

# INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

## 2003 SPECIAL 301 REPORT

# COSTA RICA

## EXECUTIVE SUMMARY

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**Special 301 recommendation:** IIPA recommends that Costa Rica remain on the Special 301 Watch List to address continuing issues related to amending its intellectual property law and improving on-the-ground anti-piracy actions. It was placed on the Priority Watch List in 2001, and on the Watch List in years prior. IIPA believes it is critical that the issues raised in this report be addressed during the U.S.-Central America Free Trade Agreement (CA-FTA) negotiations with Costa Rica. Costa Rica has a strong copyright economy and, at the same time, has significant barriers to effective enforcement.

**Overview of key actions:** It is time for the Costa Rican government to take immediate action to improve intellectual property rights (IPR) enforcement and bring its copyright laws into compliance with TRIPS, as promised by the Costa Rican government last year, as well as meeting TRIPS-plus standards in light of the upcoming CA-FTA, and fully implementing the WIPO Copyright Treaty. The U.S. government should insist that the Costa Rican government immediately address all of the problems identified herein prior to the finalization of CA-FTA. Copyright piracy levels remain high for most industries, with estimated trade losses due to piracy amounting to at least \$17.6 million in 2002.

- Although the Costa Rican government announced encouraging steps to improve IP protection at the beginning of 2002, most of them have yet to be implemented. The few improvements to its copyright protection regime that the Costa Rican government tried to implement, particularly the appointment of IPR “link” prosecutors and official experts, have had little or no effect to date.
- Delays in judicial proceedings and lack of official investigators, public prosecutors and criminal and civil judges specializing in intellectual property enforcement caused serious enforcement problems in 2002, especially to the business software industry.
- In 2000, Costa Rica enacted its “*Ley de Procedimientos de Observancia de los Derechos de Propiedad Intelectual*,” intellectual property reform legislation which diverged substantially from TRIPS requirements and actually scaled back the protection afforded to copyrighted materials. Despite the copyright industry’s recommendations, this law has not been modified to adapt it to TRIPS.

**Actions which the government of Costa Rica should take in 2003:** The most urgent measures that should be adopted in Costa Rica are the following—

- Create a Public Prosecutor’s Office specialized in IP matters, and;
- Amend the “*Ley de Procedimientos de Observancia de los Derechos de Propiedad Intelectual*” to bring it into full compliance with Costa Rica’s obligations under TRIPS and

the WIPO internet treaties, and to incorporate the copyright industries' recommendations for improvement and achievement of TRIPS-plus standards;

- Reduce unwarranted delays in investigations, prosecutions and sentencing in copyright cases;
- Increase significantly penal sanctions for IPR violations to allow the courts to issue deterrent-level sentences;
- Take a leadership role in the CA-FTA IPR negotiations, advocating high levels of copyright protection and enforcement measures in the IPR Chapter.

**COSTA RICA**  
**ESTIMATED TRADE LOSSES DUE TO PIRACY**  
*(in millions of U.S. dollars)*  
**and LEVELS OF PIRACY: 1999 – 2002<sup>1</sup>**

INDUSTRY	2002		2001		2000		1999	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level
<b>Business Software Applications<sup>2</sup></b>	8.6	61%	6.9	64%	14.9	68%	9.4	71%
<b>Records &amp; Music</b>	7.0	50%	4.8	40%	3.0	40%	3.0	40%
<b>Motion Pictures</b>	2.0	40%	2.0	40%	2.0	40%	2.0	95%
<b>Entertainment Software</b>	NA	NA	NA	NA	0.2	50%	NA	NA
<b>Books</b>	NA	NA	NA	NA	NA	NA	NA	NA
<b>TOTALS</b>	17.6		13.7		20.1		14.4	

For several years, IIPA and its members have identified numerous copyright enforcement deficiencies in the Costa Rican legal and enforcement system. For a country which receives significant preferential treatment under several U.S. trade programs, Costa Rica continues to make only sporadic and inconsistent improvement in its IPR enforcement regime.<sup>3</sup>

<sup>1</sup> The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2003 Special 301 submission, and is available on the IIPA website at [www.iipa.com/pdf/2003spec301methodology.pdf](http://www.iipa.com/pdf/2003spec301methodology.pdf).

