



March 16, 2000

Chairman of the GSP Subcommittee
of the Trade Policy Staff Committee
600 17th Street, NW, Room 518
Washington, DC 20508

Re: Pre-Hearing Brief in Support of the GSP 1999
Country Practices Review Against the Dominican
Republic
65 Fed. Reg. 7410 (Feb. 14, 2000) and 65 Fed. Reg.
11104 (Mar. 1, 2000)
Case: Dominican Republic 007-CP-99

To the Chairman and the Entire Subcommittee:

The International Intellectual Property Alliance (IIPA) submits this Pre-Hearing Brief in support of the decision by the Trade Policy Staff Committee to accept IIPA's June 16, 1999 petition to review the status of the Dominican Republic as a GSP beneficiary developing country with respect to the intellectual property rights criteria of the GSP Program. Our petition also requested that the Dominican Republic's eligibility under the Caribbean Basin Economic Recovery Act be reviewed. Today, the IIPA also submits notice of our request to present oral testimony at the April 2000 GSP hearings, along with our recording industry and business software colleagues.

IIPA and its Members

The IIPA is a coalition of seven trade associations representing U.S. copyright-based industries in bilateral and multilateral efforts to open up foreign markets closed by piracy and other market access barriers. These member associations represent over 1,450 U.S. companies producing and distributing products protected by copyright laws throughout the world — all types of computer software including business software and entertainment software (such as videogame CD's and cartridges, personal computer CD's and multimedia products); motion pictures, television programs and home videocassettes; music, records, CDs, and audiocassettes; and textbooks, tradebooks, reference and professional publications and journals (in both electronic and print media).

The IIPA and its seven member associations, and in turn their member companies, are interested parties to this proceeding. These associations and companies have significant economic interests in being able to enter fully the Dominican market; invest, sell and distribute their products; and enjoy effective legal protection against the infringement – theft – of these creative products.

COPYRIGHT LAW AND MARKET ACCESS ISSUES

The current Dominican copyright law falls short of the substantive standards of both the Berne Convention and the WTO TRIPS Agreement as well as the “adequate and effective” standard found in both the GSP and the CBI trade programs. Efforts over the last two years to pass amendments to the copyright law have met with little tangible success, and the bill remains pending in the Senate. The Dominican Republic must take steps to revise its copyright law, adopt enforcement provisions, and actually take effective enforcement actions to meet its bilateral and multilateral obligations. In addition, the Dominican Republic should be encouraged to ratify the two 1996 “digital” treaties of the World Intellectual Property Organization (the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty) and adopt provisions to implement them in order to protect against Internet and other forms of digital piracy.

1. The Copyright Law of 1986

The Dominican Republic needs to revise its current copyright law, the Copyright Law of 1986. This law contains several major deficiencies and requires clarification in several key areas. For example, computer programs should be expressly protected as “literary works.” Terms of protection (particularly for cinematographic works and photographs) must be extended to meet at least the TRIPS standards, since protection is currently only provided for 30 years for cinematographic works. Full protection for pre-existing works, sound recordings and performances must be ensured, in accordance with TRIPS. Rental rights for producers of sound recordings are not explicitly found in the current law. Overbroad exceptions to protection must be significantly narrowed to meet the TRIPS Article 13 test, especially for computer programs. Translation and reproduction licenses for foreign works do not meet the terms of the Berne Appendix (and therefore are also TRIPS-incompatible).

Also missing from the current Dominican laws are procedures for copyright owners to obtain and conduct civil ex parte searches (surprise civil searches conducted without notice to the suspect), an important remedy required by TRIPS. Criminal penalties and civil remedies must actually be applied at levels sufficient to deter piracy. Finally, customs regulations must be clarified to permit the seizure of illegal products.

2. The 1998 Copyright Bill

The IIPA is aware that the Dominican Government does intend to implement high levels of copyright protection found in modern copyright laws and thereby address the deficiencies in its current law. 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. While it was hoped this would speed passage of the non-controversial copyright law, the copyright bill remains stuck in the Senate.

