CBI).

Regarding the mandatory criteria, the CBERA mandates that beneficiary country status be denied if U.S. intellectual property is expropriated (19 U.S.C. 2702(b)(2)(A) and (B)), or if a government-owned entity broadcasts U.S. copyrighted material, including films or television material, belonging to United States copyright owners without their consent (19 U.S.C. 2702(b)(5)).

CBTPA beneficiaries must also meet the existing CBERA discretionary IPR criterion of 19 U.S.C. 2702(c)(9) which involves

the extent to which such country provides under its law adequate and effective means for foreign nationals to secure, exercise, and enforce exclusive rights in intellectual property, including patent, trademark, and copyright rights; [...]

The criterion requiring “adequate and effective” protection of intellectual property rights, including copyright protection and enforcement, is a flexible one that changes over time toward higher standards. In the CBTPA, Congress took the opportunity to spell out what it believes is covered by the “adequate and effective” criteria. Section 213(b)(5)(B)(ii) of the CBTPA (codified at 19 U.S.C. 2703(b)(5)(B)(ii)) outlines the discretionary eligibility criteria which includes

the extent to which the country provides protection of intellectual property rights consistent with or greater than the protection afforded under the Agreement on Trade-Related Aspects of Intellectual Property Rights described in section 101(d)(15) of the Uruguay Round Agreements Act.

The reference to “greater than” TRIPS is explained in the conference report as follows:

With respect to intellectual property protection, it is the intention of the conferees that the President will also take into account the extent to which potential beneficiary countries are providing or taking steps to provide protection of intellectual property rights comparable to the protections provided to the United States in bilateral intellectual property agreements.³

Accordingly, each country must re-meet all the CBERA criteria as well as the explicit TRIPS-or-greater criteria and bilateral IPR agreement standards in order to enter the CBTPA.

HOW THE CBTPA SHOULD APPLY TO COPYRIGHT IN THIS REGION

The CBTPA outlines a multi-layer level of IPR protection, as discussed above. We would like to elaborate on these various elements.

First, the CBTPA legislative history makes very clear that, at the very minimum, countries must provide protection “consistent with or greater” than the levels found in the WTO TRIPS Agreement. The CBTPA itself requires that the President must examine the extent to which all these countries provide copyright protection “consistent with or greater than the protection afforded under” TRIPS.

³ See Conference Report of the House of Representatives on the Trade and Development Act of 2000 [to accompany H.R. 434], Joint Explanatory Statement of the Committee of Conference on Subtitle B—Trade Benefits for Caribbean Basin Countries.

With respect to substantive copyright law developments, the TRIPS Agreement is widely recognized as containing the minimum standards of IPR protection. The TRIPS Agreement incorporates the levels of copyright protection found in the Berne Convention (1971 Paris text), adds explicit protection for computer programs as literary works, adds a rental right, and also affords protection for performers and producers of sound recordings. Importantly, TRIPS also adds an entire section on the enforcement of substantive rights, including measures on civil remedies, administrative measures, border measures and criminal penalties. The January 1, 2000 deadline for full compliance by World Trade Organization (WTO) developing country members with all their copyright substantive and enforcement obligations under the TRIPS Agreement has arrived. Stated another way, most of the 24 countries which are under consideration to be CBTPA-eligible countries must already be in compliance with TRIPS. The two exceptions are Haiti (which is a least developing country, still under the TRIPS transition period) and Bahamas (not yet a WTO member). Aruba is not a WTO member, but a self-governing dependency of the Netherlands. Montserrat and the British Virgin Islands are not WTO members in their own right, but are British dependencies.

Second, these 24 countries must meet the higher IPR criterion of the CBTPA, regardless of their WTO membership status. In fact, Congress explains that it expects the President to consider the extent to which potential CBTPA beneficiary countries "are providing or taking steps to provide" protection comparable to the much higher levels of protection found in U.S. bilateral intellectual property right agreements. Among the CBTPA-targetted countries, only Trinidad & Tobago and Nicaragua have signed a Bilateral IPR Agreement with the United States. The U.S. bilateral IPR agreement contains several provisions which go beyond the TRIPS measures. These "greater than TRIPS" elements (to which Congress refers) on the copyright side include explicit provisions regarding protection for encrypted program-carrying satellite signals, protection against parallel imports, a longer term of protection than TRIPS, and provisions on national treatment and contractual rights.