<sup>2</sup> BSA's estimated piracy losses and levels for 2002 are preliminary, and will be finalized in mid-2003. In IIPA's February 2002 Special 301 filing, BSA's 2001 estimates of \$9.0 million at 68% were identified as preliminary; BSA finalized its 2001 numbers in mid-2002, and those revised figures are reflected above. BSA's trade loss estimates reported here represent losses due to piracy which affect only U.S. computer software publishers in this country, and differ from BSA's trade loss numbers released separately in its annual global piracy study which reflects losses to (a) all software publishers in this country (including U.S. publishers) and (b) losses to local distributors and retailers in this country.

<sup>3</sup> Regarding imports during the first 11 months of 2002: \$456.6 million worth of Costa Rican goods entered the U.S. under the CBTPA; \$11.7 million worth of Costa Rican goods entered the U.S. under the duty-free GSP code (representing an 78.7% decrease from the same time period in 2001); and \$608.2 million worth of Costa Rican goods entered the U.S. under the CBI (representing an increase of 12.2% from the same period in 2001). For more details on the history of bilateral engagement on copyright issues with Costa Rica, see Appendices D and E of this filing.

# COPYRIGHT PIRACY IN COSTA RICA

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The high level of business software piracy is the consequence of an ineffective judicial system and intellectual property (“IP”) protection legislation that fails to deter piracy.

## COPYRIGHT ENFORCEMENT

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### Ineffective Judicial System

Copyright enforcement in Costa Rica still fails to meet TRIPS and bilateral IPR standards. It takes more than six months from the filing of a criminal or civil case before a software pirate is raided. On one occasion, it took 15 months for prosecutors, the Judicial Investigative Office (OIJ) and judges to raid a software pirate in a criminal case filed by BSA. Judges and prosecutors are not proficient in intellectual property and software matters and official investigations are extremely slow.

Copyright enforcement can be improved in Costa Rica but a serious commitment from the Costa Rican government and the judiciary is necessary. Some of the key recommendations by industry are:

(1) Creation of a Public Prosecutor’s Office specialized in IP matters: In June of this year, during a reception organized by BSA for the Costa Rican President, President Pacheco reiterated the Costa Rican government’s commitment to improving copyright protection. Going further than the previous administration, President Pacheco promised the enactment of a law creating a public prosecutor’s office specialized in IP matters. BSA applauded this announcement as it believes that the creation of a specialized prosecutor’s office with nationwide jurisdiction may be the only way to significantly expedite IP criminal cases. Unfortunately, the specialized IP Prosecutor’s Office is non-existent. Given the significant delays and lack of proficiency observed by prosecutors, judges and the OIJ, the creation of this office has become even more of a priority.

(2) Creation of the Inter-Ministerial Committee on IP matters by decree: During the first quarter of 2002 an Inter-Ministerial Committee on IP matters was created. This special Committee is comprised of delegates from the Ministry of Justice, Ministry of Foreign Trade, Public Ministry, OIJ, Customs Administration, and Judicial School. This committee was created by resolution of all the aforementioned government agencies. Ratification of this committee through a presidential decree would empower it to act in front of other public agencies and private organizations and would be a further signal of the government’s true commitment to IPR protection.

(3) Improve training in IP matters: During 2002 the BSA conducted two training seminars for judges, prosecutors and official experts at the Judicial School. Unfortunately, the government did not itself hold any IPR seminars during that year. It is incumbent upon the government to ensure that all agencies, departments and government officials involved in IPR protection receive the necessary training to achieve a baseline level of knowledge that will allow them to be effective in enforcing IPR. While industry is willing to continue cooperating with the government to achieve this goal, it cannot bear this burden alone.

(4) Eliminate delays and improve the performance of prosecutors, judges and OIJ during the pre-raid procedural stage: Procedural delays in criminal cases could be avoided if prosecutors were to request, and judges were to order, *ex parte* raids based exclusively on sufficient evidence offered by private plaintiffs (“querellantes”), as allowed by the Criminal Procedural Code.

