

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2002 SPECIAL 301 REPORT

EL SALVADOR

EXECUTIVE SUMMARY

Given the continuing serious defects in civil and criminal enforcement and the legislature's efforts to eliminate criminal enforcement altogether, IIPA recommends that USTR place El Salvador on the Special 301 Watch List this year.

Piracy levels still remain high. For the business software industry, the estimated piracy rate in El Salvador is 80%, one of the highest in Latin America. To make matters worse, a bill is currently pending before the Salvadoran Legislative Assembly which would effectively eliminate criminal enforcement of copyright infringement. This bill would leave copyright holders without any avenue to enforce their rights. Such denial of criminal and civil remedies for copyright enforcement would conflict with El Salvador's multilateral and bilateral obligations.

Because of evidentiary burdens and delays in the civil system, rights holders basically have had to rely on the Salvadoran criminal process to enforce their rights. The courts do not move forward on copyright cases. There simply is no deterrence in the system. Rights holders have to fight to prove their standing in some criminal cases. The Salvadoran government should amend its civil and criminal enforcement procedures to comply fully with the WTO TRIPS Agreement, and amend its copyright law to implement the requirements of the WIPO treaties. Until these reforms are made, both copyright owners and Salvadoran authorities will lack the protections and remedies necessary to combat the extremely high levels of piracy in El Salvador.

In November 2000, USTR completed a Special 301 out-of-cycle review of El Salvador to assess that government's efforts to improve enforcement procedures and promote the use of authorized software in all government ministries. At that time, the business software industry reported that progress was being made to work with Salvadoran criminal authorities to bring software anti-piracy actions. USTR acknowledged this development and noted, "Nonetheless, software piracy in El Salvador remains a serious problem, and it is vital that El Salvador maintain this new momentum and reduce current levels of piracy."¹ This problem has not yet been resolved. El Salvador should be placed on the Watch List.

¹ Press Release 00-77, Office of the U.S. Trade Representative, "USTR Announces Results of Special 301 Out-of-Cycle Reviews," November 8, 2000. For details on El Salvador's bilateral experience under Special 301 and the GSP program, please see appendices D and E of this 2002 Special 301 submission

EL SALVADOR: 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 Software Applications ²	9.8	78%	9.7	79%	13.6	83%
Motion Pictures	2.0	30%	2.0	50%	2.0	80%
Sound Recordings / Musical Compositions	5.0	40%	5.0	40%	5.0	40%
Entertainment Software	NA	NA	0.1	50%	NA	NA
Books	1.0	NA	1.0	NA	NA	NA
TOTALS	17.8		17.7		20.6	

In October 2000, the U.S. Senate approved the Bilateral Investment Treaty with El Salvador, which was signed in March 1999. El Salvador was required to have in place TRIPS-level protection, both in terms of its substantive intellectual property law requirements and the enforcement obligations, by the end of April 1999.

El Salvador is a beneficiary developing country under the Generalized System of Preferences (GSP) and Caribbean Basin Economic Recovery Act (CBERA) trade programs; both of these programs contain criteria requiring adequate and effective protection for U.S. copyright owners.³ Recently, El Salvador also became an eligible beneficiary country of the U.S.-Caribbean Basin Trade Partnership Act (CBTPA).⁴ To maintain these CBTPA benefits, El Salvador must meet all the CBERA criteria, as well as the CBTPA's explicit TRIPS-or-greater criteria. As a WTO member, El Salvador also is currently obligated to meet both its substantive copyright obligations and the enforcement text of the TRIPS Agreement.

² BSA estimates for 2001 are preliminary. In IIPA's February 2001 Special 301 filing, BSA's 2000 estimates of \$13.5 million at 82% were identified as preliminary. BSA finalized its 2000 numbers in mid-2001, and the revised estimates are reflected above.

³ In 2000, \$20.8 million of Salvadoran goods entered the U.S. under the duty-free GSP code, accounting for 1.1% of its total imports to the U.S. For the first 11 months of 2001, \$10.7 million of Salvadoran goods (or 0.6% of El Salvador's total imports to the U.S. from January to November) entered the U.S. under the duty-free GSP code, representing a 46.2% decrease over the same time period last year. In 2000, \$41.9 million of goods entered the U.S. under the CBI. For the first 11 months of 2001, \$52 million entered under the CBI, representing a 23.9% increase over the same period last year. In 2000, \$26 million goods entered under the CBTPA. For the first 11 months of 2001, \$852 million entered under the CBTPA.