Third, one of the copyright industries' challenges in substantive laws is to elevate the levels of protection to account for changes in the digital environment. The Internet fundamentally transforms copyright piracy from a mostly local phenomenon to a global plague. It makes it cheaper and easier than ever for thieves to distribute unauthorized copies of copyrighted materials around the globe. Modern copyright laws must respond to this fundamental change by providing that creators have the basic property right to control distribution of copies of their creations. Copyright owners must be able to control delivery of their works, regardless of the specific technological means employed. Many of these legal changes are contemplated by the two so-called "internet" treaties of the World Intellectual Property Organization (WIPO): the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT). In fact, the U.S. government has worked at all levels to encourage countries to sign, ratify and implement these two treaties. As USTR notes, these treaties "provide the essential legal framework for the continued spectacular growth of e-commerce in coming years by ensuring that valuable content is fully protected from piracy on the Internet."⁴

The Americas already lead the world in the number of countries which have either deposited their instruments with WIPO or have passed ratification legislation necessary to move forward with developing their instruments of deposit. Of these Caribbean countries, El Salvador, Panama, and St. Lucia have already deposited their ratification instruments for both Treaties with WIPO, and Costa Rica is expected to deposit in the near future. These Treaties will enter into effect when 30 nations have

⁴ Press Release 00-30, Office of the U.S. Trade Representative, "USTR Releases Super 301, Special 301 and Title VII Reports," May 1, 2000, at page 10.

deposit their instruments; right now the count is WCT—19, WPPT—16. IIPA believes that it is important for the CBTPA-eligible countries to be taking steps toward ratifying and implementing these WIPO Treaties. We strongly suggest that the U.S. government request that each country make a commitment to the United States regarding its best efforts to ratify and implement the WIPO Treaties' obligations (by a near date certain) as part of its process to become a CBTPA-eligible country.

Fourth, legal reform of copyright laws, while critical to meeting the GSP, CBERA and now CBTPA standards, is not sufficient in and of itself. IIPA believes that one of the most immediate problems in this region is the failure of many of these countries to adequately enforce their existing copyright laws. The CBERA clearly provides in Section 212(c)(9) that "adequate and effective means ... to enforce exclusive" copyright rights is part of its eligibility criteria. As discussed above, TRIPS also has an entire section devoted to enforcement of laws, as mentioned above. The point is that laws, even good laws, which are not effectively enforced on-the-ground do not satisfy the IPR criteria in U.S. trade programs nor the TRIPS Agreement.

High levels of piracy of films, television programs, home videocassettes, music, audiocassettes and compact discs, textbooks, tradebooks, reference and professional publications and journals, and business, entertainment and multimedia software on all platforms hurt U.S. creators. Here is a sampling of the kinds of piracy our industries encounter in this region of the world.

- The unauthorized reception and retransmission of U.S. domestic satellite signals in Central America and the Caribbean region is a priority concern to the U.S. motion picture industry. Without authorization from copyright owners, cable system operators, hotels, resorts, bars and homeowners have erected satellite dishes to intercept programming intended for reception with the U.S. This signal theft harms the theatrical exhibition of motion pictures in these markets and slows the development of a legitimate home video market as well. In addition, video piracy remains a consistent problem in this region.
- Business software piracy involves counterfeiting, resellers, mail order houses, bulletin boards, and end-user piracy. The greatest threat comes from end-user piracy, where typically a corporate or institutional use copies software onto the hard disks of many more computers than the number authorized. End-user piracy occurs in government, education, and business enterprises throughout this region. The Business Software Alliance (BSA) released an April 1999 study by PricewaterhouseCoopers updating an 1997 study which projected the following: if the level of piracy in Latin America were reduced to the benchmark level of 27% -- knowing that the average piracy rate in Latin America for personal computer business software is 68%, then an additional 67,062 could have been employed in 1996, and an additional \$679.7 million in tax revenues could have been generated that same year to local Latin economies.⁵ The study projected that the packaged software market in Latin America would grow by 35% per year in 1997 and 1998, and by 34% annually in 1999 and 2000. According to BSA's most recent survey, 1999 Global Software Piracy Report, the average level of business software piracy in Latin America was 59%.⁶

⁵ See Contributions of the Packaged Software Industry to the Global Economy, a study conducted by PricewaterhouseCoopers, commissioned by the Business Software Alliance, April 1999, page 25.

⁶ See Press Release, The Business Software Alliance, "Software Industry Suffers From 5-year Cumulative Impact of Global Software Piracy, Estimated at \$59.2 Billion," May, 24, 2000. This study was jointly commissioned by BSA and SIIA, and conducted by International Planning & Research (IPR). For more information, see <http://www.bsa.org/pressbox/enforcement/959190119.html>.

- Piracy of sound recordings (*fonogramas*) and music remains high in the region. While audiocassette piracy has been the preferred business of pirates for years, the levels of music CD piracy is rising rapidly.
- The U.S. videogame industry suffers from inadequate enforcement by governmental and judicial authorities in the region. Pirated and counterfeit videogame products are found on all platforms, including cartridges, personal computer CD-ROMs and multimedia products.
- The major forms of piracy afflicting the U.S. book publishing industry in the region are commercial and photocopying piracy. Photocopying shops near universities often fill requests for illegal reproductions of entire textbooks.

