

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE



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GSP Subcommittee
Trade Policy Staff Committee
Office of the U.S. Trade Representative
600 17th Street NW, Room 518
Washington, DC 20508

Re: Request for Review of the Intellectual Property Rights Practices of Guatemala in the 2000 Annual GSP Country Eligibility Practices Review, 65 Fed. Reg. 41514 (July 5, 2000)

To the Subcommittee:

The Trade Policy Staff Committee (TPSC) of the Office of the United States Trade Representative (USTR) published in the July 5, 2000 Federal Register a notice announcing the 2000 Annual Generalized System of Preferences (GSP) Country Eligibility Practices Review. USTR indicated that "interested parties may submit petitions to have the GSP status of any eligible beneficiary developing country reviewed with respect to any of the designation criteria listed in subsections 502(b) or 502(c) of the Trade Act (19 U.S.C. 2462(b) and (c))." See 65 Fed. Reg. 41515.

The International Intellectual Property Alliance (IIPA) hereby submits its request that the eligibility of Guatemala as a GSP beneficiary developing country be reviewed, and that its GSP benefits be suspended or withdrawn, in whole or in part, if requisite improvements are not made by Guatemala to remedy the deficiencies (outlined below) which adversely affect U.S. copyright owners. In 1999, Guatemala exported goods valued at \$14.4 million to the U.S. which received preferential duty-free treatment under the GSP Program, which represented approximately 0.6% of its total exports to the U.S., according to U.S. government statistics.

In addition, IIPA requests that the eligibility of Guatemala as a beneficiary developing country under the Caribbean Basin Economic Recovery Act (CBERA) be reviewed, and that its CBERA benefits be suspended or withdrawn, in whole or in part, if improvements are not made by Guatemala to remedy the deficiencies (outlined below) which adversely affect U.S. copyright owners. Also in 1999, Guatemala exported goods valued at \$285.3 million to the U.S. which received preferential duty-free treatment under CBERA, which represented about 12.6% of total exports to the U.S.

Petitioner and its Interest: The International Intellectual Property Alliance

IIPA is a coalition of seven trade associations that collectively represent the U.S. copyright-based industries -- the motion picture, music and recording, business and entertainment software, and book publishing industries. IIPA's member associations are the Association of American Publishers (AAP), AFMA (formerly the American Film Marketing Association), the Business Software Alliance (BSA), the Interactive Digital Software Association (IDSA), the Motion Picture Association of America (MPAA), the National Music Publishers' Association (NMPA) and the Recording Industry Association of America (RIAA).

These member associations represent over 1,450 U.S. companies producing and distributing works protected by copyright laws throughout the world -- all types of computer software including business software and entertainment software (such as videogame CDs and cartridges, personal computer CDs and multimedia products); motion pictures, television programs, home videocassettes and DVDs; music, records, CDs and audiocassettes; and textbooks, tradebooks, reference and professional publications and journals (in both electronic and print media).

These U.S. copyright-based companies are the leading edge of the world's high technology, entertainment, and publishing industries. According to Copyright Industries in the U.S. Economy: The 1999 Report, prepared for IIPA by Economists, Inc., the core copyright industries accounted for \$348.4 billion in value added to the U.S. economy, or approximately 4.3% of the Gross Domestic Product (GDP) in 1997 (the last year for which complete data is available). In 1997, the total copyright industries accounted for \$529.3 billion in value added, or approximately 6.53% of GDP. The "total" copyright industries include the "core" industries plus those that, under conservative assumptions, distribute such products or other products that depend wholly or principally on copyrighted materials. The "core" copyright industries are those which create copyrighted materials as their primary product. The U.S. copyright industries are also among the nation's most dynamic and fast-growing economic sectors. The core copyright industries' share of the GDP grew more than twice as fast as the remainder of the U.S. economy between 1977 and 1997 (6.3% vs. 2.7%). Employment in the core copyright industries grew three times the rate of national employment growth between 1977 and 1997 (4.8% vs. 1.6%). More than 6.9 million workers were employed by the total copyright industries, about 5.3% of the total U.S. work force, in 1997. The core copyright industries generated an estimated \$66.85 billion in foreign sales and exports in 1997, an 11.1% gain over 1996 and larger than the foreign sales and exports of the food, tobacco, apparel, textile, and aircraft industries combined. Preliminary estimates for foreign sales and exports for 1998 are \$71.0 billion. For more detailed information on the IIPA and its members, visit www.iipa.com.

The U.S. creative industries represent one of the few sectors of the U.S. economy that regularly contributes to a positive balance of trade. It is essential to the continued growth and future competitiveness of these industries that our trading partners provide free and open markets and high levels of protection to the copyrights on which this trade depends. Inexpensive and accessible reproduction technologies make it possible for U.S. copyrighted works to be pirated -- stolen -- in other countries, and including specifically for the purposes of this petition, Guatemala. However, the copyright industries represented in IIPA lose an estimated \$20-22 billion annually due to piracy outside the United States. These hefty losses, if not halted, could reverse this path of growth in these sectors, threaten the high wage employment that these industries bring to the U.S. economy, and damage U.S. competitiveness. To combat the problems of inadequate legislation and weak

enforcement in developing countries, the U.S. copyright-based industries joined with the Administration to support various trade tools with IPR provisions over the years, including the GSP Program, Special 301, Section 301, the Caribbean Basin Economic Recovery Act, the Andean Trade Preferences Act, and the U.S.-Caribbean Basin Trade Partnership Act.

