

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2006 SPECIAL 301 REPORT

DOMINICAN REPUBLIC

EXECUTIVE SUMMARY

Special 301 Recommendations: IIPA recommends that the Dominican Republic be elevated from the Special 301 Watch List and placed on the Priority Watch List in 2006. IIPA and its members support the IPR chapter in the U.S.-Central America-Dominican Republic Free Trade Agreement.¹ The CAFTA-DR contains strong provisions on copyright law and enforcement, and includes a side letter by which the government of the Dominican Republic made specific commitments to improve broadcast piracy enforcement and resolve copyright infringement cases in the courts in advance of the FTA entering into force.² This FTA was signed on August 2, 2004, and will hopefully enter into force with the Dominican Republic sometime during 2006.³

Actions for the Dominican Republic to Take in 2006:

- Have the enforcement agencies (including the police-*Fiscalía*, ONDA and INDOTEL) conduct more regular and sustained actions, followed by prompt criminal prosecutions;
- Improve interagency communication and cooperation between ONDA and the Attorney General's Office;
- Assign a squad of investigative law enforcement officers to follow up on the cases after ONDA or the *Fiscalía* has conducted a raid;
- Focus particular attention on inspecting/monitoring those broadcast television stations which continue to broadcast U.S. programming without authorization, and follow up with criminal and administrative actions;
- Expedite prosecutions and judicial decisions in criminal cases;
- Dedicate more resources and training to ONDA, including, but not limited to, more inspectors, more equipment, and expanding ONDA to include satellite offices;
- Support ONDA's use of penalties under their regulations to fine and close down retail outlets where infringing actions have been identified or infringing products seized;
- Assure proper implementation of the new Criminal Procedure Code, which entered into effect in August 2004 (i.e., training of judges, prosecutors and police officers in intellectual property matters and *ex officio* authorizations of raids, inspections and closures of illegal activities);
- Continue to work toward full implementation of the copyright and enforcement elements in the CAFTA-DR IPR chapter and WIPO Treaties.

¹ IIPA Press Release, "IIPA applauds the signing of the U.S.-Central American-Dominican Republic FTA," Aug. 2, 2005, at <http://www.iipa.com/pdf/IIPA%20CAFTA%20DR%20Signing%20by%20Pres%20Bush%20FINAL%2008022005.pdf>.

² The U.S.-DR-CAFTA IPR Chapter text is posted on the USTR website at http://www.ustr.gov/assets/Trade_Agreements/Bilateral/CAFTA/CAFTA-DR_Final_Texts/asset_upload_file934_3935.pdf and the August 4, 2004 Side Letter on IPR Procedures is posted at http://www.ustr.gov/assets/Trade_Agreements/Bilateral/CAFTA/CAFTA-DR_Final_Texts/asset_upload_file15_5851.pdf.

³ USTR Press Release on CAFTA-DR Implementation, December 30, 2005 at http://www.ustr.gov/Document_Library/Press_Releases/2005/December/Statement_of_USTR_Spokesman_Stephen_Norton_Regarding_CAFTA-DR_Implementation.html.

DOMINICAN REPUBLIC
Estimated Trade Losses Due to Copyright Piracy
(in millions of U.S. dollars)
and Levels of Piracy: 2001-2005⁴

INDUSTRY	2005		2004		2003		2002		2001	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Records & Music ⁵	10.8	75%	10.3	75%	9.9	65%	6.9	65%	7.7	65%
Business Software ⁶	2.6	77%	2.0	77%	3.0	76%	3.6	61%	4.0	64%
Motion Pictures ⁷	NA	NA	2.0	20%	2.0	20%	2.0	60%	2.0	60%
Entertainment Software ⁸	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA
Books	1.0	NA	1.0	NA	1.0	NA	1.0	NA	1.0	NA
TOTALS	14.4+		15.3		15.9		13.5		14.7	

COPYRIGHT PIRACY IN THE DOMINICAN REPUBLIC

Over the years, several trade tools have been used to engage the Dominican Republic to improve copyright protection and enforcement,⁹ including Special 301 as well as the Generalized System of Preferences (GSP) program.¹⁰ IIPA and its members look to the Dominican Republic to continue to work to improve on-the-ground copyright enforcement which, we believe, is imperative to reducing the high levels of piracy in this country.

⁴ The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2006 Special 301 submission at www.iipa.com/pdf/2006spec301methodology.pdf.

⁵ RIAA reports that in 2003, \$9.9 million represented the estimated sales displacement to the legitimate industry. In 2004, the losses to the legitimate market increased to \$10.3 million with an estimate of 1.53 million pirate CD and cassettes units available in the market.

