

# INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

## 2001 SPECIAL 301 REPORT

# DOMINICAN REPUBLIC

## EXECUTIVE SUMMARY

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The Dominican Republic adopted a new copyright law in October 2000, fulfilling many years of effort to replace its inadequate 1986 copyright law. This legislative achievement represents success in advancing higher levels of substantive copyright protection as well as expanding the battery of tools available for criminal, civil and administrative copyright enforcement in the Dominican Republic. The effective implementation and enforcement of the new copyright law is critical to the copyright industries, which have struggled against widespread and endemic copyright piracy in the Dominican Republic for more than a decade. A lack of effective legal mechanisms – such as low criminal penalties, very few criminal cases prosecuted, no civil *ex parte* remedy, high judicial bonds -- proved to be significant barriers to effective copyright enforcement. Starting in late 1999, some improvement in anti-piracy actions began to be made by criminal and administrative authorities and several civil cases were commenced as well. The copyright industries expect that the new enforcement tools and remedies provided in the 2000 copyright law will bolster anti-piracy efforts, which will result in lowering the high piracy levels.

Many elements of the IIPA's GSP 1999 petition against the Dominican Republic were related directly to longstanding enforcement problems (see below). In order to support continued progress on effective implementation and enforcement of the new copyright law, IIPA recommends that the Dominican Republic remain on the Priority Watch List at this time.

### ESTIMATED TRADE LOSSES DUE TO PIRACY (in millions of U.S. dollars) and LEVELS OF PIRACY: 1996 - 2000

INDUSTRY	2000		1999		1998		1997		1996	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Motion Pictures	2.0	60%	2.0	80%	2.0	90%	2.0	100%	2.0	100%
Sound Recordings / Musical Compositions	2.0	80%	2.0	80%	2.0	80%	NA	NA	NA	NA
Business Software Applications <sup>1</sup>	12.3	70%	7.4	69%	7.3	73%	NA	NA	NA	NA
Entertainment Software <sup>2</sup>	6.0	NA	NA	NA	NA	NA	NA	NA	NA	NA
Books	1.0	NA	1.0	NA	1.0	NA	1.0	NA	1.0	NA
<b>TOTALS</b>	<b>23.3</b>		<b>17.5</b>		<b>12.4</b>		<b>3.0</b>		<b>3.0</b>	

<sup>1</sup> BSA estimates for 2000 are preliminary.

<sup>2</sup> IDSA estimates for 2000 are preliminary.

The U.S. copyright-based industries in the IIPA have supported high-level, bilateral engagement between the U.S. and the Dominican Republic.<sup>3</sup> As a result of lack of progress in both legislative reform and effective enforcement, IIPA filed a June 1999 petition with the U.S. government to initiate a review under two trade programs, the Generalized System of Preferences (GSP) and the Caribbean Basic Economic Recovery Act (CBERA, or CBI), of the eligibility of the Dominican Republic to participate in these programs 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 accepted this petition on February 14, 2000, and hearings were held on May 12, 2000; this GSP review is ongoing.<sup>4</sup> Bilateral talks to evaluate progress on intellectual property rights matters were held in Santo Domingo in November 2000.

Recently, the Dominican Republic 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>5</sup> To maintain these CBTPA benefits, the Dominican Republic must meet all the CBERA criteria, as well as the CBTPA's explicit TRIPS-or-greater criteria. As a WTO member, the Dominican Republic is obligated to meet both its substantive copyright obligations as well as the enforcement text of the TRIPS Agreement. In fact, the intellectual property rights system of the Dominican Republic will be on the agenda of the April 2001 TRIPS review in Geneva.

## **COPYRIGHT LAW AND MARKET ACCESS**

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### **New Copyright Law of 2000**

The Dominican Government succeeded in its years-long effort to pass new copyright legislation which contained high levels of copyright protection.<sup>6</sup> The bill was finally passed by the Chamber of Deputies on July 24, 2000 and by the Senate on July 26, and signed by new President Hipolito Mejia Dominguez on August 21, 2000 as Law No. 65-00. Although the official date of publication of this law is August 24, 2000, it was published in the Official Gazette on October 24,

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<sup>3</sup> 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 2001 Special 301 report.