As mentioned above, as the forms of piracy shift from hard-goods and more toward digital media, the copyright industries and national governments' challenges to enforce copyright laws grow exponentially.

IIPA'S RECOMMENDATIONS REGARDING SPECIFIC COUNTRIES AND THE CBTPA

IIPA and its members have been following copyright legislation and enforcement developments in this region for many years. We have worked with the U.S. Trade Representative to use a variety of trade tools to encourage targeted countries in this region to improve their copyright regimes. We have used the GSP program, the CBERA program, and the Special 301 process to foster progress on copyright legal reform and enforcement throughout this region.

Second, IIPA believes that the Subcommittee should not designate four countries – Dominican Republic, Costa Rica, El Salvador and Bahamas – as eligible CBTPA countries.

- The Dominican Republic currently is under a GSP investigation for its failure to provide adequate and effective intellectual property rights protection. In June 1999, IIPA submitted a GSP/CBI IPR petition to the U.S. Trade Representative, and this petition was accepted. We cannot support giving additional trade benefits to the Dominican Republic under a third trade program when it is under investigation for its failure to meet the IPR criteria in two existing U.S. trade programs.
- Criminal copyright enforcement efforts by Costa Rican authorities continue to decline. Prosecutorial and judicial delays have stymied the hopes of any tangible progress, especially in San José. Prosecutors continue to require incorrect standards of proof from copyright owners before issuing inspections. On the legislative front, efforts to raise the level of criminal sanctions for copyright piracy have been waylaid.
- In El Salvador, the business software industry has been unable to obtain any criminal enforcement. Prosecutors simply refuse to take software cases even after the industry had provided them with sufficient evidence. Civil enforcement measures are not a viable option. Legislation proposed in late 1999 would require all copyright owners to exhaust all civil remedies before any potential criminal action could be taken; if enacted, this would violate the TRIPS Agreement.

- Earlier this year, Bahamas passed a regulation to its Copyright Act which created a new compulsory license for the retransmission of television programming by persons who are licensed cable operators. This compulsory license goes far beyond the internationally accepted limits of such a license to the unprecedented step of permitting retransmission of any copyrighted work transmitted over its territory, including the encrypted signals of U.S. "basic cable" and "pay" TV services. The introduction of such a broad compulsory license is inconsistent with the obligations of the Berne Convention for the Protection of Literary and Artistic Works, to which the Bahamas is a signatory, and also violates Bahamas' bilateral obligations under the CBERA.

More details on the problems in these four countries appear in the attached Appendix.

IIPA urges the Subcommittee to conduct a full review of the 20 other potentially CBTPA-eligible countries' satisfaction of the CBTPA IPR criteria. To this end, we have some brief comments on a few additional countries, below.

- Caribbean nations in general: The Caribbean and Central America are uniquely susceptible to cable piracy and signal theft because the satellite footprint of U.S. programs covers this geographical region. The Bahamian compulsory licensing scheme constitutes an extremely dangerous precedent, particularly for the English-speaking Caribbean countries. MPAA reports that government representatives from Trinidad & Tobago have announced plans to introduce a similar compulsory license for cable retransmission, and other countries, such as Jamaica, appear to be willing to consider similar systems. Close monitoring of any possible trends toward implementing a similar kind of compulsory license is required, especially in the commercially important markets of Jamaica and Barbados, as well as other neighboring countries.
- Guatemala: In 1997, Guatemala amended its Criminal Code to require that all criminal prosecutions for copyright infringement had to be brought by the private sector, thus removing the government from any obligation to prosecute criminal copyright cases. Efforts to amend this code remain pending three years later. Guatemala was the subject of a GSP investigation from 1991 to 1994 for widespread cable television piracy. Currently Guatemala resides on the Special 301 "Priority Watch List" for high levels of piracy and that government's failure to take effective enforcement action.

Finally, IIPA recommends when the U.S. government discusses CBTPA eligibility with each country, the U.S. should obtain commitments from each country on how it addresses its copyright obligations (as we have outlined above), before eligibility is conferred.

CONCLUSION

Over the past seventeen years, the IPR criteria of the CBERA program have provided significant incentive for substantial improvements in the copyright laws and enforcement practices of any Caribbean and Central America countries. We expect that the United States--Caribbean Basin Trade Partnership Act will work in a similar manner.

IIPA appreciates this opportunity to provide our comments and input on the IPR criteria found in the CBTPA. We look forward to continue to working with you toward improving copyright protection and enforcement in the Caribbean and Central American region.

