

# INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

## 2001 SPECIAL 301 REPORT

# GUATEMALA

### EXECUTIVE SUMMARY

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The copyright industries continue to confront high piracy levels and inadequate copyright enforcement in Guatemala. Recent legislative reform undercut criminal sanctions and civil remedies for copyright infringement. In September 2000, amendments to the Guatemala copyright law were adopted in Decreto 56-2000, and entered into effect on November 1, 2000. On a positive note, this law reinstated "public" prosecution of copyright crimes; this issue had been at the top of the copyright industries' agenda for years. The Decreto also implemented certain requirements of the WIPO treaties. Unfortunately, the amendments also seriously weakened existing civil and criminal remedies. Criminal penalties were substantially decreased, and the statutory damages provision was removed entirely.

Unfortunately, the copyright law amendments have done little to improve copyright enforcement in-practice in Guatemala. The prosecutors (*fiscalías*) are overburdened and understaffed; it currently takes at least four weeks to obtain a search and seizure order to raid a suspected copyright infringer. This problem could be resolved with the creation of a Special Prosecutor's Office for intellectual property crimes; the Guatemalan government has until November 1, 2001 to create this office. Copyright piracy levels remain high. For example, the level of business software piracy in Guatemala is 79%, one of the highest in Latin America. In sum, Guatemala still has much work to do to meet its multilateral and bilateral intellectual property rights obligations. IIPA recommends that USTR place Guatemala on the Special 301 Watch List.

#### ESTIMATED TRADE LOSSES DUE TO PIRACY (in millions of U.S. dollars) and LEVELS OF PIRACY: 1995 - 2000

INDUSTRY	2000		1999		1998		1997		1996		1995	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Motion Pictures	2.0	60%	2.0	70%	3.0	70%	3.0	86%	NA	100%	NA	100%
Sound Recordings / Musical Compositions	4.0	60%	4.0	60%	4.0	60%	4.0	60%	3.0	50%	0.2	46%
Business Software Applications <sup>1</sup>	12.6	79%	12.7	80%	8.0	82%	6.3	86%	7.5	90%	7.5	94%
Entertainment Software <sup>2</sup>	0.1	60%	NA	NA	4.0	85%	4.2	87%	4.0	79%	NA	NA
Books	2.3	NA	2.5	NA	2.5	NA	2.0	NA	2.0	NA	2.0	NA
<b>TOTALS</b>	<b>21.0</b>		<b>21.2</b>		<b>21.5</b>		<b>19.5</b>		<b>16.5</b>		<b>9.7</b>	

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

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

In May 2000, USTR noted these copyright enforcement difficulties in Guatemala, stating: "Piracy, including by government agencies, is widespread, and the Government of Guatemala has failed to take effective enforcement action. The U.S. urges Guatemala to honor its WTO TRIPS Agreement commitments to enforce protection of intellectual property."<sup>3</sup>

Last year, in order to highlight the copyright industries' dissatisfaction with the 2000 legislation and inadequate enforcement, IIPA filed a petition on August 21, 2000 with the U.S. Trade Representative, requesting President to review the eligibility of Guatemala as a beneficiary developing country under the Generalized System of Preferences (GSP) and Caribbean Basin Economic Recovery Act (CBERA) trade programs for Guatemala's failure to provide adequate and effective copyright protection for U.S. copyright owners.<sup>4</sup> IIPA also noted at that time that it would be inconsistent for the U.S. government to grant new, additional benefits to Guatemala under the U.S. Caribbean Basin Trade Partnership Act (CBTPA) while conducting an investigation under GSP and CBI for Guatemala's failure to afford adequate and effective IPR protection to U.S. copyrights.<sup>5</sup> Despite IIPA's requests, CBTPA eligibility to Guatemala was granted<sup>6</sup> and our GSP/CBERA IPR petition was not accepted. The problems IIPA highlighted last fall remain the same in early 2001. As a WTO member, Guatemala is currently obligated to meet both its substantive copyright obligations as well as the enforcement text of the TRIPS Agreement.

