

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2006 SPECIAL 301 REPORT

THE BAHAMAS

EXECUTIVE SUMMARY

Special 301 Recommendation: IIPA recommends that The Bahamas be kept on the Special 301 Watch List in 2006.

Actions that the Government of Bahamas should take in 2006:

- Implement the 2004 amendments to the Copyright Act which remove the objectionable and overbroad compulsory license.
- Issue regulations to correct longstanding problems by:
 - Reducing overbroad discounts on cable retransmission royalties to hotels (by eliminating any discount) and schools and hospitals (by ensuring they are for private, non-commercial use only);
 - Providing a cable royalty rate that affords equitable remuneration to rightsholders;
 - Announcing a procedure under which rightsholders may file claims under the compulsory license.
- Protect U.S. sound recordings.
- Implement the 1996 WIPO Treaties.

COPYRIGHT LAW AND RELATED ISSUES

Letters of agreement regarding overbroad compulsory license: On February 18, 2000, the Motion Picture Association (MPA) and the Television Association of Programmers (TAP) filed a Special 301 petition that highlighted the fact that the Government of The Bahamas had created an overly broad compulsory license permitting the unauthorized re-transmission by cable television systems of any copyrighted work transmitted over its territory, including encrypted transmissions; such a compulsory license violates international copyright norms. The Government of the United States entered into negotiations with the Government of The Bahamas to address this problem. The resulting exchange of letters dated October 26 and November 9, 2000 constituted an Agreement between the two parties. Under that Agreement, The Bahamas committed to conform its cable compulsory license to international norms. Details of the issues involved and the resulting agreement appeared in IIPA's 2001 Special 301 report.¹

Four years passed without any legislative action on the copyright law until (the industry found out, belatedly) amendments were passed in June 2004. The 2004 amendments did remove the objectionable compulsory license from the law. Proper implementation of these

¹ See IIPA's 2001 301 report on The Bahamas at <http://www.iipa.com/rbc/2001/2001SPEC301BAHAMAS.pdf>.

amendments would limit the scope of the compulsory license to the unaltered retransmission of free, over-the-air broadcast signals and would not permit retransmission of encrypted signals or extend to retransmission over the Internet.

Nevertheless, MPA continues to report that the government of The Bahamas has not fully implemented its 2004 law amendments and the 2000 Agreement. First, the government explicitly refused to implement the 2004 amendments until the commercial demands of Cable Bahamas were fulfilled. As part of the 2000 Agreement, the U.S. government promised to “encourage” U.S. rightholders to negotiate licenses on commercial terms. MPAA has taken a number of specific steps to assist its member companies and U.S. programmers in evaluating their options regarding licensing additional product to Bahamian cable operators. It is important to note that the MPAA member companies are not the sole U.S. rightholders who have interests in distribution and programming in Bahamas and the rest of the Caribbean region.

Second, remaining problems about the cable compulsory license rates, exceptions and claims procedures all could be resolved via regulations, since they already appear in regulations, not law. Yet to date, The Bahamas has provided no indication that it intends to address the other elements of its existing regulatory regime that also represent violations of the Berne Convention. These three problems are:

- Existing regulations give hotels a 75% discount and schools and hospitals a 100% discount on cable royalty rates. MPAA believes that the exception for hotels is indefensible. The exception for schools and hospitals might be tolerable if and only if the regulations clarified that the use by hospitals and schools was non-commercial use only.
- The cable royalty rate also fails to provide equitable remuneration to rightholders. The rates established in the regulations are far lower on a per-signal basis than rates paid for television broadcast signals under compulsory licenses permitted by international norms, and fail to meet the “equitable” standard under Berne. The 2000 Agreement contained a provision which had the Bahamian Copyright Royalty Tribunal (CRT) consulting with U.S. rightholders to provide equitable remuneration for the compulsory licensing of such free-over-the-air broadcasts and to amend the royalty rate structure of the Regulations.
- The government has never announced a procedure under which rightholders may file claims under the compulsory license.

Until these problems are resolved, the entire system in The Bahamas fails to provide any compensation to rightholders.

Copyright law: Copyright protection in The Bahamas is based on its Copyright Act, 1998, including the Copyright (Amendment) Act 2004 (discussed above).

However, the current copyright law does not provide a point of attachment for U.S. or foreign sound recordings. The Bahamas has not joined the Geneva Phonograms Convention, nor the WTO, nor has it ratified or implemented the WIPO Performances and Phonograms Treaty (WPPT). This means that U.S. sound recordings are not protected in The Bahamas. This untenable situation is startling, because The Bahamas is a beneficiary country of the U.S. preferential Caribbean Basin Initiative (CBI) trade program, which requires adequate and

effective protection for U.S. copyrighted materials, including sound recordings.² The Bahamas has the potential to be a successful market for the legitimate recorded music industry due to high levels of tourism and per capita income. The legitimate industry is interested in the exploitation of local and international repertoire in public locations, including cruise ships, and by broadcasters. The immediate impact of these inadequacies is that international sound recordings do not receive the same treatment as local sound recordings and that Internet exploitation of music may be unprotected in the Bahamas.

In terms of other international trade obligations, The Bahamas is not a WTO member. In May 2001, the government submitted a request for accession, and a Working Party was established in July 2001. The Bahamas has not yet submitted a Memorandum on the Foreign Trade Regime and the Working Party has not yet met, according to the WTO. Furthermore, with respect to other works, The Bahamas is a party to the Brussels Act (1948) of the Berne Convention (it has adhered only to the administrative provisions, Articles 22-33, of the Paris 1971 text). The WTO TRIPS Agreement incorporates, by reference, the obligations of the 1971 Berne Convention.

In brief, The Bahamas has many steps to take to improve its national legislation, including, at a minimum, ratifying the WPPT, the WIPO Copyright Treaty (WCT), and the substantive provisions of the Paris Act (1971) of the Berne Convention.

² The Bahamas currently participates in the Caribbean Basin Initiative (CBI), and is also an eligible beneficiary country under the Caribbean Basin Trade Partnership Act (CBPTA). One of the CBI discretionary criteria requires that The Bahamas provide “adequate and effective means under its laws for foreign nations to secure, to exercise, and to enforce exclusive rights in intellectual property, including . . . copyrights.” During the first 11 months of 2005, \$99.7 million worth of Bahamian goods (or 15.2% of The Bahamas’ total exports to the U.S. from January to November) entered under the CBI, representing an increase of 20.9% from the same period in 2004.

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