

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE



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February 14, 2003

Mr. Steven Falken
Executive Director for GSP
Chairman, GSP Subcommittee
Office of the U.S. Trade Representative
1724 F Street NW, Room F-220
Washington, DC 20508

Re: Dominican Republic GSP IPR Review
Case: 012-CP-02

To the GSP Subcommittee:

We take this opportunity to update and supplement the public file with respect to the ongoing GSP review of the intellectual property rights practices of the Dominican Republic.

Attached please find IIPA's 2003 Special 301 report on the Dominican Republic, which we filed with USTR today. This report is also available online at the IIPA website at www.iipa.com.

We suggest that the Subcommittee swiftly schedule another public GSP hearing on the IPR practices in the Dominican Republic. The situation regarding copyright piracy and enforcement there requires the urgent attention of this Subcommittee.

Sincerely,

Eric H. Smith
President
International Intellectual Property Alliance

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2003 SPECIAL 301 REPORT

DOMINICAN REPUBLIC

EXECUTIVE SUMMARY

Special 301 recommendation: In order to support continued progress on effective implementation and enforcement of the 2000 copyright law, IIPA recommends that the Dominican Republic remain on the Priority Watch List, where it has been since 1998. IIPA filed a petition in June 1999 with the U.S. government to review the intellectual property rights practices of the Dominican Republic under the Generalized System of Preferences and the Caribbean Basin Initiative; USTR accepted this petition and GSP hearings were held in May 2000. IIPA recommends that the GSP Subcommittee swiftly schedule another hearing. Copyright must remain high on the bilateral trade agenda.

Overview of key problems: Levels of copyright piracy in the Dominican Republic remain quite high—well over 60% across almost all copyright sectors. The government of the Dominican Republic has taken commendable steps to address some of the issues and challenges it faces regarding copyright protection and enforcement, and this is commendable. However, the effective enforcement of the 2000 copyright law, which corrected numerous deficiencies in the prior legislation, remains critical. While industry cooperation with administrative (such as ONDA) and criminal agencies is good, actions resulting in practical deterrence against copyright infringement are mixed. During 2002, television piracy worsened, with no actions taken against the larger stations involved in unauthorized broadcasts; in fact, according to the MPAA, the Dominican Republic suffers the worst levels of broadcast piracy in the entire region. Meanwhile, ONDA still needs more political and economic support within the government in order to go beyond simple retail cases of copyright enforcement. Estimated 2002 trade losses due to piracy in the Dominican Republic were \$12.8 million.

Actions for the government of the Dominican Republic to take in 2003:

- Instruct the enforcement agencies (including ONDA, INDOTEL and the police) to take immediate and specific actions and prosecutions against certain broadcast television stations which continue to broadcast U.S. programming without authorization;
- Dedicate more resources and training to ONDA inspectors—for example, fund and expand ONDA to include satellite offices in the North and the South;
- Assign a squad of investigative law enforcement officers (police) to follow up on the cases after ONDA or Fiscalia has conducted a raid;
- Support ONDA's use of penalties under the *Reglamento* (regulation) to fine and close down retail outlets, including television stations, where infringing actions have been identified or infringing products seized;
- Continue to have ONDA and the Fiscalia seek the assistance of copyright-based industry organizations;
- Assure proper implementation of the new Criminal Procedure Code (i.e., training of judges, prosecutors and police officers);
- Create a dedicated position for National IPR Prosecutor, with nationwide jurisdiction.

DOMINICAN REPUBLIC
ESTIMATED TRADE LOSSES DUE TO PIRACY
(in millions of U.S. dollars)
and LEVELS OF PIRACY: 1998 – 2002¹

INDUSTRY	2002		2001		2000		1999		1998	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Motion Pictures	2.0	60%	2.0	60%	2.0	60%	2.0	80%	2.0	90%
Records & Music ²	6.9	65%	7.7	65%	2.0	80%	2.0	80%	2.0	80%
Business Software Applications ³	2.9	61%	4.0	64%	6.7	68%	7.4	69%	7.3	73%
Entertainment Software	NA	NA	NA	NA	6.0	NA	NA	NA	NA	NA
Books	1.0	NA	1.0	NA	1.0	NA	1.0	NA	1.0	NA
TOTALS	12.8		14.7		17.7		17.5		12.4	

