

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2008 SPECIAL 301 REPORT

COSTA RICA

Special 301 Recommendation: IIPA recommends that Costa Rica be elevated to the Priority Watch List in 2008.

EXECUTIVE SUMMARY

IIPA and its members congratulate Costa Rica on its affirmation of the Dominican Republic-Central America-U.S. Free Trade Agreement (DR-CAFTA), and look forward to the prompt and proper implementation of the CAFTA-DR IPR Chapter, both in terms of legislative reform of its enforcement and copyright laws as well as effective deterrence against piracy. Proper legislative implementation must correct the long standing deficiencies in important criminal enforcement procedures and available sanctions.

The most pressing problem which continues to brew in Costa Rica is the complete lack of effective criminal copyright enforcement taken by Costa Rican authorities for the past three years. Most disturbingly, there has been no prosecutorial interest in pursuing criminal copyright cases and this problem rests at high levels of the Costa Rican government. For the recording industry, no criminal prosecutions are moving forward at all, due to a 2005 order issued by the Attorney General to halt all music piracy cases. For the software industry, the possibility of prosecutions remains low as prosecutors use the standards in the current law to decline to take cases forward. If any case were actually to reach sentencing, judges would impose only minor sanctions because the law considers copyright infringement minor offenses. Street piracy remains pervasive and Internet piracy appears to be on the rise in major cities as well as rural areas. IIPA members understand that the Attorney General is not a member of the Executive Branch, and appreciate the interests of the Executive Branch to effectively protect copyright. However, this should not obscure the fact that it remains the responsibility of all branches of the Republic of Costa Rica to effectively protect and enforce copyright. Costa Rica merits elevation to the Priority Watch List this year primarily because of the continuing difficulties at the political level in getting a green-light from the Attorney General to permit criminal copyright prosecutions. Even if the DR-CAFTA legislation is implemented perfectly (and some concerns remain on this legislation), under the current circumstances, effective enforcement of any copyright law seems remote. Such an untenable situation should not be tolerated from an FTA trading partner.

PRIORITY ACTIONS IN 2008

Enforcement

- The Supreme Court should require the Attorney General to instruct his prosecutors to process and expedite copyright infringement cases and promptly take action on the dozens of cases that have been submitted to his prosecutors.
- Reduce unwarranted delays in investigations and prosecutions.
- Reduce delays in sentencing in criminal copyright cases.
- Increase the level of criminal sanctions for copyright infringement in the DR-CAFTA implementation package and apply these in practice.
- Create a Public Prosecutor's Office specialized in IP matters and assign resources and personnel to the office.
- Improve training of enforcement officials and technical experts in Costa Rican agencies.

- Implement in practice, the software asset management practices in government agencies called for in the 2002 Decree.
- Engage state and municipal governments in the anti-piracy campaign through the cancellation of operating licenses for any locale selling pirate product.

Legislation

- Work on pending CAFTA Implementing legislation (Bill No. 16,117) to ensure that its provisions fully and properly implement Costa Rica's IPR obligations.
- Create and fund a Specialized IP Prosecutor Office.

IIPA and its members support the DR-CAFTA,¹ as it contains high levels of IPR protection and enforcement.² On October 7, 2007, Costa Rican voters supported DR-CAFTA in a constitutional referendum, and President Arias signed it on November 22, 2007. Costa Rica must pass legislation to bring its national laws in line with DR-CAFTA by February 29, 2008, at which time it will become the final country to have this regional agreement enter into force. Costa Rica is currently a beneficiary country of several U.S. trade programs which contain obligations to provide adequate and effective IPR protection and enforcement, such as the Generalized System of Preferences (GSP) and the Caribbean Basin Initiative.³ Once DR-CAFTA is in force in Costa Rica, these bilateral trade benefits will be phased out.

COSTA RICA										
Estimated Trade Losses Due to Copyright Piracy										
(in millions of U.S. dollars)										
and Levels of Piracy: 2003-2007⁴										
INDUSTRY	2007		2006		2005		2004		2003	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Sound Recordings & Musical Compositions	14.5	60%	15.1	60%	18.3	60%	NA	NA	7.2	56%
Business Software⁵	17.0	63%	15.0	64%	10.0	66%	9.0	67%	10.0	68%
Motion Pictures⁶	NA	NA	NA	NA	2.0	100%	2.0	40%	2.0	35%
Books	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA
Entertainment Software	NA	NA	15.1	60%	NA	NA	NA	NA	NA	NA
TOTALS	31.5		30.1		30.3		11.0		19.2	

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 final text of the CAFTA-DR IPR Chapter is posted on USTR's website at http://www.ustr.gov/Trade_Agreements/Bilateral/CAFTA/CAFTA-DR_Final_Texts/Section_Index.html.

