June 29, 2001

Ms. Donna R. Koehnke  
Secretary to the Commission  
U.S. International Trade Commission  
500 E St., SW  
Washington, DC 20436


Dear Ms. Koehnke:

This letter responds to the request issued by the United States International Trade Commission for public comments relevant to the preparation by the Administration of a report on the Caribbean Basin Economic Recovery Act (CBERA) which is to be submitted to Congress on or before September 30, 2001. This report, covering CBERA during the year 2000, will be the fifteenth ITC report since CBERA was enacted.

The IIPA and the U.S. Copyright Industries

IIPA is a coalition of seven trade associations (listed below) that collectively represent the U.S. copyright-based industries -- the motion picture, music and recording, business and entertainment software, and book publishing industries. These member associations represent almost 1,500 U.S. companies producing and distributing materials protected by copyright laws throughout the world -- all types of computer software including business software and entertainment software (such as video game CDs and cartridges, personal computer CDs and multimedia products); motion pictures, television programs, home videocassettes and DVDs; music, records, CDs and audiocassettes; and textbooks, trade books, reference and professional publications and journals (in both electronic and...
print media). These U.S. copyright-based industries represent the leading edge of the world's high technology, entertainment and publishing industries.¹

To combat the twin problems of piracy and market access barriers around the world, and especially in developing countries, the U.S. copyright-based industries joined with the Administration and Congress to fashion new legislation and negotiating tools. IIPA and its members have supported various trade tools with intellectual property rights (IPR) provisions over the years, including the CBERA (also known as the Caribbean Basin Initiative or CBI), the Generalized System of Preferences Program (GSP), Special 301, Section 301, the Andean Trade Preferences Act (ATPA), the U.S.-Caribbean Trade Partnership Act (CBTPA) and the African Growth Opportunities Act (AGOA).

The CBERA Program and the CBTPA are Important IPR Trade Tools

The 1983 enactment of the CBERA² was a key point in the use of U.S. trade policy to promote exports of products and services protected by copyright, patents, trademarks, and other intellectual property laws. For the first time, Congress explicitly linked trade benefits to intellectual property protection by beneficiary countries. Under CBERA program, countries can only receive trade preferences if they satisfy statutory criteria which include intellectual property rights (IPR) standards. The CBERA IPR provisions contain both mandatory and discretionary criteria.

Last year, Congress passed the Trade and Development Act of 2000 which enhanced trade benefits for Caribbean and Central American countries.³ Known as the United States-Caribbean Basin Trade Partnership Act (CBTPA), Title II of this law amended the CBERA⁴ to authorize the President to designate countries in this region to be eligible for preferential tariff treatment for certain articles by (1) extending duty-free and quota-free treatment for certain textile and apparel goods and (2) extending NAFTA-equivalent tariff treatment to a number of other products previously excluded from the CBERA program. In order to qualify for these benefits, the countries must meet certain designation criteria. Specifically, to be a “CBTPA beneficiary country,” a country must meet the original CBERA criteria which include two IPR criteria, three mandatory and two discretionary criteria.

¹ According to the Copyright Industries in the U.S. Economy: The 2000 Report, prepared for the IIPA by Economists, Inc., these core copyright industries accounted for $457.2 billion in value added to the U.S. economy, or approximately 4.94% of the Gross Domestic Product (GDP) in 1999 (the last year for which complete data is available). The total copyright industries¹ accounted in 1999 for $677.9 billion in value added, or approximately 7.33% of GDP. 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 1999 (7.2% vs. 3.1%). Employment in the core copyright industries grew at close to three times the employment growth in the economy as a whole between 1977 and 1999 (5.0% vs. 1.6%). More than 4.3 million workers were employed by the total copyright industries, about 3.24% of the total U.S. work force, in 1999. The core copyright industries accounted for an estimated $79.65 billion in foreign sales and exports in 1999, a 15% gain over the $69.21 billion generated in 1998. IIPA’s press release on the issuance of this report is available on IIPA’s website, at http://www.iipa.com/copyright_us_economy.html.
First, regarding the mandatory criteria, the CBERA requires that beneficiary country status be denied if such country has nationalized, expropriated or otherwise seized ownership or control of property owned by a U.S. citizen (19 U.S.C. § 2702(b)(2)(A)) or has taken steps to repudiate or nullify any intellectual property (19 U.S.C. § 2702(b)(2)(B)). Furthermore, 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)), the President shall not designate that country.

Second, beneficiary countries must meet the two discretionary IPR criterion of the CBERA, found 19 § U.S.C. 2702(c)(9) and (10). According to these provisions, the President shall take into account

(9) 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;
(10) the extent to which such country is prohibits its nationals from engaging in the broadcast of copyrighted materials, including films or television material, belonging to United States copyright owners without their express consent; […]

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 fact, the U.S. Congress expanded the level of the intellectual property rights provisions when it passed the CBTPA. There 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) defines the IPR-related discretionary eligibility criteria to include:

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.5

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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. However, as a matter of political reality, the President declared all 24 current CBERA beneficiaries as eligible CBTPA beneficiary countries on October 2, 2000.6

Nevertheless, it is clear that many of the CBTPA-eligible countries fail to meet the higher IPR standards elaborated under the CBTPA. 7 These counties should be on-notice that they must take appropriate action, both in terms of reforming their legislation as well as enforcing their laws, to meet their “part of the bargain” in receiving these unilateral preference trade benefits.

The Economic Impact of Copyright Piracy and the Need for Adequate and Effective Copyright Protection and Enforcement in this Region

Over the past few years, several Central American and Caribbean nations have taken positive steps toward achieving this goal by amending their copyright laws or passing entirely new laws. For example, the Bahamas, Costa Rica, El Salvador, Guatemala, Honduras, Jamaica, Nicaragua, Panama, St. Lucia and Trinidad & Tobago have passed new copyright legislation in recent years. It is important to note that legislative reform alone is not sufficient to meet the CBERA standard of “adequate and effective protection.”

Overview of copyright piracy in this region

IIPA believes that the most immediate problem in the Central American and Caribbean, as is the case throughout the Americas, is the failure of many of the countries to adequately enforce their existing copyright laws. High levels of piracy — of films, television programs, home videocassettes, music, sound recordings (audiocassettes and CDs), business, entertainment and multimedia software on all platforms, textbooks, trade books, reference and professional publications and journals — hurt both U.S. and local creators.

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6 “USTR Announces AGOA/CBI Country Designations,” Press Release 00-67, Office of the United States Trade Representative, available at http://www.ustr.gov/releases/2000/10/00-67.pdf. See also 65 Fed. Reg. 60236 (Oct. 10, 2000). The USTR was authorized to make additional determinations regarding these countries’ abilities to implement certain customs procedures before the CBTPA preferential duties were activated. Also on October 2, 2001, USTR determined that Belize, Costa Rica, Dominican Republic, El Salvador, Guatemala, Haiti, Honduras, Jamaica, Nicaragua, and Panama were making substantial progress toward implementing and following the customs procedures required by the CBTPA and were therefore immediately qualified for the enhanced trade benefits.

7 On July 17, 2000, the IIPA filed comments with USTR responding to its June 19, 2000 public notice regarding the eligibility criteria for CBTPA beneficiaries. There we outlined our views on the eligibility of certain countries with respect to their compliance with the IPR criteria of the CBTPA. IIPA recommended that the Dominican Republic, Costa Rica, El Salvador and Bahamas should not be designated as eligible CBTPA countries, given the unacceptable copyright-related situations in each country. We also urged that full review of the 20 other countries’ satisfaction of the CBTPA IPR criteria be conducted before any benefits were granted. IIPA’s July 20 filing is available on our website at http://www.iipa.com/pdf/2000_Jul26_CBTPA.pdf.
For example, the unauthorized reception and retransmission of U.S. domestic satellite signals in Central America and the Caribbean region remains 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 problem throughout the 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. It is imperative that software producers have access to both criminal and civil ex parte search remedies.

Piracy of sound recordings and music remains high in this region. While audiocassette piracy (analog) has been the preferred business of pirates in recent years, the industry reports that the levels of CD piracy are rising in this region. The increased sale of CD-burners is a recent development in the entire region which has elevated piracy levels for sound recordings.

The U.S. videogame industry suffers from inadequate enforcement by governmental and judicial authorities in the region. In particular, Panama has served as a major transshipment point for pirated and counterfeit video game products 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. This problem has been reported throughout much of Central America as well as the Dominican Republic.

A chart outlining the estimated trade losses due to piracy of U.S. copyrighted materials (in millions of U.S. dollars) and estimated levels of piracy for 2000 in some of the CBERA countries appears below.

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<th></th>
<th>Motion Pictures</th>
<th>Records &amp; Music</th>
<th>Business Applications</th>
<th>Entertainment Software</th>
<th>Books</th>
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<tr>
<td>TOTAL LOSSES ($millions)</td>
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8 BSA estimates for 2000 are final and reflect estimated U.S. losses only. BSA’s losses for countries’ entire market, include the local chain, can be found in the Sixth Annual BSA Global Software Piracy Study (May 2001), available at www.bsa.org.
IIPA, in our February 2001 Special 301 submission to the U.S. Trade Representative (USTR), focused on specific developments in five countries in the region: Costa Rica, Dominican Republic, El Salvador, Guatemala and the Bahamas. Copies of these full reports are attached to this submission. They can also be accessed at the IIPA website at http://www.iipa.com/countryreports.html. The following paragraphs summarize the problems faced by U.S. copyright industries in these five countries.

**COSTA RICA:** 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. Delays in judicial proceedings, lack of official investigators and public prosecutors specialized in intellectual property crimes, as well as the drastic budget cuts imposed on the judiciary caused serious enforcement problems in 2000 which are continuing in 2001. On the legislative front, efforts to raise the level of criminal sanctions for copyright piracy took a step backward. Over the objection of the copyright industries, Costa Rica passed intellectual property legislation in October 2000 which amended certain procedures and sanctions in intellectual property rights cases. As a result, some industries already report difficulties in bringing criminal cases to prosecutors under this amended code. In the 2001 Special 301 review, IIPA recommended that Costa Rica be elevated to the Priority Watch List. On April 30, 2001, USTR agreed with IIPA’s recommendation and scheduled an “out of cycle” review for the Fall of 2001.

**DOMINICAN REPUBLIC:** As a result of lack of progress in both legislative reform and effective enforcement, IIPA filed a June 1999 petition with the U.S. government to initiate a review under the Generalized System of Preferences (GSP) and CBERA trade program of the eligibility of the Dominican Republic to participate in these programs due to its failures to provide adequate effective copyright protection for U.S. copyright owners and to provide equitable and reasonable market access. A lack of effective legal mechanisms -- such as low criminal penalties, very few criminal cases prosecuted, no civil *ex parte* remedy, high judicial bonds -- proved to be significant barriers to effective copyright enforcement. The IIPA’s petition was accepted, hearings were held, and the review remains ongoing. IIPA notes that the leverage provided by this review has helped foster progress in-country. The Dominican Republic adopted a new copyright law in October 2000, fulfilling many years of effort to replace its inadequate 1986 copyright law. This legislative achievement represents success in advancing higher levels of substantive copyright protection as well as expanding the battery of tools available for criminal, civil and administrative copyright enforcement in the Dominican Republic. The effective implementation and enforcement of the new copyright law is critical to the copyright industries, which have struggled against widespread and endemic copyright piracy in the Dominican Republic for more than a decade. The copyright industries expect that the new
enforcement tools and remedies provided in the new copyright law will bolster anti-piracy efforts, which will result in lowering the high piracy levels.

EL SALVADOR: In November 2000, USTR completed a special 301 out-of-cycle review of El Salvador to assess that government’s efforts to improve enforcement procedures and promote the use of authorized software in all government ministries. At that time, the business software industry reported that progress was being made to work with the Salvadoran criminal authorities to bring software anti-piracy actions. Despite increased raid activity by law enforcement authorities during the end of 2000 and early 2001, piracy levels remain high. For the business software industry, the estimated piracy rate in El Salvador is 79%, one of the highest in Latin America. To make matters worse, a bill is still pending before the Salvadoran Legislative Assembly which would effectively eliminate criminal enforcement of copyright infringement altogether. This bill would leave copyright holders without any avenue whatsoever to enforce their rights. Such denial of criminal and civil remedies for copyright enforcement would conflict with El Salvador’s multilateral and bilateral obligations. Because of evidentiary burdens and delays in the civil system, rightsholders basically have had to rely on the Salvadoran criminal process to enforce their rights. Prosecutors and the courts do not move forward on copyright cases; there simply is no deterrence in the system. Rightsholders have to fight to prove their standing in some criminal cases. The Salvadoran government should amend its civil and criminal enforcement procedures to comply fully with the WTO TRIPS Agreement, and amend its copyright law to implement the requirements of the WIPO treaties. Until these reforms are made, both copyright owners and Salvadoran authorities will lack the protections and remedies necessary to combat the extremely high levels of piracy in El Salvador.