SUMMARY OF BILATERAL IPR ENGAGEMENT

The IIPA and its members have long supported high-level, bilateral engagement between the U.S. and the Dominican Republic.⁴ In June 1999, IIPA filed a June 1999 petition with the U.S. government to initiate a review of the eligibility of the Dominican Republic to participate in two trade programs, the Generalized System of Preferences (GSP) and the Caribbean Basic Economic Recovery Act (CBERA, or CBI), due to its failures to provide adequate and effective copyright protection for U.S. copyright owners and to provide equitable and reasonable market access. The Office of the U.S. Trade Representative (USTR) accepted

¹ The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2003 Special 301 submission, and is available on the IIPA website at www.iipa.com/pdf/2003spec301methodology.pdf.

² RIAA reports that \$7.65 million (rounded to \$7.7 million, above) for 2001 represents the estimated sales displacement to the legitimate industry. Actual revenue to music pirates is estimated at \$4.1 million. For the sake of comparison, the recording industry's loss estimate for 2000 of \$2 million was based on less complete information, and represented a projection of pirate revenue rather than industry losses.

³ BSA's estimated piracy losses and levels for 2002 are preliminary, and will be finalized in mid-2003. In IIPA's February 2002 Special 301 filing, BSA's 2001 estimates of \$12.3 million at 70% were identified as preliminary; BSA finalized its 2001 numbers in mid-2002, and those revised figures are reflected above. BSA's trade loss estimates reported here represent losses due to piracy which affect only U.S. computer software publishers in this country, and differ from BSA's trade loss numbers released separately in its annual global piracy study which reflects losses to (a) all software publishers in this country (including U.S. publishers) and (b) losses to local distributors and retailers in this country.

⁴ For a full discussion on the copyright industries' and U.S. government's lengthy bilateral engagement with the Dominican Republic on IPR issues, see Appendices D and E of IIPA's 2002 Special 301 report.

this petition on February 14, 2000, and hearings were held on May 12, 2000. Currently, this review is ongoing.⁵

In addition, the Dominican Republic also became an eligible beneficiary country of the U.S.-Caribbean Basin Trade Partnership Act (CBTPA) in 2000.⁶ To maintain its CBTPA benefits, the Dominican Republic must meet all the CBERA criteria, as well as the CBTPA's explicit TRIPS-or-greater criteria. In fact, in July 2000, IIPA recommended that the Dominican Republic should not be designated as an eligible CBTPA country, given that its copyright enforcement regime failed to meet the CBTPA statutory criteria.⁷ Furthermore, as a WTO member, the Dominican Republic is obligated to meet its substantive copyright obligations as well as the enforcement text of the TRIPS Agreement.

The Dominican Republic and the U.S. continue their bilateral economic relations in the context of regular Trade and Investment Council (TIC) meetings. The next TIC meeting will be held in Santo Domingo in the Spring 2003, and IIPA strongly requests that copyright be included on the agenda for action-oriented discussions.

COPYRIGHT PIRACY IN THE DOMINICAN REPUBLIC

Copyright piracy across the industry sectors remains very high in the Dominican Republic.

The Motion Picture Association of America (MPAA) reports that audiovisual piracy in the Dominican Republic in 2002 reflected a combined piracy rate across various media of 60%, resulting in an estimated \$2 million in losses to U.S. owners of filmed entertainment. In early 2002, the most disturbing problem was that current theatrical releases and theatrical DVDs were being broadcast in the Dominican Republic without authorization. At that time, unauthorized broadcasts of other less current materials also continued. Recent reports have confirmed that the broadcast piracy problem is as bad as it has ever been. Furthermore, illegal broadcasts of non-current theatrical releases continues, almost unabated, on these three channels. Several large broadcast television stations—specifically, Telemicro-Channel 5 (VHF), Canal Digital-Channel 15 (UHF) and Canal del Sol-Channel 40 (UHF)—regularly broadcast U.S. programming, including motion pictures produced by MPAA member companies, without authorization. These channels often use DVDs or videos as the source materials for their broadcasts.

Estimated levels of both broadcast piracy and cable piracy in the Dominican Republic each amount to 20%. While broadcast piracy is the most immediate and pressing problem,

⁵ A significant amount of goods (over \$2.47 billion) from the Dominican Republic receive preferential duty-free treatment under the U.S. trade program. Specifically, for the first 11 months of 2002: \$14.2 million worth of Dominican goods entered the U.S. under the duty-free GSP code (representing a 57.8% decrease from the same period in 2001); \$827 million worth of Dominican goods entered under the CBERA (representing a 10.7% increase over the same period in 2001) and \$1.63 billion of Dominican goods entered under the CBTPA (representing a 15.2% increase from the same period in 2001).