## **COPYRIGHT PIRACY IN GUATEMALA**

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Software piracy by both resellers and end users is widespread in Guatemala. The estimated level of piracy of U.S. business applications software in Guatemala in 2000 was 79%, one of the highest piracy rates in Latin America. As a result of widespread piracy in Guatemala, U.S. copyright owners of business software lost an estimated \$12.6 million in 2000. BSA believes that these losses are largely due to the fact that Guatemalan law (as discussed below) fails to establish effective deterrents for infringing acts. Within the last year, the business software industry has worked with the Guatemalan police to conduct raids. However, the police have no

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<sup>3</sup> Press Release 00-30, Office of the United States Trade Representative, "USTR Releases Super 301, Special 301 and Title VII Reports," May 1, 2000. Guatemala was kept on the Priority Watch List.

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

<sup>5</sup> In 1999, \$14.1 million of Guatemalan imports to the United States benefited from the GSP program, accounting for nearly 1% of its total imports to the U.S., and \$285.3 million of Guatemalan goods benefited from the CBI program in 1999, accounting for 12.6% of its imports that year. For the first 11 months of 2000, \$28.8 million of Guatemalan goods entered the U.S. under the duty-free GSP code and \$224.7 million under the CBI. For further background on Guatemala's appearance on the Special 301 lists, see Appendices D and E of this 2001 Special 301 submission.

<sup>6</sup> Trade and Development Act of 2000, Pub. L 106-200 (May 18, 2000). USTR subsequently determined that Guatemala has implemented, or is making substantial progress toward implementing, certain customs procedures based on those found in NAFTA. As a result, this determination made Guatemala 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.

proactive role in the actions, but are merely required to be present to comply with criminal due process under Guatemalan law. During 2000, BSA conducted seven raids against end-users and one raid against a reseller. All of these cases were settled out of court.

With respect to motion picture piracy, Guatemala has achieved a minor reduction in cable piracy in 2000. Whereas in 1999, not one of the estimated 250 national cable operators was completely legitimate, many Guatemala City cable operators have now signed license agreements for MPA member company product. Nevertheless, there are still many cases of cable operators retransmitting unauthorized movies or programs. Underreporting of subscribers is a persistent problem, and rural operators still remain outside the legitimate system. Home video piracy continues to dominate the legitimate market, with back-to-back copying accounting for much of the 60% video piracy rate in the market. Unauthorized parallel imports of home videocassettes have increased via couriers importing tapes from the U.S. Annual losses to the U.S. motion picture industry due to audiovisual piracy in Guatemala are estimated to be \$2 million in 2000.

Book publishers reports that there has been some improvement in the use of pirated books at universities. The availability of low-priced legitimate books through local distributors has improved. There remains a high level of photocopying of copyrighted materials in universities. Estimated losses due to book piracy in Guatemala dropped slightly to \$2.3 million in 2000.

Estimated losses due to sound recording and music piracy in Guatemala remained at constant levels in 2000, which were \$4.0 million, with a 60% piracy level.

The Interactive Digital Software Association (IDSA) reports that estimated trade losses due to piracy of entertainment software (including videogame CDs and cartridges, personal computer CD-ROMs and multimedia entertainment products) in Guatemala are \$140,000 in 2000, with an estimated piracy level of 60%.

## **COPYRIGHT ENFORCEMENT IN GUATEMALA**

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The Guatemalan General Prosecutor's office has only 21 prosecutors (*fiscales*) for the entire country. The Guatemalan judicial system faces internal security issues (e.g., judges being threatened and kidnapped) as well as heavy backlogs of cases. BSA has reported significant delays in the issuance of *ex parte* searches, as well as breaches of confidentiality, by the Guatemalan judiciary. In particular, court employees have, in some cases, leaked news of *ex parte* seizure requests to the targets, completely destroying any element of surprise or opportunity to prevent the destruction of evidence.

While these are daunting difficulties, Guatemala is under both bilateral (GSP and CBI) and multilateral (TRIPS) obligations to take actions to respect and protect intellectual property within and at its borders. BSA is encouraged that some of these problems will be addressed once the Special Prosecutor's Office for intellectual property crimes is created as mandated by Decreto 56-2000. The Guatemalan government, however, has shown no progress to-date in creating of this office.