The IIPA acknowledges the positive features of this copyright bill, a bill which is an improvement over the 1986 Copyright Law. For example, the 1998 bill addresses many of the key TRIPS substantive points, including protection for computer programs, databases, and the minimum

term of protection. The lack of civil ex parte orders under the 1986 law has been remedied, thus providing a critical TRIPS-consistent enforcement tool. The bill, like the current law, would provide a term of three months to three years in jail for most criminal infringements. At last report, it appears likely that the level of fines has increased, up from 1,000 to 10,000 pesos to a proposed 50 to 1,000 minimum wage (based on the current minimum wage of RD\$3,000; this represents potential fines of between US\$9,000 and US\$180,000).

While this copyright bill is a marked improvement over the current law, IIPA believes that some further refinements would clarify and enhance the bill's TRIPS-levels of protection as well as the WIPO Treaties' obligations. To support this legislative process, IIPA and some of its members submitted last Fall a set of detailed yet straightforward comments aimed at improving the copyright bill (e.g.; revising some of the definitional sections, narrowing some of the proposed exceptions to protection). At last report, it remains unclear to IIPA whether any of these clarifying comments would be incorporated into the bill. The Dominican Congress started a new legislative session on February 27, 2000.

3. The General Telecommunications Law of 1998

Changes to the telecommunications law and its regulations have left the audiovisual industry without effective legal recourse against signal theft piracy. Current legal actions are limited to demonstrating specific non-authorized use of the underlying copyright, a burdensome and ineffective process. The proposed copyright law currently before Congress would cure this deficiency by requiring television operators to obtain prior authorization for the use of the work.

INDOTEL (the Dominican Republic Telecommunications Institute) is empowered to regulate and control telecommunication issues, including the granting and revocation of operating licenses, inspecting business and equipment, and applying sanctions for non-compliance, but its authority does not extend to copyright violations. ONDA has some limited television piracy enforcement power by Article 116 of the Telecommunications Act (enabling ONDA to act on television piracy as described in Regulation 85-93), but it is only for the non-authorized use of a video for broadcast purposes as covered by Article 8 of Regulation 85-93. It is imperative that the current bill affecting copyright legislation effectively contemplate signal theft activity and that subsequent INDOTEL and ONDA regulations be expanded to include signal theft piracy.

4. Tax and duties on recorded music

The 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 has learned that while the import duties and taxes applicable to sound recordings remain fairly high,¹ the official valuations for pre-recorded musical media (e.g. cassettes and compact discs) have been

¹ 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.

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.

COPYRIGHT PIRACY AND ENFORCEMENT IN THE DOMINICAN REPUBLIC

High levels of copyright piracy have been a major problem in the Dominican Republic for over a decade. Generally, a lack of effective legal mechanisms has stunted enforcement efforts. Only in the mid-to-latter part of 1999 did criminal and administrative anti-piracy actions emerge which resulted in raids and seizures of infringing products. But even then, enforcement actions go awry, as in the series of recording industry actions in December 1999. The lack of a civil *ex parte* search remedy continues to block business software industry enforcement efforts. High judicial bonds in business software cases also serve as an impediment to effective enforcement.

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	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Motion Pictures	2.0	80%	2.0	90%	2.0	100%	2.0	100%	NA	NA
Sound Recordings / Musical Compositions	2.0	80%	2.0	80%	NA	NA	NA	NA	NA	NA
Computer Programs: Business Applications ²	7.4	69%	7.3	73%	NA	NA	NA	NA	NA	NA
Computer Programs: Entertainment Software	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA
Books	1.0	NA	1.0	NA	1.0	NA	1.0	NA	1.5	NA
TOTALS	17.5		12.4		3.0		3.0		1.5	

Computer software piracy in the Dominican Republic focuses on hard disk loading and end user piracy. In 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

² 1999 business applications estimates, provided by the Business Software Alliance (BSA), are preliminary. BSA's 1998 statistics appeared in IIPA's June 1999 GSP/CBI petition against the Dominican Republic.

businesses of all sizes, from small family businesses to large, prosperous financial institutions and industrial concerns. In addition, investigations by the Business Software Alliance (BSA) have revealed some instances of counterfeiting in the Dominican Republic. The BSA is watching this trend closely, but it does not appear to be the focus of Dominican piracy. Preliminary estimated losses due to business software in 1999 are \$7.4 million, with a 69% piracy level.