<sup>4</sup> In 1999, \$31.2 million of Dominican imports to the United States benefited from the GSP program, accounting for 0.8% of its total imports to the U.S, and \$820.3 million of goods under the CBI program, accounting for 19.2% of its imports to the U.S. For the first 11 months of 1999, \$42.5 million of Dominican goods entered the U.S. under the duty-free GSP code, representing a 40.5% increase over the same time period last year, and \$738.2 million entered under the CBI.

<sup>5</sup> Trade and Development Act of 2000, Pub. L 106-200 (May 18, 2000). USTR subsequently determined that the Dominican Republic has implemented, or is making substantial progress toward implementing, certain customs procedures based on those found in NAFTA. This determination made the Dominican Republic 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," Oct. 5, 2000.

<sup>6</sup> 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. In October 1999, IIPA and several other IIPA members submitted detailed comments on how to improve that legislation. The detailed list of IIPA's October 2000 recommendations and concerns with certain provisions and requests for clarification about the then-pending copyright bill are not discussed in this country report. IIPA understands that very few amendments were made to the copyright bill between late 1999 and its final promulgation in August 2000.

2000, entering into effect that same day. President Mejia has spoken in support of enforcing IPR laws in his country, even mentioning intellectual property piracy in his inaugural address.

IIPA once again acknowledges the positive features of this new copyright law. This law is a vast improvement over the 1986 Copyright Law.<sup>7</sup> 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* orders under the 1986 law has been remedied, thus providing a critical TRIPS-consistent enforcement tool. Also, the level of criminal fines has been increased in the new law. The 1986 law provided for low penalties of only RD\$1,000 to \$10,000 (US\$60 to \$600). However, the new law bases fines on the statutory minimum wage, which is RD\$3,000 (US\$180) per month. The new law creates fines of 50 to 1,000 times the minimum wage, which at the current exchange rate creates potential fines of US\$9,000 to US\$180,000. We understand that the Dominican Congress is considering increasing the minimum wage, which would only increase the possible penalties for copyright violation. 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 has been expanded, and comes close to meeting the obligations found in both of the WIPO treaties.

IIPA understands that regulations are being drafted to implement the new copyright law. ONDA (the National Copyright Office) has indicated that it will be receptive to comments on the draft regulations. It appears that drafting these regulations may be a challenging task to ONDA, due to budgetary constraints. IIPA and its member associates welcome the opportunity to work with ONDA on these important implementing regulations.

The Dominican Republic should be encouraged to ratify the two 1996 WIPO treaties, the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty. Ratification is the natural next step for the Dominican Republic. In fact, the prior ONDA administration supported ratification of these treaties, and the Ministry of Foreign Affairs is reviewing this matter.

## **COPYRIGHT PIRACY IN THE DOMINICAN REPUBLIC**

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Computer software piracy in the Dominican Republic is comprised primarily of hard-disk loading and end-user piracy. 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. In addition, investigations by the Business Software Alliance

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<sup>7</sup> The 1986 copyright law contained several major deficiencies. For example, computer programs should be expressly protected as "literary works." Terms of protection (particularly for cinematographic works and photographs) were only 30 years, far less than TRIPS standards. Rental rights for producers of sound recordings were not explicitly found. Overbroad exceptions to protection needed to be significantly narrowed to meet the TRIPS Article 13 test, especially for computer programs. Translation and reproduction licenses for foreign works did not meet the terms of the Berne Appendix (and therefore were also TRIPS-incompatible). Full protection for pre-existing works, sound recordings and performances needed to be clearly ensured, in accordance with TRIPS. Also missing from the Dominican law were explicit procedures for copyright owners to obtain and conduct civil *ex parte* searches, also required by TRIPS. Finally, the statutory level of criminal penalties was far too low to serve as a deterrent.