⁶ Trade and Development Act of 2000, Pub. L. 106-200 (May 18, 2000).

⁷ See IIPA's July 17, 2000 Comments to USTR Regarding Eligibility Criteria for Beneficiaries of the U.S.-Caribbean Trade Partnership Act, available at http://www.iipa.com/pdf/2000_Jul26_CBTPA.pdf.

MPA reports that cable and MMDS system operators in the Dominican Republic (systems such as Cable TV Dominicana, Telecable Luperón, Happy Day TV Cable, Cable La Unión and Cables de Miches) also engage in signal theft by making unauthorized retransmissions of U.S. satellite-carried programming. Since the country is located within the footprint of most U.S. domestic satellites, cable operators throughout the territory are able to downlink, decode and retransmit these signals to their subscribers. This type of piracy has caused far-reaching market distortions. The simultaneous retransmission of U.S. pay channels, featuring motion pictures still in their theatrical release in the Dominican Republic, greatly reduces legitimate business opportunities in other media by disrupting the normal release sequence to theatrical exhibitors, retail video outlets and legal cable operators.

Piracy of sound recordings and music in the Dominican Republic continues to plague the country, with piracy estimated at 65%. The estimated trade loss due to music recording piracy was \$6.9 million in 2002. The piracy rate estimate for audiocassettes is 98%, compact disc (CDs) is 30% in retail stores, with a noticeable increase in the tourist areas and major shopping areas around the country. The move from audiocassettes to music CDs has brought about an explosive growth of pirate music recorded on the CD-R format. In 2002, street vendors and retailers set up in kiosks at the major malls and plazas around the Dominican Republic were the main source of illicit retail distribution of pirated recording. The street level inventories continue to be 100 % pirate. Pirate audiocassettes cost between US\$1.00-2.00 per unit and counterfeit CD-Rs can range from US\$3.00-5.00. Counterfeit music CDs traced back to the Ukraine continue to make it into the Dominican Republic, although this is not a big concern at this time. These molded CD counterfeits make it to the larger retail stores and sell at or near suggested retail. With few exceptions, the majority of the counterfeit and pirate CD-Rs are recorded in the Dominican Republic. ONDA reduced operations in music related activities by 227% in 2002. Total seizures dropped 87% from 2001 to 2002.

The Business Software Alliance (BSA) reports that computer software piracy in the Dominican Republic comprises primarily end-user piracy and hard-disk loading. With hard-disk loading, Dominican resellers load unlicensed software onto computer hardware and sell the package to an end user. In some cases, the software is represented as legitimate and the purchasers may be unaware that they are buying illegal software; in other cases, the purchasers are complicit in the piracy. End-user piracy rates remain high among Dominican businesses of all sizes, from small family businesses to large, prosperous financial institutions and industrial concerns. Preliminary estimated losses due to business software piracy in 2002 are \$2.9 million, with a 61% piracy level.

The book publishing industry reports that problems in the Dominican Republic primarily involve illegal photocopying of English as a Second Language (ESL) textbooks. Commercial piracy is diminishing as legitimate distributors increase. Estimated trade losses to the publishing industry remain at approximately \$1 million in 2002.

The Interactive Digital Software Association (IDSA) reports that there is piracy of entertainment software (including videogame CDs and cartridges, personal computer CDs, and multimedia products) occurring in the Dominican Republic.

COPYRIGHT ENFORCEMENT IN THE DOMINICAN REPUBLIC

Coordination among enforcement agencies is improving but actions do not always result in deterrence.

As in prior years, the key to real progress in the Dominican Republic is a serious commitment from the Executive to support and encourage effective action by ONDA, INDOTEL and criminal prosecutors in a consistent and comprehensive governmental response to piracy. ONDA must be given the necessary support and resources to continue its campaign of investigations and raids against pirates. Coordination between the *Fiscalia* and ONDA, which had been strained up until early 2001, improved during 2002; there remains room for improvement in 2003 in the collective effort to prosecute copyright infringers. The Office of the President can facilitate coordination between ONDA, INDOTEL, the *Fiscalia*, and the police, and can make the fight against piracy a top public priority. Dominican judges at the trial and appellate levels should continue their training to give the copyright law full implementation. Since 2002, the judges have started to grant petitions for civil copyright claims, as provided under the new copyright law.