Piracy of sound recordings and music in the Dominican Republic remains rampant. Although the problem is primarily in the form of pirate cassettes, piratical CDs and CD-Rs are becoming a problem in Santo Domingo as well as tourist centers located on the north and east coasts. Street vendors selling these cassettes crowd the sidewalks in the commercial centers in Santo Domingo and throughout the island. The average price of a pirate audiocassette on the streets is approximately US\$2.00. Significantly, the street vendors are supplied by wholesale distributors at fixed locations which openly sell this product at an average price of US\$1.00 per cassette. Piratical product can still be purchased at the Santo Domingo airport. Raids conducted in Santo Domingo and Santiago in December 1999 have driven some distributors of illicit sound recordings underground, but these raids have not resulted in piracy rate reductions. Because the distribution channels for illicit sound recordings are well developed, and enforcement efforts have thus far been ineffective, the recording industry fears that as CD hardware and personal computers become more accessible to the population, CD piracy will eventually become as rampant as cassette piracy. The recording industry estimates piracy levels to be in the neighborhood of 80% for cassettes and 15% for CDs, resulting in trade losses of approximately \$2 million in 1999.

The U.S. motion picture and television industry's major problems are satellite signal theft and cable piracy. The industry has very limited legal recourse for signal theft piracy. Thus, cable and MMDS system operators and UHF television broadcasters who make unauthorized retransmissions of U.S. satellite-carried programming (mostly U.S. premium services and basic cable signals) have developed an entrenched pirate cable industry; even local hotels make unauthorized uses of these signals. Not only are the program suppliers hurt through the loss of copyright fees, but so are local broadcasters and cable operators who have purchased exclusive rights to use the programs on their cable or broadcast systems, only to find the same programs being retransmitted by pirate cable operators. In addition, several large television stations periodically broadcast recent hit U.S. motion pictures on VHF or UHF channels, and use DVD or videocassettes as the source of their transmissions. The Motion Picture Association (MPA) has been able to take some limited criminal action against such video-based television piracy, but the impact on the overall market and its tendency toward piracy has been limited.

Signal theft has disrupted the sequential distribution of motion pictures to theaters, followed by home video, pay TV, and free TV distribution. As a result, theaters in the Dominican Republic are suffering because of the ready availability of both illegal satellite and cable programming and illegal video product. The video market suffers greatly because of the lack of control over non-authorized use of motion picture product: nearly 90% of the market is pirate. More disappointing is the fact that the video market is sensitive to effective legal action. Actions taken in 1998 and 1999 show decreases in the video piracy rate to 80% in 1999, but these changes may be temporary. It is important to have consistent action against both video and television piracy in order to have a more permanent impact. Estimated trade losses to the motion picture industry remain at \$2 million in 1999 in the Dominican Republic.

For the book publishing industry, problems in the Dominican Republic primarily involve illegal photocopying of English as a Second Language (ESL) textbooks. New book distributors

continue to open stores in the country. Estimated trade losses to the publishing industry remain at approximately \$1 million in 1999.

COPYRIGHT ENFORCEMENT IN THE DOMINICAN REPUBLIC

1. Efforts at governmental interagency coordination to effectively combat piracy have failed to date

The Dominican Government has attempted to develop new inter-organizational mechanisms to address the piracy problem, such as a special commission in the Ministry of Industry and Commerce and an interagency anti-piracy group (COPAL). In March 1997, this interagency anti-piracy group was formed to process complaints, seize illegal materials and close businesses involved in piratical activity against all forms of piracy was formed in the public prosecutor's office. However, COPAL has yet to be legally established and become operational.

The most recent effort is the September 1999 creation of a commission led by the Ministry of Industry and Commerce, which includes 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 is to intensify efforts by the government to combat piracy.

