

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2002 SPECIAL 301 REPORT

GUATEMALA

EXECUTIVE SUMMARY

Although the copyright industries continue to confront high piracy levels in Guatemala, IPR enforcement has improved considerably since the creation of the Special Prosecutor's Office for intellectual property crimes. Unfortunately, legislative reform recently passed with substantially decreased criminal penalties and removed a statutory damages provision for civil copyright infringement in its entirety. Software piracy at the government level still remains a serious problem in Guatemala. In September 2000, amendments to the Guatemala copyright law were adopted in *Decreto 56-2000*, and entered into effect on November 1, 2000. This law reinstated the "public" prosecution of copyright crimes, an issue that had been at the top of the copyright industries' agenda for years. The *Decreto* also implemented certain requirements of the WIPO treaties. Guatemala is close to completing its domestic process to ratify both WIPO treaties, and we recommend that this and the deposit of its instruments with WIPO be accomplished promptly.

The Special Prosecutor's Office for intellectual property crimes recently created by the copyright law amendments has helped to improve copyright enforcement in practice in Guatemala. This Special Prosecutor's Office, however, is overburdened and understaffed; it currently takes at least three to four weeks to obtain a search and seizure order to raid a suspected copyright infringer. Copyright piracy levels remain high. For example, the level of business software piracy in Guatemala is 75%, one of the highest in Latin America. Although Guatemala is moving in the right direction, there is still much work to do to meet its multilateral and bilateral intellectual property rights obligations. IIPA recommends that USTR keep Guatemala on the Special 301 Watch List.

GUATEMALA: ESTIMATED TRADE LOSSES DUE TO PIRACY
(in millions of U.S. dollars)
and LEVELS OF PIRACY: 1996 – 2001

INDUSTRY	2001		2000		1999		1998		1997		1996	
	Loss	Level										
Business Software Applications ¹	13.4	75%	12.3	77%	12.7	80%	8.0	82%	6.3	86%	7.5	90%
Motion Pictures	2.0	60%	2.0	60%	2.0	70%	3.0	70%	3.0	86%	NA	100%
Sound Recordings / Musical Compositions	NA	NA	4.0	60%	4.0	60%	4.0	60%	4.0	60%	3.0	50%
Entertainment Software	NA	NA	0.1	60%	NA	NA	4.0	85%	4.2	87%	4.0	79%
Books	2.5	NA	2.3	NA	2.5	NA	2.5	NA	2.0	NA	2.0	NA
TOTALS	17.9		20.9		21.2		21.5		19.5		16.5	

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."²

Some of these problems, like piracy at government level, have not been resolved yet. There have been some attempts to engage the government in a legalization process, to no avail.

COPYRIGHT PIRACY IN GUATEMALA

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 2001 was 84%, 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 \$15.1 million in 2001. BSA believes that these losses are largely due to the fact that Guatemalan law (as discussed below) fails to establish

¹ BSA estimates for 2001 are preliminary. In IIPA's February 2001 Special 301 filing, BSA's 2000 estimates of \$12.6 million at 79% were identified as preliminary. BSA finalized its 2000 numbers in mid-2001, and the revised estimates are reflected above

² 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 that year. Guatemala is also a beneficiary country of three U.S. trade programs. In 2000, \$30.5 million of Guatemalan goods entered the U.S. under the duty-free GSP code, accounting for 1.2% of its total imports to the U.S. For the first 11 months of 2001, \$30.5 million of Guatemalan goods (or 1.3% of Guatemala's total imports to the U.S. from January to November) entered the U.S. under the duty-free GSP code, representing a 6.1% increase over the same time period last year. In 2000, \$250 million of Guatemalan goods entered the U.S. under the CBI, accounting for 12.2% of its total imports to the U.S. For the first 11 months of 2001, \$217 million of Guatemalan entered under the CBI, representing a 3.4% decrease (or 9% of Guatemala's total imports to the U.S. from January to November). In 2000, \$14.7 million entered under the CBTPA, accounting for .6% of its total imports to the U.S. For the first 11 months of 2001, \$458 million entered under the CBTPA, representing 19% of Guatemala's total imports to the U.S. for the same period.

effective deterrents for infringing acts. During 2000, BSA conducted seven raids against end users and one raid against a reseller. All of these cases were settled out of court. In 2001, BSA conducted 10 criminal raids against end users and 3 criminal raids against resellers of illegal software. These cases were also settled out of court.

Book publishers report that unauthorized copying of college books has increased. Cheaper books through the old RTAC program are no longer available. VAT on book sales increases the original prices by up to 90% over the list prices in the Mexican subsidiaries of U.S. publishers. There is little respect for intellectual property, and no enforcement of existing laws. Estimated losses due to book piracy rose slightly in 2001, to \$2.5 million.

Based on prior reports, sound recording and music piracy in Guatemala dominates the local market. Estimated losses and piracy levels are not available for 2001.

The Interactive Digital Software Association (IDSA) reports that to piracy of entertainment software (including videogame CDs and cartridges, personal computer CD-ROMs, and multimedia entertainment products) is found in Guatemala. Estimated 2001 videogame piracy levels and losses are not available.

COPYRIGHT ENFORCEMENT IN GUATEMALA

BSA is encouraged that copyright enforcement has improved significantly since the creation of the Special Prosecutor's Office for IP crimes. However, BSA still faces some significant delays in the issuance of *ex parte* searches.

Delays in Criminal Enforcement

There have been reports of delays in obtaining *ex parte* search orders. Currently it takes at least three weeks to obtain a search order from the moment a criminal complaint is filed.

There have also been some reports of further delays, in some cases because of the lack of coordination between the Special Prosecutor's Office and the police. In Guatemala, the Special Prosecutor's Office has to request from the Police a preliminary investigation of the case before requesting the Court to issue an *ex parte* search order. Because the police in Guatemala are not properly trained to conduct these types of investigations, it is not uncommon that the prosecutor has to ask the police to resolve some mistakes committed during the investigation.

In November 2001, BSA filed a criminal complaint against a reseller of illegal software. The prosecutor requested the police to conduct an investigation and corroborate the defendant's correct place of business. It is common practice in Guatemala for the police to provide the Prosecutor's Office with both an oral and written report of the investigation. The oral report is transcribed and later submitted to the Court along with the rest of the warrant search request documents. In this case, the address submitted in the police written report and the address submitted in the transcripts of the police oral report did not match. For this reason, the Court denied the prosecutor's request to issue a search warrant. The mistake was eventually fixed and the raid successfully conducted. However, it took almost two months to obtain the search warrant,

ample time for the evidence to be destroyed or simply disappear from the reseller's place of business.

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 which 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).

For these reasons, during 2000 and 2001, BSA did not file any civil actions for copyright infringement.

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 right holder 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

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 are 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). We understand the WCT is in its last stage of ratification before deposit with WIPO, with the paperwork currently within the Ministry of Foreign Affairs. The WPPT appears to have taken a wayward turn in the legislative process in late 2001, and now is waiting for its third reading. IIPA and its members recommend that Guatemala move forward to complete its ratification process promptly and deposit its instruments for both treaties with WIPO.

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.

Government Software Management

During the last two years, there have been several attempts to engage the government of Guatemala in legalizing its installed software base. In June 2001, one of BSA member companies

finalized a legalization agreement with a government agency, but when the documents were sent to the Ministry of Public Finance for final approval, the process was stalled. Few agencies have legalized the software they use. Most of the public administration still uses unlicensed software.