In March 2001, an interagency commission was formed to coordinate all the agencies dealing with intellectual property issues, including ONDA, foreign affairs, customs, public health and others. It is headed by the President of INDOTEL and has members from the Ministry of Industry and Commerce, Customs, the Health Ministry and the Culture Ministry. While this interagency group is an important information-sharing forum for different government agencies, its primary focus should be to support the concrete enforcement efforts of ONDA, the *Fiscalia*, INDOTEL and other agencies. During 2002, the commission pressed for the approval of the WIPO treaties in the the Senate.

The good news continues to be that the 2000 copyright law provides more tools for Dominican Republic agencies and rightholders to take more concrete action against piracy. The bad news is that the impact of the new copyright law has not been felt because of a lack of effective application and a lack of willingness to enforce the new measures. The Executive branch has failed, for example, to fulfill its promise to coordinate action against piracy with the new measures by failing to develop a promised interagency effort to coordinate actual anti-piracy actions by the appropriate agencies and by failing to adequately support ONDA. In addition, there has been little encouragement to pursue prosecutions under the law. No action has been taken to effectively address television piracy by operators containing close political ties to the administration.

ONDA's Inspections and Actions in 2002

The Structure of ONDA: ONDA is the Mejia government's successful response to piracy in the Dominican Republic. When the government took office in August 2000, President Mejia appointed Mariel Leon as director of ONDA, who was director until July of 2002. During that period ONDA carried out an aggressive campaign of inspections, raids and seizures against pirates. This effort has continued under the new ONDA Director, Dr. Edwin Espinal, who has been very proactive not only in Santo Domingo but also in other cities. ONDA presently has a contingency of nine inspectors in the Santo Domingo main office. ONDA needs to maintain an office in the North, preferably Santiago. In addition, funding should be made for an additional satellite office in the South.

One concrete step toward improvement of enforcement actions in the Dominican Republic would be to continue to actively foster closer coordination between ONDA and the police. ONDA has requested additional support from the police in its investigations of piracy, and also in providing security for ONDA personnel when they perform inspections and raids on suspected pirates. In both of these areas, police support would allow ONDA to operate more effectively. The police could assist ONDA with their inspections of the leads and tips ONDA receives about suspected pirates operating in the DR. Since the January 2002 publication of the copyright regulations (*reglamento*), ONDA has started to apply its administrative fines against copyright infringers with some success.

The industries' experience with ONDA: The industries continue to have varying experiences regarding the deterrent effect of ONDA enforcement actions.

MPAA indicates that, because of apparent political concerns, the Dominican enforcement agencies have totally failed in enforcing the law against the illegal television broadcasts transmitted by three television stations in Santo Domingo. The increased incidence of television piracy -- a problem in the Dominican Republic for well over a decade -- threatens to dilute the new attitude of ONDA and INDOTEL toward compliance in the television industry, as television stations begin to see an uneven application of the law and a tolerated model of unlawful conduct. In early 2002, MPA and several of its member-company executives met with Dominican authorities, including the Attorney General and the Assistant Secretary of Commerce and Industry, to detail complaints regarding specific broadcasters. The Dominican authorities admitted that the problem was political and promised to take action. However, no action was taken and the problem continued. In mid-December 2002, MPAA counsel worked with both ONDA and INDOTEL to conduct inspections at Telemicro and Canal Digital. The notarized complaints alleged unauthorized broadcasts of MPAA-member company films, "Pearl Harbor," "Black Hawk Down," "Training Day," "Bandits," "Rollerblade," "Lake Placid," "Spy Game," and "Swordfish." Broadcast station personnel denied the charges, saying they did not broadcast pirated movies. These cases remain under investigation. With respect to TV and cable piracy, ONDA has jurisdiction to take enforcement; it can also work with INDOTEL, especially if ONDA requires technical assistance. These two agencies have done a good job applying the 2000 Copyright Law to small businesses, such as video stores and small television stations. For example, in March 2002 actions were taken against Channel 12 in Santiago, Jaravisión in Jarabacoa and Telediaducto in Moca. It is important to acknowledge that ONDA has done a good job with video piracy enforcement. The frustration comes from the lack of governmental enforcement actions against these three larger broadcast stations.