These organizational efforts have not been fully effective in the copyright industries' view. For example, while MPA acknowledges the good intentions behind such attempts, it much prefers that the Dominican Government first develop the related agencies. For example, before assigning ONDA to any interagency effort, ONDA should demonstrate that it in fact can and will take action against television and video piracy.

2. Criminal enforcement against audiovisual piracy improved in 1999

Public prosecutors in Santo Domingo and Santiago have increased their cooperation with MPA to fight audiovisual piracy. The Santo Domingo office has taken action against both television piracy and video piracy and the Santiago office is actively developing an action plan in cooperation with MPA. Although judicial prosecution has been slow, the Prosecutor's Office has acted quickly and effectively on complaints. Although the Santo Domingo office has an office assigned to IP cases, it is run by a single attorney and is overwhelmed by trademark cases. The Santiago office has no assigned resources for piracy. This lack of resources limits what would otherwise be an effective effort. MPA is increasing the resources dedicated toward investigation of non-authorized commercial activities in 2000 in an effort to overcome the problem of lack of resources. However, the need for additional prosecution-oriented resources as well as more effective administrative action (discussed below) will be necessary in order for the Prosecutor's Offices to have an effective overall impact.

3. While cooperation with the police and prosecutors on business software cases continues, the industry has had to resort to using the trademark law to conduct criminal actions

In July 1998, the government established a new Intellectual Property Department within the District Attorney's Office for Santo Domingo, but it did not perform up to expectations. A new prosecutor hired in March 1999 has made efforts which have resulted in some positive change. In particular, the BSA reports some improvement with the Dominican prosecutors. Initially, the anti-piracy efforts taken by the Intellectual Property Department within the District Attorney's Office for Santo Domingo during 1998 and early 1999 on behalf of the business software community were extremely disappointing. However, the tide seemed to turn in early 1999 with the March 1999 hiring of a new assistant district attorney to head this office. This D.A. has demonstrated in numerous actions/raids his willingness to invoke Dominican law in ex officio actions against software pirates. After a flurry of ex officio actions against software pirates in July and August, these actions slowed down during the Fall as the D.A. turned to piracy in other industries. However, The reports that during 1999 the D.A. has brought more than 30 ex officio actions against Dominican software pirates. The D.A. has pledged to BSA that he will continue bringing actions against software pirates, but his office currently lacks the funds and personnel to run a consistently strong anti-piracy program. The BSA is hopeful that this anti-piracy initiative 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.

These successful anti-piracy actions/raids were initiated in spite of several problems with the Dominican Republic's copyright law, which provides for criminal but not civil ex parte inspections (see discussion below). However, the provisions in the Dominican Republic for criminal ex parte inspections are undermined by inconsistent and antiquated criminal procedure requirements. Because of these flaws with the copyright law and criminal procedures, software owners have been forced to rely on the Dominican trademark law to initiate these actions. The trademark law authorizes a private party to request a criminal, but not a civil, ex parte investigation of potential counterfeiting. Unfortunately, the trademark law provides inadequate remedies for infringements (100 pesos, or about US\$8) and is not an adequate anti-piracy measure. Thus the BSA is forced to bring each case as a hybrid trademark/copyright case. This is a needless and discriminatory procedural obstacle for software rights owners. While the trademark law provides ex parte investigations but inadequate damages, criminal remedies in the copyright law provide the only chance for remedies that are adequate to deter software pirates.

4. Initial enforcement actions involving sound recording piracy were extremely disappointing

The recording industry is gravely concerned regarding criminal enforcement efforts in the Dominican Republic based on recent experiences in Santo Domingo. In early December 1999, representatives of the recording industry met with the District Attorney for Santo Domingo to present two cases developed by the RIAA. These cases involved two substantial counterfeit cassette distribution centers in Santo Domingo, as well as a counterfeit cassette manufacturing facility.

According to intelligence developed by the RIAA, there were between 50,000 and 75,000 counterfeit cassettes at the two centers in Santo Domingo.