GUATEMALA: The copyright industries continue to confront high piracy levels and inadequate copyright enforcement in Guatemala. Recent legislative reform undercut criminal sanctions and civil remedies for copyright infringement. In September 2000, amendments to the Guatemala copyright law were adopted in Decreto 56-2000, and entered into effect on November 1, 2000. On a positive note, this law reinstated “public” prosecution of copyright crimes; this issue had been at the top of the copyright industries’ agenda for years. The Decreto also implemented certain requirements of the WIPO treaties. Unfortunately, the amendments also seriously weakened existing civil and criminal remedies. Criminal penalties were substantially decreased, and the statutory damages provision was removed entirely. Unfortunately, the copyright law amendments have done little to improve copyright enforcement in-practice in Guatemala. The prosecutors (fiscalías) are overburdened and understaffed; it currently takes at least four weeks to obtain a search and seizure order to raid a suspected copyright infringer. This problem could be resolved with the creation of a Special Prosecutor’s Office for intellectual property crimes; the Guatemalan government has until November 1, 2001 to create this office. Copyright piracy levels remain high for all industry sectors.

THE BAHAMAS: In January 2000, the Government of the Bahamas implemented its copyright law. The law included an overbroad compulsory license that violated numerous international copyright standards and established an unacceptable precedent. Cable operators were authorized to downlink and retransmit pay television signals from the U.S., including via the Internet. Bilateral negotiations between the governments took place
during 2000. The Bahamas agreed to narrow the scope of its compulsory license to permit rebroadcast via cable only of copyright works that are broadcast free-over-the-air. The Bahamas has taken the first steps toward correcting these problems by introducing amending legislation, but the issue has not been finally resolved. Close attention must be paid to two issues in particular: (1) monitoring the adoption of the copyright amendment legislation recently presented to parliament, and (2) ensuring that consultations between the Copyright Royalty Tribunal and U.S. rightholders result in more equitable remuneration for the compulsory licensing of free-over-the-air broadcasts of copyrighted works. Prompt and effective implementation of bilateral agreements is a primary concern to all the U.S. copyright-based industries.

Conclusion

IIPA appreciates this opportunity to provide the ITC with information on the copyright aspects of the CBERA program.

We look forward to working with the Administration and Congress to increase the effectiveness of this important trade policy tool to tackle copyright piracy and improve copyright reform efforts in this region.

Respectfully submitted,

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

IIPA submitted detailed reports on the following five countries in its February 16, 2001 submission to the U.S. Trade Representative (USTR) in its annual “Special 301” review. Copies of these reports are appended herein:

Costa Rica
Dominican Republic
El Salvador
Guatemala
The Bahamas

These reports are on the IIPA website at http://www.iipa.com/countryreports.html.
EXECUTIVE SUMMARY

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. Delays in judicial proceedings, lack of official investigators and public prosecutors specialized in intellectual property crimes, as well as the drastic budget cuts imposed on the judiciary caused serious enforcement problems in 2000 which will likely continue in 2001. Estimated trade losses due to copyright piracy in Costa Rica are $14.2 million for 2000.

On the legislative front, efforts to raise the level of criminal sanctions for copyright piracy took a step backward. Over the objection of the copyright industries, Costa Rica passed intellectual property legislation in October 2000 which amended certain procedures and sanctions in intellectual property rights cases. As a result, some industries already report difficulties in bringing criminal cases to prosecutors under this amended code.

Because of this deteriorating situation, IIPA recommends that Costa Rica be elevated to the Priority Watch List.

ESTIMATED TRADE LOSSES DUE TO PIRACY
(in millions of U.S. dollars)
and LEVELS OF PIRACY: 1998 - 2000

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<td>Business Software Applications¹</td>
<td>9.0</td>
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<td>9.4</td>
<td>71%</td>
<td>6.8</td>
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<td>40%</td>
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<tr>
<td>TOTALS</td>
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<td>14.4</td>
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¹ BSA estimates for 2000 are preliminary. In IIPA’s February 2000 Special 301 submission, BSA’s 1999 loss figure of $9.1 million was also reported as preliminary. BSA’s 1999 statistics were finalized in mid-2000, and are reflected above.

² IDSA estimates for 2000 are preliminary.
In order to highlight the copyright industries’ dissatisfaction with both the legislative and enforcement situation in Costa Rica, IIPA filed a petition on August 21, 2000 with the U.S. Trade Representative, requesting President to review the eligibility of Costa Rica as a beneficiary developing country under the Generalized System of Preferences (GSP) and Caribbean Basin Economic Recovery Act (CBERA) trade programs for Costa Rica’s failure to provide adequate and effective copyright protection for U.S. copyright owners.³ IIPA also noted that the time that it would be inconsistent for the U.S. government to grant new, additional benefits to Costa Rica under the U.S-Caribbean Basin Trade Partnership Act (CBTPA) while conducting an investigation under GSP and CBI for Costa Rica’s failure to afford adequate and effective IPR protection to U.S. copyrights.⁴ Despite our requests, CBTPA eligibility to Costa Rica was granted⁵ and our GSP/CBERA IPR petition was not accepted. The problems IIPA highlighted last fall remain the same in early 2001.

COPYRIGHT PIRACY IN COSTA RICA

The number of local pirate resellers and CD burners remains very high because of the lack of deterrent legislation, and an inefficient judicial system. Under-licensing cases were detected in corporate end users and in municipalities in 2000. The business software piracy rate was 68% in 2000, and represented estimated losses of $9.0 million last year.

The motion picture industry continues to be concerned with video piracy in Costa Rica. MPA reports that organized video piracy regained its presence in 1998 and 1999 after MPA successfully dismantled the Sempero network that controlled organized distribution out of Panama. Currently, locals control organized illegal reproduction and distribution. Recent investigations have uncovered three independent rings. One surrendered to MPA’s satisfaction, the other two continue and are openly recognized as pirates by video store operators (who also buy from them). These two rings are MPA targets, and MPA is currently in discussions with police regarding proper action. Effective action against these pirates would substantially reduce video piracy in Costa Rica. There is also some back-to-back copying in individual video stores, although MPA is of the belief that such activity is not currently significant and can be addressed through commercial activity. Annual losses to the U.S. motion picture industry due to audiovisual piracy in Costa Rica are estimated to be $2 million in 2000. Estimated levels of piracy for 2000 were 40%, a major drop from previous

³ In 1999, $24.9 million of Costa Rica’s imports to the United States benefited from the GSP program, accounting for 0.6% of its total imports to the U.S. For the first eleven months of 2000, $50.6 million of Costa Rican goods entered the United States under the duty-free GSP code, representing a 117% increase over the same time period last year. Under the Caribbean Basin Initiative (CBI, also known as CBERA) program, which contains similar IPR criteria, Costa Rica had $683 million worth of goods enter the U.S. in 1999, accounting for 17.2% of its total imports into the United States. For the first 11 months of 2000, $552.7 million of Costa Rican goods entered the U.S. under the CBI. For further background on Costa Rica’s appearance on the Special 301 lists, see Appendices D and E of this submission.


years. This decline was due primarily to industry efforts, which included organizing a new video association, shutting down two distributors of pirate product, and encouraging new market entry, all of which resulted enhanced promotion of legitimate product and reduction of pirated product.

Piracy of sound recordings, especially in audiocassette format, is widespread in Costa Rica. In addition to domestic piracy, Nicaragua and Mexico are reported to be sources of imported pirate product. Estimated losses for the music and sound recording industries in Costa Rica were $3.0 million in 2000. The estimated level of piracy last year was placed at 40%. The industry believes that the drop in piracy levels between 1998 (90%) and 1999 (40%) may be attributed to an increase in legitimate sales, especially of compact discs (CD) in 1999. The loss estimate has remained constant because the level of audiocassette piracy continues to remain high, and this impacts negatively on legitimate sales. Currently, the Costa Rican recording market has not been blanketed with pirate CDs, a phenomenon which has adversely affected several other markets in Latin America. The recording industry reports that it is becoming more and more difficult to enforce criminal cases. Fewer police raids have taken place in recent months.

AAP reports that there is some photocopying of publications at the universities, but this has not worsened in the last year. There are no significant losses to report.

IDSA estimates the piracy level of entertainment software (including videogame CD-ROMs and cartridges, personal computer CD-ROMs and multimedia entertainment products) in Costa Rica to be 50%, causing an estimated $200,000 in trade losses due to piracy in 2000.

COPYRIGHT ENFORCEMENT

IIPA and its members have made several suggestions, in prior Special 301 filings, our 2000 GSP/CBERA petition, as well as through its members and colleagues doing business in San José, to reduce prosecutorial and judicial delays to improve the on-the-ground situation. Here are a few illustrative suggestions:

(1) Improve coordination of activities with public prosecutors and investigators. The General Prosecutor’s Office of Costa Rica has not implemented any appropriate policies to coordinate the activities of the Judicial Investigation Office (OIJ) and the public prosecutors. Such a coordinated effort would aid in improving the efficacy of investigatory actions and follow-up.

(2) Appoint specialized IPR prosecutors. The initiative to appoint public prosecutors specializing in intellectual property crimes has been completely abandoned. This initiative was originally included as a recommendation by the Special Commission on IP Matters which was working on omnibus IPR reform in 1999, but was dropped from the omnibus legislative bill which passed in late December 1999. The General Prosecutor’s Office of Costa Rica recommended rejection of this initiative, among other reasons, because of their lack of resources. Local copyright industries, including the local publishing industry and the National Museum of Costa Rica, among others, have lobbied hard for creation of this unit. 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.

(3) **Create a coordinated and national plan.** There is no institution, office, or national program exclusively dedicated to defending intellectual property rights and coordinating intellectual property activities, the only exception being the copyright, patent, and trademark registries. Even though the President of Costa Rica and certain ministries have expressed support for the protection of intellectual property rights, they have not taken concrete steps. In addition, the illegal use of copyright works is very common in the public sector.

(4) **Improve copyright training (legal and enforcement) at all levels.** Training in copyright matters needs to be provided for all levels of enforcement, police, customs, administrative police, prosecutors and judges.

**There is No Official Program Dedicated to Defend Intellectual Property Rights.**

There is no institution, office, or national program exclusively dedicated to defending intellectual property rights and coordinating intellectual property activities, with the exception of the copyright, patent, and trademark registries. Even though the President of Costa Rica and certain ministries have expressed support for the protection of intellectual property rights, they have not taken concrete steps to strengthen such protection. In addition, the illegal use of copyright works is very common in the public sector itself. The administrative police are not trained in intellectual property crimes, which presents an obstacle to proper enforcement.

The Ministry of Foreign Affairs and the Ministry of Justice expressed little support for intellectual property bills when treated by Congress. It appears that the Costa Rican government was more interested in showing the WTO that Costa Rica had complied with the provisions of TRIPS by the deadline (December 31, 1999), than with the actual substantive content of the provisions contained in the legislation. Passage of the Ley de Observancia was also compounded by local efforts to pass legislation in order to obtain preferential benefits under the CBTPA.

**Delays in Criminal Investigations and Proceedings and Lack of Judicial Resources Represented Important Obstacles to Anti-Piracy Enforcement.**

(1) **Public Prosecutors**

There is serious concern on the part of all copyright industries regarding the interpretation and application of the procedural and criminal provisions of the law, and the delays in the criminal cases caused by the prosecutors. Public prosecutors argue that the cause of the delays in judicial proceedings is the huge number of cases assigned to them, but BSA believes this is not the only reason. In a software piracy case brought by the BSA against Duarco SA (Exp. 99-12908-042-PE C/.Empresa Duarco SA en D/Carlos Corrales Solano, Infracción Ley de Derechos de Autor), the criminal complaint was submitted on June 10, 1999, and although no inspection of the company was conducted, without any precise investigation, the prosecutor decided to reject the complaint. This decision was appealed and the court decided that the prosecutor should continue the process.
In another criminal case filed by the BSA against a company on June 11, 1999, the prosecutor of Tres Ríos delayed more than a year before conducting a raid at BSA’s request.

One source of these problems is the refusal of the General Prosecutor’s Office to appoint a prosecutor specializing in Intellectual Property crimes due to an alleged lack of resources. Another serious enforcement problem facing BSA in Costa Rica is the level of proof required by prosecutors before they request authorization from judges for search and seizure orders. Public prosecutors of San José and Tres Ríos were reluctant in 2000 to request search and seizure orders from judges unless there was conclusive evidence that a crime had been committed. Even though the Costa Rican Criminal Procedural Code only requires "sufficient cause" (motivos suficientes) to approve the preliminary inspection of suspected pirates, public prosecutors in many cases have transformed this standard into a standard of "complete certainty" by requiring excessive proof of illegality before conducting the inspection, such as certified statements of the number of computers and the number and type of pirate software to be found within the premises. BSA believes that the difficulty in obtaining preliminary injunctions in criminal cases to protect intellectual property rights is a violation of articles 41 and 50 of TRIPS.

In addition to these problems, public prosecutors have requested proof of registration of protected works in order to consider them legally protected. This requirement for the formality of registration violates Costa Rican intellectual property legislation, as well as the Berne Convention.

For the above reasons, since June 1999, all BSA criminal cases initiated in San Jose and Tres Ríos have been seriously delayed. The first two new BSA inspections were finally conducted in October 2000. This resulted in five indictments.

(2) The Judicial Investigation Office (OIJ)

The General Criminal Unit of the OIJ is in charge of the investigation of intellectual property crimes. Even though this unit has made efforts to conduct the investigations properly, it does not have adequate resources, and BSA cases have been delayed. The unit only has four software investigators, yet has jurisdiction over the whole country. Other problems are lack of appropriate computers and transportation.