The recording industry reported that music piracy operations suffered a setback due to reduced involvement by ONDA. ONDA went from conducting 180 music-related operations in 2001, where they seized 65,589 pirate audiocassettes and music CDs, to 55 operations in 2002, seizing 30,582 pirate audiocassettes and music CDs. This is a dramatic reduction during 2002. RIAA looks for a dramatic improvement in this area. ONDA needs to work more closely with other government and non-government entities to make the best use of its limited resources. The assignment of a law enforcement specialist/detective to ONDA would facilitate the need for follow-up investigations beyond the present first tier seizure of product and/or arrest of a vendor/retailer. The need to identify deeply into the criminal networks that manufacture and distribute the illicit product is crucial to an effective anti-piracy campaign and an important element needed to deter others. In addition, the *reglamento*, although considered, was not used by ONDA against any music piracy retail targets during 2002.

BSA reports it continues to be able to work very effectively with ONDA and the *Fiscalia* in this new enforcement regime. During 2002, the *Fiscalia* was very proactive and conducted 15 more *ex officio* actions in 2002 than in prior years. In the case of actions against software pirates, ONDA conducts inspections and routinely seizes computers that are found to contain illegal software. ONDA then refers this evidence to the *Fiscalia* for criminal prosecution. BSA expects to keep working closely with ONDA and *Fiscalia* and would like to see continuing increase in the amount of raids taken by these two agencies. Working with Dominican prosecutors in the *Fiscalia* offices, BSA has achieved twelve (12) convictions of software piracy in recent years. Other prosecutions for piracy and counterfeiting are working their way through the Dominican courts.

Criminal enforcement in 2002 continues to have mixed results.

In July 1998, the government established a new Intellectual Property Department within the District Attorney's Office for Santo Domingo. However, when it comes to actual enforcement taken by the criminal authorities, the industries had mixed experiences in 2002.

No progress on broadcast television piracy cases, only video cases: The audiovisual industry has not seen a serious attempt to coordinate criminal copyright enforcement, including prosecutions, against broadcast television piracy. In contrast to the dismal situation with broadcast piracy, MPAA reports that cooperation and results with ONDA on video piracy cases have been positive.

Recording industry continues to report minimal progress: The RIAA reports that there were 55 raids/seizure operations by ONDA in 2002, resulting in the confiscation of 3,078 audiocassettes and 27,504 pirate CDs/CD-Rs, an 87% decrease of 2001. These actions included raids of three illegal manufacturing and distributing facilities of pirate CD-R operations. Because of the drastic decreases in operations and seizures by ONDA, the RIAA has been working with ADOPROFONO, a local group of music labels brought together as a coalition, to address the increasing piracy problems in the Dominican Republic. Through this group, which was formed in July of 2002, and the assistance of the *Fiscalia* (Prosecutor's Office, IPR prosecutor), ADOPROFONO conducted 11 operations and seized 284,000-pirate/counterfeit music CDs and 11,000 audiocassettes through December 2002. The RIAA is encouraging the formation of a task force that would include members of the *Fiscalia*, ONDA, ADOPROFONO, and the National Police, to address music piracy issues and work together in the identification, arrest, seizure and prosecution of illicit manufacturers, distributors and vendors of music pirates.

Positive results with business software actions: During the first half of 2002, ONDA, the District Attorney's Office, State Attorney's office, and INDOTEL and other private industries launched the Zero Tolerance Campaign. Some government officials actively participated in this campaign, which was held from March to June 2002. The District Attorney's office conducted eight raids and ONDA conducted between 20 and 30 inspections. BSA has also worked with ONDA to provide their inspectors with leads on suspected pirates. After conducting their own investigations, ONDA carries out inspections where appropriate and if any pirated software is found, ONDA confiscates any computers loaded with the illegal software. ONDA then prepares a report and refers the evidence of piracy to the *Fiscalia* for prosecution. These referrals resulted in the *Fiscalia* filing between 50 and 60 cases against software pirates during 2002. The *Fiscalia* continues to be very cooperative with BSA in prosecuting these cases. BSA understands that despite the large volume of files coming over from ONDA, the *Fiscalia* is up to date on filing criminal actions resulting from the ONDA inspections. Likewise, it is important to point out that after the new Criminal Procedure Code was approved, the *Fiscalia* initiated more

ex officio actions in software cases. BSA expects, since the approval of the new criminal procedure code, to keep working closely with ONDA and *Fiscalia* and would like to see more raids during this year.