Action Requested by Petitioner

Pursuant to the Trade Act of 1974, as amended (19 U.S.C. 2461 *et seq.*), IIPA, on behalf of its seven trade association members, hereby petitions the President to review the eligibility of Guatemala as a GSP and CBERA beneficiary developing country, and if requisite improvements are not made swiftly by Guatemala, then IIPA requests the President to suspend or withdraw GSP and/or CBERA benefits of Guatemala, in whole or in part, for its failure to provide adequate and effective copyright protection for U.S. copyright owners.

IIPA also believes 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. CBTPA eligibility to Guatemala should not be granted at this time.

Legal Authority for this Petition and Discussion of the IPR Criteria in the GSP and CBERA Statutes

A full discussion of the legal authority for this petition, and the specific IPR provisions and legislative history of both the GSP and the CBI programs is found in Appendix A. To summarize, in the GSP Renewal Act of 1984, Congress specified conditions that GSP beneficiary countries must meet in order to gain and maintain their preferential trading status. In particular, one of these express conditions (which Congress also delineated as one "purpose" of the GSP Program) was to encourage developing countries "to provide effective means under which foreign nationals may secure, exercise, and enforce exclusive intellectual property rights."¹ The legislation required the President to apply mandatory and discretionary criteria with respect to IPR protection as a condition to a country achieving "beneficiary" status under the GSP Program. When the GSP Program was reauthorized in August 1996, the language of the IPR discretionary criterion for GSP eligibility in Section 502(c)(5) was simplified slightly and now requires the President to "take into account the extent to which such country is providing adequate and effective protection of intellectual property rights."² The Caribbean Basin Economic Recovery Act (CBERA),³ enacted in 1983, represented the first time Congress explicitly linked trade benefits to intellectual property protection by beneficiary countries. Under the CBI program, countries can only receive trade preferences if they satisfy statutory criteria, which include intellectual property rights (IPR) standards.

Guatemala Fails to Provide "Adequate and Effective Protection" of U.S. Copyrights

¹ See Section 501(b)(9)(B) of the GSP Renewal Act of 1984.

² GSP Renewal Act of 1996, Title I, Subtitle J, of the Small Business Job Protection Act of 1996, Pub. L. No. 104-188 (codified at 19 U.S.C. 2462(c)(5)).

³ See Section 212 of the Caribbean Basin Economic Recovery Act, Pub. L. No. 98-67 (codified at 19 U.S.C. 2702) (also known as CBERA, or the Caribbean Basin Initiative (CBI)).

There has been significant amount of U.S. attention given to the intellectual property situation in Guatemala. For example, the U.S. Trade Representative has highlighted enforcement difficulties in Guatemala. Specifically, in her May 1, 2000 Special 301 announcements, Ambassador Charlene Barshefsky kept Guatemala on the "Priority Watch List" and stated:

Guatemala's Criminal Procedures Code requires that all criminal enforcement be brought as "private actions," making criminal penalties difficult to obtain in cases of copyright infringement. 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.⁴

In an effort to redress this deficiency as well as to correct other omissions in the 1998 Copyright Law and support the establishment of an effective system of criminal and civil enforcement remedies against copyright infringement, the U.S. copyright industries have worked for the last three years to pass legislation that would amend the 1998 Copyright Law and the Criminal Procedure Code.

- 1. The 1997 amendments to the Criminal Procedure Code, which removed the authority of Guatemalan enforcement authorities to conduct "public actions" against criminal copyright infringement actions, have resulted in the inadequate and ineffective protection of U.S. copyrights.**

In late 1997, the Guatemalan Congress passed amendments to the Criminal Procedure Code which changed copyright infringement actions from public to "private" penal actions (Decree No. 79-97 of October 15, 1997). As a result, copyright rightholders must bring and prosecute criminal copyright infringement cases on their own initiative. Most disturbingly at the time, the 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.

The lack of governmental involvement in criminal infringement cases fails on its face to meet the GSP/CBERA standard of "adequate and effective" protection. In addition, the Guatemalan Government's explanation that it is not responsible for criminal actions contradicts Guatemala's existing enforcement obligations under the World Trade Organization (WTO) Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). Under Article 61 of TRIPS, Guatemala is obliged to "provide for criminal procedures and penalties to be applied at least in cases of willful trademark counterfeiting or copyright piracy on a commercial scale. Remedies available shall include imprisonment and/or monetary fines sufficient to provide a deterrent, consistently with the level of penalties applied for crimes of a corresponding gravity." Private rightholders simply cannot invoke the power of the State to pursue, prosecute and adjudicate criminal cases on their own initiative.

⁴ Press Release 00-30, Office of the United States Trade Representative, "USTR Releases Super 301, Special 301 and Title VII Reports," May 1, 2000.

Furthermore, Guatemala's 1997 legislative repeal of an existing remedy – that is, the "public action" in copyright cases – represents a violation of Guatemala's TRIPS obligations under the standstill provision of Article 65.5. TRIPS Article 65.5 provides: "A Member availing itself of a transition period ... shall ensure that any changes in its laws, regulations and practice made during that period do not result in a lesser degree of consistency with the provisions of this Agreement." Guatemala is a "less developing country" which qualified for a four-year transition period for the implementation of TRIPS, and this period terminated effective January 1, 2000.