The prosecutors are empowered by law to oversee and control OIJ investigations, but the General Prosecutor’s Office has not implemented any policies to coordinate the activities of the prosecutors and the OIJ. Many conflicts between the prosecutors and the OIJ have occurred, causing further delays to the BSA criminal cases.

In addition to all these problems, the government substantially cut the budget of the judiciary, which means that the lack of resources in certain sectors will undoubtedly worsen. The Director of OIJ, Ms. Linette Saborio, declared that the informática (technology) department of the OIJ will have only an annual budget of Colones 30 million, which is approximately U.S.$98,039. This budget limitation will certainly cause additional enforcement problems for BSA.

(3) Judges

Judicial training programs and seminars are necessary to increase understanding of Costa Rica’s intellectual property legislation and the international treaties signed by their country, and
improve application of intellectual property law to copyright infringement cases. Indeed, there has been criticism in the press on this regard: A report submitted to the Supreme Court in late 1999 addressed the need to train judges in the application of injunctive relief. The BSA organized a training seminar in 1999, but the judiciary has not organized any training on its own initiative.

COPYRIGHT LAW AND RELATED LEGAL ISSUES

Copyright Law Amendments and WIPO Treaties

In order to comply with TRIPS by January 2000, Costa Rica amended its 1982 copyright law (and several other intellectual property rights laws) on December 31, 1999. The revised copyright law was published in Law No. 7979 of January 31, 2000. Several positive improvements to the copyright law were made, including: revising the right of reproduction; extending the basic term of protection for works to life of the author plus 70 years, and for audiovisual works to 70 years after first exhibition and for sound recordings to 70 years after fixation; recognizing the rightholder’s exclusive right to make a work or sound recording available to the public. The copyright law still failed 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.

The one positive legislative success in the past year has been Costa Rica’s ratification and deposit of its instruments of ratification to both the WIPO treaties – the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty. These instruments were deposited with WIPO on May 23, 2000. Costa Rica should once again amend its 1982 copyright law to fully respond to the challenges of the rapidly evolving marketplace for copyrighted materials by implementing the substantive obligations found in these treaties.

However, the administrative procedures for border measures and all civil sanctions and criminal penalties were dropped from the 1999 copyright amendments and are now pending in the Ley de Observancia bill (discussed below). The civil and criminal procedures are governed by the Civil Procedural Code and the Criminal Procedural Code, respectively.

Ley de Observancia

A bill, "Proyecto de Ley No. 13642, Ley de Procedimientos de Observancia de los Derechos de Propiedad Intelectual" (known as the Ley de Observancia), represented an attempt to improve procedures and penalties for copyright infringement in Costa Rica. The copyright industries in Costa Rica worked diligently to craft a satisfactory bill which would provide both the government and rightsholders with the ability to take specific actions to fight copyright infringements. As originally drafted in January 2000, this bill would combine all penalty provisions for violations of intellectual property rights, including patent, trademark, copyright and the like, into a single new law. The basic purpose of the bill was to provide more adequate penalties and procedures in accordance with TRIPS.

Publicly, the Intellectual Property Special Committee supported the protection of intellectual property rights, but during committee meetings, the committee members proposed a reduction in civil sanctions and criminal penalties, and increased requirements to obtain injunctive
relief. For example, the Intellectual Property Special Committee proposed maximum criminal penalties of between two- to three-year jail terms for intellectual property infringements, no civil sanctions or criminal penalties when the illegal use is for nonbusiness or noncommercial purposes, restrictions on the type of products that can be seized by the courts, and the removal of other important provisions from the original bill.

In response, the intellectual property associations of Costa Rica (Asociación de Autores y Compositores Musicales, Cámara del Libro, Asociación Productores Fonográficos, MPA, Asociación para la Protección de Programas Informáticos, Productores Audiovisuales, and Asociación de Inventores) united to defend the provisions of the original bill under attack and to inform the Intellectual Property Special Committee and the deputies about their concerns regarding the revised bill.

Once the bill was returned to the Plenario Legislativo by the Committee, and after the bill was preliminarily approved by the Plenario Legislativo, ten deputies, among them the President of the Intellectual Property Special Committee, requested the opinion of the Constitutional Chamber of the Supreme Court of Costa Rica on the constitutionality of some provisions in the bill. The requested court review delayed the approval process.

On May 31, 2000, the Constitutional Chamber declared that the proposed criminal sanctions in the bill were unconstitutional because there was no private or public interest involved (bien jurídicamente protegido), and because the descriptions of the crimes were inaccurate. The BSA does not agree with this opinion because: (a) the Court ignored the fact that the interests protected by the bill are intellectual property rights, which are protected by the National Constitution of Costa Rica; and (b) the bill used precise language (i.e., reproduce, distribute, transfer, communicate) which is the same language found in the 1982 copyright law, which was ratified by the same Court on at least six occasions.

Unfortunately, the Costa Rican Congress did not listen to the recommendations and warnings of the local intellectual property associations, and on October 2, 2000, passed the "Ley de Procedimientos de Observancia de los Derechos de Propiedad Intelectual," which differs greatly from the requirements to which Costa Rica must adhere under TRIPS and the Berne Convention.

Three of the most harmful provisions of the new Ley de Observancia are:

- Article 43: Provides that criminal actions against intellectual property violations are considered public actions but can be initiated only by private individuals or corporations (publica de instancia privada). This means that in the event that a public officer detects any intellectual property violations, he will not be allowed to initiate legal action. Only the injured parties can initiate legal action. This is a serious disadvantage in comparison to the original text of the bill that established that criminal actions for intellectual property rights infringements could be initiated by public authorities (accion publica de instancia publica). The "instancia privada" action, which limits the enforcement capability of public authorities, does not satisfy Costa Rica’s TRIPS Article 41 obligation to ensure that its enforcement procedures permit “effective action” against infringements.

- Articles 54 and 59: Provide a maximum penalty of three (3) years of imprisonment for copyright violations. In the original text of the bill, the maximum penalty was four years of
imprisonment. These articles provide the same maximum penalty for those who fix a work without authorization and sell infringing materials. Under other provisions of Costa Rican criminal law, sentences for crimes having a maximum penalty of three years of imprisonment can be commuted, and the defendants never have to serve time.6

- Article 70: Provides that the "minor" (insignificante) and "without profit" (gratuito) use and reproduction of illegal products will not be penalized. This is probably the most harmful provision of the new law. There is no definition of minor use and reproduction, and it is not clear when the use and reproduction of illegal products is considered to be without profit. For example, if public authorities inspect a bank and find that it has 100 illegal copies of BSA member products installed in its computers, the bank could avoid liability, arguing that it does not profit by using the software, because it only provides banking and financial services. It will be very easy for pirate resellers to avoid liability by simply reproducing and selling illegal software in small amounts, using many CD burners and retail outlets. The BSA will be forced to prove the illegal connection among the many CD reproduction centers to overturn the qualification of minor use and reproduction. This provision violates the Berne Convention as well as various provisions of TRIPS.

When the Ley de Observancia bill was passed by Congress, only a presidential veto could have defeated it. A written petition was submitted to the President, expressing the concerns of the copyright associations about the bill and recommending that the President veto the above-mentioned articles. Unfortunately, the deputies who favored the revisions belonged to the same political party as the President, and the President promulgated the bill without vetoing the troubling articles.

Soon after the President promulgated the Observancia Law, enforcement problems ensued. A prosecutor petitioned to dismiss a software piracy complaint filed by BSA against a university (La Universidad Iberoamericana), on the grounds that the denounced piracy crimes were not within the scope of the new Observancia Law. Because the new law penalizes those who illegally fix or reproduce copyright works, the prosecutor argued that demonstrated use by the university of illegal software was not proof that the university violated the law by illegally fixing or reproducing software products. Article 54 of the Observancia Law does not say anything about "use" of illegal copyright works. This case remains open, and BSA is awaiting the judge’s decision on the prosecution’s motion to dismiss.

**Criminal Procedure Code and a Statutory Time Limit**

Article 33 of the Criminal Procedural Code provides that there must be a final decision by a court before the expiration of half of the maximum penalty period for the relevant crime measured from the date the defendant is charged with the crime; if there is no such decision during this period, the case will be dismissed. Considering that copyright crimes have a maximum penalty of three years of imprisonment, copyright cases will be dismissed unless final decisions are made within one-and-one-half years from the date a defendant is charged. While seemingly intended to eliminate judicial backlog, this requirement creates a great risk that defendants will take advantage

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6 By comparison, Article 212 of the Costa Rican Criminal Code states a maximum penalty of six years of imprisonment for larceny, a kind of theft of physical property. Since intellectual property crimes are a form of theft of intangible property, the lesser sentence applied to them as compared to larceny indicates an inconsistency between the norms of the Observancia Law and the rest of Costa Rican law.
of prosecutorial delays and pretrial maneuvering to wait out the clock and seek dismissal of infringement cases after only a year and a half. This short time period creates great uncertainty as whether copyright cases will ever be heard.

If this “rocket docket” approach is maintained, the copyright industries argued that 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. However, the Ley de Observancia did not extend jail terms for copyright infringement beyond 3 years, so the industries are left with the original problem of this tight statutory time limit.
INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE
2001 SPECIAL 301 REPORT
DOMINICAN REPUBLIC

EXECUTIVE SUMMARY

The Dominican Republic adopted a new copyright law in October 2000, fulfilling many years of effort to replace its inadequate 1986 copyright law. This legislative achievement represents success in advancing higher levels of substantive copyright protection as well as expanding the battery of tools available for criminal, civil and administrative copyright enforcement in the Dominican Republic. The effective implementation and enforcement of the new copyright law is critical to the copyright industries, which have struggled against widespread and endemic copyright piracy in the Dominican Republic for more than a decade. A lack of effective legal mechanisms -- such as low criminal penalties, very few criminal cases prosecuted, no civil ex parte remedy, high judicial bonds -- proved to be significant barriers to effective copyright enforcement. Starting in late 1999, some improvement in anti-piracy actions began to be made by criminal and administrative authorities and several civil cases were commenced as well. The copyright industries expect that the new enforcement tools and remedies provided in the 2000 copyright law will bolster anti-piracy efforts, which will result in lowering the high piracy levels.

Many elements of the IIPA’s GSP 1999 petition against the Dominican Republic were related directly to longstanding enforcement problems (see below). In order to support continued progress on effective implementation and enforcement of the new copyright law, IIPA recommends that the Dominican Republic remain on the Priority Watch List at this time.

ESTIMATED TRADE LOSSES DUE TO PIRACY
(in millions of U.S. dollars)
and LEVELS OF PIRACY: 1996 - 2000

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1 BSA estimates for 2000 are preliminary.
2 IDSA estimates for 2000 are preliminary.
The U.S. copyright-based industries in the IIPA have supported high-level, bilateral engagement between the U.S. and the Dominican Republic. As a result of lack of progress in both legislative reform and effective enforcement, IIPA filed a June 1999 petition with the U.S. government to initiate a review under two trade programs, the Generalized System of Preferences (GSP) and the Caribbean Basic Economic Recovery Act (CBERA, or CBI), of the eligibility of the Dominican Republic to participate in these programs due to its failures to provide adequate and effective copyright protection for U.S. copyright owners and to provide equitable and reasonable market access. The Office of the U.S. Trade Representative accepted this petition on February 14, 2000, and hearings were held on May 12, 2000; this GSP review is ongoing. Bilateral talks to evaluate progress on intellectual property rights matters were held in Santo Domingo in November 2000.

Recently, the Dominican Republic also became an eligible beneficiary country of the U.S.-Caribbean Basin Trade Partnership Act (CBTPA), found in Title II of the Trade and Development Act of 2000. To maintain these CBTPA benefits, the Dominican Republic must meet all the CBERA criteria, as well as the CBTPA’s explicit TRIPS-or-greater criteria. As a WTO member, the Dominican Republic is obligated to meet both its substantive copyright obligations as well as the enforcement text of the TRIPS Agreement. In fact, the intellectual property rights system of the Dominican Republic will be on the agenda of the April 2001 TRIPS review in Geneva.

COPYRIGHT LAW AND MARKET ACCESS

New Copyright Law of 2000

The Dominican Government succeeded in its years-long effort to pass new copyright legislation which contained high levels of copyright protection. The bill was finally passed by the Chamber of Deputies on July 24, 2000 and by the Senate on July 26, and signed by new President Hipolito Mejia Dominguez on August 21, 2000 as Law No. 65-00. Although the official date of publication of this law is August 24, 2000, it was published in the Official Gazette on October 24.

3 For a full discussion on the copyright industries’ and U.S. government's lengthy bilateral engagement with the Dominican Republic on IPR issues, see Appendices D and E of IIPA’s 2001 Special 301 report.

4 In 1999, $31.2 million of Dominican imports to the United States benefited from the GSP program, accounting for 0.8% of its total imports to the U.S., and $820.3 million of goods under the CBI program, accounting for 19.2% of its imports to the U.S. For the first 11 months of 1999, $42.5 million of Dominican goods entered the U.S. under the duty-free GSP code, representing a 40.5% increase over the same time period last year, and $738.2 million entered under the CBI.


6 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. In October 1999, IIPA and several other IIPA members submitted detailed comments on how to improve that legislation. The detailed list of IIPA’s October 2000 recommendations and concerns with certain provisions and requests for clarification about the then-pending copyright bill are not discussed in this country report. IIPA understands that very few amendments were made to the copyright bill between late 1999 and its final promulgation in August 2000.
2000, entering into effect that same day. President Mejia has spoken in support of enforcing IPR laws in his country, even mentioning intellectual property piracy in his inaugural address.