⁶ BSA's 2005 statistics are preliminary. They represent the U.S. publishers' share of software piracy losses in the Dominican Republic, and follow the methodology compiled in the Second Annual BSA/IDC Global Software Piracy Study (May 2005), available at <http://www.bsa.org/globalstudy/>. These figures cover, in addition to business applications software, computer applications such as operating systems, consumer applications such as PC gaming, personal finance, and reference software. BSA's 2004 piracy statistics were preliminary at the time of IIPA's February 11, 2005 Special 301 filing; the 2004 data has been revised and is reflected above.

⁷ MPPA's trade losses and piracy levels for 2005 are available for a limited number of countries and are based on a methodology that analyzes physical or "hard" goods and Internet piracy. For a description of the new methodology, please see Appendix B of this report. As loss numbers and piracy levels become available for additional countries at a later time, they will be posted on the IIPA website, <http://www.iipa.com>.

⁸ ESA's reported dollar figures reflect the value of pirate product present in the marketplace as distinguished from definitive industry "losses." The methodology used by the ESA is further described in Appendix B of this report.

⁹ For more details on the history of the Dominican Republic on IPR issues under Special 301 and other trade programs, see IIPA's summary in Appendix D (<http://www.iipa.com/pdf/2006SPEC301USTRHISTORY.pdf>) and Appendix E (<http://www.iipa.com/pdf/2006SPEC301HISTORICALSUMMARY.pdf>) of this submission.

¹⁰ In June 1999, the IIPA filed a petition with the U.S. government to initiate a review under both the GSP and the CBI trade laws of the eligibility of the Dominican Republic to participate in these programs due to its failures to provide adequate and effective copyright protection for U.S. copyright owners and to provide equitable and reasonable market access. GSP hearings were held in April 2000 and in October 2003. As the Dominican Republic FTA negotiations moved forward, USTR terminated the GSP investigation on July 2, 2004. During the first 11 months of 2005, the following benefits were tracked: (a) \$136.8 million worth of Dominican goods (or 3.3% of the Dominican Republic's total exports to the U.S. from January to November) entered the U.S. under the duty-free GSP code, representing a 60% increase from the same period in the prior year; (b) \$774 million worth of Dominican goods entered under the CBI, representing a 0.6% increase over the same period in the prior year; and (c) \$1.5 billion worth of Dominican goods entered under the CBTPA, representing a 6.4% decrease over the same period in the prior year. Once the FTA enters into force, the Dominican Republic's benefits under these two trade programs will cease.

Record and music piracy: Record and music piracy continues to plague the legitimate marketplace, making it impossible for record companies to invest in the Dominican Republic. The number of vendors on the streets continues to climb, with little pro-active intervention visible by this current administration. Nearly all of the music piracy found is burned onto CD-Rs. Street vendors in possession of large inventories of pirate music flood many major shopping plazas in the tourist areas around the country. This problem extends beyond the Dominican Republic; the Recording Industry Association of America (RIAA) reports finding illicit product in flea markets in Puerto Rico that are sold by Dominicans who bring the product on the ferry between the two countries. RIAA has a pro-active anti-piracy program in the Dominican Republic, and the new criminal code sufficiently addresses the illegal act of creating, distributing and selling of illicit sound recordings. However, ONDA (the Copyright Office) -- the government agency responsible for conducting, among other things, music piracy inspections and seizures -- was absent in music piracy enforcement in 2005. In fact, ONDA has refused to provide any data or statistics to the recording industry that would shed light on the level of activity, if any, ONDA has undertaken in this area. Furthermore, the recording industry also has had some setbacks with the IPR prosecutor for one of the provinces of Santo Domingo; he has imposed a high threshold for the filing of a criminal case (discussed below). The estimated trade loss due to music recording piracy in the Dominican Republic was \$10.8 million in 2005.

Film piracy and broadcast piracy: MPA reports that broadcast and pay-TV piracy and video piracy remain key priorities for 2006 in the Dominican Republic. The broadcast/cable transmission of movies prior to release in theaters in the Dominican Republic or during their theatrical run greatly reduces legitimate business opportunities in other media by disrupting the normal release sequence to theatrical exhibitors, retail video outlets and legal cable operators. For many years, MPA and its member companies have taken action against television and video piracy in the Dominican Republic. Since 2003, the Dominican Republic has taken some actions to reduce piracy in both of these areas. In addition to broadcast piracy, retail piracy is a growing problem, and more and more street vendors are selling pirate DVDs.