## Unwarranted Delays in Criminal Enforcement

The Guatemalan judiciary has been extremely slow in issuing *ex parte* search orders, in part because only one court -- Tribunal No. 12 -- has jurisdiction over intellectual property matters. Moreover, judicial delays are further exacerbated by the fact that the government has yet to fill one of the three seats on the court. As a result, obtaining a search and seizure order in Guatemala is a process that may take several weeks, if not months, in criminal copyright infringement cases.

In August 2000, BSA filed a criminal complaint against a reseller who was selling burned CDs to the public. Because the court lacked one of its judges, the search and seizure order could not be issued. On December 14, 2000, a provisional judge was finally assigned to the court. The court, however, refused to issue the search warrant, stating that, under the new copyright law, copyright infringement actions should be commenced at the *Fiscalia*. BSA argued to the court that the case was filed well before the new law went into effect and, therefore, it should be prosecuted pursuant to the then - existing legal regime. The court rejected BSA's arguments and informed BSA counsel that it was sending the case to the *Fiscalia* for further proceedings; however, the court has yet to sign the order sending the case to the *Fiscalia*. BSA has not been able to conduct the raid against this suspected pirate, and it is very likely that due to leaks, any evidence of piracy may have been destroyed.

On December 22, 2000, BSA refiled 11 criminal complaints against suspected illegal end users and resellers of software. After petitioning the *Fiscalia* for three weeks to request a search warrant to the Court, the *Fiscalia* finally sent the request to the Court. These cases are pending in the Court waiting resolution. BSA was assured that the Court's decision would be issued within two days of filing the petition, but the orders have not been granted.

## Lack of Deterrent Criminal Penalties

Under the new law in effect since November 1, 2000, both the minimum and maximum criminal penalties for infringing acts have been substantially reduced. Infringing acts that were subject to prison terms of four to six years and fines of 50,000 to 100,000 Quetzales (approximately US\$6,425 to \$12,850), are now subject to a term of imprisonment of one to four years and fines of 1,000 to 500,000 Quetzales (about \$128 to \$64,265). Lowering the minimal level of criminal fines sends the wrong message to the Guatemalan public and to the judiciary about the importance of protecting copyrights for unauthorized exploitation. Importantly, this does not satisfy the TRIPS Article 61 standard of providing for deterrent "criminal procedures and penalties to be applied" in cases of commercial piracy.

## Inadequate and Ineffective Civil Enforcement

Because criminal enforcement is not always feasible or appropriate, BSA member companies often use civil enforcement procedures -- particularly civil *ex parte* search authority - - to combat piracy. In Guatemala, however, this legal tool is practically unavailable because information is often leaked and the surprise element of the *ex parte* search is lost. Court records are public and several companies report on a weekly basis the new cases that have been filed with the court. Unfortunately, under Guatemalan law a case cannot be filed under seal.

During 1999, BSA filed several civil complaints against illegal end-users and resellers. After numerous requests, the court finally issued the civil search and seizure order in one of the complaints. When BSA finally executed the order against the suspected illegal end user, it found that several PCs had been removed and that the illegal software originally installed had been deleted.

In addition to the leaks of information in the court process described above, BSA encounters the problem of very high bond requirements. Bonds are imposed before a court orders a search and seizure against a suspected infringer. These bonds, which have been as high as US\$20,000, are an obstacle to enforcement, in violation of TRIPS Articles 41.1 and 41.2 (remedies prevent effective action against infringement, are unnecessarily costly, and entail unreasonable delays) and Article 53 (high bond requirements are unnecessarily costly and unreasonably deter recourse to these procedures).

## **Inadequate Civil Copyright Damages**

Before the copyright law amendments entered into effect on November 1, 2000, copyright owners were entitled to recover up to 10 times the retail value of the infringed work. With the enactment of the new copyright law, this system has been eliminated. This system was, in effect, a form of statutory damages, which prescribe that a court may use a fixed sum or multiple to determine damages in lieu of determining actual damages. Statutory damages are a feature of copyright legislation in a growing number of countries. For example, statutory damages incorporated in Brazilian copyright legislation -- and recently increased -- have resulted in penalties at deterrent levels.