Last year BSA worked with the National School of the Judiciary (*Escuela Nacional de la Judicatura*) and their judicial continuing legal educational program to develop curriculum for a judicial training course on the new copyright law. This initial course was held from October 2001 to April 2002. The curriculum was available to judges all over the Dominican Republic via a state-of-the-art distance learning program, and was a great success. In addition, BSA, in coordination with the District of Attorney's Office, U.S. Embassy, and with the sponsor of the U.S. Office of Patent and Trademark (USPTO), organized a two-day seminar on Intellectual Property issues, in which international speakers from the U.S., Colombia, Venezuela, Panama and Costa Rica participated. About 400 participants among judges and prosecutors participated in this event, which was a complete success. During 2003, BSA is expecting to keep working with the National School of the Judiciary in its continuing legal education program.

Judicial action is improving in civil cases, but criminal actions lag.

An effective judicial system is a necessary ingredient in providing adequate and effective copyright protection.

Criminal cases: As recently as mid-2002, some industry representatives have felt that the Dominican Republic's judicial system is so dysfunctional that, as a practical matter, it is necessary to add a civil claim to the criminal case to inform the court that there is a victim interested in pursuing the case. The adding of the civil component to the criminal case only serves the interest of individuals looking for a way to circumvent the criminal system by pleading to the civil case in exchange for no jail time. However, this situation should improve in the future with the implementation of the new Criminal Procedure Code. Under the new code, criminal cases will be heard much more quickly. Instead of having cases rescheduled in mid-trial for months at a time, the trial would be heard continuously during the course of several days. This new code also allows for the negotiation of restitution amounts, something that is not presently available. So far, few copyright infringement cases have made it through the Dominican judicial system.

RIAA reports that the court system continues to be the weakest link in its anti-piracy efforts in the Dominican Republic. For 2002, the RIAA had 55 cases pending, 23 of which were added during the year. As of December 2002, the RIAA has been successful in obtaining eight prosecutions, including prison sentences, court fines and restitution in the amount of US\$102,500. However, all of the above cases are on appeal and have not been scheduled for review by the Court of Appeals. In contrast, BSA continues to be successful in the appeals process with the confirmation of previous judgments in their favor by the Court of Appeals. A recent realignment of territory in Santo Domingo will limit the reach that Carmen Chevalier, IPR Prosecutor in the *Fiscalia's* office, previously had to pursue these cases. Moreover, we would strongly recommend that the government move forward with creating a national post for an IPR prosecutor in the country. This would streamline cooperation between the many prosecutors' offices and provide consistency throughout the country.

Civil cases: During 2002, BSA has received five favorable judgments. In January 2002, based on an action filed in December 1998, BSA obtained a judgment on appeal which was confirmed by the Superior Court against Robotics, a reseller that imported and sold a

counterfeited office suite of programs. In the longest jail time to date in a software case, the judge condemned Robotics to one year of prison and imposed \$17,500 as damages and \$650 in fines. Likewise in January 2002, BSA obtained a judgment on appeal against *Centro Copiados León*, a copy center in which the judge condemned *Centro Copiados León* to \$14,114 in fines; \$13,636 damages. And in May 2002, BSA obtained a judgment on appeal against Almatac. The judge ordered \$7,057 in fines, \$11,000 damages plus three months of jail time. In July 2002, based on an action filed in March 1999, BSA obtained a judgment on appeal against Atlántica, a car dealership. The judge in this case ordered three months of jail time, \$350 in fines and \$11,500 damages. Finally, in December 2002, on an action filed in 1999, BSA obtained a judgment on appeal against Cocimar, an engineering firm. The judge condemned Cocimar to pay \$350 in fines and \$11,500 in damages.