Business software piracy: The Business Software Alliance (BSA) reports that computer software piracy in the Dominican Republic comprises primarily end-user piracy and hard-disk loading. End-user piracy rates remain high among Dominican businesses of all sizes, from small family businesses to large, prosperous financial institutions and industrial concerns. With hard-disk loading, Dominican resellers load unlicensed software onto computer hardware and sell the package to the consumer. In some cases, the software is represented as legitimate and the purchasers may be unaware that they are buying illegal software; in other cases, the purchasers are complicit in the piracy. Preliminary estimated trade losses to the business software industry are \$2.6 million in 2005, with a piracy level of 77%. Lowering the business software piracy levels could have a dramatic, positive effect on the local economy.¹¹

Book piracy: The book publishing industry reports that problems in the Dominican Republic during 2005 continued to center around illegal photocopying, primarily of English language teaching (ELT) textbooks. Commercial book piracy is diminishing while legitimate distributors increase. Estimated trade losses to the publishing industry were approximately \$1 million in 2005.

¹¹ BSA and International Data Corporation (IDC) released a new study on December 8, 2005, which illustrates global economic gains from reducing software piracy. This report, Expanding the Frontiers of Our Digital Future: Reducing Software Piracy to Accelerate Global IT Benefits, using 2004 data, found the following: Cutting the Dominican Republic's piracy rate 10 points (from 77% to 67%) could add \$47 million to its economy, increase local industry revenues by more than \$31 million, and pump an additional \$3 million into the Dominican Republic's tax coffers. The 10-point reduction could also create hundreds of new IT jobs. See http://www.bsa.org/idcstudy/pdfs/Dominican_Republic.pdf.

COPYRIGHT ENFORCEMENT IN THE DOMINICAN REPUBLIC

Mixed results in anti-piracy actions against music piracy. Although the recording industry has a good working relationship with the police department, the police do not take self-initiated actions. The only criminal raids taking place are via the industry's partnership with ADOPROFONO, the local group representing Dominican record labels. In 2005, RIAA's anti-piracy operations netted the following seizures: 259,950 pirate music CD-Rs, 94 CD-R burners, and 19 computers used in the manufacturing of illicit product. There have been 87 people arrested during these operations. Criminal charges were brought against 12 individuals by the prosecutor's office. There were four convictions; two were served out and two are on probation.

However, there are two disturbing developments. First, ONDA has not taken any music piracy inspections nor made any seizures. ONDA has refused to provide any data/statistics to the industry that would reveal their music anti-piracy activities. To try to address this problem, the industry has met three times with the new ONDA director. The industry's understanding is that ONDA refuses to work with the Attorney General's office, because ONDA believes that under the new law, they have sole responsibility for anti-piracy cases. Therefore, it seems the relationship between ONDA and the Prosecutor's Office is non-existent. Efforts to help reconcile this situation between these two agencies have not been successful. RIAA also met with the Secretary of State and discussed the difficulties created by the ONDA, but to date problems have not been resolved. There is a need to have the current administration identify a law enforcement body within the National Police (perhaps the tourist police), provide the necessary training, and have them become a proactive force in anti-piracy operations. The recording industry believes that ONDA could use new leadership that understands IP laws and wants to work with the National Police, the Attorney General's office and ADOPROFONO to address its growing music piracy problems.

Second, the IPR prosecutor for one of the provinces of Santo Domingo has imposed an 800-unit threshold for filing a criminal case against anyone arrested for music piracy. There is no threshold amount level written into the current criminal code. RIAA has opposed this threshold from its inception.

Actions taken against broadcast, cable operators and hotels piracy. In 2005, ONDA and INDOTEL, with assistance of the IPR Department of the Attorney General's Office, undertook eight inspections against cable operators and one broadcast station (Virus), and four cable operators were shut down. Moreover, the Attorney General's Office filed new cases against cable operators; however, authorization to perform raids was denied by judges in the first instance. INDOTEL continues to conduct investigations against hotels in the larger tourist cities.

Anti-piracy actions taken against video piracy. MPA reports that ONDA conducted 20 raids against video retailers and street vendors in 2005. The growth of DVD piracy is a concern.

Good anti-piracy actions taken against business software piracy. BSA reports continuing progress in criminal actions in 2005. The *Fiscalía of Distrito Nacional and Provincia de Santo Domingo* have been conducting inspections against both business software resellers as well as taking *ex officio* actions against business end-users. To date, BSA is satisfied with the level of activity of the police (*fiscalías*). Since the beginning of 2005, the police have carried out 17 raids (12 raids by the *Fiscalía Distrito Nacional* and another 5 by the *Fiscalía Provincia de Santo Domingo*).