(BSA) have revealed some instances of counterfeiting in the Dominican Republic. Working with Dominican prosecutors in the *Fiscalía* offices, BSA has achieved two convictions of pirates for counterfeiting software. Other prosecutions for counterfeiting are working their way through the Dominican courts. BSA is watching this trend closely, but it does not appear to be the focus of Dominican piracy at this time. Preliminary estimated losses due to business software piracy in 2000 are \$12.3 million, with a 70% piracy level.

Piracy of sound recordings and music in the Dominican Republic remains rampant, with the estimated piracy rate for audiocassettes at 80%. While counterfeit audiocassette piracy continues to dominate the market, there has been a marked increase in CD piracy, which is now estimated at 25% and higher piracy rates reported in the tourist areas of Puerto Plata and Sosua. The piracy format of choice is CD-R (recordable CDs) and there has been a noticeable increase in the number of smaller "domestic" CD-R factories. There are still large quantities of counterfeit cassettes openly sold by street vendors or available in kiosks throughout the commercial areas of major cities in the DR. It remains government policy that street vendor sweeps in Santo Domingo, Santiago, and Puerto Plata are a low priority. Pirate audiocassettes cost between US\$1.00-2.00 per unit and counterfeit CDs/CD-Rs can range in price from US \$8.00-12.00. Approximately 25% of unauthorized CD/CD-R product can be traced back to "off-shore" sources, including pirate CD-R product manufactured in New York and molded CDs (with the SID Code) replicated in Europe. Known U.S. sources of molded CDs has been, for all practical purposes, eliminated through recent RIAA demand litigation against Wings, Media Group, and Eva Tone CD plants facilities. Estimated trade losses due to audio piracy are \$2 million in 2000

The audiovisual industry reports that cable and broadcast piracy continue to be its primary copyright piracy problems in the Dominican Republic during 2000. In fact, the incidence of television piracy has apparently increased since the new administration took office. This increase may be directly related to the apparent disregard of copyright by a large television station related to an important member of the political party currently in power. Obviously, the conduct set by those in power will be copied by others in the television industry. It is disappointing that the political party in power does not care to set higher standards of respect for Dominican copyright law.

It is encouraging, however, to note the action taken at the end of 2000 by ONDA and INDOTEL against television piracy. A joint public announcement requesting compliance with copyright law was followed up by at least three inspections of television stations. One of those stations was cited and agreed in writing to begin a program of compliance with copyright requirements. In addition, INDOTEL has begun the long-ignored need for licensing television transmission and has included copyright compliance as an element to be examined in granting licenses. Nevertheless, the increased incidence of television piracy, apparently due to the conduct of a major station related to a member of the political party in power, threatens to dilute the new attitude of ONDA and INDOTEL towards compliance in the television industry as television stations begin to see an uneven application of the law and a tolerated model of conduct that goes against Dominican law. As a result, the audiovisual industry is forced to reserve judgment about the ultimate effectiveness of the ONDA-INDOTEL compliance effort.

Unfortunately, the continued high incidence of television piracy continues to distort the entire audiovisual market, adversely affecting legitimate business opportunities from theatrical exhibition, through home video, to broadcast television. This adverse impact affects even the positive effort made against piracy. For example, ONDA and MPA have made continued efforts against video piracy with a measurable degree of success in reducing the incidence of video piracy.

As a result, the overall rate in audiovisual piracy has actually gone down. But, because of the continued incidence of television piracy, there has been no real market improvement in the video market, which suffers from television stations transmitting, without authorization, movies that have yet to reach video stores. Thus, the Dominican Republic market remains weakened by a rate of video piracy of approximately 60%. Annual losses to the U.S. motion picture industry due to audiovisual piracy in the Dominican Republic are estimated to be over \$2 million in 2000.

For the book publishing industry, 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 2000.

IDSA reports that its preliminary estimated trade losses due to piracy of entertainment software (including videogame CDs and cartridges, personal computer CDs, and multimedia products) in the Dominican Republic are \$6.0 million for 2000.