Upon presentation of formal *denuncias* (criminal complaints), the raids were conducted on December 16, 1999. The results of these raids were extremely disappointing, with only 88 cassettes seized at one distribution center and approximately 1,100 seized at the other. The Assistant District Attorney's own reports reveal that thousands of counterfeit pieces were observed at each distribution center, yet only a minimal amount of the illicit product was seized at each location. The reason given for this most disturbing conduct was that there was insufficient space in the vehicle used during the raids at the distribution centers. This reason is unacceptable to the recording industry in light of the offer made on more than one occasion by the RIAA (including on the morning of the raids) to provide logistical support (e.g., vehicles, boxes, storage space, etc.) and, if necessary, to lend its expertise in the identification of counterfeit and pirate sound recordings. It is the D.A.'s policy not to allow private industry to assist in the process of conducting raids. The RIAA believes that the presence of RIAA personnel or other authorized representatives could help to improve the results of anti-piracy operations by the Dominican government.

The raid conducted on December 16, 1999 at the illicit cassette manufacturing facility in Santo Domingo was less disappointing. Still, much of the duplication equipment was left behind because, according to the assistant D.A. who handled the operation, at the time of the raids, the suspect was duplicating certain legitimate recordings in addition to some counterfeits.

Following the raids in December, the RIAA received assurances from the District Attorney for Santo Domingo that the next raids would be handled correctly. And in fact, raids conducted on February 7, 2000, at two distribution centers for illicit sound recordings in Santo Domingo yielded better results, with approximately 20,000 units seized.

The recording industry is hopeful that the D.A.'s office will deliver on its promise to fully and effectively prosecute the piracy cases presently pending and that its recent enforcement effort is a sign of a true commitment to take music piracy seriously, not simply a last-minute effort to appease the recording industry. The RIAA also hopes that the Dominican government will support and implement a long-term program to address sound recording piracy, which has gone unchecked in the Dominican Republic for too long. As the RIAA recognizes that piracy investigations can place a significant burden on resources, the RIAA routinely investigates its own cases and provides investigative support to law enforcement agencies as needed. The RIAA intends to continue to investigate sound recording piracy in the Dominican Republic and to bring *denuncias* to the Dominican Government as appropriate.

5. Administrative enforcement actions in 1999 have been disappointing

In 1999, the National Copyright Office (ONDA) began to take administrative actions against video stores selling pirate product. ONDA has now moved to the Industry and Commerce Ministry, and has been promised additional resources there. MPA will assign an increased amount of resources in 2000 to cooperate with ONDA in addressing television and video piracy. ONDA

can take action ex officio against television stations and video stores and has a very effective enforcement mechanism against video store piracy under Articles 4(f) and 12 of Regulation 85-93.

However, the number and effectiveness of actions taken by ONDA have been disappointing, perhaps because of lack of resources. It is also important that ONDA reexamine its position requiring documentation prior to taking action on complaints. A recent complaint by an audiovisual industry licensee has been held up excessively by requests for documentation. ONDA is fully capable of seriously addressing such complaints through Article 4(f) without requiring prior documentation from the complaining party because 4(f) places the burden on the video store and television station to demonstrate the proper documentation. By dedicating more resources to support ONDA, it is hoped that ONDA could establish an inspection program similar to that developed by the MPA and the Mexican Intellectual Property Institute (IMPI) in Mexico. Such a program would have a significant impact, but would require more flexibility and emphasis from ONDA.

With respect to recording piracy, the recording industry is hopeful that ONDA may be involved in future raids outside the capital of Santo Domingo.

6. The lack of a civil ex parte search remedy in the Dominican Republic violates TRIPS

The Dominican law does not allow civil ex parte inspections, as required by the TRIPS Agreement (Article 50). As discussed above, the omission of this remedy severely harms the ability of business software owners to protect their rights from unauthorized uses.