Sincerely,

Maria Strong
Vice President and Associate General Counsel
International Intellectual Property Alliance

APPENDIX

DOMINICAN REPUBLIC

Recommendation

The Subcommittee should not designate the Dominican Republic as a CBTPA-eligible country at this time. The Dominican Republic is under investigation by the GSP Subcommittee regarding its acts, policies and practices regarding intellectual property rights protection. IIPA filed a GSP/CBI IPR petition in June 1999. GSP hearings were held on May 12, 2000, and the investigation remains ongoing. For further details, please refer to USTR's public file on this GSP investigation, Dominican Republic Case Number 007-CP-99. Below is a summary of key points which IIPA and the copyright industries have raised in the context of this investigation.

Copyright Legislation

- The current Dominican law, the Copyright Law of 1986, falls short of the substantive standards of both the Berne Convention and the WTO TRIPS Agreement as well as the "adequate and effective" standard found in both the GSP and the CBI trade programs.
- A comprehensive intellectual property rights bill, called the Market Order Code, was submitted to the Congress in October 1998, and included bills on copyright, industrial property, antitrust, and consumer protection. In the fall of 1999, Dominican legislators split up this large package so that the individual bills could be considered separately. The IIPA acknowledges the positive features of this copyright bill, a bill which is an improvement over the 1986 Copyright Law. For example, the 1998 bill addresses many of the key TRIPS substantive points, including protection for computer programs, databases, and the minimum term of protection. The lack of civil *ex parte* orders under the 1986 law has been remedied, thus providing a critical TRIPS-consistent enforcement tool. The bill, like the current law, would provide a term of three months to three years in jail for most criminal infringements. The level of proposed fines increased, up from 1,000 to 10,000 pesos to a proposed 50 to 1,000 minimum wage (based on the current minimum wage of RD\$3,000; this represents potential fines of between US\$9,000 and US\$180,000).
- While this copyright bill is a marked improvement over the current law, IIPA believes that some further refinements would clarify and enhance the bill's TRIPS-levels of protection as well as the WIPO Treaties' obligations. To support this legislative process, IIPA and some of its members submitted in October 1999 a set of detailed yet straightforward comments aimed at improving the copyright bill (e.g.; revising some of the definitional sections, narrowing some of the proposed exceptions to protection). Very few of these suggestions were incorporated into the bill which was passed by the Senate on March 29, 2000.
- The Chamber of Deputies was expected to vote on the copyright bill on June 25, 2000, but this did not take place. The bill remains pending action before the Chamber of Deputies. Reportedly the Deputies are now considering further amendments to the bill; if the bill is amended, it must be sent back to the Senate. To the extent amendments are being made, IIPA strongly recommends that the

Deputies consider incorporating the detailed comments and proposed language which IIPA circulated in October 1999.

Copyright Piracy and Enforcement

- While cooperation with the prosecutors and the Copyright Office (known as ONDA) on business software cases continues, the software industry remains concerned that there is not yet a comprehensive, sustained government response from the legislative and judicial branches in the form of passage of the copyright bill, better procedural safeguards for rightsholders in Dominican courts, and a permanent end to high bond requirements for foreign litigants. In particular, the lack of a civil ex parte search remedy in the current Dominican Republic law violates TRIPS.
- Initial enforcement actions in late 1999 involving sound recording piracy were extremely disappointing, with much piratical product left behind by the assistant district attorneys who handled these raids at two distribution centers of pirate cassettes in Santo Domingo. Since those actions, the RIAA has been conducting investigations in preparation of escalating its local campaign. Last week, the District Attorneys for Puerto Plata and Santiago, as well the National Copyright Office (ONDA), were cooperative in conducting additional enforcement actions at retail locations investigated by the RIAA. The RIAA is concerned that the seizures of illicit product alone, without timely and adequate punitive measures by the criminal justice system, will not sufficiently deter sound recording piracy. The RIAA is also concerned that the anti-piracy programs it has developed in the Dominican Republic will be continued, and that pending sound recording piracy cases will be prosecuted fully by the incoming government of Hipólito Mejía.
- The motion picture industry is very concerned with the Dominican Republic's requirement that specific registrations be submitted as a condition of copyright protection for videos. Although this requirement has been limited to video, it directly harms the theatrical and television businesses; because the sale and rental of unauthorized works in video format are being accomplished without the coordination of the theatrical and television business divisions. This registration practice violates both the no-formalities rule of the Berne Convention and the current Dominican copyright law which also does not require such registration for protection.

ESTIMATED TRADE LOSSES DUE TO PIRACY (*in millions of U.S. dollars*)
 and LEVELS OF PIRACY: 1995 - 1999

INDUSTRY	1999		1998		1997		1996		1995	
	Loss	Video Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Motion Pictures	2.0	80%	2.0	90%	2.0	100%	2.0	100%	NA	NA
Sound Recordings / Musical Compositions	2.0	80%	2.0	80%	NA	NA	NA	NA	NA	NA
Computer Programs: Business Applications	12.5	72%	7.3	73%	NA	76%	NA	80%	NA	89%
Computer Programs: Entertainment Software	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA
Books	1.0	NA	1.0	NA	1.0	NA	1.0	NA	1.5	NA
TOTALS	\$17.5		\$12.4		\$3.0		\$3.0		\$1.5	

COSTA RICA

Recommendation

The Subcommittee should not designate Costa Rica as a CBTPA-eligible country at this time. Below is a summary of key points which IIPA and the copyright industries have raised in the context of the annual Special 301 process.