IIPA once again acknowledges the positive features of this new copyright law. This law is a vast improvement over the 1986 Copyright Law. For example, the 2000 law corrects many of the key TRIPS substantive points, including protection for computer programs, databases, and the minimum term of protection. The lack of civil \textit{ex parte} orders under the 1986 law has been remedied, thus providing a critical TRIPS-consistent enforcement tool. Also, the level of criminal fines has been increased in the new law. The 1986 law provided for low penalties of only RD$1,000 to $10,000 (US$60 to $600). However, the new law bases fines on the statutory minimum wage, which is RD$3,000 (US$180) per month. The new law creates fines of 50 to 1,000 times the minimum wage, which at the current exchange rate creates potential fines of US$9,000 to US$180,000. We understand that the Dominican Congress is considering increasing the minimum wage, which would only increase the possible penalties for copyright violation. The new law (like the old one) provides a term of three months to three years in jail for most criminal infringements. Importantly, the scope of exclusive economic rights for authors and producers of phonograms has been expanded, and comes close to meeting the obligations found in both of the WIPO treaties.

IIPA understands that regulations are being drafted to implement the new copyright law. ONDA (the National Copyright Office) has indicated that it will be receptive to comments on the draft regulations. It appears that drafting these regulations may be a challenging task to ONDA, due to budgetary constraints. IIPA and its member associates welcome the opportunity to work with ONDA on these important implementing regulations.

The Dominican Republic should be encouraged to ratify the two 1996 WIPO treaties, the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty. Ratification is the natural next step for the Dominican Republic. In fact, the prior ONDA administration supported ratification of these treaties, and the Ministry of Foreign Affairs is reviewing this matter.

\textbf{COPYRIGHT PIRACY IN THE DOMINICAN REPUBLIC}

Computer software piracy in the Dominican Republic is comprised primarily of hard-disk loading and end-user piracy. With hard-disk loading, Dominican resellers load unlicensed software onto computer hardware and sell the package to an end user. In some cases, the software is represented as legitimate and the purchasers may be unaware that they are buying illegal software. In other cases, the purchasers are complicit in the piracy. End-user piracy rates remain high among Dominican businesses of all sizes, from small family businesses to large, prosperous financial institutions and industrial concerns. In addition, investigations by the Business Software Alliance

\footnote{The 1986 copyright law contained several major deficiencies. For example, computer programs should be expressly protected as “literary works.” Terms of protection (particularly for cinematographic works and photographs) were only 30 years, far less than TRIPS standards. Rental rights for producers of sound recordings were not explicitly found. Overbroad exceptions to protection needed to be significantly narrowed to meet the TRIPS Article 13 test, especially for computer programs. Translation and reproduction licenses for foreign works did not meet the terms of the Berne Appendix (and therefore were also TRIPS-incompatible). Full protection for pre-existing works, sound recordings and performances needed to be clearly ensured, in accordance with TRIPS. Also missing from the Dominican law were explicit procedures for copyright owners to obtain and conduct civil \textit{ex parte} searches, also required by TRIPS. Finally, the statutory level of criminal penalties was far too low to serve as a deterrent.}
(BSA) have revealed some instances of counterfeiting in the Dominican Republic. Working with Dominican prosecutors in the Fiscaliá offices, BSA has achieved two convictions of pirates for counterfeiting software. Other prosecutions for counterfeiting are working their way through the Dominican courts. BSA is watching this trend closely, but it does not appear to be the focus of Dominican piracy at this time. Preliminary estimated losses due to business software piracy in 2000 are $12.3 million, with a 70% piracy level.

Piracy of sound recordings and music in the Dominican Republic remains rampant, with the estimated piracy rate for audiocassettes at 80%. While counterfeit audiocassette piracy continues to dominate the market, there has been a marked increase in CD piracy, which is now estimated at 25% and higher piracy rates reported in the tourist areas of Puerto Plata and Sosua. The piracy format of choice is CD-R (recordable CDs) and there has been a noticeable increase in the number of smaller "domestic" CD-R factories. There are still large quantities of counterfeit cassettes openly sold by street vendors or available in kiosks throughout the commercial areas of major cities in the DR. It remains government policy that street vendor sweeps in Santo Domingo, Santiago, and Puerto Plata are a low priority. Pirate audiocassettes cost between US$1.00-2.00 per unit and counterfeit CDs/CD-Rs can range in price from US $8.00-12.00. Approximately 25% of unauthorized CD/CD-R product can be traced back to "off-shore" sources, including pirate CD-R product manufactured in New York and molded CDs (with the SID Code) replicated in Europe. Known U.S. sources of molded CDs has been, for all practical purposes, eliminated through recent RIAA demand litigation against Wings, Media Group, and Eva Tone CD plants facilities. Estimated trade losses due to audio piracy are $2 million in 2000.

The audiovisual industry reports that cable and broadcast piracy continue to be its primary copyright piracy problems in the Dominican Republic during 2000. In fact, the incidence of television piracy has apparently increased since the new administration took office. This increase may be directly related to the apparent disregard of copyright by a large television station related to an important member of the political party currently in power. Obviously, the conduct set by those in power will be copied by others in the television industry. It is disappointing that the political party in power does not care to set higher standards of respect for Dominican copyright law.

It is encouraging, however, to note the action taken at the end of 2000 by ONDA and INDOTEL against television piracy. A joint public announcement requesting compliance with copyright law was followed up by at least three inspections of television stations. One of those stations was cited and agreed in writing to begin a program of compliance with copyright requirements. In addition, INDOTEL has begun the long-ignored need for licensing television transmission and has included copyright compliance as an element to be examined in granting licenses. Nevertheless, the increased incidence of television piracy, apparently due to the conduct of a major station related to a member of the political party in power, threatens to dilute the new attitude of ONDA and INDOTEL towards compliance in the television industry as television stations begin to see an uneven application of the law and a tolerated model of conduct that goes against Dominican law. As a result, the audiovisual industry is forced to reserve judgment about the ultimate effectiveness of the ONDA-INDOTEL compliance effort.

Unfortunately, the continued high incidence of television piracy continues to distort the entire audiovisual market, adversely affecting legitimate business opportunities from theatrical exhibition, through home video, to broadcast television. This adverse impact affects even the positive effort made against piracy. For example, ONDA and MPA have made continued efforts against video piracy with a measurable degree of success in reducing the incidence of video piracy.
As a result, the overall rate in audiovisual piracy has actually gone down. But, because of the continued incidence of television piracy, there has been no real market improvement in the video market, which suffers from television stations transmitting, without authorization, movies that have yet to reach video stores. Thus, the Dominican Republic market remains weakened by a rate of video piracy of approximately 60%. Annual losses to the U.S. motion picture industry due to audiovisual piracy in the Dominican Republic are estimated to be over $2 million in 2000.

For the book publishing industry, problems in the Dominican Republic primarily involve illegal photocopying of English as a Second Language (ESL) textbooks. Commercial piracy is diminishing as legitimate distributors increase. Estimated trade losses to the publishing industry remain at approximately $1 million in 2000.

IDSA reports that its preliminary estimated trade losses due to piracy of entertainment software (including videogame CDs and cartridges, personal computer CDs, and multimedia products) in the Dominican Republic are $6.0 million for 2000.

COPYRIGHT ENFORCEMENT IN THE DOMINICAN REPUBLIC


The U.S. copyright industries have been concerned, over the years and throughout the course of the GSP review to date, that there has not been a comprehensive, sustained government response to copyright enforcement in the Dominican Republic. A new government took charge in August 2000, and new officials have been placed throughout the government. The goods news is that the 2000 Copyright Law now provides more tools for Dominican Republic agencies and rightholders to take more concrete action against piracy. The time is ripe for concrete action.

Since the promulgation of the copyright law, a new interagency commission has been formed to coordinate all the agencies dealing with intellectual property issues, including ONDA, foreign affairs, customs, public health and others. This commission is awaiting action from the Office of the President for its official creation. While this commission could be an important information-sharing forum for different government agencies, the primary focus must be on supporting the concrete enforcement efforts of ONDA, the fiscalias, and others.

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8 IIPA and its members have seen other blue-ribbon interagency committees before and they did not tackle the piracy problem. For example, a special commission in the Ministry of Industry and Commerce and an interagency anti-piracy group (COPAL) was formed in March 1997 in the public prosecutor’s office to process complaints, seize illegal materials and close businesses involved in piratical activity against all forms of piracy. However, COPAL never become operational. Then in September 1999, another commission was created, led by the Ministry of Industry and Commerce and including the legal counsel to the President, the attorney general, the head prosecutor of the federal district, INDOTEL, ONDA, the National Commission of Public Spectacles and Radio, and the director of the Intellectual Property Office of the Ministry of Industry and Commerce. The mission of this group was to intensify efforts by the government to combat piracy. As IIPA has reported before, the copyright industries have acknowledged the good intent behind these agencies but we have been disappointed in the ability of these groups to achieve concrete results in reducing piracy on the ground in the Dominican Republic.
The key to real progress in the Dominican Republic is a consistent, comprehensive government response to piracy. Each branch of government has an important role to play. From the executive branch, ONDA must be given the necessary support and resources to continue its aggressive campaign of investigations and raids against pirates, in an environment that is free from political pressure. The Fiscalía must continue to work with ONDA and others to prosecute pirates.

The Office of the President can facilitate coordination between ONDA, the Fiscalía, and the police, and can continue to make the fight against piracy a top public priority, as President Mejía did in his inaugural address. The Congress must continue to protect intellectual property rights through legislative action. Dominican judges at the trial and appellate levels must be properly prepared to give the copyright law full effect. In particular, the judges must be willing to move swiftly to grant petitions for civil copyright claims, as provided under the new copyright law.

It is an encouraging sign that ONDA is still located under the Ministry of Culture. While there was discussion in 2000 about moving ONDA to the Ministry of Industry and Commerce, ONDA is operating efficiently now in its present location, in an environment relatively free of political pressure. One concrete step toward improvement of enforcement actions in the Dominican Republic would be to foster closer coordination between ONDA and the police. IIPA understand that ONDA has requested additional support from the police in its investigations of piracy, and also in providing security for ONDA personnel when they perform inspections and raids on suspected pirates. In both of these areas, police support would allow ONDA to operate more effectively. The police could assist ONDA with their inspections of the leads and tips ONDA receives about suspected pirates operating in the DR. In addition, ONDA inspectors have faced difficult situations in some of their inspections of suspected pirates. Police escorts would help ensure that ONDA personnel would be safe at all times while conducting inspections.

ONDA’s Administrative Actions in 2000 Reflect Much Improvement Toward Anti-Piracy Enforcement in the Dominican Republic

In late 2000, ONDA reported that it has conducted numerous inspections, some of which have been followed by seizures of pirated products and arrests by police (for example, between August 29 and October 31, 2000, ONDA conducted 82 inspections). In at least one case, an ONDA inspection of a suspected book counterfeiter uncovered a ring of book, currency and passport counterfeiters. ONDA reacted quickly to this situation by carrying out an administrative ex officio action that sent the counterfeiters to prison. ONDA reported that its budget resources were exhausted before the end of 2000. ONDA does need adequate resources to enforce its responsibilities under the copyright law. ONDA has also prepared a work plan for its near-term objectives in setting up its offices and tasking.

Despite these challenges, ONDA is the primary success story of the Mejía government’s response to piracy in the Dominican Republic. When the government took office in August, President Mejía appointed Mariel Leon as director of ONDA, and ever since then ONDA has carried out an aggressive campaign of inspections, raids and seizures against pirates. In the case of actions against software pirates, ONDA conducts inspections and routinely seizes computers that are found to contain illegal software. These computers become evidence against the pirates in criminal prosecutions. In some cases, ONDA follows up its initial inspection with raids.
In cases where illegal software is found, ONDA refers this evidence to the Fiscalía for criminal prosecution (see discussion of criminal enforcement efforts below).

The recording industry also reports that the positive change in enforcement since the new administration took office is due to ONDA and its efforts. Since the passage of the new copyright law, ONDA itself has initiated one inspection and three seizures without filed complaints (denuncias). RIAA, at the request of ONDA, provided training to their representatives and hope to expand this training to Customs and the DA's office. RIAA also provided a CD Piracy Plant Awareness seminar to OMAR Systems, the only optical disc replication facility in the country.

In 2000, ONDA took action against 50 video stores and three television stations with good results. However, it became apparent that ONDA did not have the resources to adequately follow through on subsequent inspections and citations. ONDA has moved to new and larger offices within the Ministry of Culture, with the promise of increased resources. It is not clear if those resources will be used for enforcement. The amount of resources needed for inspection, analysis, citation and decision-making action against television piracy is greater than that needed for video store action. The three actions ONDA took against television piracy barely began to address the problem. It is the audiovisual industry’s opinion that ONDA, in order to be effective, requires additional enforcement resources, independence of action and increased cooperation from prosecutors for criminal case follow-up to ONDA actions.

Criminal Enforcement in 2000 Was Inconsistent Across the Copyright Sectors. More Work Needs to be Done to Give Full Effect to the New Copyright Law, Including the Application of Deterrent Administrative Penalties, in Order to Improve this Situation in 2001.