On the legislative front, industry representatives of the legitimate copyright industries have worked for the last three years to change this untenable situation. They have drafted amendments to the Criminal Code and the Criminal Procedures Code which would once again make copyright piracy a "public" offense (see discussion below). The industries have also united to lobby the Guatemalan Government and Congress for the passage of such legislation.

2. Passage of the pending set of amendments to the Copyright Law and the Criminal Procedure Code would serve to correct some omissions in the 1998 Copyright Law and support the establishment of an effective system of criminal and civil enforcement remedies against copyright infringement.

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 represented a four-year effort and reflected much improvement over the archaic 1954 Copyright Law. Many amendments made to the draft bill before its passage were appropriately made in relation to the ongoing negotiations for a bilateral IPR agreement and in recognition of Guatemala's international obligations under TRIPS and the Berne Convention (to which Guatemala adhered, effective July 28, 1997). However, efforts to amend the copyright bill before its passage to correct the omission of the "public action" in the Criminal Code, along with several other substantive issues, were not successful. The copyright industries, therefore, continued in its efforts to fix both these laws.

The October 1999 Bill to amend the Copyright Law of 1998 would improve enforcement measures and substantive provisions

Within the last year, progress has been made by the Guatemalan executive branch to correct these legislative deficiencies. As a result, in October 1999, a set of amendments which would amend the 1998 Copyright Law and the Criminal Procedures Code was introduced to the Congress. The bill has the support of the copyright industries, which worked diligently with the Ministry of Economy and various legislators, including the Economic Committee, to agree upon the necessary reforms and support its enactment by Congress. In brief, this bill would have accomplished the following important objectives. For example, it would have:

- Made criminal copyright infringements a “public action” such that law enforcement authorities may take action to arrest persons suspected in the commission of a crime of infringement and to seize illegal merchandise and materials employed in the manufacture of such merchandise. This proposal would amend the Criminal Procedures Code to correct the problems caused by the 1997 amendment.
- Expanded the section on criminal offenses for copyright infringements by making those infringements part of the Criminal Code. Presently the Guatemalan Criminal Code prohibits the reproduction, import, export, transportation, distribution, commercialization, exhibition, sale or offer of sale of illegal copies of protected works and sound recordings. These infringing acts are subject to a term of imprisonment of four to six years and a fine of 50,000 to 100,000 quetzales (about US\$6,425 to \$12,850). The copyright bill proposes the same level of penalties for a broader range of infringements, which track the rights afforded in the copyright bill.
- Established procedures, including timelines, for the Public Ministry or an aggrieved rights holder 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, in Guatemala, and serve toward satisfying Guatemala’s obligations under the TRIPS enforcement text.
- 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 expand the scope of administrative authority for the Register of Intellectual Property. The Register also would have the authority to issue administrative sanctions, including fines.
- Corrected a Berne Convention violation in the 1998 Law which had based the term of protection for works on the ownership of the economic rights, rather than the type of subject matter. The basic term of protection remains life of the author plus 75 years, or 75 years after publication (for works like computer programs, audiovisual works and other collective works).
- Expanded and clarified, in a positive way, the scope of several of the economic rights for authors, including the reproduction right and the distribution right. The definitions of “cable distribution,” “transmission” and “retransmission” which would greatly assist the audiovisual industry and enforcement authorities to take copyright actions against cable operators retransmitted copyright protected programming without authorization.
- Expanded the scope of the provisions on presumption of transfer of all exclusive rights in an audiovisual works, already found in the 1998 law, by including transferring the exercise of the moral rights in the audiovisual work to the producer.
- 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.

This bill passed out of the Economic Committee on May 2, 2000, and received its second reading on May 12, 2000. The bill was scheduled for its third and final reading before a plenary session of Congress on May 15, 2000, but this reading did not occur due to a backlash initiated by several members of Congress. This faction of Congress circulated a message that the passage of the copyright bill and the industrial property bill (particularly those amendments providing TRIPS-level protections) would risk social and economic instability in Guatemala.

As a result of this backlash, both the copyright bill and the industrial property bill were stripped of key enforcement amendments, including those provisions that would have restored public prosecution authority, strengthened penalties, and created a specialized intellectual property division in the Attorney General's office. Congress enacted the revised industrial property bill in July 2000. The copyright bill which has been significantly weakened; it is, however, still pending before Congress.

IIPA is encouraged that the President vetoed the industrial property legislation because its key provisions had been dismantled, and returned the bill to Congress. IIPA members are urging Congress to reinstate the copyright bill's key enforcement provisions and enact it in the same form in which it was introduced last year.

3. Because of inadequate and ineffective copyright protection and enforcement in Guatemala, U.S. copyright owners suffer economic loss.

Because of piracy of U.S. copyrighted materials in Guatemala, U.S. rightholders lost at least an estimated \$21.2 million in 1999. We believe that in no small part this is due to the fact that Guatemalan law (as discussed above) fails to require or authorize government prosecution of copyright crimes. Instead, private copyright owners are forced to initiate private criminal or civil actions against infringers. Nevertheless, within the last year, both the business software and motion picture industries have worked with the Guatemalan police to conduct raids. However, the police have no proactive role in the actions, but are merely required to be present to comply with criminal due process under Guatemalan law.

Moreover, the national police are understaffed and overworked, thus making it difficult to get their attention on criminal copyright crimes. The 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. 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. Under current law, due to the lack of a public action, aggrieved rightholders must prosecute infringement cases on their own by filing an *ex parte* seizure request with the judiciary (i.e., the same procedure used to obtain civil orders). 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 the seizure request to the targets, completely destroying any element of surprise or opportunity to prevent the destruction of evidence.