2002 CRIMINAL ENFORCEMENT STATISTICS IN THE DOMINICAN REPUBLIC

CRIMINAL COPYRIGHT ENFORCEMENT STATISTICS 2002			
ACTIONS	MOTION PICTURES	BUSINESS APPLICATIONS SOFTWARE	SOUND RECORDINGS
Number of Raids conducted	NA	98	55 by ONDA and 11 by ADOPROFONO
By Police (D.A.)		15	
By Customs			
Number of cases commenced		25	13
Number of defendants convicted (including guilty pleas)			8
Acquittals and Dismissals			
Number of Cases Pending		12	45
Total number of cases resulting in jail time		3	All RIAA sentences are on appeal
Suspended Prison Terms			
Maximum 6 months		3	
Over 6 months			
Over 1 year			
Total Suspended Prison Terms			
Prison Terms Served (not suspended)			
Maximum 6 months			
Over 6 months			
Over 1 year			
Total Prison Terms Served (not suspended)			
Number of cases resulting in criminal fines		5	8
Up to \$1,000		1	3
\$1,000 to \$5,000			5
Over \$5,000		4	
Total amount of fines levied			\$25,700

Civil Enforcement Improves: *Ex Parte* Searches, Damages and Bonds

The court of appeals of Santo Domingo, in two BSA civil cases (*MC Todo Casa* and *Vimenca*), expressly banned the imposition of bonds even in cases filed under the scope of the previous IP Law No. 32-86 in which a payment of a bond was necessary. BSA considers this opinion a very positive one. The 2000 law provides expressly for civil *ex parte* inspections, as

required by the TRIPS Agreement (Article 50), an element which was missing in the prior copyright legislation. The omission of this remedy had severely harmed the ability of business software owners to protect their rights from unauthorized uses. The copyright industries look for the courts of the Dominican Republic to apply its laws to afford civil remedies, including damages, at levels “adequate to compensation for the injury the right holder has suffered,” as required by TRIPS Article 45.1.

The 2000 Copyright Law corrected another problem in Dominican law and practice in that it expressly prohibits judges from imposing onerous bonds in cases brought by foreign plaintiffs. The imposition of those onerous bonds made judicial enforcement of BSA members' copyrights virtually impossible. Under the Dominican civil code, only non-Dominicans could be required to pay bonds for instituting suits in Dominican courts.⁸ However, the new copyright law has relieved foreign rights holders of this burden when protecting their rights in Dominican courts. In fact, BSA has successfully argued against the imposition of bonds in six cases since the copyright law was passed. This is a major improvement in the practical ability of copyright holders to defend their ownership rights in Dominican courts.

COPYRIGHT LAW AND RELATED ISSUES

Copyright Law 2000 and Its Regulations 2001

The Dominican government succeeded in its years-long effort to pass new copyright legislation which contained high levels of copyright protection. Although the official date of publication of this law was August 24, 2000, it was published in the Official Gazette on October 24, 2000, entering into effect that same day. The law has many positive features which the IIPA has previously identified, and is a vast improvement over the 1986 copyright law. For example, the 2000 law corrects many of the key TRIPS substantive points, including protection for computer programs, databases, and the minimum term of protection. The lack of civil *ex parte* search authority was also remedied. The level of criminal fines was increased significantly, and is based on the statutory minimum wage, which is RD\$3,690 (US\$168) per month; the law creates fines of 50 to 1,000 times the minimum wage (or US\$8,400 to US\$165,000). The new law (like the old one) provides a term of three months to three years in jail for most criminal infringements. Importantly, the scope of exclusive economic rights for authors and producers of phonograms was expanded, and comes close to meeting the obligations found in both of the WIPO treaties. However, the law does not provide producers of sound recordings with broad exclusive rights over all forms of communication, and in recognition of the changes in technology which in turn are changing the way music consumers get access to recorded music, such a right should be provided in the law.

In March 2001 a regulation (*reglamento*) was passed which empowered the Director of ONDA to, among other things, continue pursuing violators in IPR cases. It provides the following: (1) the Director of ONDA has the authority to fine any establishment (individual) selling pirated/counterfeit products on the spot. The fines levied can range from 5 percent to 200 percent of the minimum salary; (2) the Director can also close down any establishment for

⁸ The magnitude and discriminatory nature of those bonds appeared to violate the Dominican Republic's TRIPS national treatment obligation (TRIPS Article 3 provides that “Each Member shall accord to the nationals of other Members treatment no less favorable than it accords to its own nationals with regard to the protection of intellectual property...”). Such discriminatory treatment also conflicted with the government's current TRIPS Article 41(2) obligation, requiring that procedures concerning the enforcement of intellectual property rights be “fair and equitable,” not “unnecessarily complicated or costly.”

