

# INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

## 2002 SPECIAL 301 REPORT

# COSTA RICA

## EXECUTIVE SUMMARY

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Costa Rica finally has begun to take certain steps long sought by the copyright industries to resolve the very difficult enforcement and legislative difficulties faced by such industries in 2001 and prior years. Delays in judicial proceedings, lack of an administrative office or official program to protect intellectual property rights, lack of official investigators and public prosecutors specialized in intellectual property crimes, as well as budget restrictions on the judiciary caused serious enforcement problems in 2001.

In 2000, Costa Rica enacted a very harmful intellectual property law, "*Ley de Procedimientos de Observancia de los Derechos de Propiedad Intelectual*", which diverges substantially from TRIPS requirements. Despite the copyright industry's recommendations, this law was not amended to adapt it to TRIPS in 2001. Although the IIPA and its members are encouraged by the improvements announced by the Costa Rican government this month, particularly the IPR training of additional prosecutors and official experts, many of the commitments made by the government (Ministry of Foreign Trade) to the U.S. Ambassador have not yet been implemented. IIPA recommends that Costa Rica remain on the Priority Watch List until concrete, sustainable results are obtained.

### COSTA RICA: ESTIMATED TRADE LOSSES DUE TO PIRACY (in millions of U.S. dollars) and LEVELS OF PIRACY: 1999 - 2001

INDUSTRY	2001		2000		1999	
	Loss	Level	Loss	Level	Loss	Level
Business Applications Software <sup>1</sup>	15.6	69%	14.9	68%	9.4	71%
Sound Recordings / Musical Compositions	4.8	40%	3.0	40%	3.0	40%
Motion Pictures	2.0	40%	2.0	40%	2.0	95%
Entertainment Software	NA	NA	0.2	%	NA	NA
Books	NA	NA	NA	NA	NA	NA
<b>TOTALS</b>	22.4		20.1		14.4	

<sup>1</sup> BSA statistics for 2002 are preliminary. In IIPA's February 2001 Special 301 filing, BSA's 2000 estimates of \$9.0 million at 68% were identified as preliminary. BSA finalized its 2000 numbers in mid-2001, and the revised piracy loss estimate is reflected above.

## COPYRIGHT PIRACY IN COSTA RICA

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The lack of effective copyright legislation and judicial protection of intellectual property rights in Costa Rica caused the number of pirate resellers and end users to remain very high during 2001. The government has not taken the lead by legalizing its own software. The business software piracy rate was 69% in 2001, and represented estimated losses to U.S. publishers of approximately \$15.6 million during that year. This means that almost seven in 10 software programs installed in Costa Rica in 2001 were illegal. The recording industry estimates \$4.8 million in trade losses during 2001, and a piracy rate of 40%. The increase in the losses amount from prior years is due to the shift from cassette to CD-R piracy.

## COPYRIGHT ENFORCEMENT

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IIPA and its members have made several recommendations to improve copyright enforcement in prior 301 submissions,<sup>2</sup> 2000 GSP/CBERA petitions, and in the latest Costa Rican Special 301 out-of-cycle review.<sup>3</sup>

Also, IIPA members have individually extended additional recommendations to the Costa Rican government over two years; the first concrete results were announced this month. Some of the most important recommendations are:

**(1) Appoint specialized IPR prosecutors.** The Costa Rican government just announced that at a meeting held on February 7, 2002, the Attorney General of the Republic officially announced that the Public Ministry has appointed 12 specialized “link” prosecutors, one for each public prosecutor’s office in the country, to handle “with priority” intellectual property complaints. While

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<sup>2</sup> For more details on the history of bilateral engagement on copyright issues with Costa Rica, see appendices D and E of this filing. In 2000, \$55.3 million of Costa Rican goods entered the U.S. under the GSP, accounting for 1.6% of its total imports to the U.S. Under the CBI, Costa Rica had \$601.4 million worth of goods enter the U.S. in 2000, accounting for 17% of its total imports to the U.S. In 2000, \$15.6 million of Costa Rican goods entered the U.S. under the CBTPA. For the first 11 months of 2001, \$388 million of Costa Rican goods entered the U.S. under the CBTPA. For the first 11 months of 2001, \$54.9 million of Costa Rican goods entered the U.S. under the duty-free GSP code, representing a 8.5% increase over the same time period last year. For the first 11 months of 2001, \$542.3 million of Costa Rican goods entered the U.S. under the CBI, representing a decrease of 1.9% from the same period last year.