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

INDUSTRY	1999		1998		1997		1996		1995	
	Loss	Video Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Motion Pictures	2.0	70%	3.0	70%	3.0	86%	NA	100%	NA	100%
Sound Recordings / Musical Compositions	4.0	60%	4.0	60%	4.0	60%	3.0	50%	0.2	46%
Computer Programs: Business Applications	12.7	80%	8.0	82%	6.3	86%	7.5	90%	7.5	94%
Computer Programs: Entertainment Software	NA	NA	4.0	85%	4.2	87%	4.0	79%	NA	NA
Books	2.5	NA	2.5	NA	2.0	NA	2.0	NA	2.0	NA
TOTALS	21.2		21.5		19.5		16.5		9.7	

Attached as Appendix B is the methodology used by IIPA members to calculate estimated losses due to copyright piracy. This methodology was also submitted to USTR in IIPA's 2000 Special 301 submission. Below is an overview of the piracy problems and damages caused by inadequate and ineffective protection for U.S. copyrights in Guatemala.

Guatemala still has a very high level of business software piracy in Latin America — an estimated 80%. Due to widespread and unchecked piracy, virtually all of Guatemala's demand for software is still being supplied by pirated product. In spite of the inadequacy of the law, the Business Software Alliance (BSA) was able to conduct in the first half of 2000, five legal actions in Guatemala. During this period, BSA conducted a criminal raid of a pirate reseller who entered into a settlement agreement with BSA. In addition, BSA conducted criminal raids against four end-users, all of which also entered into settlement agreements with BSA. However, it took an average of three weeks to obtain the ex parte searches in these cases. This unreasonable delay increased the likelihood of leaks from the judiciary. Indeed, one of the targets was tipped-off before the criminal raids could be conducted by BSA. The raids are too recent to have resulted in measurable increases in sales in general, but BSA is hopeful that the raids will create a sense in the market that the risks of using illegal software are real. Nevertheless, it is unlikely that BSA will be able to achieve a significant reduction in piracy rates without the threat (and implementation) of public criminal prosecution.

Guatemala continues to suffer from severe cable television piracy. In 1999, not one of the estimated 250 cable operators was engaged in completely legitimate operations. This problem has persisted in Guatemala for the last decade. U.S. encrypted and unencrypted domestic satellite signals are retransmitted to subscribers in Guatemala City and in small towns in the interior. While the major operators in the capital do maintain legal contracts with U.S. programmers, they also retransmit unlicensed programming and under-report their licensed subscriber counts by as much as 50%. A Cable Law was passed in 1992, but continues to be inadequate to address the cable piracy problem effectively. Home video piracy is the second major audiovisual problem in Guatemala, with back-to-back copying accounting for as much as 70% of this piracy. In August 1999, MPA held its first organized public destruction ceremony of pirate videos.

The recording and music industry continue to face widespread piracy problems in Guatemala. Street vending of pirate products is prevalent and notorious in major cities and Guatemala City. Another major problem remains Guatemala's ineffective control of its borders with Mexico. Thousands of illegal audiocassettes enter Guatemala from Tapachula. The recording industry also have evidence of product coming into the country via airplanes from Belize. Mexican judges of Chiapas have denied search warrants to raid the factories in Mexico. In the meantime, there is no response from Guatemalan customs to stop the flood of pirated product. Pirate CDs are a growing presence in this market, and Mexico and Belize are primary sources of the this pirate supply. So far, pirated product from Asia has not been found in great amounts.

In downtown Guatemala City, many stalls selling pirate product cover the main streets, some right in front of, or a few blocks away from, the Presidential Palace. Pirates have no fear of any actions being taken against them. The few criminal actions which the industry was able to obtain in 1998 were solely the result of industry initiative and constant efforts to have the authorities run the raids. There are no pending music and recording industry cases, and no sentences for copyright infringement have been issued. Basically, the recording industry is able to bring actions depending on the good will and rare support from those enforcement authorities who happen to understand the problem of piracy. Unfortunately, this action happens only on a personal level, and by no means reflects any official attitude.

With respect to the book publishing industry, unauthorized photocopying and commercial piracy are the prevalent forms of book piracy in Guatemala. Illegal photocopying of science, technical and medical textbooks around the universities is far too common. There has been no noticeable improvement in reducing book piracy since the 1998 Copyright Law entered into effect.

The piracy of entertainment software products (including videogame CDs and cartridges, personal computer CDs, and multimedia entertainment products) also is widespread in Guatemala.

CONCLUSION

For the reasons stated in this submission, IIPA requests that the TPSC initiate a review the GSP and CBERA country eligibility of Guatemala for its failure to provide adequate and effective copyright protection for U.S. copyright owners. If requisite improvements are not made in Guatemala to remedy these deficiencies, then IIPA requests that the U.S. suspend its eligibility or withdraw GSP and/or CBERA benefits of Guatemala, in whole or in part. In addition, CBTPA eligibility to Guatemala should not be granted at this time.