## **Delays in criminal and civil procedures and slow and inefficient official investigations of IP crimes are still serious obstacles to efficient IP enforcement in Costa Rica.**

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

- Specialized “Link” Prosecutors: In February 2002, the Costa Rican General Prosecutor officially announced that 12 specialized “link” prosecutors, one for each public prosecutor’s office in the country, were appointed to handle, “with priority,” intellectual property cases. While this development appeared to be positive, IIPA reported in our February 2002 Special 301 submission that it was premature to comment on whether it would resolve the IP enforcement difficulties that the industry faced in Costa Rica. Another year has passed, and IIPA regrets to report that the IP enforcement issues remain the same as before these announcements were made and before Costa Rica was removed from Priority Watch List in 2002. The Costa Rican Public Ministry did not appoint new “link” prosecutors, but instead commissioned already existing prosecutors who failed to resolve the existing IP enforcement issues.
- Delays in criminal cases: Normally, it takes more than six months for prosecutors to request a raid in a criminal case. A clear example of these delays is the case filed by BSA member companies against a company named AutoMercantil. This company was sued in September of 2001 and was finally raided in November of 2002, more than a year later. This case was handled by the Common Crimes Unit of the Public Ministry and the Second District Criminal Court of San José. The preliminary investigation was conducted by the Common Crimes Division of the Judicial Investigative Office (OIJ). It bears mention that in software piracy cases, failure to act within days on the *ex parte* search request can lead to leaks and destruction of key evidence. The recording industry reports that it takes approximately two to four months to obtain search warrants for a single raid. Consequently information from any investigation becomes obsolete with the movement of pirates.
- Raids ordered based on private plaintiff’s evidence: Public prosecutors usually request an investigation report from official experts at the OIJ before requesting a search and seizure order from a judge. The OIJ’s reports normally do not add substantive information to the evidence previously provided by the copyright holder when requesting the search and seizure order. OIJ’s preliminary investigations do however cause significant delays during the pre-raid procedural stages. The information and evidence provided by private plaintiffs is legally sufficient for public prosecutors and judges to order the raids. The Costa Rican Criminal Procedural Code allows public prosecutors to request, and judges to order, inspections in those cases where a claimant, acting as private plaintiff (“querellante”), submits all the information and evidence necessary for the prosecutors and judges legally to order such inspections. This is similar to the

procedures followed in much of Latin America. Unfortunately, this procedure is rarely implemented in criminal cases because public prosecutors invariably have requested the OIJ's investigation prior to requesting the search and seizure order from the judge.

- Public prosecutors do not allow private plaintiffs to participate in software piracy raids: Despite the fact that private plaintiffs in criminal actions ("querellantes") are parties to the criminal action and thus have standing to participate in all proceedings, public prosecutors and judges normally do not allow private plaintiffs ("querellantes") to actively participate during software piracy raids. Apart from violating procedural due process rights accorded to private plaintiffs ("igualdad procesal del acusador particular"), this practice hampers the effectiveness of the prosecutors and jeopardizes the success of the action, since it prevents the plaintiffs and their experts from providing the much needed technical and licensing assistance that the prosecutors need to determine whether an infringement has occurred.

## (2) Judicial Investigative Office ("OIJ")

- Lack of personnel at OIJ: The General Criminal Unit of the OIJ is in charge of investigating intellectual property crimes. As reported in previous IIPA Special 301 submissions, this unit's lack of specialized personnel prevents it from adequately performing its duties. For example, there are four software investigators available to work on crimes which in some way or another may involve the use of software (such as money laundering cases where the records of the illegal activity may reside in a computer's hard disk). These are the same experts that are called upon to act as the sole experts in software piracy cases. Their multiple roles and nationwide jurisdiction more often than not make them unavailable to participate in piracy cases.

Most of the delays in criminal cases filed by BSA against software pirates in Costa Rica in 2002 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 took place, 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 not conducted until 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.

- If the public prosecutors insist on OIJ investigation reports prior to the raid, it will be necessary to appoint at least three additional official experts specializing in software piracy crimes at OIJ.
- OIJ's experts do not have software licensing and legal knowledge, which has caused problems and delays during preliminary investigations and inspections. It is imperative for the government to implement an extensive training program for official experts in these matters, in addition to the training provided by BSA.
- The recording industry reports that very few cases have been carried out by this group because of a lack of resources. Of those few cases processed, only two reached a sentencing phase and were subsequently suspended.

- Lack of resources and budget is still a problem for the OIJ, and the judiciary in general, to properly perform its duties.

### (3) Judges

- Criminal 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.
- 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.
- Civil judges demonstrated in 2001 that they can handle software piracy cases in an expedited manner. However, significant delays were observed in BSA cases handled by civil courts in 2002. For example, it took approximately six months for the 3rd District Court of San José to conduct a raid against a company sued by BSA member companies in April of 2002, the American Business Academy. This despite the fact that the *Ley de Observancia* requires judges to rule on an *ex parte* search and seizure request within 48 hours of its filing.