## **COPYRIGHT ENFORCEMENT IN THE DOMINICAN REPUBLIC**

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### **Despite Enforcement Efforts by ONDA and Others in the Second Half of 2000, the Dominican Government Still Needs to Develop a Consistent, Comprehensive Response to Piracy in Order to Make Tangible Progress in Anti-Piracy Efforts During 2001.**

The U.S. copyright industries have been concerned, over the years and throughout the course of the GSP review to date, that there has not been a comprehensive, sustained government response to copyright enforcement in the Dominican Republic. A new government took charge in August 2000, and new officials have been placed throughout the government. The good news is that the 2000 Copyright Law now provides more tools for Dominican Republic agencies and rightholders to take more concrete action against piracy. The time is ripe for concrete action.

Since the promulgation of the copyright law, a new interagency commission has been formed to coordinate all the agencies dealing with intellectual property issues, including ONDA, foreign affairs, customs, public health and others.<sup>8</sup> This commission is awaiting action from the Office of the President for its official creation. While this commission could be an important information-sharing forum for different government agencies, the primary focus must be on supporting the concrete enforcement efforts of ONDA, the *fiscalias*, and others.

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<sup>8</sup> IIPA and its members have seen other blue-ribbon interagency committees before and they did not tackle the piracy problem. For example, a special commission in the Ministry of Industry and Commerce and an interagency anti-piracy group (COPAL) was formed in March 1997 in the public prosecutor's office to process complaints, seize illegal materials and close businesses involved in piratical activity against all forms of piracy. However, COPAL never became operational. Then in September 1999, another commission was created, led by the Ministry of Industry and Commerce and including 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 was to intensify efforts by the government to combat piracy. As IIPA has reported before, the copyright industries have acknowledged the good intent behind these agencies but we have been disappointed in the ability of these groups to achieve concrete results in reducing piracy on the ground in the Dominican Republic.

The key to real progress in the Dominican Republic is a consistent, comprehensive government response to piracy. Each branch of government has an important role to play. From the executive branch, ONDA must be given the necessary support and resources to continue its aggressive campaign of investigations and raids against pirates, in an environment that is free from political pressure. The *Fiscalía* must continue to work with ONDA and others to prosecute pirates.

The Office of the President can facilitate coordination between ONDA, the *Fiscalía*, and the police, and can continue to make the fight against piracy a top public priority, as President Mejia did in his inaugural address. The Congress must continue to protect intellectual property rights through legislative action. Dominican judges at the trial and appellate levels must be properly prepared to give the copyright law full effect. In particular, the judges must be willing to move swiftly to grant petitions for civil copyright claims, as provided under the new copyright law.

It is an encouraging sign that ONDA is still located under the Ministry of Culture. While there was discussion in 2000 about moving ONDA to the Ministry of Industry and Commerce, ONDA is operating efficiently now in its present location, in an environment relatively free of political pressure. One concrete step toward improvement of enforcement actions in the Dominican Republic would be to foster closer coordination between ONDA and the police. IIPA understands that 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. In addition, ONDA inspectors have faced difficult situations in some of their inspections of suspected pirates. Police escorts would help ensure that ONDA personnel would be safe at all times while conducting inspections.

## **ONDA's Administrative Actions in 2000 Reflect Much Improvement Toward Anti-Piracy Enforcement in the Dominican Republic**

In late 2000, ONDA reported that it has conducted numerous inspections, some of which have been followed by seizures of pirated products and arrests by police (for example, between August 29 and October 31, 2000, ONDA conducted 82 inspections). In at least one case, an ONDA inspection of a suspected book counterfeiter uncovered a ring of book, currency and passport counterfeiters. ONDA reacted quickly to this situation by carrying out an administrative *ex officio* action that sent the counterfeiters to prison. ONDA reported that its budget resources were exhausted before the end of 2000. ONDA does need adequate resources to enforce its responsibilities under the copyright law. ONDA has also prepared a work plan for its near-term objectives in setting up its offices and tasking.

Despite these challenges, ONDA is the primary success story of the Mejia government's response to piracy in the Dominican Republic. When the government took office in August, President Mejia appointed Mariel Leon as director of ONDA, and ever since then ONDA has carried out an aggressive campaign of inspections, raids and seizures against pirates. In the case of actions against software pirates, ONDA conducts inspections and routinely seizes computers that are found to contain illegal software. These computers become evidence against the pirates in criminal prosecutions. In some cases, ONDA follows up its initial inspection with raids.