30 days, indefinitely in repeat cases; (3) recidivists can be fined up to 400 percent of the minimum salary and the establishment closed down indefinitely. These administrative penalties are in addition to criminal penalties. In the early part of January 2002, INDOTEL funded the publishing of the *Reglamento*, which allegedly was the hold-up in actually applying its penalties. The *Reglamento* was finally published in the *Official Gazette* and made available to the public on January 2002, even though in the publication it states the date of March 14, 2001. Since the publishing of the *Reglamento*, ONDA has started to apply these administrative penalties with success.

Criminal Procedures Code 2002

The Dominican Congress on July 2, 2002 passed a new Criminal Procedure Code. This code includes some of the changes that the copyright industries had been lobbying for. Significantly, the new Criminal Procedure Code continues to allow ONDA and the *Fiscalia* to conduct *ex officio actions*.

WIPO Treaties

The Dominican Republic should be encouraged to ratify the two 1996 WIPO treaties, the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty. The current ONDA administration supports ratification of these treaties. In October 2002, the Senate opined in favor of the ratification of these two treaties. Currently the document is in the Chamber of Deputies for its opinion. Ratification is the natural next step for the Dominican Republic, especially because its 2000 copyright law already includes many of the treaties' obligations. A vote could happen at any time.

Constitutional Challenge to the Copyright Law

BSA is currently defending against a constitutional challenge to the 2000 copyright law. A reseller defendant in a BSA case, Hard Soft, has filed a constitutional challenge in the Supreme Court of Justice in Santo Domingo, alleging that portions of the 2000 copyright law are unconstitutional. Among the challenged provisions are Article 37, which excludes software from the private copying safe harbor; Article 44, which exempts public communications; and Article 74, which explains uses authorized by a software producer. Hard Soft argues that the copyright law protects software more tightly than other media, and is thus unconstitutional because of unequal protection. Hard Soft also argues that because software is protected as a literary work, private copying should be permissible, as it is with other literary works; the exception for public communications should cover the public demonstration of computers for sale purposes. BSA has filed a brief refuting these arguments, and ONDA, CERLALC (UNESCO's organization) and copyright expert Ricardo Antequera of Venezuela have also filed a brief against this constitutional challenge. Currently, BSA is waiting for the next hearing, which is scheduled for March 24, 2003.

COPYRIGHT AND REGIONAL TRADE NEGOTIATIONS

The negotiation of bilateral and regional free trade agreements (FTAs) is assuming increasing importance in overall U.S. trade policy. These negotiations offer an important opportunity to persuade our trading partners to modernize their copyright law regimes so they can maximize their participation in the new e-commerce environment, and to improve

enforcement procedures. The FTA negotiations process offer a vital tool for encouraging compliance with other evolving international trends in copyright standards (such as fully implementing WIPO treaties obligations and extending copyright terms of protection beyond the minimum levels guaranteed by TRIPS) as well as outlining specific enforcement provisions which will aid countries in achieving effective enforcement measures in their criminal, civil and customs contexts.

IIPA believes that the IPR chapter in the Free Trade Area of the Americas (FTAA) must be forward-looking, technologically neutral documents that set out modern copyright obligations. They should not be summary recitations of already existing multilateral obligations (like TRIPS). As the forms of piracy continue to shift from hard goods and more toward digital media, the challenges faced by the copyright industries and national governments to enforce copyright laws grow exponentially. The Internet has transformed copyright piracy from a local phenomenon to a global wildfire. CD-R burning is fast becoming a pirate's tool of choice throughout this region. Without a modern legal and enforcement infrastructure, including effective criminal and civil justice systems and strong border controls, we will certainly see piracy rates and losses greatly increasing in this region, thus jeopardizing more American jobs and slowing the growth of the copyright sectors both in the U.S. and the local markets.

Therefore, the IPR chapter in the FTAA should contain the highest levels of substantive protection and enforcement provisions possible. At a minimum, the IPR chapter should: (a) be TRIPS- and NAFTA-plus, (b) include—and clarify—on a technologically neutral basis the obligations in the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty (WCT and WPPT), and (c) include modern and effective enforcement provisions that respond to today's digital and Internet piracy realities. Despite the existence of these international obligations, many countries in the Western Hemisphere region fail to comply with the TRIPS enforcement obligations, both in their legislation and in practice. It is in the area of enforcement that some of the greatest gains for U.S. and local copyright creators can be achieved.