The new copyright law contains much higher levels of criminal penalties for copyright infringement. The challenge, however, is for the government officials of the Dominican Republic to apply, in practice, its criminal procedures and remedies at levels sufficient to deter piracy.

Business software industry adopted a new criminal enforcement strategy which has had positive results since the copyright law entered effect

BSA and its member companies continued to undertake criminal actions in 2000. However, while in the past BSA had worked directly with the fiscalía to conduct raids and file criminal actions against pirates, BSA has been able to leverage ONDA’s new inspection powers to increase the pace of inspections and criminal prosecutions.

Since passage of the new copyright law, which gave new inspection authority to ONDA, BSA has worked with ONDA to provide their inspectors with leads on suspected pirates. After conducting their own investigations, ONDA carries out inspections where appropriate. Where ONDA finds illegal software, ONDA confiscates the software and any computers loaded with illegal software. ONDA then prepares a report and refers the evidence of piracy to the fiscalía for prosecution. The new fiscalía who took office after the change in government in August has been cooperating with the business software industry representatives on its actions. These referrals have resulted in the fiscalía filing between 30 and 40 cases against software pirates in the second half of 2000. BSA has attached pendant civil claims to about 10 of the most egregious cases, and these are
currently working their way through the Dominican courts. BSA understands that despite the large volume of files coming over from ONDA, the fiscalía is up to date on filing criminal actions resulting from these ONDA inspections.

The Dominican Republic’s old copyright law provided for criminal but not civil ex parte inspections (see discussion below). At that time the procedures for criminal ex parte inspections were undermined by antiquated procedures, so computer software rightholders were forced to rely on the trademark law to initiate criminal actions. However, with the advent of the new copyright law, these obstacles have become largely a thing of the past. BSA looks forward to the time when these cases reach trial, so that it can fully assess how the courts will give full effect to the new penalty provisions in the copyright law.

In July 1998, the government established a new Intellectual Property Department within the District Attorney’s Office for Santo Domingo, but at first it did not perform up to expectations. However, the tide seemed to turn in early 1999 with the hiring of a new assistant district attorney to head this office. After a flurry of ex officio actions against software pirates in July and August of 1999, these actions slowed down to a steady pace. During 1999 the D.A. brought more than 30 ex officio actions against Dominican software pirates. As discussed above, the new D.A., Aristy Caraballo, and the new head of the IP Department, Carmen Chevalier — both Mejia appointees — have continued to cooperate effectively with ONDA and the BSA. However, the IP Department currently lacks the funds and personnel to run the strongest possible anti-piracy program. The BSA is hopeful that the DA’s ongoing commitment to anti-piracy reflects a new long-term policy for copyright protection in Santo Domingo, and that the Dominican Government will continue to support a strong enforcement presence in Santo Domingo.

In September 2000, BSA presented a day-long seminar to Santo Domingo fiscalía personnel on the new copyright law, including practical tips for enforcing the law. In particular, the fiscalía have been very effective in working with ONDA to leverage ONDA’s new inspection powers into criminal prosecutions (as discussed in more detail below). BSA anticipates that this coordination will continue, and hopefully by mid-2001 some of the ONDA cases will begin to reach trial, so that we can more fully assess how effective this approach has been.

**Recording industry criminal actions in 2000 resulted in some seizures but no effective prosecutions**

The recording industry reports that its principal problem in the Dominican Republic at this time is the lack of criminal prosecution. There are three major adverse effects of no criminal prosecutorial follow-up in the Dominican Republic. The first is many of the manufacturing operations have gone "underground" making investigations more difficult, more complex, and longer. The second involves the lack of prosecution which has removed any deterrent to pirates from continuing their infringing activities. And finally, if the system were working, suspects facing possible jail time might serves as valuable sources of information by providing important information about ongoing piracy operations. Not faced with this possibility, the opportunity to obtain needed information from convicted pirates is lost.

The recording industry reports that there were a total of nine raids in 2000, resulting in the confiscation of 23,434 counterfeit/pirate cassettes and 2,758 pirate/counterfeit CDs/CD-Rs. These actions included raids against two illegal audiocassette manufacturing facilities and one pirate CD-R operation. RIAA surveyed approximately 35 tourist locations in the DR in May 2000 and found
that the majority of the locations were retailing pirate/counterfeit CDs and CD-Rs. RIAA, through its local attorney, sent out two dozen cease and desist letters; there was a compliance rate of approximately 50%. There has been no movement in criminal prosecutions whatsoever, with at least 12 cases pending prosecution dating back to December 1999 in the three jurisdictions in the Dominican Republic. Additionally, local police authorities have exhibited no interest in sound recording piracy referring it, instead, to the local District Attorney’s office. In fact, recent investigations by the recording industry have determined that 8 of the 12 companies/entities/individuals previously raided by the criminal authorities remain in the piracy business at the same locations where the original actions took place.

**No progress on criminal actions for audiovisual piracy has been made**

In 1999, MPA reported that public prosecutors in Santo Domingo and Santiago had increased their cooperation to fight audiovisual piracy and that their main concern was the lack of resources assigned to anti-piracy. However, in 2000 that interest in prosecuting piracy cases has apparently been lost with the new administration and the cases against television piracy being developed by former prosecutors have apparently been dropped. It is not certain what will happen to the under-resourced IP office in the Santo Domingo prosecutor (it was run by a single attorney and was overwhelmed by trademark cases). The Santiago office had no assigned resources for piracy and there appears to be no interest in anti-piracy efforts. Overall, there is a clear step backwards in applying the criminal law against copyright violation, specifically against television piracy. The audiovisual industry has not seen a serious attempt to coordinate copyright enforcement actions beyond the informal, yet effective, cooperation between ONDA and INDOTEL. MPA is particularly concerned with the obvious lack of cooperation from police and prosecutors.

**The Lack of a Civil Ex Parte Search Remedy in the Dominican Republic Has Been Corrected by the New Copyright Law and Must be Implemented Properly and Promptly. In Addition, Civil Damages Imposed Must Be Adequate to Compensate for the Injury the Rightsholder Has Suffered.**

The new 2000 copyright law corrects a major omission in the former copyright law. The 2000 law provides expressly for civil ex parte inspections, as required by the TRIPS Agreement (Article 50). The omission of this remedy had severely harmed the ability of business software owners to protect their rights from unauthorized uses. While BSA welcomes the ability to petition the courts for civil ex parte actions, thus far the courts have been somewhat slow to grant such a petition. BSA has filed one civil case in November 2000, and as of the date of this report the court has not acted on the request. Clearly, in order to give full effect to this part of the new copyright law, the courts will need to move more swiftly to consider these petitions.

Historically, civil damages awarded under the 1986 copyright law were completely inadequate, both as a statutory matter and as applied in practice, to compensate the copyright owner. Now that the new copyright law has been adopted, the copyright industries look for the courts of the Dominican Republic to apply its laws afford civil remedies, including damages, at levels “adequate to compensation for the injury the rightholder has suffered,” as required by TRIPS Article 45.1.
The Cost of Judicial Bonds Remained High in Business Software Cases Brought Before the New Copyright Law Prohibited Such Onerous and Discriminatory Bonds. This Problem is Expected to Disappear in 2001.

The new 2000 copyright law corrects a major problem in prior Dominican law and practice. The 2000 law expressly prohibits judges from imposing onerous bonds in cases brought by foreign plaintiffs.

Until recently, the imposition of these onerous bonds made judicial enforcement of BSA members' copyrights virtually impossible. Under the Dominican civil code, only non-Dominicans could be required to pay bonds for instituting suits in Dominican courts. In case after case under the old law, BSA claims for alleged software piracy were effectively stalemated by the imposition of unreasonably large bonds, often many times larger than the total monetary damages sought in the case. The magnitude and discriminatory nature of these bonds appeared to violate the Dominican Republic's current TRIPS national treatment obligation, which is not subject to transition (TRIPS Article 3 provides that "Each Member shall accord to the nationals of other Members treatment no less favorable than it accords to its own nationals with regard to the protection of intellectual property. . . ."). Clearly this discriminatory treatment conflicted with the government's current TRIPS Article 41(2) obligation, requiring that procedures concerning the enforcement of intellectual property rights be “fair and equitable,” not “unnecessarily complicated or costly.”

However, the new law has had the desired impact in this area, and has relieved foreign rightsholders of this burden when protecting their rights in Dominican courts. BSA has successfully argued against the imposition of bonds in four cases since the copyright law was passed. This is a major improvement in the practical ability of copyright rightsholders to defend their ownership rights in Dominican courts.

Judicial Action Has Been a Historical Weak Element, But Signs Appear Positive for Improvement in Both Civil and Criminal Cases.

An effective judicial system is a necessary ingredient in providing adequate and effective copyright protection. Few copyright infringement cases have made it through the Dominican judicial system. However, since July 2000, BSA has received favorable judgments in three cases against pirates that had been filed under the old copyright law. In two cases decided in December 2000, Atlantica and Asfaltos Dominicanos, the judges entered judgments for significant fines and damages plus jail time. The fines and damages totalled U.S.$12,350 for Atlantica and U.S.$30,722 for Asfaltos Dominicanos. In both cases, the judge ordered 3 months jail time. Atlantica and Asfaltos Dominicanos were both end-user cases. In a third case, Garibaldi, the judge initially gave Garibaldi fines and damages plus jail time, but in the amended judgment dropped the jail time. Garibaldi was convicted of counterfeiting software. All three cases are on appeal.

As mentioned above, the courts have been somewhat slow to grant petitions for civil ex parte actions as provided in the new copyright law. However, BSA is working with the Supreme Court and their judicial continuing legal educational program to present a seminar on the new copyright law to all Dominican judges. BSA has been asked to present this seminar in April 2001.
Government Procurement Law

Law 146-00 was passed on December 11, 2000, but has not yet been enacted. This law prohibits the Dominican government from acquiring imported goods and services when using funds from the government’s budget. This law will limit the capacity of foreign companies to sell to the Dominican government. Apparently, this prohibition will only apply if there is a “Similar National—Local Product.” While the impact of this law is hard to predict, given the ease of creating local Dominican versions of software programs, this law may pose a significant for BSA member companies in the future.

Duties and Taxes on Computer Software

In contrast to the protectionist National—Local law passed the same day, the government of the Dominican Republic passed Law 147-00 on December 11, 2000. Article 13-1 of the law states: “There will not be import duties for: the importation of personal computers, and their parts, components, spare parts, programs and other accessories of the exclusive use of the computers ...” This does not appear to include videogames or DVDs, unless a software program came in a DVD format.

Tax and Duties on Recorded Music

RIAA reported in IIPA’s 1999 GSP/CBI petition that the Dominican government placed inordinately high import duties and excise taxes on sound recordings, which, in effect, served to shield domestic producers of piratical product by making legitimate imported product disproportionately more expensive. Since the filing of that petition, the recording industry learned in early 2000 that while the import duties and taxes applicable to sound recordings remain fairly high, the official valuations for prerecorded musical media (e.g., cassettes and compact discs) have been reduced. The import duties and other applicable taxes have consequently diminished to acceptable levels. Because the imposition of these tariffs has in the past resulted in the denial of “equitable and reasonable access to the markets” of the Dominican Republic — one of the discretionary criteria under the GSP and CBI programs — the recording industry will continue to monitor duties and taxes applicable to sound recordings.

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9 It is the recording industry’s understanding that imported sound recordings are subject to a 30% import duty on the CIF value of the goods, plus an excise tax of 15% on the aggregate of the CIF value plus the import duty, plus an 8% tax on the aggregate of the CIF value, plus the import tariff, plus the excise tax. In addition, a 5% currency exchange fee is payable on the amount of U.S. dollars (or other foreign currency) acquired through the exchange system operated by local commercial banks in order to pay for imported items.
EXECUTIVE SUMMARY

Given the serious defects in civil and criminal enforcement and the legislature's efforts to eliminate criminal enforcement altogether, IIPA recommends that USTR place El Salvador on the Special 301 Watch List this year.

In November 2000, USTR completed a Special 301 out-of-cycle review of El Salvador to assess that government's efforts to improve enforcement procedures and promote the use of authorized software in all government ministries. At that time, the business software industry reported that progress was being made to work with Salvadoran criminal authorities to bring software anti-piracy actions. USTR acknowledged this development and noted, "Nonetheless, software piracy in El Salvador remains a serious problem, and it is vital that El Salvador maintain this new momentum and reduce current levels of piracy."

Despite increased raid activity by law enforcement authorities during the last six months, piracy levels remain high. For the business software industry, the estimated piracy rate in El Salvador is 82%, one of the highest in Latin America. To make matters worse, a bill is currently pending before the Salvadoran Legislative Assembly which would effectively eliminate criminal enforcement of copyright infringement altogether. This bill would leave copyright holders without any avenue whatsoever to enforce their rights. Such denial of criminal and civil remedies for copyright enforcement would conflict with El Salvador's multilateral and bilateral obligations.

Because of evidentiary burdens and delays in the civil system, rightsholders basically have had to rely on the Salvadoran criminal process to enforce their rights. Prosecutors and the courts do not move forward on copyright cases; there simply is no deterrence in the system. Rightsholders have to fight to prove their standing in some criminal cases. The Salvadoran government should amend its civil and criminal enforcement procedures to comply fully with the WTO TRIPS Agreement, and amend its copyright law to implement the requirements of the WIPO treaties. Until these reforms are made, both copyright owners and Salvadoran authorities will lack the protections and remedies necessary to combat the extremely high levels of piracy in El Salvador.