Copyright Enforcement

- Slow and poor investigation of complaints and the sluggish progress of cases through the courts remain the primary problems in tackling copyright infringement in Costa Rica. The OIJ (Organismo de Investigación Judicial), charged with preliminary investigation of all cases in Costa Rica involving computers, has been hampered by woefully inadequate staff. Lack of OIJ investigators slowed down prosecutors' ability to obtain search warrants to conduct raids on pirate resellers or end users in business software cases.
- Delay in prosecuting cases in progress remains an obstacle to effective enforcement of rights. Even when OIJ reports are submitted, prosecutors have responded very slowly in scheduling raids and seeking indictments. At times, prosecutors impose capricious requirements for search warrants, thereby erecting additional and unforeseen barriers to carrying out a raid and initiating a case. A recent reform to the Criminal Procedures Code requires that criminal cases in general be disposed of within a period of time corresponding to one-half the maximum penalty for the offense. In the case of copyright infringement, this requirement would provide a maximum period of 1½ years to dispose of a case or have it dismissed. While seemingly intended to eliminate judicial backlog, this requirement creates a great risk that defendants will take advantage of prosecutorial delays and pretrial maneuvering to wait out the clock and seek dismissal of infringement cases after only a year and a half. If this "rocket docket" approach is maintained, it should be balanced by increasing penalties for copyright infringement to create effective deterrents to piracy, in the range of 4 or 5 years as a maximum sentence. Not only would this change permit cases a reasonable time to go forward given the slow realities of the Costa Rican court system (affording perhaps 2 or 2½ years to dispose of a case rather than the 1½ year now available), it would also allow for detention of defendants for the first time. Currently, detention is not available where the maximum sanction is 3 years imprisonment or less; raising the maximum penalty to 4 or 5 years would permit detention, thus providing an important tool to deterring infringing behavior.
- Furthermore, public prosecutors are requiring an incorrect standard of proof. Even though the Costa Rican Criminal Procedural Code only requires "sufficient cause" (*motivos suficientes*) to approve the preliminary inspection of suspected pirates, public prosecutors have transformed this standard into a standard of "complete certainty" by requiring excessive and unnecessary proof of illegality before conducting the inspection, such as certified statements of the number of computers and number and type of pirate software to be found within a premises. Even though Costa Rican law appears to permit the "sufficient cause" standard in witness depositions or circumstantial evidence, public prosecutors generally reject this standard of proof, making it almost impossible for copyright holders to obtain preliminary injunctions in criminal cases to protect their rights, in violation of articles 41 and 50 of TRIPS. Among judges, confusion about the interpretation of a

1998 Criminal Procedure Code requirement about the gathering of evidence has meant that some judges impose illogical requirements before ordering a search warrant.

ESTIMATED TRADE LOSSES DUE TO PIRACY
(in millions of U.S. dollars)
 and LEVELS OF PIRACY: 1998 - 1999

INDUSTRY	1999		1998	
	Loss	Level	Loss	Level
Computer Programs: Business Applications	9.4	71%	6.8	72%
Motion Pictures	2.0	95%	3.0	90%
Sound Recordings / Musical Compositions	NA	NA	3.0	90%
Computer Programs: Entertainment Software	NA	NA	NA	NA
Books	NA	NA	NA	NA
TOTALS	\$11.4		\$12.8	

Legal Reforms

- COPYRIGHT LAW: Costa Rica spent the latter half of 1999 reforming several of its intellectual property laws, including the Copyright Law of 1982. As a result of reforms passed on December 31, 1999, BSA reports that Costa Rica now recognizes the rightholder's exclusive right to make a work available to the public, critical to protecting copyrighted materials distributed over the Internet. The law fails to provide adequate protection against the circumvention of technological measures; it provides protection against the circumvention of encrypted satellite signals only (which is too limited). Another deficiency under the current copyright law is its failure to protect against parallel importation. Costa Rica's decision to deprive copyright owners of control over parallel importation leaves its borders open to importation of illegitimate copies.
- CRIMINAL SANCTIONS IN THE PROPOSED LEY DE OBSERVANCIA: A most important amendment to the Costa Rican legislation involving criminal sanctions remains pending (Bill No. 13642, *Ley de Procedimientos de Observancia de los Derechos de Propiedad Intelectual*). The Constitutional Chamber of the Costa Rican Supreme Court declared that the proposed criminal sanctions in the bill are unconstitutional because there is no private or public interest *involved (bien jurídicamente protegido)*, and because the description of the crimes is not accurate. This characterization is incorrect because (i) the bill uses the same language found in the 1982 Copyright Law, which was many times ratified by the same Court, and (ii) because the Court ignored that the interests protected by the bill are intellectual property rights which are protected by the Costa Rican National Constitution. This process has entailed substantial delays, and many important provisions have been declared unconstitutional. The bill is now in the Constitutional Affairs Committee of the Legislative Assembly, which must decide the next steps to take. It is possible that some Costa Rican legislators will try to obtain approval of the bill in August 2000, but with lower penalties than those proposed in the original bill of the *Ley de Observancia*. It is very