## COPYRIGHT LAW AND RELATED LEGAL ISSUES

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### The Inadequate Ley de Observancia (2002)

On October 2, 2000, Costa Rica passed an intended TRIPS compliance law, “Ley de Procedimientos de Observancia de los Derechos de Propiedad Intelectual (“Ley de Observancia),” which diverges substantially from the requirements to which Costa Rica must adhere under TRIPS. Some of the most harmful provisions of the Ley de Observancia are:

- *Ex officio actions*: The competent authorities in Costa Rica should be able to initiate criminal actions *ex officio*, without the need for a complaint by a private party. Article 43 of the Ley de Observancia provides that criminal actions against intellectual property violations are considered public actions but can be initiated only by private parties (“acción publica de instancia privada”). This means that in the event that a public official detects any intellectual property violations, such official cannot initiate legal action. Only the injured party can initiate legal action.

In BSA’s opinion, this provision may violate TRIPS Article 41 (effective action against infringement). In a country like Costa Rica with a software piracy rate of approximately 64%, the “instancia privada” action, which limits the enforcement authority of public officials, is not an effective action as required by TRIPS. Public officials must be empowered to initiate legal actions for IP violations.

- *Penalties are not at deterrent levels*: Articles 54 and 59 of Ley de Observancia provide a maximum penalty of three (3) years of imprisonment for copyright violations. These articles provide the same maximum penalty for those who fix a work without

authorization and sell infringing materials. Under other provisions of the Costa Rican penal law, sentences for crimes having a maximum penalty of three years of imprisonment can be commuted (suspended), and the defendants never have to serve time. Thus, these provisions violate Articles 41 and 61 of TRIPS (deterrent remedies).<sup>4</sup> Maximum imprisonment penalties should be high enough (four or more years) so as to prevent commutation.

- *Lack of criminalization of some forms of piracy:* Article 70 of the Ley de Observancia provides that the “minor” (“insignificante”) and “without profit” (“gratuito”) use and reproduction of illegal products will not be penalized. This is probably the most harmful provision of the law. There is no definition of “minor” use and reproduction, and it is not clear when the use and reproduction of illegal products is considered “without profit.” It may be easy for pirate resellers to avoid liability by simply reproducing and selling illegal software in small amounts, using a variety of CD burners and retail outlets. BSA may 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 various provisions of TRIPS and should be removed.
- *Costa Rican law does not provide for statutory damages:* TRIPS Article 45.2 permits nations to authorize their courts to order payment of “pre-established damages” (e.g., statutory damages). While statutory damages are not mandatory under TRIPS, the adoption of this remedy has proved to be an effective way to deter piracy in other countries, such as Brazil. The adoption of statutory damages provisions in the Costa Rican Legislation would be a significant step toward achieving TRIPS-plus standard in light of the upcoming CA-FTA.

## Bills to Amend the Ley de Observancia

**Proposal by the government:** The Costa Rican Foreign Trade Ministry (COMEX) stated in 2002 that a bill to amend the Ley de Observancia would be submitted by the government to the Costa Rican Congress soon. This has yet to occur. According to reports, the most relevant amendments which will be included in this bill are—

- Article 70 (“Insignificance Principle” or “Principio de lesividad e insignificancia”) will be removed;
- Fines for copyright violations will be added to the Ley de Observancia;
- A special Official Investigators Unit will be created to participate in IP crime-solving;
- A Public Prosecutor’s Office specialized in IP will be created;
- Maximum imprisonment penalties for IP violations will be elevated to five (5) years.

While addressing some of the significant shortcomings of the Ley de Observancia, this proposed bill is missing some key provisions. For it to be adequate, it must also provide that:

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<sup>4</sup> By comparison, Article 212 of the Costa Rican Criminal Code states 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 indicates an inconsistency between the Ley de Observancia and other Costa Rican legislation.

- (i) public officials, not only injured parties, should be able to file criminal actions for IP violations (“acción pública de instancia pública”);
- (ii) the “insignificance principle” in the Costa Rican Criminal Procedural Code should not apply to IP violations;
- (iii) the unauthorized “use” of protected works is a crime; and
- (iv) that any fine imposed for IP violations should be in addition to the prison sentence, and not “alternatively,” as proposed in this bill.