Respectfully submitted,

Eric H. Smith
President
International Intellectual Property Alliance

APPENDIX A

**Statutory Basis for the Country Eligibility Practice Review
of the Intellectual Property Rights Practices of
GUATEMALA
under the Criteria of the Generalized System of Preferences
and the Caribbean Basin Economic Recovery Act
and
Review of IIPA's Recommendation regarding Guatemala's Ineligibility
to participate in the U.S.-Caribbean Basin Trade Partnership Act**

GENERALIZED SYSTEM OF PREFERENCES (GSP)

The GSP Program of the United States provides unilateral, non-reciprocal, preferential duty-free entry for over 4,650 articles from approximately 140 countries and territories designated beneficiary countries and territories for the purpose of aiding their economic development through preferential market access. The GSP program was instituted on January 1, 1976, and authorized under Title V of the Trade Act of 1974 (19 U.S.C. 2461 et seq.) for a 10-year period. Since 1997, an additional 1,770 items are eligible for GSP treatment for specified least developing beneficiary developing countries.

The GSP program has been renewed several times since its establishment. Most recently, in 1999 Congress reauthorized the GSP program through September 30, 2001.⁵ What was unique about this extension was that, for the first time in several years, Congress extended the GSP Program for more than a single year. IIPA has supported a multi-year extension of this program to support the use of the GSP program as a tool to protect the interests of U.S. copyright owners around the world.

Provisions tying intellectual property protection to trade benefits were first added to the Trade and Tariff Act of 1984 [hereinafter "TTA 1984"]. Title V of the TTA 1984, known as the GSP Renewal Act of 1984,⁶ renewed the GSP Program and specifically required the President to consider intellectual property protection in determining whether to designate a developing country as eligible for GSP benefits. While there has been a minor change in the statutory language between the GSP Renewal Act of 1984 and the GSP Renewal Act of 1996, the GSP provisions as related to IPR remain essentially the same as in 1984. The legislative history of the 1984 Renewal Act is particularly instructive on the important link between GSP benefits and strong IPR protection.

⁵ See Extension of Duty-Free Treatment under Generalized System of Preferences, Section 508 of the Ticket to Work and Work Incentives Improvement Act of 1999, Pub. L. No. 106-170 (codified at 19 U.S.C. 2465).

⁶See the Generalized System of Preferences Renewal Act of 1984, Title V, Pub. L. No. 98-573 (1984) (codified at 19 U.S.C. 2461-2465).

The GSP Renewal Act of 1984

In the GSP Renewal Act of 1984, Congress specified conditions that GSP beneficiary countries must meet in order to gain and maintain their preferential trading status. In particular, one of these express conditions (which Congress also delineated as one “purpose” of the GSP Program) was to encourage developing countries “to provide effective means under which foreign nationals may secure, exercise, and enforce exclusive intellectual property rights.”⁷

The legislation required the President to apply mandatory and discretionary criteria with respect to IPR protection as a condition to a country achieving “beneficiary” status under the GSP Program. The mandatory criterion prohibited the designation of a country from becoming a “beneficiary developing country” if, for example, “such country has nationalized, expropriated, or otherwise seized ownership or control of property, including patents, trademarks, or copyrights, owned by a United States citizen or by a corporation, partnership, or association which is 50 percent or more beneficially owned by United States citizens.” See Section 503(b)(4) of the GSP Renewal Act of 1984, now codified at 19 U.S.C. 2462(b)(2)(D).

The GSP Renewal Act of 1984 added as a discretionary criterion, in determining whether to designate a developing country as eligible to receive GSP duty-free trade treatment, that

the President shall take into account ... the extent to which [each] country is providing adequate and effective means under its laws for foreign nations to secure, to exercise, and to enforce exclusive rights in intellectual property, including patents, trademarks, and copyrights.

Section 503(c)(5) of the GSP Renewal Act of 1984, codified at 19 U.S.C. 2462(c)(5). The Senate Finance Committee Report explained that:

To determine whether a country provides “adequate and effective means,” the President should consider the extent of statutory protection for intellectual property (including the scope and duration of such protection), the remedies available to aggrieved parties, the willingness and ability of the government to enforce intellectual property rights on behalf of foreign nationals, the ability of foreign nationals effectively to enforce their intellectual property rights on their own behalf and whether the country’s system of law imposes formalities or similar requirements that, in practice, are an obstacle to meaningful protection.

S. Rep. No.98-485, 98th Cong., 2d Sess. At 11 (1984). The Senate Report also noted:

In delegating this discretionary authority to the President, it is the intent of the Committee that the President will vigorously exercise the authority to withdraw, to suspend or to limit GSP eligibility for non-complying countries....

Where valid and reasonable complaints are raised by U.S. firms concerning a beneficiary country’s market access policy or protection of intellectual property rights, for example, it is expected that such interests will be given prominent attention by the President in deciding whether to modify duty-free treatment for that country.

⁷ See Section 501(b)(9)(B) of the GSP Renewal Act of 1984.

Id. at 12-13 (emphasis added). The House Ways and Means Committee stated that “countries wishing to reap the benefits of preferential duty-free access to the U.S. market must fulfill international responsibilities” in the intellectual property area. House Rep. No. 98-1090, 98th Cong., 2d Sess. at 12 (1984).

The IPR criteria are a condition, not only for obtaining GSP benefits in the first place, but also for retaining them. The 1984 Act authorized the President to “withdraw, suspend, or limit the application of the duty-free treatment accorded under Section 501 of this title with respect to any article or any country” and requires the President, when taking any such action, to “consider the factors set forth in Sections 501 and 502(c).” TTA 1984 Section 505(a)(1); TA 1974 Section 504(a)(1), as amended; 19 U.S.C. 2464(a)(1) (emphasis added). The Act also created a system of “general reviews” to ensure that these statutory criteria are met. TTA 1984 Section 505(b); TA 1974 Section 504(c)(2)(A), as amended; 19 U.S.C. 2464(c)(2)(A); see also 15 C.F.R. 2007.3.