<sup>3</sup> In the April 30, 2001 Special 301 announcement in which Costa Rica was placed on the Priority Watch List, USTR noted that “there is growing concern regarding the lack of effective enforcement activity by the Government of Costa Rica.” The United States “urge[d] Costa Rica to improve coordination of enforcement activities between public prosecutors and investigators; appoint special prosecutors to take on intellectual property cases; create a coordinated nationwide plan for defending and enforcing IP rights; and improve enforcement-related training at all levels of government.” On October 31, 2001, USTR announced its decision regarding the out-of-cycle review. Because “little progress has been made on the four-point list of enforcement-related actions in USTR’s April 30 announcement,” Costa Rica remained on the Priority Watch List.

this development appears to be positive, it is premature to comment on whether it will solve the enforcement bottleneck faced by the copyright industries. However, newspaper reports have indicated that these are not new prosecutors, but merely prosecutors who will receive some special training. They are not limited to IPR, and indeed, nobody knows how they will handle IPR cases or what “priority” for IPR means. So it is premature to applaud the action.

**(2) Create a coordinated national plan.** An official agency, office or program entirely dedicated to the protection of intellectual property rights should be implemented in Costa Rica. With the exception of the copyright, patent and trademark registries, there is no such agency, office or program in Costa Rica. BSA has knowledge that the Costa Rican government is supporting the creation of an Inter-Ministerial Committee on Intellectual Property matters to ensure progress on intellectual property protection, but there is no confirmation that this committee has been formed so far.

**(3) Improve intellectual property training.** Training in intellectual property matters, in particular copyright, should be undertaken at all governmental levels of enforcement, police, customs, prosecutors, judges, and the Judicial Investigative Office. In June 2001, BSA conducted a training seminar for judges, public prosecutors, and OIJ at the Judicial School, where BSA local counsel and even a BSA software expert from Mexico participated as speakers. Unfortunately, no training seminars were undertaken by the government in 2001. The Ministry of Foreign Trade has just announced that the Judicial School will conduct training of the new link prosecutors and OIJ officials. We hope this does occur.

**(4) Reduce delays and improve performance of prosecutors, judges and OIJ during the preraid procedural stage.** Reducing delays and improving the performance of prosecutors, judges, and the OIJ could be accomplished by ordering raids based exclusively on sufficient evidence offered by private plaintiffs (*querellantes*), or by a resolution of the President of the Supreme Court, called a *directriz*, instructing lower court judges and prosecutors to accept private expert investigations if the OIJ experts are overwhelmed and unable to perform their duties within a reasonable time period.

## **Delays in criminal investigations and proceedings, limitation on private plaintiffs’ participation in criminal proceedings and lack of judicial resources remain some of the major enforcement difficulties encountered by the copyright industries in Costa Rica.**

### **(1) Public Prosecutors**

Public prosecutors usually request an investigation report from official experts from the Judicial Investigative Office (OIJ) before requesting a search and seizure order from a judge. The OIJ’s reports normally do not add much substantive information to the information and evidence previously provided by BSA members when requesting the search and seizure order. OIJ’s preliminary investigations cause significant delays during the pre-inspection procedural stages. The information and evidence provided by private plaintiffs, such as BSA’s members, normally is legally sufficient for public prosecutors and judges to order the inspections (and is widely accepted throughout Latin America). The correct procedure to be followed in criminal copyright cases would be that public prosecutors request, and judges order, inspections in those cases where a claimant,

acting as private plaintiff (*querellante*), submits all the information and evidence necessary for prosecutors and judges legally to order such inspections. Unfortunately, this procedure has never been implemented in criminal cases filed by BSA members because public prosecutors have invariably requested the OIJ's investigation prior to requesting the search and seizure order from the judge. To the best of the BSA's knowledge, the public prosecutor's criteria is the result of instructions (*directriz*) issued by the Adjunct Public Prosecutor of the Common Crimes Division (*Fiscal Adjunto de la Sección de Delitos Varios*), who is in charge of anti-piracy activities at the Public Prosecutor's Office.

Public prosecutors and judges do not allow private plaintiffs (*querellantes*) to actively participate during software piracy inspections, even though such plaintiffs have standing and already constitute a party in these cases. This contradicts procedural due process rights accorded to private plaintiffs (*igualdad procesal del acusador particular*). Such procedural limitations imposed by public prosecutors are exacerbated when the private plaintiff is being assisted by a private technical expert during the inspection; the inspection might fail without such expert assistance.