Now under Guatemalan law, a rightholder is only entitled to recover direct damages for civil copyright violations. Without the threat of significant damages, the new copyright law fails to provide an adequate deterrent to piracy, as required by TRIPS Articles 41 and 45.

## **COPYRIGHT LAW ISSUES IN GUATEMALA**

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### **1997 Amendments to the Criminal Procedure Code**

In late 1997, the Guatemalan Congress passed amendments to the Criminal Procedure Code which changed copyright infringement actions from public to "private" criminal actions (Decree No. 79-97 of October 15, 1997). As a result, copyright rightholders were forced to initiate and prosecute criminal copyright infringement cases on their own initiative. Most disturbingly at the time, the Guatemalan government justified such action by claiming that it was not the responsibility of the government to prosecute criminal cases of copyright infringement. At the time, Ministry officials told the private sector that this amendment was made to increase the speed of actions, since public prosecutors were overwhelmed with other cases.

Fortunately, this legal regime has changed with the 2000 copyright law amendments. Copyright infringement actions now considered to be "public" criminal actions. The copyright industries worked for years to achieve this result.

## Copyright Law of 1998

The Guatemalan Congress adopted a new copyright law on April 28, 1998, which was published as Law No. 33/98 on May 21, 1998. The 1998 copyright law included amendments to modernize and strengthen the archaic 1954 copyright law. Unfortunately, the 1998 law omitted an amendment that would have reinstated “public actions” in the Criminal Code, as well as several other reforms needed to harmonize Guatemalan law with TRIPS and international copyright treaties.

## Copyright Law Amendments of 2000

In September 2000, the Guatemalan Congress passed amendments to the Copyright Law of 1998, which were published as Decreto 56-2000. This new law represented a three-year effort to strengthen Guatemalan copyright law and to correct the omission of the “public action” in the Criminal Code. In brief, this bill:

- Recognized criminal copyright crimes as “public actions,” thus authorizing law enforcement authorities to arrest suspected infringers and seize illegal copies and manufacturing equipment.
- Recognized a copyright owner’s exclusive right of “making available” its works and phonograms to the public for on-demand access.
- Substantially expanded the number of infringing acts, which track the rights afforded to rightholders under the WIPO treaties. Specifically, it created new crimes that penalized the circumvention of copy-protection technologies and the removal or alteration of rights management information.
- Established procedures, including timelines, for the Public Ministry or an aggrieved copyright owner to request and obtain precautionary measures from the competent judicial authority. These procedures are critical to improving the efficacy of enforcement measures, both criminal and civil.
- Created a Special Prosecutor’s Office that would specialize in intellectual property offenses and have exclusive responsibility for prosecuting criminal copyright infringements.
- Revised the registration functions and expanded the scope of administrative authority for the Register of Intellectual Property.
- Clarified the work-for-hire provisions as they apply to computer programs.
- Revised the pertinent sections relating to the establishment and operation of collecting societies.

## The WIPO Treaties

Guatemala has yet to deposit its instruments of accession to the new “digital” treaties of the World Intellectual Property Organization: the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonogram Treaty (WPPT). IIPA and its members recommend that Guatemala move forward to ratify these treaties.

Decreto 56-2000 implemented several obligations found in the WIPO treaties. For instance, the new law provides for a copyright owner's exclusive right of "making available" its works or phonograms to the public for on-demand access. The new law makes clear that the traditional property rights of copyright owners apply in cyberspace and that only the copyright owner of a song, sound recording, audio-visual product, software program or video game can authorize it to be copied via the Internet, transmitted across the network, or downloaded by a computer or other device. In addition, the new law prohibits the circumvention of copy-protection technologies and the removal or alteration of rights management information.

Despite these reforms, however, the Guatemalan copyright law was significantly weakened by the amendments (described above) which reduce criminal penalties and eliminate statutory damages. Moreover, the government's failures to create the required intellectual property rights prosecutors office and address judicial delays have significantly hindered copyright enforcement in Guatemala.