IIPA requests that this GSP Subcommittee follow the explicit intent of Congress, and advise the President to “vigorously exercise” his authority to withdraw, suspend or limit GSP eligibility of Guatemala for its non-compliance with the statutory criterion on IPR in the GSP Program.

The GSP Renewal Act of 1996

When the GSP Program was reauthorized in August 1996, the language of the IPR discretionary criterion for GSP eligibility in Section 502(c)(5) was simplified slightly and now requires the President to “take into account the extent to which such country is providing adequate and effective protection of intellectual property rights.”⁸ The expired law specified (as discussed above) that each beneficiary country provide “adequate and effective means under its laws for foreign nationals to secure, to exercise and to enforce exclusive rights in intellectual property, including patents, trademarks, and copyrights.” Otherwise, the GSP Renewal Act contains identical IPR provisions, including “mandatory” criteria denying GSP status to countries that directly or indirectly expropriate U.S. property (including intellectual property), and authorizing the President to withdraw, suspend or limit GSP privileges based on failure to meet the IPR criteria.

IIPA notes that in June 1991, the Motion Picture Association (MPA) filed a GSP petition to deny Guatemala preferential trade benefits under this trade program because of Guatemala’s failure to provide adequate and effective protection to U.S. copyrighted films and television programming which resulted in the widespread unauthorized interception and retransmission of U.S. programming by Guatemalan cable operators. USTR accepted this petition, and twice extended the investigation. Guatemala passed a Cable Law in June 1992 and issued implementing regulations in late 1993. After some progress was made in the licensing of programming by Guatemala City cable operators and the implementation of the Cable Law in the interior of the country, MPA withdrew its GSP petition on June 13, 1994. However, cable piracy continues to persist to this day, and this 1992 Cable Law still has not been amended to strengthen its provisions.

⁸ GSP Renewal Act of 1996, Title I, Subtitle J, of the Small Business Job Protection Act of 1996, Pub. L. No. 104-188 (codified at 19 U.S.C. 2462(c)(5)).

CARIBBEAN BASIN ECONOMIC RECOVERY ACT (CBERA or CBI)

In addition to GSP benefits, Guatemala also receives a very significant amount of additional trade benefits under the Caribbean Basin Economic Recovery Act (CBERA).⁹ The enactment in 1983 of this Act was a key point in the use of U.S. trade policy to promote exports of products and services protected by copyright because, for the first time, Congress explicitly linked trade benefits to intellectual property protection by beneficiary countries. Under the CBI program, countries can only receive trade preferences if they satisfy statutory criteria; these include intellectual property rights (IPR) standards.

In submitting the Second Report on the Operation of the Caribbean Basin Economic Recovery Act to Congress in 1996, President Clinton acknowledged that intellectual property rights concerns remain in the region, and the possibility of losing CBI benefits "serves as an incentive to encourage countries to work toward enforcing adequate intellectual property rights..."¹⁰

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

The existing CBERA discretionary IPR criterion of 19 U.S.C. 2702(c)(9) involves

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

Over the years, there has been a noticeable shift in extending more trade benefits under CBERA to those countries which are both GSP and CBERA beneficiaries.

U.S.-CARIBBEAN BASIN TRADE PARTNERSHIP ACT (CBTPA)

Guatemala is currently under consideration for eligibility under a new U.S. trade program. Title II of the Trade and Development Act of 2000 contains provisions for enhanced trade benefits for Caribbean and Central American countries.¹¹ Specifically, the United States-Caribbean Basin Trade Partnership Act (CBTPA) amends the Caribbean Basin Economic Recovery Act (CBERA) to authorize the President to designate select countries in this region to be eligible for preferential tariff treatment for certain articles, including duty-free and quota-free treatment for certain textile and apparel goods.

⁹ See Section 212 of the Caribbean Basin Economic Recovery Act, Pub. L. No. 98-67 (codified at 19 U.S.C. 2702) (also known as CBERA or the Caribbean Basin Initiative (CBI)).

¹⁰ Press Release, Office of the United States Trade Representative, "President Clinton Sends Report on the Operation of the Caribbean Basin Economic Recovery Act to the Congress," October 9, 1996.

¹¹ Trade and Development Act of 2000, Pub. L. 106-200 (May 18, 2000).

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

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

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

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

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

With respect to intellectual property protection, it is the intention of the conferees that the President will also take into account the extent to which potential beneficiary countries are providing or taking steps to provide protection of intellectual property rights comparable to the protections provided to the United States in bilateral intellectual property agreements.¹²

Accordingly, each eligible 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.. The CBTPA legislative history makes very clear that, at the very minimum, countries must provide protection “consistent with or greater” than the levels found in the WTO TRIPS Agreement. The CBTPA itself requires that the President must examine the extent to which all these countries provide copyright protection “consistent with or greater than the protection afforded under” TRIPS. With respect to substantive copyright law developments, the TRIPS Agreement is widely recognized as containing the minimum standards of IPR protection. The TRIPS Agreement incorporates the levels of copyright protection found in the Berne Convention (1971 Paris text), adds explicit protection for computer programs as literary works, adds a rental right, and also affords protection for performers and producers of sound recordings. Importantly, TRIPS also adds an entire section on the enforcement of substantive rights, including measures on civil remedies, administrative measures, border measures and criminal penalties. The January 1, 2000 deadline for full compliance by World Trade Organization (WTO) developing country members with all their copyright substantive and enforcement obligations under the TRIPS Agreement has arrived.