ESTIMATED TRADE LOSSES DUE TO PIRACY  
(in millions of U.S. dollars)  
and LEVELS OF PIRACY:  1999 - 2000

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In October 2000, the U.S. Senate approved the Bilateral Investment Treaty with El Salvador, which was signed in March 1999. At the time of the BIT negotiation, El Salvador was required to have in place TRIPS-level protection, both in terms of its substantive intellectual property law requirements plus the enforcement obligations by the end of April 1999.

El Salvador is a beneficiary developing country under the Generalized System of Preferences (GSP) and Caribbean Basin Economic Recovery Act (CBERA) trade programs; both these programs contain criteria requiring adequate and effective protection for U.S. copyright owners. Recently, El Salvador also became an eligible beneficiary country of the U.S.-Caribbean Basin Trade Partnership Act (CBTPA). To maintain these CBTPA benefits, El Salvador must meet all the CBERA criteria, as well as the CBTPA’s explicit TRIPS-or-greater criteria. As a WTO member, El Salvador also is currently obligated to meet both its substantive copyright obligations as well as the enforcement text of the TRIPS Agreement.

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2 BSA estimates for 2000 are preliminary.

3 IDSA estimates for 2000 are preliminary.

4 In 1999, $3.1 million of Salvadoran imports to the United States benefited from the GSP program, accounting for less than 1% of its total imports to the U.S. An additional $59.1 million worth of goods entered the United States under the CBI in 1999, representing 3.7% of its total imports to the U.S. For the first 11 months of 2000, $19.9 million of Salvadoran goods entered the U.S. under the duty-free GSP code, representing a 276.6% increase over the same time period last year. Another $41.9 million of goods entered the U.S. under the CBI.

Much more work needs to be done by El Salvador to meet its TRIPS and bilateral obligations, especially with respect to improving effective enforcement within the country and at its borders.

COPYRIGHT PIRACY IN EL SALVADOR

Business software piracy by both resellers and end users is rampant in El Salvador. The estimated level of piracy of U.S. business applications software in El Salvador in 2000 was 82%, one of the highest piracy rates in Latin America. Estimated trade losses in El Salvador due to business software piracy were $13.5 million.

The sound recording and music industry reports estimated trade losses due to piracy of $5.0 million, with a 40% level of piracy in 2000.

The home video market in El Salvador is experiencing a sharp decrease in piracy, now considered to be between 40% and 50%. The pirate video clubs used to announce the new releases in the media, but now that Blockbuster is present in the market with four stores, it is Blockbuster who announces its releases every week with a full-color page. Annual losses to the U.S. motion picture industry due to audiovisual piracy in El Salvador are estimated to be $2 million in 2000.

The book publishing industry reports book piracy exists in the country, and is particularly noticed at the National University. Estimated losses due to book piracy are placed at $1.0 million in 2000.

The estimated piracy level of entertainment software (including videogame CD-ROMs and cartridges, personal computer CD-ROMs and multimedia entertainment products) in El Salvador is 50%, causing an estimated $100,000 in trade losses due to piracy in 2000.

COPYRIGHT ENFORCEMENT IN EL SALVADOR

Inadequate and Ineffective Criminal Enforcement

Because of onerous evidentiary requirements and excessive judicial delays, business software publishers are denied an effective civil enforcement mechanism to combat piracy. As a result, software publishers are completely dependent upon criminal enforcement by the Fiscalía to protect their rights. Up until May 2000, the Fiscalía refused to conduct almost all of the raids against software pirates requested by BSA, even though a special IP unit was created in 1997 to enforce intellectual property rights. However, during the second half of 2000 the Fiscalía became far more aggressive in combating piracy, conducting 14 criminal actions at BSA’s request, including five reseller raids and nine end-user raids. In El Salvador, most of BSA’s criminal cases have been settled out of court.

Although BSA applauds the recent increase in prosecutorial activity, there are still several problems that need to be addressed to achieve TRIPS compliance in El Salvador. Under Article 41 of TRIPS, procedures for the enforcement of intellectual property rights may not be
unnecessarily complicated or entail unreasonable time limits or unwarranted delays. Moreover, enforcement procedures must be effective and constitute a deterrent to further infringements.

El Salvador’s criminal enforcement procedures fail to comply with these TRIPS requirements. Despite increased raid activity in El Salvador, the courts have thus far refused to convict or punish software pirates; thus, criminal enforcement provides no meaningful deterrent to piracy. For example, in January 2000, a criminal complaint was filed by BSA against a reseller who sold pirated software to an educational institution. After repeated requests by BSA, the Fiscalía raided the defendant’s place of business in April 2000 and found evidence of software piracy. However, the judge provisionally found in favor of the defendant, claiming that the software publisher (a leading producer of widely used business software) had failed to provide sufficient evidence that it owned the copyright in the relevant software program. The court provisionally acquitted the defendant and ordered the software publisher to submit additional evidence of copyright ownership. Under Salvadoran 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.6 In compliance with the court’s request, the software publisher submitted sufficient evidence to merit a presumption of ownership under Salvadoran law; nevertheless, the court rejected the evidence, demanding further proof of ownership. The court’s imposition of onerous and “unnecessarily complicated” evidentiary requirements illustrates the existing defects in the Salvadoran legal system.

In addition, Salvadoran law makes it difficult for U.S. copyright owners to obtain the legal standing necessary to file a criminal complaint or provide evidence in criminal proceedings. In particular, although Salvadoran law permits a U.S. copyright owner to assist the Fiscalía in prosecuting a criminal copyright offense, it requires the copyright owner to provide its legal representative with a special power of attorney for that criminal case. Based on this requirement, the Fiscalía has, in the past, refused to conduct criminal seizures requested by BSA’s counsel, arguing that counsel’s general power of attorney is inadequate, even though it clearly empowers Salvadoran counsel to represent BSA in all criminal infringement actions. For example, in December 1999, BSA filed a criminal complaint against a pirate reseller, providing direct evidence that the reseller had sold an investigator a computer with illegally installed software. Despite this evidence, the Fiscalía recommended that the judge deny BSA’s request for an investigation of this target by law enforcement officials, arguing that BSA was not an interested party in the proceedings because it had failed to provide counsel with a special power of attorney for this particular case. The court decided in favor of the Fiscalía and was affirmed on appeal. The legal requirement of a special power of attorney for each criminal case results in significant delays and costs and plainly constitutes the kind of unnecessary complication prohibited under TRIPS.

BSA also has encountered situations where the procedures and actions of the Fiscalía have not been “fair and equitable” pursuant to TRIPS Article 42. In August 1999, BSA filed a complaint with the Fiscalía against a company that had refused to legalize its use of software despite repeated BSA warnings. The Fiscalía refused to grant BSA’s ex parte seizure request and instead notified the defendant of the seizure request. Such notification violates TRIPS Article 50. This action, in effect, forced BSA to negotiate an “agreement” with the defendant. The Fiscalía’s actions in this case clearly denied BSA effective enforcement against an admitted pirate. However, since the appointment in mid-2000 of Ms. Benfós de Tablas as head of the Fiscalía’s IP crimes unit, BSA has not experienced these types of problems.

6Ley de Fomento y Protección de la Propiedad Intelectual, Art. 32 in fine, and Berne Convention Art. 15(1).
Turning towards legislative threats, the Salvadoran legislature is considering a bill that would virtually eliminate criminal enforcement against piracy. The bill was introduced in September 1999 by three members of the Legislative Assembly in an effort to prevent BSA from initiating criminal raids against pirates. The bill would amend existing copyright law to require that copyright owners exhaust all civil remedies and obtain an initial finding in their favor before initiating any criminal proceedings. Given the inadequacy of civil enforcement under Salvadoran law (as described below) and the significant time required to obtain a civil finding (at least one year), this bill would effectively prevent any criminal enforcement against copyright infringement and leave copyright owners without any avenue whatsoever to enforce their rights. If enacted, this bill would clearly violate El Salvador’s current obligations under TRIPS, as well as the GSP, CBI and CBTPA trade programs. BSA has been advised by local counsel that it is “unlikely” that this bill will move forward, although the legislation does remain pending in the Economic Commission of the Legislature.

**Inadequate Civil Enforcement**

Because criminal enforcement is not always feasible or appropriate, BSA member companies often utilize civil enforcement procedures -- particularly civil ex parte search authority -- to combat piracy. In El Salvador, however, software publishers have great difficulty obtaining civil ex parte search authority because of onerous evidentiary requirements. Moreover, the civil law fails to impose any time limits on the process for reviewing and approving civil seizure requests. \(^7\) BSA has found that, on average, it takes 45 days to obtain civil seizure authority in El Salvador, by which time news of the raid may have leaked to the defendant or BSA’s evidence may have grown stale. This unwarranted delay, which is far longer than the average authorization process in other countries in Latin America, violates Article 41 of TRIPS, which requires that remedies for copyright infringement be “expeditious.” Due to these procedural obstacles, BSA conducted only one civil action in El Salvador during 2000.

In addition to unacceptable delays in the court process described above, BSA encounters the problem of the imposition of very high bond requirements. Bonds imposed before a court orders a search and seizure against a suspected pirate have been as high as $20,000. Such bonds are an obstacle to enforcement, in violation of TRIPS Articles 41.1 and 41.2 (remedies prevent effective action against infringement, are unnecessarily costly, and entail unreasonable delays), Article 53 (high bonds requirements are unreasonable deterrence).

**Inadequate Civil Damages for Copyright Infringement**

The Salvadoran copyright law permits only direct economic damages for civil copyright violations, and thus prohibits punitive, consequential or statutory damages. Without the threat of significant damages, the copyright law fails to provide an adequate deterrent to piracy, as required by TRIPS Articles 41 and 45.

In contrast, other countries have legislated a system of statutory damages which provide for an effective deterrent mechanism to combat piracy. In Brazil, for instance, the unauthorized reproduction or publication of a protected work may be subject to statutory damages.

\(^7\)In 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.
equivalent to up to 3,000 times the retail value of the protected work.\textsuperscript{8} The same solution has been adopted by the United States (up to a maximum of $30,000 per protected work).\textsuperscript{9} Bolivia is also considering such a solution in a bill prepared by the Ministry of Justice (between three to five times the retail value of the protected work).\textsuperscript{10}

\section*{COPYRIGHT LAW AND RELATED ISSUES}

\subsection*{Copyright Law of 1993}

Copyright protection in El Salvador is based on its 1993 copyright law. As previously discussed, the two critical deficiencies with this law which result in little real copyright protection through civil channels in El Salvador are the lack of statutory damages and the absence of deadlines for government officials who undertake the various steps of authorizing a civil inspection of a suspected pirate. Both deficiencies are in violation of TRIPS Article 41.1, which requires that remedies for copyright infringement be “expeditious” and provide an effective deterrent to piracy.

\subsection*{Copyright Bill of September 1999}

On September 27, 1999, three members of the Legislative Assembly submitted a bill that would virtually eliminate criminal enforcement of copyrights. 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 favor\textsuperscript{11} 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 existing deficiencies in civil enforcement, this bill would leave copyright holders without any avenue whatsoever to enforce their rights. It goes without saying that this bill, if enacted, would clearly violate TRIPS. Copyright protection in El Salvador must be increased, not decreased, in order for El Salvador to satisfy its multilateral and bilateral obligations.

\subsection*{Implementation of the WIPO Treaties}

Internet piracy is increasingly prevalent throughout Latin America and a growing threat to software publishers and other copyright owners. El Salvador already has been commended for being the first country in the Americas to deposit its instruments of accession to the new “digital” treaties of the World Intellectual Property Organization: the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonogram Treaty (WPPT). These treaties, like all international treaties, are considered self-executing under Salvadoran law. However, as a practical matter, specific implementation in domestic law is needed to provide explicit

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{8} Ley de Derechos de Autor, No. 9610, Article 103.
\item \textsuperscript{9} U.S. Copyright Act, 17 U.S.C § 504 (c).
\item \textsuperscript{10} Anteproyecto de Código de Propiedad Intelectual, Art. 175 I.
\item \textsuperscript{11} Such 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.
\end{itemize}
\end{footnotesize}
guidance to the public and the judiciary on the specific obligations contained in these treaties. The government of El Salvador has yet to amend its copyright legislation to implement fully the obligations of both WIPO Treaties. As a result, copyright owners are not assured adequate protection of their rights in the digital environment.

**Industry-proposed Amendments to the 1993 Copyright Law**

The business software industry has been working with the Ministry of Economy to amend the Copyright Law of 1993. In December 2000, BSA submitted a proposal to the Ministry of Economy which aimed to: (1) implement the WIPO treaties under domestic law providing for a copyright owner’s exclusive right of “making available” its works (or phonograms) to the public for on-demand access; (2) set a deadline on which civil magistrates must issue search and seizure orders; and (3) establish statutory damages in cases of copyright infringement. BSA is not aware of any developments in the Ministry of Economy to pursue the proposed changes.