important to the copyright industries that the criminal sanctions section of the bill be approved in its original form.

- There has been tremendous resistance in the Congress to increasing the sanctions above the current 1- 3 years' imprisonment for violations of economic rights in copyright. (Costa Rica currently imposes only prison sentences, not fines, but detention of defendants is only permitted where a violation is punishable by four or more years' imprisonment.). Because of the interaction of these low sanctions with the new Criminal Procedure Code provisions discussed above, and given the new but misguided emphasis on concluding cases rapidly, the practical effect of maintaining low sanctions is that many cases will be dismissed one year after filing, with little or no substantive progress having been made and little or no inconvenience to the infringer.
 - A much-needed special IP prosecutors' unit has not yet been approved. A key recommendation of IIPA's 1999 Special 301 report on Costa Rica -- to create a special unit of prosecutors devoted to copyright infringement cases -- was included in the written report of the Special Commission of Congress studying IP matters, but was dropped from the omnibus IP reform bill sent to Congress in December 1999. The Attorney General's office is in favor of the specialized unit, which would open the door to agreements on training and technical assistance for enforcing copyright. The proposal for a new IP unit has been reintroduced to the Special Commission and should be adopted with the hope of achieving a dedicated unit of at least three prosecutors with nationwide jurisdiction, three or four trained investigators from the OIJ, and four technical experts. The special prosecutors' IP unit should be created promptly.
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EL SALVADOR

Recommendation

The Subcommittee should not designate El Salvador as a CBTPA-eligible country at this time. Below is a summary of key points which IIPA and the copyright industries have raised in the context of the annual Special 301 process. In particular, inadequate enforcement by the Salvadoran authorities have adversely affected the rights of the business software community. The U.S. Trade Representative plans to conduct a Special 301 "out of cycle" review of El Salvador's IPR regime later this year.

Copyright Enforcement

- Because effective civil remedies are not available, criminal enforcement is the only real option for copyright enforcement. Unfortunately, Salvadoran criminal authorities (the *fiscalía*) generally have refused to enforce at least business software copyrights since June 1999, despite repeated pleas by the Business Software Alliance (BSA), which represents the business software industry. These BSA cases have involved both reseller and end-user pirates.
- To make matters worse, a recently introduced bill is pending before the Salvadoran Legislative Assembly which would effectively eliminate criminal enforcement of copyrights altogether. This bill would leave copyright holders without any avenue whatsoever to enforce their rights. In turn, such a denial of criminal and civil remedies for copyright enforcement would conflict with El Salvador's current obligations as a WTO member. These actions (or lack thereof) by the Salvadoran government explain the very high levels of piracy in El Salvador. For business software, the Salvadoran piracy rate of 83% for 1999 is the highest in the Americas.

ESTIMATED TRADE LOSSES DUE TO PIRACY
(in millions of U.S. dollars)
and LEVELS OF PIRACY: 1999

INDUSTRY	1999	
	Loss	Level
Computer Programs: Business Applications	13.6	83%
Motion Pictures	2.0	80%
Sound Recordings / Musical Compositions	5.0	40%
Computer Programs: Entertainment Software	NA	NA
Books	NA	NA
TOTAL	\$20.6	

- Software producers have no effective copyright enforcement available in El Salvador. They are completely dependent upon criminal enforcement by the *fiscalía*. Since June 1999, the *fiscalía* generally has refused to enforce business software copyrights. This has been devastating to BSA

members, whose software is pirated widely by Salvadoran end users and resellers. IIPA's 2000 Special 301 submission outlines several specific instances to illustrate this situation.

- To make matters worse, there are no effective civil enforcement remedies available. In many countries, the business software industry sometimes uses civil processes to enforce their legal rights and their copyrighted materials. However, in El Salvador, copyright holders are without effective civil copyright protection under Salvadoran law. The TRIPS agreement requires that effective civil judicial procedures and remedies be available to enforce intellectual property rights.