¹² See Conference Report of the House of Representatives on the Trade and Development Act of 2000 [to accompany H.R. 434], Joint Explanatory Statement of the Committee of Conference on Subtitle B—Trade Benefits for Caribbean Basin Countries.

On July 17, 2000, IIPA responded to USTR's request for public comments on the eligibility of certain countries with respect to their compliance with the intellectual property rights (IPR) criteria which the President must consider when designating these Caribbean Basin countries as eligible beneficiary countries under the new CBTPA.

In our submission, IIPA urged the CBTPA Subcommittee to conduct a full review of 20 of the potentially CBTPA-eligible countries' satisfaction of the CBTPA IPR criteria (IIPA had explicitly recommended that four of the 24 eligible countries be denied eligibility). IIPA highlighted specific comments regarding Guatemala. There we expressed our serious concern that the 1997 amendments to Criminal Code which required that all criminal prosecutions for copyright infringement had to be brought by the private sector in effect removed that government from its obligation to prosecute criminal copyright cases. We recounted that efforts to amend this code remain pending three years later. These problems have been outlined in more detail in our submission today.

We believe it would be inconsistent for the U.S. Government to grant new, additional benefits to Guatemala under the CBTPA program while at the same time initiating an investigation under GSP/CBI for Guatemala's failure to afford adequate and effective IPR protection to U.S. copyrights. Therefore, CBTPA eligibility to Guatemala should not be granted at this time.

APPENDIX B

Methodology Used to Estimate Trade Losses due to Copyright Piracy And Levels of Piracy

Estimated trade losses due to piracy are calculated by the member associations of the International Intellectual Property Alliance (IIPA). Since it is impossible to gauge losses for every form of piracy, we believe that our members' statistics for 1999 (and prior years) actually underestimate the losses due to piracy experienced by the U.S. copyright-based industries. The methodology in this petition is identical to that which has been used by IIPA members in the IIPA's submissions to the U.S. Trade Representative in the annual Special 301 review.

TRADE LOSSES DUE TO PIRACY

In general, pirate production for export for the records and music, computer programs and book publishing industries is included in the loss figure for the country of manufacture, not the country of ultimate sale. For the motion picture industry, losses are generally counted in the country in which the sale of product occurs.

COMPUTER SOFTWARE: BUSINESS APPLICATIONS

The Business Software Alliance (BSA)'s calculation method compares two sets of data -- the *demand* for new software applications, and the legal *supply* of new software applications.

Demand: PC shipments for the major countries are estimated from proprietary and confidential data supplied by software publishers. The data is compared and combined to form a consensus estimate, which benefits from the detailed market research available to these member companies.

Two dimensions break the shipments into four groups. Splitting the PC shipments between Home and Non-Home purchasers represents the market segments of each country. The PC shipments are also compared to the change in the installed base of existing PCs. The part of PC shipments which represents growth of the installed base is called "new shipments" and is separated from the "replacement shipments" which represent new PCs that are replacing older PCs.

A scale of the installed base of PCs by country compared to the number of white-collar workers was developed. PC penetration statistics are a general measure of the level of technological acceptance within a country. The level of penetration, for a variety of reasons, varies widely from country-to-country. This level is then ranked and each country is assigned to one of five maturity classes.

The number of software applications installed per PC shipment is provided by member companies, and the following ratios for the four shipment groups are developed:

Home-New Shipments
Non-Home - New Shipments
Home - Replacement Shipments
Non-Home - Replacement Shipments

For each shipment group, ratios are developed for each of five maturity classes. U.S. historical trends are used to estimate the effects of lagged technological development by maturity class.

Piracy rates can vary among applications. Grouping the software applications into three Tiers and using specific ratios for each Tier further refined the ratios. The Tiers were General Productivity Applications, Professional Applications, and Utilities. These were chosen because they represent different target markets, different price levels, and it is believed, different piracy rates.

Software applications installed per PC shipped are researched and estimated using these dimensions:

1. Home vs. Non-Home
2. New PCs vs. Replacement PCs
3. Level of Technological Development
4. Software Application Tier

From this work, a total software applications installed estimate was calculated for each country.

Supply: Data was collected by country and by the 26 business software applications. Shipment data was limited in some instances, hence, uplift factors were used to estimate U.S. and world-wide shipments.

Piracy Estimates: The difference between software applications installed (demand) and software applications legally shipped (supply) equals the estimate of software applications pirated. The piracy rate is defined as the amount of software piracy as a percent of total software installed in each country.

Dollar Losses: The legal and pirated software revenue was calculated by using the average price per application. This is a wholesale price estimate weighted by the amount of shipments within each software application category.

To develop the wholesale dollar losses for U.S. software publishers, the wholesale dollar losses due to piracy were reduced by the ratio of the software shipped by U.S. software publishers as a percent of software shipped by all software publishers.