In cases where illegal software is found, ONDA refers this evidence to the *Fiscalía* for criminal prosecution (see discussion of criminal enforcement efforts below).

The recording industry also reports that the positive change in enforcement since the new administration took office is due to ONDA and its efforts. Since the passage of the new copyright law, ONDA itself has initiated one inspection and three seizures without filed complaints (*denuncias*). RIAA, at the request of ONDA, provided training to their representatives and hope to expand this training to Customs and the DA's office. RIAA also provided a CD Piracy Plant Awareness seminar to OMAR Systems, the only optical disc replication facility in the country.

In 2000, ONDA took action against 50 video stores and three television stations with good results. However, it became apparent that ONDA did not have the resources to adequately follow through on subsequent inspections and citations. ONDA has moved to new and larger offices within the Ministry of Culture, with the promise of increased resources. It is not clear if those resources will be used for enforcement. The amount of resources needed for inspection, analysis, citation and decision-making action against television piracy is greater than that needed for video store action. The three actions ONDA took against television piracy barely began to address the problem. It is the audiovisual industry's opinion that ONDA, in order to be effective, requires additional enforcement resources, independence of action and increased cooperation from prosecutors for criminal case follow-up to ONDA actions.

### **Criminal Enforcement in 2000 Was Inconsistent Across the Copyright Sectors. More Work Needs to be Done to Give Full Effect to the New Copyright Law, Including the Application of Deterrent Administrative Penalties, in Order to Improve this Situation in 2001.**

The new copyright law contains much higher levels of criminal penalties for copyright infringement. The challenge, however, is for the government officials of the Dominican Republic to apply, in practice, its criminal procedures and remedies at levels sufficient to deter piracy.

#### **Business software industry adopted a new criminal enforcement strategy which has had positive results since the copyright law entered effect**

BSA and its member companies continued to undertake criminal actions in 2000. However, while in the past BSA had worked directly with the *fiscalía* to conduct raids and file criminal actions against pirates, BSA has been able to leverage ONDA's new inspection powers to increase the pace of inspections and criminal prosecutions.

Since passage of the new copyright law, which gave new inspection authority to ONDA, BSA has worked with ONDA to provide their inspectors with leads on suspected pirates. After conducting their own investigations, ONDA carries out inspections where appropriate. Where ONDA finds illegal software, ONDA confiscates the software and any computers loaded with illegal software. ONDA then prepares a report and refers the evidence of piracy to the *fiscalía* for prosecution. The new *fiscalía* who took office after the change in government in August has been cooperating with the business software industry representatives on its actions. These referrals have resulted in the *fiscalía* filing between 30 and 40 cases against software pirates in the second half of 2000. BSA has attached pendant civil claims to about 10 of the most egregious cases, and these are

currently working their way through the Dominican courts. BSA understands that despite the large volume of files coming over from ONDA, the *fiscalía* is up to date on filing criminal actions resulting from these ONDA inspections.

The Dominican Republic's old copyright law provided for criminal but not civil *ex parte* inspections (see discussion below). At that time the procedures for criminal *ex parte* inspections were undermined by antiquated procedures, so computer software rightholders were forced to rely on the trademark law to initiate criminal actions. However, with the advent of the new copyright law, these obstacles have become largely a thing of the past. BSA looks forward to the time when these cases reach trial, so that it can fully assess how the courts will give full effect to the new penalty provisions in the copyright law.

In July 1998, the government established a new Intellectual Property Department within the District Attorney's Office for Santo Domingo, but at first it did not perform up to expectations. However, the tide seemed to turn in early 1999 with the hiring of a new assistant district attorney to head this office. After a flurry of *ex officio* actions against software pirates in July and August of 1999, these actions slowed down to a steady pace. During 1999 the D.A. brought more than 30 *ex officio* actions against Dominican software pirates. As discussed above, the new D.A., Aristy Caraballo, and the new head of the IP Department, Carmen Chevalier — both Mejia appointees — have continued to cooperate effectively with ONDA and the BSA. However, the IP Department currently lacks the funds and personnel to run the strongest possible anti-piracy program. The BSA is hopeful that the DA's ongoing commitment to anti-piracy 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.