To address the defects identified in the Salvadoran legal system and promote stronger copyright protection and enforcement, IIPA and its members continue to encourage the Salvadoran government to adopt the following reforms and improvements:

- Amend the Ley de Fomento y Protección de la Propiedad Intelectual (civil law) to establish a deadline for judicial action on ex parte seizure requests and lower the evidentiary threshold for obtaining such orders.
- Amend the Ley de Fomento y Protección de la Propiedad Intelectual to permit statutory or punitive damages for piracy.
- Encourage the government to adopt a decree (comparable to the U.S. Executive Order) requiring all government agencies and public institutions to use only legal software.
- Amend the Código Procesal Penal (Criminal Law Proceedings) to allow foreign companies to file complaints and assist the Fiscalía in prosecuting a case without the need for a special power of attorney for every case (i.e., a general power of attorney that authorizes local counsel to act on behalf of the company should be deemed sufficient).
- Encourage the government to reject/terminate the proposed legislation that would eliminate criminal remedies for copyright piracy.
- Encourage the Fiscalía to continue investigating and prosecuting criminal copyright offenses, in cooperation with BSA and other IIPA members.
- Encourage the Salvadoran judiciary to convict pirate resellers and impose sanctions that adequately reflect the seriousness of the offense and deter future acts of piracy.
- Implement a copyright owner’s exclusive right of “making available” its works or phonograms to the public for on-demand access.
EXECUTIVE SUMMARY

The copyright industries continue to confront high piracy levels and inadequate copyright enforcement in Guatemala. Recent legislative reform undercut criminal sanctions and civil remedies for copyright infringement. In September 2000, amendments to the Guatemala copyright law were adopted in Decreto 56-2000, and entered into effect on November 1, 2000. On a positive note, this law reinstated “public” prosecution of copyright crimes; this issue had been at the top of the copyright industries’ agenda for years. The Decreto also implemented certain requirements of the WIPO treaties. Unfortunately, the amendments also seriously weakened existing civil and criminal remedies. Criminal penalties were substantially decreased, and the statutory damages provision was removed entirely.

Unfortunately, the copyright law amendments have done little to improve copyright enforcement in practice in Guatemala. The prosecutors (fiscalías) are overburdened and understaffed; it currently takes at least four weeks to obtain a search and seizure order to raid a suspected copyright infringer. This problem could be resolved with the creation of a Special Prosecutor’s Office for intellectual property crimes; the Guatemalan government has until November 1, 2001 to create this office. Copyright piracy levels remain high. For example, the level of business software piracy in Guatemala is 79%, one of the highest in Latin America. In sum, Guatemala still has much work to do to meet its multilateral and bilateral intellectual property rights obligations. IIPA recommends that USTR place Guatemala on the Special 301 Watch List.

ESTIMATED TRADE LOSSES DUE TO PIRACY
(in millions of U.S. dollars)
and LEVELS OF PIRACY: 1995 - 2000

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<td>0.1</td>
<td>60%</td>
<td>NA</td>
<td>NA</td>
<td>4.0</td>
<td>85%</td>
</tr>
<tr>
<td>Books</td>
<td>2.3</td>
<td>NA</td>
<td>2.5</td>
<td>NA</td>
<td>2.5</td>
<td>NA</td>
</tr>
<tr>
<td>TOTALS</td>
<td>21.0</td>
<td>NA</td>
<td>21.2</td>
<td>NA</td>
<td>21.5</td>
<td>NA</td>
</tr>
</tbody>
</table>

¹ BSA estimates for 2000 are preliminary.
² IDSA estimates for 2000 are preliminary.
In May 2000, USTR noted these copyright enforcement difficulties in Guatemala, stating: “Piracy, including by government agencies, is widespread, and the Government of Guatemala has failed to take effective enforcement action. The U.S. urges Guatemala to honor its WTO TRIPS Agreement commitments to enforce protection of intellectual property.”

Last year, in order to highlight the copyright industries' dissatisfaction with the 2000 legislation and inadequate enforcement, IIPA filed a petition on August 21, 2000 with the U.S. Trade Representative, requesting President to review the eligibility of Guatemala as a beneficiary developing country under the Generalized System of Preferences (GSP) and Caribbean Basin Economic Recovery Act (CBERA) trade programs for Guatemala’s failure to provide adequate and effective copyright protection for U.S. copyright owners. IIPA also noted at that time that it would be inconsistent for the U.S. government to grant new, additional benefits to Guatemala under the U.S. Caribbean Basin Trade Partnership Act (CBTPA) while conducting an investigation under GSP and CBI for Guatemala’s failure to afford adequate and effective IPR protection to U.S. copyrights. Despite IIPA's requests, CBTPA eligibility to Guatemala was granted and our GSP/CBERA IPR petition was not accepted. The problems IIPA highlighted last fall remain the same in early 2001. As a WTO member, Guatemala is currently obligated to meet both substantive copyright obligations as well as the enforcement text of the TRIPS Agreement.

COPYRIGHT PIRACY IN GUATEMALA

Software piracy by both resellers and end users is widespread in Guatemala. The estimated level of piracy of U.S. business applications software in Guatemala in 2000 was 79%, one of the highest piracy rates in Latin America. As a result of widespread piracy in Guatemala, U.S. copyright owners of business software lost an estimated $12.6 million in 2000. BSA believes that these losses are largely due to the fact that Guatemalan law (as discussed below) fails to establish effective deterrents for infringing acts. Within the last year, the business software industry has worked with the Guatemalan police to conduct raids. However, the police have no

3 Press Release 00-30, Office of the United States Trade Representative, “USTR Releases Super 301, Special 301 and Title VII Reports,” May 1, 2000. Guatemala was kept on the Priority Watch List.


5 In 1999, $14.1 million of Guatemalan imports to the United States benefited from the GSP program, accounting for nearly 1% of its total imports to the U.S., and $285.3 million of Guatemalan goods benefited from the CBI program in 1999, accounting for 12.6% of its imports that year. For the first 11 months of 2000, $28.8 million of Guatemalan goods entered the U.S. under the duty-free GSP code and $224.7 million under the CBI. For further background on Guatemala's appearance on the Special 301 lists, see Appendices D and E of this 2001 Special 301 submission.

proactive role in the actions, but are merely required to be present to comply with criminal due process under Guatemalan law. During 2000, BSA conducted seven raids against end-users and one raid against a reseller. All of these cases were settled out of court.

With respect to motion picture piracy, Guatemala has achieved a minor reduction in cable piracy in 2000. Whereas in 1999, not one of the estimated 250 national cable operators was completely legitimate, many Guatemala City cable operators have now signed license agreements for MPA member company product. Nevertheless, there are still many cases of cable operators retransmitting unauthorized movies or programs. Underreporting of subscribers is a persistent problem, and rural operators still remain outside the legitimate system. Home video piracy continues to dominate the legitimate market, with back-to-back copying accounting for much of the 60% video piracy rate in the market. Unauthorized parallel imports of home videocassettes have increased via couriers importing tapes from the U.S. Annual losses to the U.S. motion picture industry due to audiovisual piracy in Guatemala are estimated to be $2 million in 2000.

Book publishers report that there has been some improvement in the use of pirated books at universities. The availability of low-priced legitimate books through local distributors has improved. There remains a high level of photocopying of copyrighted materials in universities. Estimated losses due to book piracy in Guatemala dropped slightly to $2.3 million in 2000.

Estimated losses due to sound recording and music piracy in Guatemala remained at constant levels in 2000, which were $4.0 million, with a 60% piracy level.

The Interactive Digital Software Association (IDSA) reports that estimated trade losses due to piracy of entertainment software (including videogame CDs and cartridges, personal computer CD-ROMs and multimedia entertainment products) in Guatemala are $140,000 in 2000, with an estimated piracy level of 60%.

COPYRIGHT ENFORCEMENT IN GUATEMALA

The Guatemalan General Prosecutor's office has only 21 prosecutors (fiscales) for the entire country. The Guatemalan judicial system faces internal security issues (e.g., judges being threatened and kidnapped) as well as heavy backlogs of cases. BSA has reported significant delays in the issuance of ex parte searches, as well as breaches of confidentiality, by the Guatemalan judiciary. In particular, court employees have, in some cases, leaked news of ex parte seizure requests to the targets, completely destroying any element of surprise or opportunity to prevent the destruction of evidence.

While these are daunting difficulties, Guatemala is under both bilateral (GSP and CBI) and multilateral (TRIPS) obligations to take actions to respect and protect intellectual property within and at its borders. BSA is encouraged that some of these problems will be addressed once the Special Prosecutor's Office for intellectual property crimes is created as mandated by Decreto 56-2000. The Guatemalan government, however, has shown no progress to-date in creating of this office.
Unwarranted Delays in Criminal Enforcement

The Guatemalan judiciary has been extremely slow in issuing ex parte search orders, in part because only one court – Tribunal No. 12 – has jurisdiction over intellectual property matters. Moreover, judicial delays are further exacerbated by the fact that the government has yet to fill one of the three seats on the court. As a result, obtaining a search and seizure order in Guatemala is a process that may take several weeks, if not months, in criminal copyright infringement cases.

In August 2000, BSA filed a criminal complaint against a reseller who was selling burned CDs to the public. Because the court lacked one of its judges, the search and seizure order could not be issued. On December 14, 2000, a provisional judge was finally assigned to the court. The court, however, refused to issue the search warrant, stating that, under the new copyright law, copyright infringement actions should be commenced at the Fiscalía. BSA argued to the court that the case was filed well before the new law went into effect and, therefore, it should be prosecuted pursuant to the then-existing legal regime. The court rejected BSA’s arguments and informed BSA counsel that it was sending the case to the Fiscalía for further proceedings; however, the court has yet to sign the order sending the case to the Fiscalía. BSA has not been able to conduct the raid against this suspected pirate, and it is very likely that due to leaks, any evidence of piracy may have been destroyed.

On December 22, 2000, BSA refiled 11 criminal complaints against suspected illegal end users and resellers of software. After petitioning the Fiscalía for three weeks to request a search warrant to the Court, the Fiscalía finally sent the request to the Court. These cases are pending in the Court waiting resolution. BSA was assured that the Court’s decision would be issued within two days of filing the petition, but the orders have not been granted.

Lack of Deterrent Criminal Penalties

Under the new law in effect since November 1, 2000, both the minimum and maximum criminal penalties for infringing acts have been substantially reduced. Infringing acts that were subject to prison terms of four to six years and fines of 50,000 to 100,000 Quetzales (approximately US$6,425 to $12,850), are now subject to a term of imprisonment of one to four years and fines of 1,000 to 500,000 Quetzales (about $128 to $64,265). Lowering the minimal level of criminal fines sends the wrong message to the Guatemalan public and to the judiciary about the importance of protecting copyrights for unauthorized exploitation. Importantly, this does not satisfy the TRIPS Article 61 standard of providing for deterrent “criminal procedures and penalties to be applied” in cases of commercial piracy.

Inadequate and Ineffective Civil Enforcement

Because criminal enforcement is not always feasible or appropriate, BSA member companies often use civil enforcement procedures – particularly civil ex parte search authority – to combat piracy. In Guatemala, however, this legal tool is practically unavailable because information is often leaked and the surprise element of the ex parte search is lost. Court records are public and several companies report on a weekly basis the new cases that have been filed with the court. Unfortunately, under Guatemalan law a case cannot be filed under seal.
During 1999, BSA filed several civil complaints against illegal end-users and resellers. After numerous requests, the court finally issued the civil search and seizure order in one of the complaints. When BSA finally executed the order against the suspected illegal end user, it found that several PCs had been removed and that the illegal software originally installed had been deleted.

In addition to the leaks of information in the court process described above, BSA encounters the problem of very high bond requirements. Bonds are imposed before a court orders a search and seizure against a suspected infringer. These bonds, which have been as high as US$20,000, are an obstacle to enforcement, in violation of TRIPS Articles 41.1 and 41.2 (remedies prevent effective action against infringement, are unnecessarily costly, and entail unreasonable delays) and Article 53 (high bond requirements are unnecessarily costly and unreasonably deter recourse to these procedures).

**Inadequate Civil Copyright Damages**

Before the copyright law amendments entered into effect on November 1, 2000, copyright owners were entitled to recover up to 10 times the retail value of the infringed work. With the enactment of the new copyright law, this system has been eliminated. This system was, in effect, a form of statutory damages, which prescribe that a court may use a fixed sum or multiple to determine damages in lieu of determining actual damages. Statutory damages are a feature of copyright legislation in a growing number of countries. For example, statutory damages incorporated in Brazilian copyright legislation -- and recently increased -- have resulted in penalties at deterrent levels.

Now under Guatemalan law, a rightholder is only entitled to recover direct damages for civil copyright violations. Without the threat of significant damages, the new copyright law fails to provide an adequate deterrent to piracy, as required by TRIPS Articles 41 and 45.

**COPYRIGHT LAW ISSUES IN GUATEMALA**

**1997 Amendments to the Criminal Procedure Code**

In late 1997, the Guatemalan Congress passed amendments to the Criminal Procedure Code which changed copyright infringement actions from public to “private” criminal actions (Decree No. 79-97 of October 15, 1997). As a result, copyright rightholders were forced to initiate and prosecute criminal copyright infringement cases on their own initiative. Most disturbingly at the time, the Guatemalan government justified such action by claiming that it was not the responsibility of the government to prosecute criminal cases of copyright infringement. At the time, Ministry officials told the private sector that this amendment was made to increase the speed of actions, since public prosecutors were overwhelmed with other cases.