Status of criminal prosecutions against broadcasters: Ongoing broadcast piracy has been one of the major piracy problems in the Dominican Republic over the last decade. Below is a summary of the pending television piracy cases in which MPA is active:

- In 2004, MPAA filed criminal complaints with the District Attorney against Digital 15 and Virus (broadcast stations). However, in 2005, the only legal action filed was against Virus, which was settled. No other criminal actions were initiated.
- In the Canal del Sol case, the first hearing was held in 2003, followed by additional hearings in 2004. On June 11, 2004, the judge decided in favor of the right holders and the prosecution and allowed the inclusion of the director of Canal del Sol as a named defendant. The final decision is still pending. Canal del Sol has entirely changed its programming and currently broadcasts only music videoclips and programs regarding politics. This positive, improved behavior is mainly due to three reasons: the MPA legal action; INDOTEL's intervention with the owner of Canal del Sol; and political interests of the owners which established a new political party.
- In the Telemicro case, hearings took place in 2003 and 2004. In 2004, the court sanctioned Telemicro's representative (with three months' jail and a fine of 50 times minimum wage (US\$4,915). Unfortunately, the judge did not order the cessation of the transmissions of infringing signals. MPA had filed an accompanying civil suit, and was awarded US\$11,000. The defendant has appealed the civil decision. Both penalties and damages currently are suspended, pending this appeal. In December 2005, the Court decided to review all evidence presented, which is expected to take place in February 2006.

Prosecutions and courts results in recording piracy cases: As noted above, the recording industry has experienced setbacks with the IPR prosecutor for one of the provinces of Santo Domingo. The prosecutor has imposed an 800-unit threshold for filing a criminal case against anyone arrested for music piracy; there is no threshold amount level written into the current criminal code. And, the fact that the possession of 100 or more units constitutes a criminal felony charge in nearly every state in the U.S., RIAA has opposed this threshold requirement since its inception.

The judicial process in the Dominican Republic has improved under the amendments to the criminal procedural code that entered into effect on September 21, 2004. The RIAA has successfully obtained four prosecutions for people processed after the new code entered into effect. This represents a substantial increase in both prosecutions and the expeditious manner in which the cases were processed. For its cases which predated the 2004 changes in the criminal code, the RIAA continues to experience great delays at the appellate level. For example, 105 criminal cases for music piracy filed between 1999 and September 2004 are still pending trial or appellate court review.

Trainings: RIAA has provided education and training geared to the different audiences in the Dominican Republic. In 2005, these included IP seminars with other IP industries, specific training for prosecutors, ONDA inspectors and members of the ADOPROFONO anti-piracy team that highlight identification of pirate product, impact on the music industry, artist, employees of labels, distributors and retailers. RIAA utilizes sample product picked up in the streets of Santo Domingo to show actual product being sold locally. With the change in ONDA, the RIAA offered training for all of the new inspectors; however, ONDA has not agreed to schedule a training session for their personnel. RIAA held a training session with the prosecutor's office in early 2005.

COPYRIGHT LAW AND RELATED ISSUES

Copyright Law: The Dominican Republic adopted a new copyright law in October 2000 (Law 65-00), fulfilling many years of work to replace its inadequate 1986 copyright law. The GSP investigation clearly helped prompt legislative consideration of the new law. The 2000 law represented success in advancing higher levels of substantive copyright protection as well as expanding the battery of tools available for criminal, civil and administrative copyright enforcement. The law raised the level of copyright protection up to WTO TRIPS levels, and also integrated some elements found in the two WIPO "Internet" Treaties. However, several refinements to the copyright law and other laws will be required to fully implement the comprehensive IPR obligations found in the CAFTA-DR.

WIPO Internet Treaties: The Dominican Republic joined both the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty (WPPT), with January 10, 2006 as the dates of entry into force. The deposit process took about three years, and IIPA and its members are pleased that the Dominican Republic has joined the international community in adhering to these two important treaties. We welcome and now expect full implementation of the treaties' obligation as part of the FTA implementing process.

Criminal Procedural Code Amendments: The amendments to the criminal procedural code (adopted in July 2002) entered into effect on September 21, 2004. The criminal cases underway at that time will be adjudicated under the current procedural laws which certainly have not served to expedite criminal cases and prosecutions. As reported above, the recording industry has a significant backlog of cases stifling in the courts under the old code.

Constitutional Challenge to Copyright Law: BSA is currently defending against a constitutional challenge to the 2000 Copyright Law. A reseller defendant in a BSA case, Hard Soft, filed a constitutional challenge in the Supreme Court of Justice in Santo Domingo, alleging that portions of the 2000 Copyright Law are unconstitutional. Hard Soft argues that the copyright law protects software more stringently than other media, and is thus unconstitutional because of unequal protection, in addition to other arguments. BSA has filed a brief refuting these arguments, and ONDA also filed a brief against this constitutional challenge. The hearing to consider whether Hard Soft committed a copyright infringement was scheduled for November 4, 2003, but was postponed until April 2004. BSA is still waiting for the Supreme Court's final decision on this constitutional challenge.