7. The cost of judicial bonds continues to remain high and unnecessarily costly, especially in business software cases

BSA reports continuing difficulties with the judiciary, and some very recent improvement regarding on-the-ground cooperation with the prosecutors. A very serious problem affecting the business software industry is the high cost of bonds required in criminal cases. Over the past two years, BSA members have been required by Dominican courts to pay over US\$580,000 in bonds in six criminal cases as a condition to litigating copyright infringement cases in these courts. In these cases, BSA members' filed claims³ totaling \$1.3 million dollars; the bonds alone cost over one-third of the requested relief. In one case filed recently in Puerto Plata, BSA's claim against the defendant was for US\$75,000. In an order explicitly rejecting the application of the TRIPS Agreement requirements, the judge in that case set the bond at \$93,750. In another recently case, when BSA obtained a bond certificate from a Dominican insurer as required by the court, the court rejected it because it was not signed by a corporate representative of the plaintiff and therefore was only an "intention" of the insurance company. The most egregious example is a case involving the defendant T&L Software in 1998. BSA members filed an action requesting \$12,500 in damages; on August 27, 1998, the court imposed a bond of \$195,000, over 15 times the amount of the claim

³To be more specific, these claims are civil claims for damages, which are filed with the criminal cases, as permitted under Dominican law.

requested.⁴

The imposition of these onerous bonds makes judicial enforcement of BSA members' copyrights virtually impossible. Almost every defendant today petitions a Dominican court to impose these bonds on BSA members. Furthermore, under the Dominican civil code, only non-Dominicans are required to pay bonds for instituting suits in Dominican courts. The magnitude and discriminatory nature of these bonds appear to violate the Dominican Republic's current TRIPS national treatment obligation, which is not subject to transition (TRIPS Article 3 provided 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 will also conflict with the government's upcoming TRIPS Article 41(2) obligation requiring that procedures concerning the enforcement of intellectual property rights be "fair and equitable," not "unnecessarily complicated or costly."

8. Judicial action remains a weak element in effective enforcement

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. In March 1999, BSA obtained its first-ever verdict against a pirate in a case brought under the copyright law. The defendant in this case was the Santo Domingo software reseller Serecom-Raessa. This verdict requires the defendant to pay US\$25,000 to the two BSA member companies named in the case, and also requires the president of Serecom-Raessa to serve three months in jail. The verdict was rendered under a procedure akin to a default judgment, because the defendant did not appear in court. The defendant is appealing the verdict. No hearing has been set as of mid-February 2000. On July 2, 1999, BSA obtained a judgment against Compurent for US\$18,750 in damages and a fine of US\$85,000. The verdict also included a three-month prison term for the principal of Compurent, and confiscation of the illegal software products and equipment seized at the raid. Compurent is appealing, and a hearing was set for March 2000.

Conclusion

This Pre-Hearing Brief provides a detailed discussion of the deficiencies in the Dominican copyright legal and enforcement regime. We would be pleased to respond to any questions or clarifications you may have concerning this information.

Respectfully Submitted,

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

⁴ To make matters worse, in that case, the judge would not accept local counsel's power of attorney, and required senior executives of BSA member companies to appear personally before the court to attest to local counsel's authority to represent the plaintiff companies. This procedural requirement was "overly burdensome" with respect to mandatory personal appearances, in violation of TRIPS Article 42 (which admittedly did not take effect in the Dominican Republic until January 1, 2000).

APPENDIX A TO IIPA PRE-HEARING BRIEF

METHODOLOGY FOR ESTIMATED U.S. TRADE LOSSES AND LEVELS OF COPYRIGHT PIRACY ABROAD IN 1999

Estimated trade losses due to piracy and estimated piracy levels are calculated by IIPA's member associations. Since it is impossible to gauge losses for every form of piracy, we believe that our reported estimates for 2000 actually underestimate the losses due to piracy experienced by the U.S. copyright-based industries. This methodology is also used as the basis for the statistics provided in IIPA's February 18, 2000 Special 301 submission to the U.S. Trade Representative.

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. There are rare exceptions; for example, in Paraguay, the RIAA notes that \$190 million of the estimated \$200 million in losses are due to the transshipment of pirate CDs from countries in Southeast Asia. In 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
1. New PCs vs. Replacement PCs
2. Level of Technological Development
3. 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 Interactive Digital Software Association (IDSA)'s calculation method 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;
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 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

The 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 the 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, the 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.