In September 2000, BSA presented a day-long seminar to Santo Domingo *fiscalía* personnel on the new copyright law, including practical tips for enforcing the law. In particular, the *fiscalía* have been very effective in working with ONDA to leverage ONDA's new inspection powers into criminal prosecutions (as discussed in more detail below). BSA anticipates that this coordination will continue, and hopefully by mid-2001 some of the ONDA cases will begin to reach trial, so that we can more fully assess how effective this approach has been.

### **Recording industry criminal actions in 2000 resulted in some seizures but no effective prosecutions**

The recording industry reports that its principal problem in the Dominican Republic at this time is the lack of criminal prosecution. There are three major adverse effects of no criminal prosecutorial follow-up in the Dominican Republic. The first is many of the manufacturing operations have gone "underground" making investigations more difficult, more complex, and longer. The second involves the lack of prosecution which has removed any deterrent to pirates from continuing their infringing activities. And finally, if the system were working, suspects facing possible jail time might serve as valuable sources of information by providing important information about ongoing piracy operations. Not faced with this possibility, the opportunity to obtain needed information from convicted pirates is lost.

The recording industry reports that there were a total of nine raids in 2000, resulting in the confiscation of 23,434 counterfeit/pirate cassettes and 2,758 pirate/counterfeit CDs/CD-Rs. These actions included raids against two illegal audiocassette manufacturing facilities and one pirate CD-R operation. RIAA surveyed approximately 35 tourist locations in the DR in May 2000 and found

that the majority of the locations were retailing pirate/counterfeit CDs and CD-Rs. RIAA, through its local attorney, sent out two dozen cease and desist letters; there was a compliance rate of approximately 50%. There has been no movement in criminal prosecutions whatsoever, with at least 12 cases pending prosecution dating back to December 1999 in the three jurisdictions in the Dominican Republic. Additionally, local police authorities have exhibited no interest in sound recording piracy referring it, instead, to the local District Attorney's office. In fact, recent investigations by the recording industry have determined that 8 of the 12 companies/entities/individuals previously raided by the criminal authorities remain in the piracy business at the same locations where the original actions took place.

### **No progress on criminal actions for audiovisual piracy has been made**

In 1999, MPA reported that public prosecutors in Santo Domingo and Santiago had increased their cooperation to fight audiovisual piracy and that their main concern was the lack of resources assigned to anti-piracy. However, in 2000 that interest in prosecuting piracy cases has apparently been lost with the new administration and the cases against television piracy being developed by former prosecutors have apparently been dropped. It is not certain what will happen to the under-resourced IP office in the Santo Domingo prosecutor (it was run by a single attorney and was overwhelmed by trademark cases). The Santiago office had no assigned resources for piracy and there appears to be no interest in anti-piracy efforts. Overall, there is a clear step backwards in applying the criminal law against copyright violation, specifically against television piracy. The audiovisual industry has not seen a serious attempt to coordinate copyright enforcement actions beyond the informal, yet effective, cooperation between ONDA and INDOTEL. MPA is particularly concerned with the obvious lack of cooperation from police and prosecutors.

### **The Lack of a Civil *Ex Parte* Search Remedy in the Dominican Republic Has Been Corrected by the New Copyright Law and Must be Implemented Properly and Promptly. In Addition, Civil Damages Imposed Must Be Adequate to Compensate for the Injury the Rightsholder Has Suffered.**

The new 2000 copyright law corrects a major omission in the former copyright law. The 2000 law provides expressly for civil *ex parte* inspections, as required by the TRIPS Agreement (Article 50). The omission of this remedy had severely harmed the ability of business software owners to protect their rights from unauthorized uses. While BSA welcomes the ability to petition the courts for civil *ex parte* actions, thus far the courts have been somewhat slow to grant such a petition. BSA has filed one civil case in November 2000, and as of the date of this report the court has not acted on the request. Clearly, in order to give full effect to this part of the new copyright law, the courts will need to move more swiftly to consider these petitions.