Fortunately, this legal regime has changed with the 2000 copyright law amendments. Copyright infringement actions now considered to be “public” criminal actions. The copyright industries worked for years to achieve this result.
Copyright Law of 1998

The Guatemalan Congress adopted a new copyright law on April 28, 1998, which was published as Law No. 33/98 on May 21, 1998. The 1998 copyright law included amendments to modernize and strengthen the archaic 1954 copyright law. Unfortunately, the 1998 law omitted an amendment that would have reinstated “public actions” in the Criminal Code, as well as several other reforms needed to harmonize Guatemalan law with TRIPS and international copyright treaties.

Copyright Law Amendments of 2000

In September 2000, the Guatemalan Congress passed amendments to the Copyright Law of 1998, which were published as Decreto 56-2000. This new law represented a three-year effort to strengthen Guatemalan copyright law and to correct the omission of the “public action” in the Criminal Code. In brief, this bill:

- Recognized criminal copyright crimes as “public actions,” thus authorizing law enforcement authorities to arrest suspected infringers and seize illegal copies and manufacturing equipment.
- Recognized a copyright owner’s exclusive right of “making available” its works and phonograms to the public for on-demand access.
- Substantially expanded the number of infringing acts, which track the rights afforded to rightholders under the WIPO treaties. Specifically, it created new crimes that penalized the circumvention of copy-protection technologies and the removal or alteration of rights management information.
- Established procedures, including timelines, for the Public Ministry or an aggrieved copyright owner to request and obtain precautionary measures from the competent judicial authority. These procedures are critical to improving the efficacy of enforcement measures, both criminal and civil.
- Created a Special Prosecutor’s Office that would specialize in intellectual property offenses and have exclusive responsibility for prosecuting criminal copyright infringements.
- Revised the registration functions and expanded the scope of administrative authority for the Register of Intellectual Property.
- Clarified the work-for-hire provisions as they apply to computer programs.
- Revised the pertinent sections relating to the establishment and operation of collecting societies.

The WIPO Treaties

Guatemala has yet to deposit its instruments of accession to the new “digital” treaties of the World Intellectual Property Organization: the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonogram Treaty (WPPT). IIPA and its members recommend that Guatemala move forward to ratify these treaties.
Decreto 56-2000 implemented several obligations found in the WIPO treaties. For instance, the new law provides for a copyright owner’s exclusive right of “making available” its works or phonograms to the public for on-demand access. The new law makes clear that the traditional property rights of copyright owners apply in cyberspace and that only the copyright owner of a song, sound recording, audio-visual product, software program or video game can authorize it to be copied via the Internet, transmitted across the network, or downloaded by a computer or other device. In addition, the new law prohibits the circumvention of copy-protection technologies and the removal or alteration of rights management information.

Despite these reforms, however, the Guatemalan copyright law was significantly weakened by the amendments (described above) which reduce criminal penalties and eliminate statutory damages. Moreover, the government's failures to create the required intellectual property rights prosecutors office and address judicial delays have significantly hindered copyright enforcement in Guatemala.
EXECUTIVE SUMMARY

In January 2000, the Government of the Bahamas implemented its copyright law. The law included an overbroad compulsory license that violated numerous international copyright standards and established an unacceptable precedent. Cable operators were authorized to downlink and retransmit pay television signals from the U.S., including via the Internet. Bilateral negotiations between the governments took place during 2000. The Bahamas agreed to narrow the scope of its compulsory license to permit rebroadcast via cable only of copyright works that are broadcast free-over-the-air. The Bahamas has taken the first steps toward correcting these problems by introducing amending legislation, but the issue has not been finally resolved.

IIPA advocates that the Bahamas be placed on the Special 301 Watch List this year in order to monitor the promises made in the bilateral agreement. Close attention must be paid to two issues in particular: (1) monitoring the adoption of the copyright amendment legislation recently presented to parliament, and (2) ensuring that consultations between the Copyright Royalty Tribunal and U.S. rightholders result in more equitable remuneration for the compulsory licensing of free-over-the-air broadcasts of copyrighted works. Prompt and effective implementation of bilateral agreements is a primary concern to all the U.S. copyright-based industries, not solely the motion picture sector.

COPYRIGHT LEGAL ISSUES

The Problem: Overbroad Compulsory License and Inequitable Remuneration Rates in the January 2000 Regulations to the Copyright Act

On January 5, 2000, the Government of the Bahamas implemented its 1998 copyright act ("the Act") through publication of regulations that, inter alia, authorized 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 regulations also would have permitted Internet retransmission of all signals via Internet. 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 member companies of the Motion Picture Association (MPA) adequate and effective protection of their intellectual property rights.1

This legislative move compounded the already existing piracy problems of signal theft and cable piracy in the Bahamas, and indeed, throughout the region. The unauthorized reception and retransmission of U.S. domestic satellite signals is widespread. Cable operators, homeowners, hotels, resorts and bars have erected satellite dishes to receive programming intended for reception only in the U.S., without obtaining the authorization from the copyright holders. Signal theft in this region has completely disrupted the orderly sequential distribution (i.e., release of motion pictures first to theaters, followed by home video, pay television and free television release) of MPA member company programming. Signal theft also has hampered the establishment of a legitimate home video industry. In addition, earnings from legitimate television broadcasts have been significantly reduced, as local broadcasters are unwilling to pay license fees for programming that already has been viewed illegally by local audiences.

The extremely dangerous international precedent set by the Bahamas’ compulsory license threatens to disrupt commercial markets for programming 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 harmful precedent and its potentially worldwide consequences, MPA believes that the January 2000 Bahamian compulsory license requirement qualifies as one of the most onerous, blatantly illegal, and egregious policies, completely flaunting respect for rights protected under copyright.

Even after the Parliament of the Bahamas adopts its recently proposed amendments to the compulsory license to limit it to retransmission of free over-the-air signals through cable systems (discussed below), the equitable remuneration rates for the compulsory license fixed in the Regulations are unreasonably low and are inconsistent with the Berne Convention.2

- Under the Act, cable operators are required to pay fixed rates as equitable remuneration to the copyright owners in accordance with the Berne Convention. The rates established in the regulations are far lower on a per-signal basis than rates paid for television broadcast signals under compulsory licenses permitted by international norms, and fail to meet the "equitable" standard under Berne.

- The Regulations made a bad situation worse by permitting cable operators to pay only 25% of the already low rates of equitable remuneration otherwise payable when the subscribers are hotels. The Berne Convention’s compulsory licenses provisions for retransmission of broadcasts do not provide any exemptions for retransmission to hotel rooms. The normal careful balancing of the interests of the users and rightholders is, in this situation, inordinately out of balance. A hotel is a commercial enterprise. There is no legitimate

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1 Both the MPA and the Television Association of Programmers (TAP) expressed their concerns with this Bahamanian legislation in their February 18, 2000 submission to the U.S. Trade Representative.

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.
need for a reduction in the equitable remuneration payable and no public interest that justifies the exception. Thus, there is no basis under international law or a legitimate need that would support such an abridgement of the copyright owners’ rights.

- Under the regulations, cable operators are exempt from having to pay to the rightholders these already low rates of equitable remuneration when the premises are rooms in hospitals, nursing homes, schools and any other health or educational facility. There are no "for profit" restrictions on this very broad exemption. For example, a school could show a copyrighted work on the school premises and charge an entrance fee to that premise to view or listen to the work.

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).

The Issue Joined: Government Negotiations Result in an October 2000 Bilateral Agreement

Last year, the Bahamanian and U.S. governments engaged in bilateral negotiations regarding this compulsory license problem in the Copyright Act and its regulations. The governments reached an agreement to resolve these matters, and this was reflected in an exchange of letters dated October 26 and November 9, 2000. The Bahamas promised to (1) submit amendments of its copyright act to its Parliament by December 31, 2000 to narrow the scope of its compulsory licensing regime to permit only the compulsory licensing of copyrighted works broadcast free-over-the-air; (2) have the Bahamanian Copyright Royalty Tribunal (CRT) consult with U.S. rightholders to provide equitable remuneration for the compulsory licensing of such free-over-the-air broadcasts and to amend the royalty rate structure of the Regulations. In December 2001, the Bahamanian government satisfied this first prong by submitting copyright amendments to its parliament. The second prong, consulting with rightholders about remuneration, has not yet happened. In particular, the motion picture industry wants the CRT to eliminate the rate reduction for hotels and narrow the exception for schools to noncommercial uses.

For its part, the U.S. government promised to "encourage" U.S. rightholders to negotiate licenses on commercial terms. The USG has contacted MPAA pursuant to this obligation. (It is important to note that the MPAA member companies are not the sole U.S. rightholders who have interests in distribution and programming in Bahamas and the rest of the Caribbean region.) MPAA has taken a number of specific steps and is exploring other options to assist its member companies and U.S. programmers in evaluating their options regarding licensing additional product to Bahamanian cable operators.

The Bahamas is a beneficiary country under the Caribbean Basin Economic Recovery Act (CBERA, or CBI), a U.S. trade program which includes criteria requiring beneficiary countries to
afford adequate and effective intellectual property rights protection to U.S. copyright owners.\(^3\) Recently, the Bahamas also became an eligible beneficiary country of the U.S.-Caribbean Basin Trade Partnership Act (CBTPA), found in Title II of the Trade and Development Act of 2000.\(^4\) To maintain these CBTPA benefits, the Bahamas must meet all the CBERA criteria, as well as the CBTPA’s explicit TRIPS-or-greater IPR criteria.

**The Solution in Progress: Monitor Legislative Progress of the Copyright Act Amendments and Have the CRT Engage in Consultations to Change the Remuneration Rates of the Compulsory License**

**The December 2000 proposed amendments**

On December 14, 2000, the Government of the Bahamas introduced before Parliament new draft amendments to the copyright act that would limit the compulsory license to over-the-air unencrypted signals. This package reflects positive progress toward most of the legal issues raised by MPA and the U.S. government over the past year. Parliament should pass these amendments as soon as possible, and not later than June 30, 2001, which represents a reasonable six-month period after the legislation was introduced.

The proposed amendments would limit the scope of the compulsory license (Section 83 of the Act). Amendments clarify the exclusive right to broadcast a copyrighted work or transmit the work by cable. Thus, the new definition of “transmission” would limit the scope of the compulsory license to over-the-air, unencrypted transmissions. The right, which currently exists as a “public performance” right, would be explicitly granted as a right to “broadcast or include the work in a cable programme service.” Encrypted satellite and terrestrial signals would no longer be within the scope of the compulsory license. An amendment also explicitly removes the Internet from the scope of Section 83 compulsory licenses. Finally, the legislative package also includes additional amendments proposed that are not associated with the compulsory license, but address transfer of ownership issues.

**The remuneration rate problem has not been addressed and the CRT must commence consultations with industry**

The December 2000 copyright law amendments do not address the industry-identified the deficiencies in royalty rates – specifically, the amount of the royalty rates in the Copyright Regulations 2000 (refer to the discussion, above). To the best of our knowledge, there is no proposal to amend the regulations at this time. To repeat, MPA believes that the rate reduction for hotels should be eliminated and the exception permitted for schools should be narrowed to non-commercial uses.

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\(^3\) In 1999, $56.0 million of Bahamas’ imports to the United States came in under the duty-free CBI code, accounting for 28.8% of its total imports to the U.S. For the first 11 months of 2000, $66.4 million of Bahamas’ goods entered the U.S. under this program, a 30.3% increase over same time period last year.

In addition, the Government of the Bahamas committed to undertake consultations with U.S. rightholders to provide enhanced equitable remuneration for the compulsory licensing for such free over-the-air broadcasts and to amend the royalty rate structure. Under the terms of the regulations issued pursuant to the Copyright Act, Cable Bahamas is obligated to have deposited monthly, beginning in January 2000, the royalties payable under the Compulsory License and to report at least annually information stipulated in Paragraph 30 of the Regulations, including numbers of subscribers, gross receipts, and signals transmitted.

Industry efforts continue on commercial matters

The U.S. government has contacted MPAA as part of its commitment to encourage U.S. copyright owners and/or holders to enter into good-faith negotiations with Cable Bahamas for providing voluntary licensing on commercial terms. MPAA has taken several actions to support this commercial endeavor. MPAA has contacted its member companies and several U.S. programmers to brief them on the policy context underlying the requests that U.S. programmers to enter into commercial negotiations with Cable Bahamas. MPAA has starting compiling historical, aggregate data on the pay television market in Bahamas and other Eastern Caribbean countries with the aim of providing updated market data to MPA member companies and other interested programmers to aid them in their independent consideration of any commercial response each individual company feels appropriate with regard to entering into negotiations with Cable Bahamas or with U.S. programmers regarding licensing of rights to programming. MPAA is also researching legal issues relating to rights held by other classes of rightholders in copyright that complicate the ability of film producers to authorize TV distribution to territories outside the United States as a part of the producer’s licensing of U.S. domestic rights to U.S. programmers.

In summary, MPA believes the goal is to ensure that local cable operators have an attractive and competitive array of programming for their customers. There may be additional legal programming options available that require further exploration by all parties.

WIPO Treaties

IIPA recommends that the Bahamas should make all efforts to ratify the two WIPO treaties, the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT). In addition, the Bahamas should amend its 1998 Copyright Act to respond to the challenges of the rapidly evolving marketplace for copyrighted materials by implementing the substantive obligations found in these treaties.