⁴ Trade and Development Act of 2000, Pub. L 106-200 (May 18, 2000). USTR subsequently determined that El Salvador has implemented, or is making substantial progress toward implementing, certain customs procedures based on those found in NAFTA. This determination made El Salvador 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.

Much more work needs to be done by El Salvador to meet its TRIPS and bilateral obligations, especially with respect to improving effective enforcement within the country and at its borders.

COPYRIGHT PIRACY IN EL SALVADOR

Business software piracy both by resellers and end users is rampant in El Salvador. The estimated level of piracy of U.S. business applications software in El Salvador in 2001 was 78%, one of the highest piracy rates in Latin America. Estimated trade losses in El Salvador due to business software piracy were \$9.8 million.

On a recent visit to El Salvador, the recording industry (led by IFPI) ascertained that the piracy level continues to be high. Few or no enforcement efforts had been made by local authorities to combat piracy. Although impaired by the lack of official market figures, the sound recording and music industry estimates trade losses due to recording piracy in El Salvador amount to \$5.0 million, with a 40% level of piracy in 2001.

The book publishing industry reports book photocopying continues unabated, mainly of college texts published by Mexican subsidiaries of U.S. publishers. A donation of books on medical sciences, economics, and management from an American non-governmental organization resulted in their being sold (by the recipients) at a fraction of the U.S. price in the open market. Efforts are being made to identify the parties involved in this fracas. Annual estimated losses due to book piracy in El Salvador remain at \$1 million.

COPYRIGHT ENFORCEMENT IN EL SALVADOR

Inadequate and Ineffective Criminal Enforcement

Because of onerous evidentiary requirements and excessive judicial delays, business software publishers are denied an effective civil enforcement mechanism to combat piracy. As a result, software publishers are completely dependent upon criminal enforcement by the *Fiscalía* to protect their rights. Up until May 2000, the *Fiscalía* refused to conduct almost all of the raids against software pirates requested by BSA, even though a special IP unit was created in 1997 to enforce intellectual property rights. However, during the second half of 2000 the *Fiscalía* became far more aggressive in combating piracy, conducting 14 criminal actions at BSA's request, including five reseller raids and nine end-user raids. In El Salvador, most of BSA's criminal cases have been settled out of court. During 2001, the *Fiscalía* conducted, at BSA's request, 11 raids. Eight of these raids were against end users while the rest were against resellers.

Although BSA applauds the outstanding performance of the *Fiscalía* in prosecuting software piracy cases, there are still several problems that need to be addressed to achieve TRIPS compliance in El Salvador. Under Article 41 of TRIPS, procedures for the enforcement of intellectual property rights may not be unnecessarily complicated or entail unreasonable time limits or unwarranted delays. Moreover, enforcement procedures must be effective and constitute a deterrent to further infringements.

El Salvador's criminal enforcement procedures fail to comply with these TRIPS requirements. Despite increased raid activity in El Salvador, the courts have thus far refused to convict or punish software pirates; thus, criminal enforcement provides no meaningful deterrent to piracy. For example, in January 2000, a criminal complaint was filed by BSA against a reseller who sold pirated software to an educational institution. After repeated requests by BSA, the *Fiscalía* raided the defendant's place of business in April 2000 and found evidence of software piracy. However, the judge provisionally found in favor of the defendant, claiming that the software publisher (a leading producer of widely used business software) had failed to provide sufficient evidence that it owned the copyright in the relevant software program. The court provisionally acquitted the defendant and ordered the software publisher to submit additional evidence of copyright ownership. Under Salvadoran law, an author's notice of authorship is sufficient evidence to be regarded as such, and the burden is on the defendant to challenge such a presumption.⁵ In compliance with the court's request, the software publisher submitted sufficient evidence to merit a presumption of ownership under Salvadoran law; nevertheless, the court rejected the evidence, demanding further proof of ownership. The court's imposition of onerous and "unnecessarily complicated" evidentiary requirements illustrates the existing defects in the Salvadoran legal system.