Historically, civil damages awarded under the 1986 copyright law were completely inadequate, both as a statutory matter and as applied in practice, to compensate the copyright owner. Now that the new copyright law has been adopted, the copyright industries look for the courts of the Dominican Republic to apply its laws afford civil remedies, including damages, at levels "adequate to compensation for the injury the rightsholder has suffered," as required by TRIPS Article 45.1.

## **The Cost of Judicial Bonds Remained High in Business Software Cases Brought Before the New Copyright Law Prohibited Such Onerous and Discriminatory Bonds. This Problem is Expected to Disappear in 2001.**

The new 2000 copyright law corrects a major problem in prior Dominican law and practice. The 2000 law expressly prohibits judges from imposing onerous bonds in cases brought by foreign plaintiffs.

Until recently, the imposition of these 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. In case after case under the old law, BSA claims for alleged software piracy were effectively stalemated by the imposition of unreasonably large bonds, often many times larger than the total monetary damages sought in the case. The magnitude and discriminatory nature of these bonds appeared to violate the Dominican Republic's current TRIPS national treatment obligation, which is not subject to transition (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. . . ."). Clearly this discriminatory treatment 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."

However, the new law has had the desired impact in this area, and has relieved foreign rightsholders of this burden when protecting their rights in Dominican courts. BSA has successfully argued against the imposition of bonds in four cases since the copyright law was passed. This is a major improvement in the practical ability of copyright rightsholders to defend their ownership rights in Dominican courts.

## **Judicial Action Has Been a Historical Weak Element, But Signs Appear Positive for Improvement in Both Civil and Criminal Cases.**

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. However, since July 2000, BSA has received favorable judgments in three cases against pirates that had been filed under the old copyright law. In two cases decided in December 2000, Atlantica and Asfaltos Dominicanos, the judges entered judgments for significant fines and damages plus jail time. The fines and damages totalled U.S.\$12,350 for Atlantica and U.S.\$30,722 for Asfaltos Dominicanos. In both cases, the judge ordered 3 months jail time. Atlantica and Asfaltos Dominicanos were both end-user cases. In a third case, Garibaldi, the judge initially gave Garibaldi fines and damages plus jail time, but in the amended judgment dropped the jail time. Garibaldi was convicted of counterfeiting software. All three cases are on appeal.

As mentioned above, the courts have been somewhat slow to grant petitions for civil *ex parte* actions as provided in the new copyright law. However, BSA is working with the Supreme Court and their judicial continuing legal educational program to present a seminar on the new copyright law to all Dominican judges. BSA has been asked to present this seminar in April 2001.

# MARKET ACCESS IN THE DOMINICAN REPUBLIC

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## Government Procurement Law

Law 146-00 was passed on December 11, 2000, but has not yet been enacted. This law prohibits the Dominican government from acquiring imported goods and services when using funds from the government's budget. This law will limit the capacity of foreign companies to sell to the Dominican government. Apparently, this prohibition will only apply if there is a "Similar National—Local Product." While the impact of this law is hard to predict, given the ease of creating local Dominican versions of software programs, this law may pose a significant for BSA member companies in the future.

## Duties and Taxes on Computer Software

In contrast to the protectionist National—Local law passed the same day, the government of the Dominican Republic passed Law 147-00 on December 11, 2000. Article 13-1 of the law states: "There will not be import duties for: the importation of personal computers, and their parts, components, spare parts, programs and other accessories of the exclusive use of the computers ..." This does not appear to include videogames or DVDs, unless a software program came in a DVD format.

## Tax and Duties on Recorded Music

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 learned in early 2000 that while the import duties and taxes applicable to sound recordings remain fairly high,<sup>9</sup> the official valuations for prerecorded musical media (e.g., cassettes and compact discs) have been 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.

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<sup>9</sup> 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.