Copyright Law and Proposed Legislation

- Copyright protection in El Salvador is based on its 1993 copyright law. There are two critical deficiencies with this law which result in little real copyright protection through civil channels in El Salvador. Software companies sometimes choose to pursue the civil route as part of their enforcement campaigns. The first problem is that only direct economic damages are awarded under Salvadoran civil law for copyright violations. Punitive, consequential or other damages are not permitted. This does not produce an adequate deterrent to piracy, as required by TRIPS Article 41.1. A second major deficiency in El Salvador's copyright law is that there are no time limits imposed on government officials who undertake the various steps of authorizing a civil inspection of a suspected pirate.⁷ In reality, it takes an average of 45 days for a civil law raid to be conducted in El Salvador from the time an investigation is requested by the copyright holder. This unwarranted delay violates TRIPS Article 41.1, which requires that that remedies for copyright infringement be "expeditious."
- On September 27, 1999, three members of the Legislative Assembly proposed a bill that would virtually eliminate criminal enforcement of copyright altogether. This bill would reform existing copyright law to require that copyright holders first proceed through all civil avenues and obtain an initial finding in their favor⁸ before any criminal process could be initiated against an infringer of a copyrighted work. Such civil litigation in El Salvador generally lasts at least a year. This bill therefore would effectively eliminate all criminal enforcement of copyrights. Given that there is essentially no copyright protection afforded under civil procedures (*see above*), this bill would leave copyright holders without any avenue whatsoever to enforce their rights. If passed, this bill would violate TRIPS. Copyright protection in El Salvador must be increased, not decreased, in order for El Salvador to satisfy its multilateral and bilateral obligations.

⁷In contrast, El Salvador's copyright law does provide for some deadlines by which officials must act in processing a request for a criminal inspection of a suspected pirate. *See, e.g.*, the description above of BSA's requested search of Cablevisa.

⁸Such an initial court finding is called a *dolo*, which means the judge determines that the defendant has an "intent to cause harm/damage" to the plaintiff.

BAHAMAS

Recommendation

The Subcommittee should not designate Bahamas as a CBTPA-eligible country at this time. In particular, regulatory developments in early 2000 violate Bahamas' multilateral and bilateral obligations – including those of the CBERA. This new compulsory retransmission license for television programming seriously threatens the legitimate development and distribution of U.S. copyright-protected film programming. It would be inconsistent for the U.S. Government to provide Bahamas with additional trade benefits under the new CBTPA program when it presently fails to satisfy the eligibility requirements of the current CBERA statute. For full details, see the February 18, 2000 Special 301 submission of the Motion Picture Association (MPA) and the Television Association of Programmers--Latin America (TAP) against Bahamas which is on file in the USTR Reading Room. Excerpts from the MPA-TAP submission on the Bahamas follow, below.

The Compulsory License

On January 5, 2000, the Government of the Bahamas introduced through regulation a new provision to its 1998 Copyright Act ("the Act") authorizing a new compulsory license for retransmission of television programming by persons who are licensed cable operators. This new compulsory license expands the scope of a compulsory license far beyond the internationally accepted limits of such a license (e.g., authorizing retransmission of free-over-the air broadcasts) to the unprecedented step of permitting retransmission of any copyrighted work transmitted over its territory, including the encrypted signals of U.S. "basic cable" and "pay" TV services. The introduction of such a broad compulsory license is inconsistent with the obligations of the Berne Convention for the Protection of Literary and Artistic Works, to which the Bahamas is a signatory. By adopting a Berne-inconsistent compulsory license, the Bahamas denies the members of the Motion Picture Association (MPA) adequate and effective protection of their intellectual property rights.

- The extremely dangerous international precedent set by this compulsory license threatens to disrupt commercial markets for programming worldwide and cause serious adverse impact on U.S. filmed entertainment and programming packages, not only in the Bahamas, but around the world. Because of the dangerous precedent and its potentially world-wide consequences, MPA believes that the Bahamian compulsory license requirement qualifies as one of the most onerous, blatantly illegal, and egregious policies facing the U.S. intellectual property industries. The Bahamian compulsory license is also inconsistent with the provisions of the Caribbean Basin Economic Recovery Act. The CBERA provides that "the President shall not designate any country a beneficiary country ... if such country has taken steps to repudiate or nullify any ... intellectual property of, a United States citizen, the effect of which is to nationalize, expropriate, or otherwise seize ownership or control of property so owned" (emphasis added).
- Implementation of the Bahamian compulsory license requires circumvention of encryption and other technical measures designed to limit reception of U.S. satellite signals to authorized recipients. In order to take advantage of the Bahamian compulsory license, Bahamian cable operators must obtain a pirate decoder. The circumvention of technical measures designed to control access to intellectual property is contrary to the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty, and the unauthorized distribution of satellite signals is

contrary to the WIPO Convention on the Distribution of Programme-carrying Signals Transmitted by Satellite (the Brussels Satellite Convention).⁹