In May 2001, the *Fiscalía* conducted a raid against a reseller of software at BSA's request. During the raid, the *Fiscalía* found evidence of "Hard Disk Loading" (HDL) piracy. On September 17, 2001 the Court held a preliminary hearing in which the judge found in favor of the defendant. The Court stated that despite the fact that evidence of HDL found during the raid was admissible and relevant, there was no evidence to link the owner of the store with the illegal act of reproducing illegal software in the hard disk of the PC that was offered for sale. In other words, the Court admonished the *Fiscalía* to submit direct evidence, such as a witness of the unauthorized reproduction by the owner of the store. According to the Court's interpretation, circumstantial evidence was not enough. The *Fiscalía* appealed the Court's decision and the Court of Appeals overturned the decision and remanded the case for further proceedings without directly addressing the issue of the sufficiency of the evidence. Because decisions from the Court of Appeals are not binding, there is a risk that a lower court might follow the example of the lower court in this case.

In addition, Salvadoran law makes it difficult for U.S. copyright owners to obtain the legal standing necessary to file a criminal complaint or provide evidence in criminal proceedings. In particular, although Salvadoran law permits a U.S. copyright owner to assist the *Fiscalía* in prosecuting a criminal copyright offense, it requires the copyright owner to provide its legal representative with a special power of attorney for each criminal case. Based on this requirement, the *Fiscalía* has, in the past, refused to conduct criminal seizures requested by BSA's counsel, arguing that counsel's general power of attorney is inadequate, even though it clearly empowers Salvadoran counsel to represent BSA in all criminal infringement actions. For example, in December 1999, BSA filed a criminal complaint against a pirate reseller, providing direct evidence that the reseller had sold an investigator a computer with illegally installed software. Despite this evidence, the *Fiscalía* recommended that the judge deny BSA's request for an investigation of this target by law enforcement officials, arguing that BSA was not an interested party in the proceedings because it had failed to provide counsel with a special power of attorney for this particular case. The court decided in favor of the *Fiscalía* and was affirmed on appeal. The legal requirement of a

⁵ Ley de Fomento y Protección de la Propiedad Intelectual, Art. 32 *in fine*, and Berne Convention Article 15(1).

special power of attorney for each criminal case results in significant delays and costs and plainly constitutes the kind of unnecessary complication prohibited under TRIPS.

BSA has also encountered some problems with expert witness availability. The *Fiscalía* currently does not have expert witnesses available to analyze the evidence found in the raids. The *Fiscalía* usually relies on the expert witnesses proposed by the parties.

In addition, the police in El Salvador do not have enough resources. It has become increasingly difficult to summon the police to assist the *Fiscalía* during the raids. Prosecuting copyright pirates without the Police's assistance could be a daunting task for the *Fiscalía*. Often police are needed not only to gain access to places where the evidence is located, but to physically protect the prosecutors and their assistants. In two recent cases, the *Fiscalía* requested the assistance of the police and the police refused, alleging lack of personnel.

Turning toward legislative threats, the Salvadoran legislature is considering a bill that would virtually eliminate criminal enforcement against piracy. The bill was introduced in September 1999 by three members of the Legislative Assembly in an effort to prevent BSA from initiating criminal raids against pirates. The bill would amend existing copyright law to require that copyright owners exhaust all civil remedies and obtain an initial finding in their favor *before* initiating any criminal proceedings. Given the inadequacy of civil enforcement under Salvadoran law (as described below) and the significant time required to obtain a civil finding (at least one year), this bill would effectively prevent any criminal enforcement against copyright infringement and leave copyright owners without any avenue whatsoever to enforce their rights. If enacted, this bill would clearly violate El Salvador's current obligations under TRIPS, as well as the GSP, CBI and CBTPA trade programs. BSA has been advised by local counsel that it is "unlikely" that this bill will move forward, although the legislation does remain pending in the Economic Commission of the Legislature.

Inadequate Civil Enforcement

Because criminal enforcement is not always feasible or appropriate, BSA member companies often utilize civil enforcement procedures – particularly civil *ex parte* search authority – to combat piracy. In El Salvador, however, software publishers have great difficulty obtaining civil *ex parte* search authority because of onerous evidentiary requirements. Moreover, the civil law fails to impose any time limits on the process for reviewing and approving civil seizure requests.⁶ BSA has found that, on average, it takes 45 days to obtain civil seizure authority in El Salvador, by which time news of the raid may have leaked to the defendant or BSA's evidence may have grown stale. This unwarranted delay, which is far longer than the average authorization process in other countries in Latin America, violates Article 41 of TRIPS, which requires that remedies for copyright infringement be "expeditious." Due to these procedural obstacles, BSA conducted only one civil action in El Salvador during 2000. For the same reasons, during 2001, BSA did not file any civil suits for copyright infringement.

