

# INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

## 2001 SPECIAL 301 REPORT

# BAHAMAS

## EXECUTIVE SUMMARY

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

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

## COPYRIGHT LEGAL ISSUES

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

On January 5, 2000, the Government of the Bahamas implemented its 1998 copyright act ("the Act") through publication of regulations that, *inter alia*, authorized a new compulsory license for retransmission of television programming by persons who are licensed cable operators. This new compulsory license expands the scope of a compulsory license far beyond the internationally accepted limits of such a license (e.g., authorizing retransmission of free-over-the-air broadcasts) to the unprecedented step of permitting retransmission of *any* copyrighted work transmitted over its territory, including the encrypted signals of U.S. basic cable and pay TV services. The regulations also would have permitted Internet retransmission of all signals via Internet. The introduction of such a broad compulsory license is inconsistent with the obligations of the Berne Convention for the Protection of Literary and Artistic Works, to which the Bahamas is a signatory. By adopting a

Berne-inconsistent compulsory license, the Bahamas denies the member companies of the Motion Picture Association (MPA) adequate and effective protection of their intellectual property rights.<sup>1</sup>

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

The extremely dangerous international precedent set by the Bahamas' compulsory license threatens to disrupt commercial markets for programming and cause serious adverse impact on U.S.-filmed entertainment and programming packages, not only in the Bahamas, but around the world. Because of the harmful precedent and its potentially worldwide consequences, MPA believes that the January 2000 Bahamian compulsory license requirement qualifies as one of the most onerous, blatantly illegal, and egregious policies, completely flaunting respect for rights protected under copyright.

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

- Under the Act, cable operators are required to pay fixed rates as equitable remuneration to the copyright owners in accordance with the Berne Convention. The rates established in the regulations are far lower on a per-signal basis than rates paid for television broadcast signals under compulsory licenses permitted by international norms, and fail to meet the "equitable" standard under Berne.
- The Regulations made a bad situation worse by permitting cable operators to pay only 25% of the already low rates of equitable remuneration otherwise payable when the subscribers are hotels. The Berne Convention's compulsory licenses provisions for retransmission of broadcasts do not provide any exemptions for retransmission to hotel rooms. The normal careful balancing of the interests of the users and rightholders is, in this situation, inordinately out of balance. A hotel is a commercial enterprise. There is no legitimate

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

<sup>2</sup> Bahamian cable operators have long argued that English language feeds of television signals are not available commercially in the Bahamas and have used this argument as justification for a compulsory license. Although MPA rejects the idea that the lack of program alternatives justifies abrogation of international copyright obligations, the premise of the argument is also incorrect. English language programming services are currently available for the English-speaking Caribbean area.

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

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

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

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

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

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

The Bahamas is a beneficiary country under the Caribbean Basin Economic Recovery Act (CBERA, or CBI), a U.S. trade program which includes criteria requiring beneficiary countries to

afford adequate and effective intellectual property rights protection to U.S. copyright owners.<sup>3</sup> Recently, the Bahamas also became an eligible beneficiary country of the U.S.-Caribbean Basin Trade Partnership Act (CBTPA), found in Title II of the Trade and Development Act of 2000.<sup>4</sup> To maintain these CBTPA benefits, the Bahamas must meet all the CBERA criteria, as well as the CBTPA's explicit TRIPS-or-greater IPR criteria.

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

### **The December 2000 proposed amendments**

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

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

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

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

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

<sup>4</sup> Trade and Development Act of 2000, Pub. L 106-200 (May 18, 2000) (also known as CBTPA).

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

### **Industry efforts continue on commercial matters**

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

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

### **WIPO Treaties**

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