- A compulsory licensing scheme that applies to cable-originated programs violates the Berne Convention and other international treaties. The Act fails to limit the types of works which may be re-transmitted under the compulsory license to free-over-the air broadcast signals, thereby creating a compulsory license that is inconsistent with the Berne Convention to which the Bahamas is a signatory.¹⁰ It is our understanding that the Government of the Bahamas intends to include cable-originated programmes (e.g., works carried by programmers such as Discovery, ESPN, HBO, Showtime, TNT, etc.) under the compulsory license requirement. The application of a compulsory licensing scheme to cable-originated programmes is inconsistent with international treaties. Article 11bis(2) of the Berne Convention does not permit the imposition of compulsory licenses in the case of cable-originated programmes.
- A broad compulsory license harms U.S. rightsholders in the Bahamas. The compulsory license covers satellite program services that are already being sold in the Bahamas. It is extremely unlikely that a cable system in the Bahamas would enter into a licensing agreement with distributors of these services when they can be expropriated for a below market compulsory license fee. The Bahamian compulsory license undermines the U.S. copyright owners' right to decide if and when their works are to be released, and in which release window. Filmed entertainment is released in a sequential pattern that generally starts with a film's theatrical release, followed by home video, pay-per-view, pay-TV, and eventually release on cable/broadcast television. This sequential pattern has been established as a flexible industry practice that provides an exclusive period -- a window -- in which to maximize revenues from that form of distribution. The Bahamian compulsory license wrecks havoc on this sequential release pattern. Whichever explanation offered of the intended scope of the license is correct, the Bahamian compulsory license constitutes an unreasonable restraint on the ability of copyright owners to enter into voluntary contractual agreements and raise contractual problems between authorized licensees and the copyright holders.
- Widening the concept of compulsory license beyond retransmission of free, over-the-air broadcast signals establishes an unacceptable, international precedent. No other compulsory license regime in the world extends to cable or satellite-originated programming. The Bahamian compulsory licensing scheme constitutes an extremely dangerous precedent, particularly for the English-speaking Caribbean countries. Government representatives from Trinidad & Tobago have announced plans to introduce a similar compulsory license for cable retransmission, and other countries, such as Jamaica, appear to be willing to consider similar systems.
- The Bahamian compulsory licensing scheme should not apply to Internet retransmissions of broadcasts. The Bahamian compulsory licensing scheme for cable retransmissions could be interpreted to include retransmissions of broadcasts over the Internet by cable companies that are also Internet access providers. While the Act limits use of the compulsory license to persons who

⁹ The United States has ratified each of these international treaties. None of these treaties has been ratified by the Bahamas.

¹⁰ The Bahamas became a signatory of the Brussels text of the Berne Convention on July 10, 1973. Therefore, between the United States and the Bahamas, the 1948 Brussels text of the Berne Convention governs any issues of copyright protection.

are licensed to operate a cable system, Bahamian cable system operators also provide Internet access services via the same cable infrastructure. Therefore, it is possible that the Act could be read to permit the use of a process known as streaming of broadcast transmissions over the Internet upon payment of a compulsory license fee. This result would be unacceptable to U.S. rightsholders and programmers.

The lack of clarity in the Bahamian Act with respect to this matter and the overly broad scope of the Act's provisions regarding retransmission, could result in clones of the Canadian iCraveTV situation in the Bahamas, whereby Bahamian cable licensees would stream U.S. copyrighted works to the millions of Internet viewers worldwide without authorization of copyright owners. This activity poses dire consequences for copyright owners and their licensees around the world. The ability of worldwide television viewers to watch these U.S. programs via the Internet would severely damage the market for filmed entertainment and the ability of U.S. copyright owners to license their works abroad. The retransmission of television broadcasts over the Internet should not be subject to a compulsory licensing scheme. Copyright owners must retain their exclusive right to authorize or prohibit the retransmission of their works over the Internet. Rightsholders are in the best position to determine when and how to license their works for Internet transmissions.

Even if the Bahamian compulsory license were limited to re-transmission of free over-the-air signals through cable systems, the equitable remuneration rates for the compulsory license fixed in the Regulations are unreasonably low and are inconsistent with the Berne Convention. New technological advances in the means of reproduction and distribution require careful consideration of the scope of allowable exemptions under the Act. Even if the Bahamian compulsory license were limited to television broadcast signals, by eliminating entirely the requirement to pay equitable remuneration in some cases such as hospitals and educational facilities, and by requiring a meager payment of 25% of the fees when the served premises are hotels, the Act renders meaningless the Berne Convention's requirement of "equitable" remuneration and is therefore inconsistent with Article 11bis(2).

- Bahamian cable operators have long argued that English language feeds of television signals are not available commercially in the Bahamas and have used this argument as justification for a compulsory license. Although MPA rejects the idea that the lack of program alternatives justifies abrogation of international copyright obligations, the premise of the argument is also incorrect. English language programming services are currently available for the English-speaking Caribbean area.