In addition to unacceptable delays in the court process described above, BSA encounters the problem of the imposition of very high bond requirements. Bonds imposed before a court

⁶ In contrast, El Salvador's copyright law does provide for some deadlines by which officials must act in processing a request for a criminal inspection of a suspected pirate.

orders a search and seizure against a suspected pirate have been as high as \$20,000. Such bonds 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 unreasonable deterrence).

Inadequate Civil Damages for Copyright Infringement

The Salvadoran copyright law permits only direct economic damages for civil copyright violations, and thus prohibits punitive, consequential or statutory damages. Without the threat of significant damages, the copyright law fails to provide an adequate deterrent to piracy, as required by TRIPS Articles 41 and 45.

In contrast, other countries have legislated a system of statutory damages which provide for an effective deterrent mechanism to combat piracy. In Brazil, for instance, the unauthorized reproduction or publication of a protected work may be subject to statutory damages equivalent to up to 3,000 times the retail value of the protected work.⁷ The same solution has been adopted by the United States (up to a maximum of \$30,000 per protected work).⁸ Bolivia is also considering such a solution in a bill prepared by the Ministry of Justice (between three to five times the retail value of the protected work).⁹

COPYRIGHT LAW AND RELATED ISSUES

Copyright Law of 1993

Copyright protection in El Salvador is based on its 1993 copyright law. As previously discussed, the two critical deficiencies with this law which result in little real copyright protection through civil channels in El Salvador are the lack of statutory damages and the absence of deadlines for government officials who undertake the various steps of authorizing a civil inspection of a suspected pirate. Both deficiencies are in violation of TRIPS Article 41.1, which requires that remedies for copyright infringement be “expeditious” and provide an effective deterrent to piracy.

Copyright Bill of September 1999

On September 27, 1999, three members of the Legislative Assembly submitted a bill that would virtually eliminate criminal enforcement of copyrights. This bill would reform existing copyright law to require that copyright holders first proceed through all civil avenues and obtain an initial finding in their favor¹⁰ before any criminal process could be initiated against an infringer of a copyrighted work. Such civil litigation in El Salvador generally lasts at least a year.

⁷ Ley de Derechos de Autor, No. 9610, Article 103.

⁸ U.S. Copyright Act, 17 U.S.C § 504 (c).

⁹ Anteproyecto de Código de Propiedad Intelectual, Art. 175 I.

¹⁰ Such an initial court finding is called a *dolo*, which means the judge determines that the defendant has the intent to cause harm/damage to the plaintiff.

This bill therefore would effectively eliminate all criminal enforcement of copyrights. Given existing deficiencies in civil enforcement, this bill would leave copyright holders without any avenue whatsoever to enforce their rights. It goes without saying that this bill, if enacted, would clearly violate TRIPS. Copyright protection in El Salvador must be increased, not decreased, in order for El Salvador to satisfy its multilateral and bilateral obligations.

Implementation of the WIPO Treaties

Internet piracy is increasingly prevalent throughout Latin America and a growing threat to software publishers and other copyright owners. El Salvador already has been commended for being the first country in the Americas 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). These treaties, like all international treaties, are considered self-executing under Salvadoran law. However, as a practical matter, specific implementation in domestic law is needed to provide explicit guidance to the public and the judiciary on the specific obligations contained in these treaties. The government of El Salvador has yet to amend its copyright legislation to implement fully the obligations of both WIPO Treaties. As a result, copyright owners are not assured adequate protection of their rights in the digital environment.

Industry-Proposed Amendments to the 1993 Copyright Law

The business software industry has been working with the Ministry of Economy to amend the Copyright Law of 1993. In December 2000, BSA submitted a proposal to the Ministry of Economy which aimed to: (1) implement the WIPO treaties under domestic law providing for a copyright owner’s exclusive right of “making available” its works (or phonograms) to the public for on-demand access; (2) set a deadline on which civil magistrates must issue search and seizure orders; and (3) establish statutory damages in cases of copyright infringement. BSA is not aware of any developments in the Ministry of Economy to pursue the proposed changes.