Apparently the bill is supported by the Costa Rican Inter-Ministerial Committee on IP matters, but the bill has not yet been submitted to the Congress because the Government is apparently resolving budget availability issues. A bill which addresses the above-mentioned four amendments should be passed as soon as possible in order for the Costa Rican IP legislation to be TRIPS-compliant.

**Proposal by the Congress:** Also, a new bill to amend the Ley de Observancia was recently submitted to the Costa Rican Congress by five congressmen and published in the Official Gazette on December 18, 2002. This bill should be reviewed by the Permanent Committee of Legal Affairs of Congress. IIPA does not have information regarding whether the bill has already been reviewed by this committee. It is worth mentioning that this bill is different from the one being reviewed by the government, discussed above. Nevertheless, our observations on the government’s bill (above) also apply to this industry-supported bill, except that the issue of “fines in the alternative” was not included in such bill.

Also on December 18, 2002, a bill to create a Public Prosecutor’s Office specialized in IP matters was published in the Official Gazette.<sup>5</sup> This bill was also submitted to the Costa Rican Congress by the same five congressmen that submitted the bill to amend the Ley de Observancia. If passed, the bill to create the Public Prosecutor’s Office will create a better enforcement environment for the intellectual property right industries.

## **Government Software Asset Management**

In February 2002, former Costa Rican President Miguel Angel Rodriguez issued a Government Software Legalization Decree. Its aim was twofold: ensuring that all software in use in the federal government was duly licensed, and establishing and implementing sound and effective software procurement and software asset management policies. During a BSA-sponsored reception for his new administration, President Pacheco reiterated his administration’s intention to fully implement that decree. Both the issuance of the decree and President Pacheco’s reiteration of it are important steps that demonstrate the Government of Costa Rica’s increasing awareness about the value of managing their software assets. We urge the Government of Costa Rica to continue down the path towards implementation of the software asset management practices called for in this decree.

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<sup>5</sup> The Costa Rican government has indicated that it is exploring international funding alternatives for the creation of the Specialized Public Prosecutor’s Office, which the copyright industry hopes is not an excuse to delay its creation.

## **COPYRIGHT AND REGIONAL TRADE NEGOTIATIONS**

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The negotiation of bilateral and regional free trade agreements (FTAs) is assuming increasing importance in overall U.S. trade policy. These negotiations offer an important opportunity to persuade our trading partners to modernize their copyright law regimes so they can maximize their participation in the new e-commerce environment, and to improve enforcement procedures. The FTA negotiations process offers a vital tool for encouraging compliance with other evolving international trends in copyright standards (such as fully implementing WIPO treaties obligations and extending copyright terms of protection beyond the minimum levels guaranteed by TRIPS) as well as outlining specific enforcement provisions which will aid countries in achieving effective enforcement measures in their criminal, civil and customs contexts.

IIPA believes that the IPR chapter in both the Free Trade Area of the Americas (FTAA) and the U.S.-Central American FTA (CA-FTA) must be forward-looking, technologically neutral documents that set out modern copyright obligations. They should not be summary recitations of already existing multilateral obligations such as TRIPS. As the forms of piracy continue to shift from hard goods and more toward digital media, the challenges faced by the copyright industries and national governments to enforce copyright laws grow exponentially. The Internet has transformed copyright piracy from a local phenomenon to a global wildfire. CD-R burning is fast becoming a pirate's tool of choice throughout this region. Without a modern legal and enforcement infrastructure, including effective criminal and civil justice systems and strong border controls, we will certainly see piracy rates and losses greatly increasing in this region, thus jeopardizing more American jobs and slowing the growth of the copyright sectors in both the U.S. and the local markets.

Therefore, IPR chapters in the FTAA and the CA-FTA should contain the highest levels of substantive protection and enforcement provisions possible. At a minimum, the IPR chapter should: (a) be TRIPS- and NAFTA-plus, (b) include—and clarify—on a technologically neutral basis the obligations in the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty (WCT and WPPT), and (c) include modern and effective enforcement provisions that respond to today's digital and Internet piracy realities. Despite the existence of these international obligations, many countries in the Western Hemisphere region fail to comply with the TRIPS enforcement obligations, both in their legislation and in practice. It is in the area of enforcement that some of the greatest gains for U.S. and local copyright creators can be achieved.