Even though search and seizure orders in BSA criminal cases handled by the public prosecutors were obtained in less time in 2001 than in 2000, it still takes from four to six months to obtain such orders, which is excessive by any standard, and far longer than in most Latin American countries.

BSA has been informed that the Public Prosecutor's Office has ordered the training of 12 "link" prosecutors on intellectual property matters. Even though these prosecutors will not have exclusive jurisdiction on IP cases, this decision constitutes a significant step toward improving intellectual property protection in Costa Rica. BSA recommends that these prosecutors be intensively trained. BSA will gladly provide additional training seminars on software licensing and technical matters if the Public Prosecutor's Office instructs all its prosecutors to attend these seminars. However, the procedural problems listed above, which substantially delay and obstruct copyright enforcement in Costa Rica, need to be resolved before the appointment of additional prosecutors will make a material difference.

## **(2) The Judicial Investigative Office (OIJ)**

The General Criminal Unit of the OIJ is in charge of investigating intellectual property crimes. As reported in previous Special 301 submissions, this unit's lack of specialized personnel prevented the unit from adequately performing its duties in 2001. For example, in 2001 there were four software investigators available to work on software piracy crimes in the whole country, and these experts could be assigned to investigate other types of crimes as a consequence of their multiple jurisdiction.

Most of the delays in criminal cases filed by BSA against software pirates in Costa Rica in 2000 and 2001 were caused by the excessive time spent by official experts (belonging to OIJ) in conducting the preliminary investigation requested by public prosecutors before the raid, preparing the investigation report and coordinating the inspection date with the prosecutors. For example, in the case initiated by BSA member companies against Grupo Inteka in June 2001, handled by the Public Prosecutor of San Jose, the raid was conducted in October of the same year, mostly due to delays in conducting the preliminary investigation. The inspection report still has not been rendered by the OIJ.

An alternative to resolve the difficulties caused by OIJ experts performance would be for the President of the Costa Rican Supreme Court to issue a resolution (*Directriz*) instructing lower court judges and prosecutors to accept private investigation reports, in the event existing official experts are overwhelmed with other responsibilities. It is clear that the delay in conducting the investigation puts the entire criminal case in jeopardy. A time limit for presenting the above mentioned investigation report should be established.

OIJ's experts do not have software licensing and legal knowledge, which has caused problems and delays during preliminary investigations and inspectors.

Lack of resources and budget is still a problem for the OIJ, and the judicial branch in general, which makes it difficult for them to properly perform their duties.

BSA has just been informed that the OIJ's director has recently ordered the training of two official experts per each OIJ office in the country on intellectual property protection. BSA applauds this measure. However, the performance of these official experts should be evaluated within the next few months to determine whether they were able to reduce the long delays to an acceptable level, in light of the significant backlog of work caused by their multiple jurisdictions.

### **(3) Judges**

Judges should accept the information and evidence offered by private plaintiffs (*querellantes*), and order the raid if such information and evidence is sufficient, without requesting prior investigation reports from the OIJ. This procedure is consistent with Costa Rican legislation.

Also, it is necessary that judges be trained in the application of local and international intellectual property legislation, as well as in technical and licensing issues relating to software piracy cases.

## **COPYRIGHT LAW AND RELATED LEGAL ISSUES**

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### **TRIPS-Compliant Legislation: *Ley de Procedimientos de Observancia de los Derechos de Propiedad Intelectual***

In order to comply with TRIPS by January 2000, Costa Rica amended the copyright law and the patent law, and passed new trademark and trade secrets laws.

Before the above laws were enacted, all civil sanctions and criminal penalties and the procedural provisions for border controls were removed and inserted in a new bill called *Proyecto de Ley de Procedimientos de Observancia de los Derechos de Propiedad Intelectual (Ley de Observancia)*. The purpose of the bill was to provide more adequate penalties and procedures in accordance with TRIPS.

Unfortunately, the Costa Rican Congress ignored the recommendations and warnings of local intellectual property associations regarding the harmful effects of certain the articles of this bill, and on October 2, 2000, passed the law known as *Ley de Procedimientos de Observancia de*

*los Derechos de Propiedad Intelectual (Ley de Observancia (Compliance Law))*, which differs greatly from the requirements to which Costa Rica must adhere under TRIPS and the Berne Convention.

Despite the concerns expressed by the U.S. copyright industry in previous Special 301 filings, in the out-of-cycle review, and directly with the Costa Rican government in 2001, the *Ley de Observancia* has not been amended to make it consistent with TRIPS. The Foreign Trade Ministry recently stated that a draft reform has been prepared to address some of the problems set forth below (specifically, to amend articles 43, 54 and 59, and remove Article 70). But preparing a draft does not solve the problem. We have no reassurance that it will ever be enacted.