COMPUTER PROGRAMS: ENTERTAINMENT SOFTWARE

The calculation method of the Interactive Digital Software Association (IDSA) uses market data of dedicated platform and PC entertainment software in both compact disc and cartridge

formats, and hardware shipments along with an estimate of the level of piracy in the target country. Where possible, losses due to exports and/or online piracy are included. Export losses are attributed to the source country, where possible. Here are the basic steps involved in determining losses to entertainment software publishers:

1. For each dedicated platform, the 1998 entertainment software units are divided by hardware units. This results in the number of applications per dedicated platform.
2. For each multimedia PC, the 1998 entertainment software units are divided by hardware units. This results in the number of entertainment applications per multimedia PC.
3. The number of applications per PC or dedicated platform is estimated (this varies country-to-country). The actual number of applications per dedicated platform or PC is then subtracted, resulting in the number of illegal applications per hardware unit.
4. The number of illegal applications per hardware unit is divided by the estimated number of applications per hardware unit, resulting in the estimated percentage of illegal software units in use.
5. The illegal software units per hardware unit is multiplied by the average wholesale price (which varies country-to-country) which is multiplied by the number of legitimate hardware units. This results in the dollar amount lost to piracy.

MOTION PICTURES

Many factors affect the nature and effect of piracy in particular markets, including the level of development of various media in a particular market and the windows between release of a product into various media (theatrical, video, pay television, and free television). Piracy in one form can spill over and affect revenues in other media forms. Judgment based on in-depth knowledge of particular markets plays an important role in estimating losses country by country.

Video: Losses are estimated using one of the following methods:

1. For developed markets:
 - a. The number of stores that rent pirate videos and the number of shops and vendors that sell pirate videos are multiplied by the average number of pirate tapes rented or sold per shop or vendor each year;
 - b. The resulting total number of pirate videos sold and rented each year in the country is then multiplied by the percent of those pirate videos that would have been sold or rented legitimately and adjusted to reflect the US producers' share of the market.
2. For partially developed markets:
 - a. The number of legitimate videos sold or rented in the country each year is subtracted from the estimated total number of videos sold or rented in the country annually to estimate the number of pirate videos sold or rented annually in the country;

- b. The resulting total number of pirate videos sold and rented each year in the country is then multiplied by the percent of those pirate videos that would have been sold or rented legitimately and adjusted to reflect the US producers' share of the market.
- 3 For fully pirate markets:
- a. Either: (a) the number of blank videos sold in the country annually is multiplied by the percent of those tapes used to duplicate US motion pictures to equal the number of pirate copies of US motion pictures sold in the country each year; or, (b) the number of VCRs in the country is multiplied by an estimated number of US motion pictures on video that would be rented and sold per VCR per year;
 - b. The figure resulting from each of the foregoing calculations is an estimate of the number of legitimate sales of videos of US motion pictures that are lost each year in the market due to video piracy. These estimates are adjusted to reflect the wholesale price of legitimate videos, to equal losses due to video piracy.

TV and Cable: Losses are estimated using the following method:

1. The number of TV and cable systems that transmit U.S. motion pictures without authorization is multiplied by the average number of U.S. motion pictures transmitted without authorization by each system each year;
2. The resulting total number of illegal transmissions is multiplied by the average number of viewers per transmission;
3. The number of viewers of these illegal transmissions is allocated among those who would have gone to a theatrical exhibition or who would have rented or purchased a legitimate video. The number of legitimate transmissions of the motion picture that would have been made is also estimated;
4. These figures are multiplied by the producers' share of the theatrical exhibition price, the wholesale share of the video cost or the license fee per legitimate transmission, as appropriate, to estimate the lost revenue from the illegal transmissions.

Public Performance: Losses are estimated using the following method:

1. The number of vehicles and hotels that exhibit videos without authorization is multiplied by the average number of viewers per illegal showing and the number of showings per year;
2. The resulting total number of viewers of unauthorized public performances is allocated among those who would have gone to a theatrical exhibition or who would have rented or purchased a legitimate video. The number of legitimate TV and cable transmissions that would have been made of the motion pictures is also estimated;

3. These figures are multiplied by the producers' share of the theatrical exhibition price, the wholesale share of the video cost or the license fee per legitimate transmission, as appropriate, to estimate the lost revenue from the illegal performances.

SOUND RECORDINGS AND MUSICAL COMPOSITIONS

RIAA generally bases its estimates on local surveys of the market conditions in each country. The numbers produced by the music industry generally reflect the value of sales of pirate product rather than industry losses, and therefore undervalue the real harm to the interests of record companies, music publishers, performers, musicians, songwriters and composers.

Where RIAA has sufficient information relating to known manufacture of pirate recordings that emanate from a third country, this loss data will be included in the loss number for the country of manufacture rather than the country of sale. In certain instances where appropriate, RIAA employs economic data to project the likely import or sale of legitimate sound recordings, rather than merely reporting pirate sales. In these instances, projected unit displacement is multiplied by the wholesale price of legitimate articles in that market rather than the retail price of the pirate goods.

BOOKS

The book publishing industry relies on local representatives and consultants to determine losses. These experts base their estimates on the availability of pirate books, especially those found near educational institutions, book stores and outdoor book stalls. A limitation here is that experts can only gauge losses based on the pirated books that are sold; it is impossible to track losses for books which are pirated but not available for public purchase. The trade loss estimates are calculated at pirate prices which are generally (but not always) below the prices which would be charged for legitimate books. Also included are conservative estimates of losses due to unauthorized systematic photocopying of books.

PIRACY LEVELS

Piracy levels are also estimated by IIPA member associations and represent the share of a country's market that consists of pirate materials. Piracy levels together with losses provide a clearer picture of the piracy problem in different countries. Low levels of piracy are a good indication of the effectiveness of a country's copyright law and enforcement practices. IIPA and its member associations focus their efforts on countries where piracy is rampant due to inadequate or non-existent copyright laws and/or lack of enforcement.