To address the defects identified in the Salvadoran legal system and promote stronger copyright protection and enforcement, IIPA and its members continue to encourage the Salvadoran government to adopt the following reforms and improvements:

- Amend the Ley de Fomento y Protección de la Propiedad Intelectual (civil law) to establish a deadline for judicial action on *ex parte* seizure requests and lower the evidentiary threshold for obtaining such orders.
- Amend the Ley de Fomento y Protección de la Propiedad Intelectual to permit statutory or punitive damages for piracy.
- Amend the Código Procesal Penal (Criminal Law Proceedings) to allow foreign companies to file complaints and assist the *Fiscalía* in prosecuting a case without the need for a special power of attorney for every case (i.e., a general power of attorney that authorizes local counsel to act on behalf of the company should be deemed sufficient).
- Encourage the government to reject/terminate the proposed legislation that would eliminate criminal remedies for copyright piracy.

- Encourage the *Fiscalia* to continue investigating and prosecuting criminal copyright offenses, in cooperation with BSA and other IIPA members.
- Encourage the Salvadoran judiciary to convict pirate resellers and impose sanctions that adequately reflect the seriousness of the offense and deter future acts of piracy.
- Enact legislation to fully implement the WIPO treaties into domestic law.

Government Software Management

The BSA applauds the government of El Salvador in its recent initiative to start a legalization process of its installed software base. On December 2001, the government and the BSA launched a software legalization campaign which includes an audit of all of the government's agencies and ministries and a negotiation of software licenses with BSA member companies. Although this campaign has just been launched, this is clearly a step in the right direction for El Salvador.

ENFORCEMENT STATISTICS FOR EL SALVADOR: 2000 and 2001

CRIMINAL COPYRIGHT ENFORCEMENT STATISTICS 2000		
ACTIONS	BUSINESS APPLICATIONS SOFTWARE	SOUND RECORDINGS
Number of Raids conducted	16	0
Number of cases commenced	18	0
Number of defendants convicted (including guilty pleas)	3	N/A
Acquittals and Dismissals	3	N/A
Number of Cases Pending	2	N/A
Total number of cases resulting in jail time	none	N/A
Suspended Prison Terms		N/A
Maximum 6 months		N/A
Over 6 months		N/A
Over 1 year		
Total Suspended Prison Terms	none	N/A
Prison Terms Served (not suspended)		
Maximum 6 months		
Over 6 months		
Over 1 year		
Total Prison Terms Served (not suspended)		N/A
Number of cases resulting in criminal fines		
Up to \$1,000		
\$1,000 to \$5,000	2	
Over \$5,000	8	
Total amount of fines levied	145,890.62	N/A

CRIMINAL COPYRIGHT ENFORCEMENT STATISTICS 2001		
ACTIONS	BUSINESS APPLICATIONS SOFTWARE	SOUND RECORDINGS
Number of Raids conducted	11	0
Number of cases commenced	11	0
Number of defendants convicted (including guilty pleas)		N/A
Acquittals and Dismissals	1	N/A
Number of Cases Pending	5	N/A
Total number of cases resulting in jail time	none	N/A
Suspended Prison Terms		N/A
Maximum 6 months		
Over 6 months		
Over 1 year		
Total Suspended Prison Terms	none	N/A
Prison Terms Served (not suspended)		
Maximum 6 months		
Over 6 months		
Over 1 year		
Total Prison Terms Served (not suspended)		N/A
Number of cases resulting in criminal fines		N/A
Up to \$1,000		
\$1,000 to \$5,000	1	
Over \$5,000	4	
Total amount of fines levied	76,812.57	N/A

CIVIL COPYRIGHT ENFORCEMENT STATISTICS				
ACTIONS	BUSINESS APPLICATIONS SOFTWARE 2000	BUSINESS APPLICATIONS SOFTWARE 2001	SOUND RECORDINGS 2000	SOUND RECORDINGS 2001
Number of civil raids conducted	1	NONE	0	0
Post-Search Action			0	N/A
Cases Pending	1		N/A	N/A
Cases Dropped			N/A	N/A
Cases Settled or Adjudicated			N/A	N/A
Value of loss as determined by Rightholder (\$USD)			N/A	N/A
Settlement/Judgment Amount (\$USD)	9400		N/A	N/A