

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2001 SPECIAL 301 REPORT

COSTA RICA

EXECUTIVE SUMMARY

Criminal copyright enforcement efforts by Costa Rican authorities continue to decline. Prosecutorial and judicial delays have stymied the hopes of any tangible progress, especially in San José. Delays in judicial proceedings, lack of official investigators and public prosecutors specialized in intellectual property crimes, as well as the drastic budget cuts imposed on the judiciary caused serious enforcement problems in 2000 which will likely continue in 2001. Estimated trade losses due to copyright piracy in Costa Rica are \$14.2 million for 2000.

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

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

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

INDUSTRY	2000		1999		1998	
	Loss	Level	Loss	Level	Loss	Level
Business Software Applications ¹	9.0	68%	9.4	71%	6.8	72%
Sound Recordings / Musical Compositions	3.0	40%	3.0	40%	3.0	90%
Motion Pictures	2.0	40%	2.0	95%	3.0	95%
Entertainment Software ²	0.2	50%	NA	NA	NA	NA
Books	NA	NA	NA	NA	NA	NA
TOTALS	14.2		14.4		12.8	

¹BSA estimates for 2000 are preliminary. In IIPA's February 2000 Special 301 submission, BSA's 1999 loss figure of \$9.1 million was also reported as preliminary. BSA's 1999 statistics were finalized in mid-2000, and are reflected above.

² IDSA estimates for 2000 are preliminary.

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

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

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

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

⁴ See International Intellectual Property Alliance, Request for Review of the intellectual Property Rights Practices of Costa Rica in the 2000 Annual GSP Country Eligibility Practices Review, August 21, 2000, available on IIPA's Website at <http://www.iipa.com> and in USTR's Reading Room in Washington, D.C.

⁵ The CBTPA is found in the Trade and Development Act of 2000, Pub. L. 106-200 (May 18, 2000). USTR subsequently determined that Costa Rica has implemented, or is making substantial progress toward implementing, certain customs procedures based on those found in NAFTA. This determination made Costa Rica fully eligible for the CBTPA trade benefits. See Press Release 00-68, Office of the U.S. Trade Representative, "Caribbean Basin Trade Partnership Act: Customs Procedure Designation," October 5, 2000.

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

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

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

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

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

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

(2) *Appoint specialized IPR prosecutors.* The initiative to appoint public prosecutors specializing in intellectual property crimes has been completely abandoned. This initiative was originally included as a recommendation by the Special Commission on IP Matters which was working on omnibus IPR reform in 1999, but was dropped from the omnibus legislative bill which passed in late December 1999. The General Prosecutor's Office of Costa Rica recommended rejection of this initiative, among other reasons, because of their lack of resources. Local copyright industries, including the local publishing industry and the National Museum of Costa Rica, among others, have lobbied hard for creation of this unit. The Attorney General's office is in favor of the specialized unit, which would open the door to agreements on training and technical assistance for enforcing copyright. The proposal for a new IP unit has been reintroduced to the Special Commission and should be adopted with the hope of achieving a dedicated unit of at least three

prosecutors with nationwide jurisdiction, three or four trained investigators from the OIJ, and four technical experts.

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

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

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

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

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

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

(1) Public Prosecutors

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

In another criminal case filed by the BSA against a company on June 11, 1999, the prosecutor of Tres Ríos delayed more than a year before conducting a raid at BSA's request.

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

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

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

(2) The Judicial Investigation Office (OIJ)

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

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

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

(3) Judges

Judicial training programs and seminars are necessary to increase understanding of Costa Rica's intellectual property legislation and the international treaties signed by their country, and

improve application of intellectual property law to copyright infringement cases. Indeed, there has been criticism in the press on this regard: A report submitted to the Supreme Court in late 1999 addressed the need to train judges in the application of injunctive relief. The BSA organized a training seminar in 1999, but the judiciary has not organized any training on its own initiative.

COPYRIGHT LAW AND RELATED LEGAL ISSUES

Copyright Law Amendments and WIPO Treaties

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

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

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

Ley de Observancia

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

Publicly, the Intellectual Property Special Committee supported the protection of intellectual property rights, but during committee meetings, the committee members proposed a reduction in civil sanctions and criminal penalties, and increased requirements to obtain injunctive

relief. For example, the Intellectual Property Special Committee proposed maximum criminal penalties of between two- to three-year jail terms for intellectual property infringements, no civil sanctions or criminal penalties when the illegal use is for nonbusiness or noncommercial purposes, restrictions on the type of products that can be seized by the courts, and the removal of other important provisions from the original bill.

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

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

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

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

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

- Article 43: Provides that criminal actions against intellectual property violations are considered public actions but can be initiated only by private individuals or corporations (*publica de instancia privada*). This means that in the event that a public officer detects any intellectual property violations, he will not be allowed to initiate legal action. Only the injured parties can initiate legal action. This is a serious disadvantage in comparison to the original text of the bill that established that criminal actions for intellectual property rights infringements could be initiated by public authorities (*accion publica de instancia publica*). The "instancia privada" action, which limits the enforcement capability of public authorities, does not satisfy Costa Rica's TRIPS Article 41 obligation to ensure that its enforcement procedures permit "effective action" against infringements.
- Articles 54 and 59: Provide a maximum penalty of three (3) years of imprisonment for copyright violations. In the original text of the bill, the maximum penalty was four years of

imprisonment. These articles provide the same maximum penalty for those who fix a work without authorization and sell infringing materials. Under other provisions of Costa Rican criminal law, sentences for crimes having a maximum penalty of three years of imprisonment can be commuted, and the defendants never have to serve time.⁶

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

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

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

Criminal Procedure Code and a Statutory Time Limit

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

⁶ By comparison, Article 212 of the Costa Rican Criminal Code states a maximum penalty of six years of imprisonment for larceny, a kind of theft of physical property. Since intellectual property crimes are a form of theft of intangible property, the lesser sentence applied to them as compared to larceny indicates an inconsistency between the norms of the Observancia Law and the rest of Costa Rican law.

of prosecutorial delays and pretrial maneuvering to wait out the clock and seek dismissal of infringement cases after only a year and a half. This short time period creates great uncertainty as whether copyright cases will ever be heard.

If this “rocket docket” approach is maintained, the copyright industries argued that it should be balanced by increasing penalties for copyright infringement to create effective deterrents to piracy, in the range of 4 or 5 years as a maximum sentence. Not only would this change permit cases a reasonable time to go forward given the slow realities of the Costa Rican court system (affording perhaps 2 or 2½ years to dispose of a case rather than the 1½ year now available), it would also allow for detention of defendants for the first time. Currently, detention is not available where the maximum sanction is 3 years imprisonment or less; raising the maximum penalty to 4 or 5 years would permit detention, thus providing an important tool to deterring infringing behavior. However, the *Ley de Observancia* did not extend jail terms for copyright infringement beyond 3 years, so the industries are left with the original problem of this tight statutory time limit.