Some of the most harmful provisions of the *Ley de Observancia* are:

Article 43: This article provides that the criminal actions for copyright violations will be "public," but can only be initiated by the injured parties (*acción pública de instancia privada*). This means that if a public officer detects a copyright violation, he or she will not be able to initiate legal action. With the elevated copyright piracy rates in Costa Rica (nearly 70% in the case of software piracy, for example), this restriction on public enforcement of copyright legislation may violate Article 41 of TRIPS (effective action against infringement). This lack of public action causes substantial losses to the copyright industries, in particular, to the recording industry.

Articles 54 and 59: These articles provide a maximum penalty of three years of imprisonment for copyright violations, and provide the same penalty for those who fix and reproduce a work without authorization and sell infringing materials. According to other provisions of Costa Rican penal legislation, sentences for crimes with maximum penalties of three years or less can be commuted and defendants do not have to serve time in prison. Penalties that allow criminal offenders to avoid prison time are not deterrent and thereby in conflict with articles 41 and 61 of TRIPS. The maximum penalties for copyright violations should be increased to at least four years of imprisonment. BSA would even accept a bill that at least elevates penalties to four years of imprisonment as the maximum penalty for "intentional" copyright crimes (committed with *dolo*, or intent), leaving three years of imprisonment as the maximum penalty for those copyright crimes committed without intent. A new criminal provision should be created to differentiate intentional from unintentional copyright crimes. Also, the inclusion of economic sanctions or fines on the *Ley de Observancia*, in addition to imprisonment penalties, would have a deterrent effect against copyright violations.<sup>4</sup>

Article 70: This is probably the most harmful provision of the *Ley de Observancia*. It establishes that those who commit any intellectual property crimes contemplated in Chapter V of such law, including copyright violations, will not be penalized if the crime was committed without profit-making intent and does not damage or affect, for being "insignificant," the interest of the authors, right holders or their authorized representatives. There is no definition of "insignificance" in the law. 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 by arguing that it

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<sup>4</sup> By comparison, Article 212 of the Costa Rican Criminal Code provides 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. This indicates an inconsistency between the norms of the *Ley de Observancia* and the rest of Costa Rican law.

does not "profit" by using the software, because it only provides banking and financial services, and that the number of pirated products are not sufficient to damage or affect the right holders' interests. It would 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 would 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.

## Government Software Management

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The Costa Rican government should legalize its own software and set an example for the public. BSA has been informed that the Costa Rica government has been working on a decree authorizing the acquisition and use of legal software by the federal government. However, no decree has been issued so far.

### CHART OF ENFORCEMENT STATISTICS FOR COSTA RICA: 2001

CRIMINAL COPYRIGHT ENFORCEMENT STATISTICS 2001		
ACTIONS	BUSINESS APPLICATIONS SOFTWARE	SOUND RECORDINGS
Number of Raids conducted	4	N.A.
Number of cases commenced	4	N.A.
Number of defendants convicted (including guilty pleas)	N/A	N.A.
Acquittals and Dismissals	1	N.A.
Number of Cases Pending	17	N.A.
Total number of cases resulting in jail time	N/A	N.A.
Suspended Prison Terms	N/A	N.A.
Maximum 6 months	N/A	N.A.
Over 6 months	N/A	N.A.
Over 1 year	N/A	
Total Suspended Prison Terms	N/A	N.A.
Prison Terms Served (not suspended)	N/A	
Maximum 6 months	N/A	
Over 6 months	N/A	
Over 1 year	N/A	
Total Prison Terms Served (not suspended)	N/A	N.A.
Number of cases resulting in criminal fines	N/A	N.A.
Up to \$1,000	N/A	
\$1,000 to \$5,000	N/A	
Over \$5,000	N/A	
Total amount of fines levied	N/A	N.A.

<b>CIVIL COPYRIGHT ENFORCEMENT STATISTICS</b>		
<b>2001</b>		
<b>ACTIONS</b>	<b>BUSINESS APPLICATIONS SOFTWARE</b>	<b>SOUND RECORDINGS</b>
Number of civil raids conducted	2	0
Post Search Action	N/A	N/A
Cases Pending	3	N/A
Cases Dropped	0	N/A
Cases Settled or Adjudicated	2	N/A
Value of loss as determined by Rightholder (\$USD)	N/A	N/A
Settlement/Judgment Amount (\$USD)	33,000	N/A