³ During the first 11 months of 2007, the following quantities of imports under preferential trade programs entered the U.S. from Costa Rica: \$290 million under the CBTPA, \$1.03 billion under the CBI and \$71.9 million under GSP, all of which represent decreases from the same time period in 2006.

⁴ The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2007 Special 301 submission at www.iipa.com/pdf/2008spec301methodology.pdf. For information on the history of Costa Rica under Special 301 review, see Appendix D at (<http://www.iipa.com/pdf/2008SPEC301USTRHISTORY.pdf>) and Appendix E at (<http://www.iipa.com/pdf/2008SPEC301HISTORICALSUMMARY.pdf>) of this submission.

⁵ BSA's 2007 statistics are preliminary. They represent the U.S. software publishers' share of software piracy losses in Costa Rica, and follow the methodology compiled in the Fourth Annual BSA and IDC Global Software Piracy Study (May 2007), available at <http://w3.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 2006 piracy statistics were preliminary at the time of IIPA's February 12, 2007 Special 301 filing and were finalized in June 2007 (see <http://www.iipa.com/statistics.html>), as reflected above.

⁶ MPAA's trade losses and piracy levels for 2006 and 2007 are not available. MPAA did provide 2005 estimates for a select group of countries, using a new methodology that analyzed both physical/"hard goods" and internet piracy. Details regarding MPAA's methodology for 2005 and prior years are found in Appendix B of this IIPA submission.

COPYRIGHT PIRACY AND ENFORCEMENT IN COSTA RICA

IIPA and its members in recent years have identified numerous copyright enforcement deficiencies in the Costa Rican legal and enforcement system.⁷ Incredibly, no progress at all was made in addressing these problems in 2007.

Internet piracy: Internet piracy, as everywhere else in the region, is a growing problem despite the low penetration of broadband. There are about 922,000 internet users, about 20% of the population (according to internetworldstats.com). However, due to low broadband penetration and the high cost of the services, Internet cafés have become an important means to download files containing unauthorized copies of copyrighted materials. These cafés have increased in number not only in the main cities, but also rural ones. The police are not taking any actions against Internet cafés.

Piracy remains widespread in 2007: The recording industry reports that piracy of sound recordings and music continues to be rampant in Costa Rica, remaining a consistently high level with the market composed of over 50% of pirate products. CD-R burning is the most prevalent form of music piracy. The capital of San José is the main center of pirate activity, followed by the state of Heredia. There have been no major changes in the distribution channels. Retail sales are concentrated in just two major chains. Several groups are involved in the importation of blank media and equipment, but the local recording industry has not been able to develop a case yet. Due to the lack of action of the prosecutors in San Jose's metropolitan area, anti piracy efforts have been diverted to other areas such as Alajuela and Heredia where some police units and local governments are more receptive to industry complaints.

The business software industry reports that the most devastating form of piracy in Costa Rica continues to be the use of infringing or unlicensed software by legitimate businesses and Government agencies. Access to broadband Internet services constitutes a new medium for users to obtain unauthorized software from websites that offer low-priced pirate software for download.

Enforcement remained ineffective in 2007: The main impediments to effective criminal enforcement are simple. First, there remains a very negative attitude by the prosecutors in accepting and pursuing copyright cases. Second, there is general problem with lack of adequate resources in the government agencies necessary to conduct any kind of effective anti-piracy campaigns.

This industry's relations with municipal police units remain positive; raids are taking place and infringing materials are being seized (these raids just do not go forward for prosecution). The local anti-piracy team did carry out some actions in markets and warehouses with the support of municipal police forces. There were 87 music piracy raids carried out in 2007, resulting in the seizure of 1.3 million units.

However, the recording industry reports that there have been no major prosecutions conducted or convictions issued in the last three years. Moreover, the Attorney General's Office continues to boycott any music piracy cases. Recall that in early 2005, many pending cases (including 12 major piracy cases) were dropped by local prosecutors, as directed by the Attorney General. The recording industry's relations with this Office remain strained, despite the industry approaching the office numerous times to try to discuss the no-prosecution policy. The Office of the Attorney General is the main obstacle to this industry's anti-piracy efforts. This problem with the Attorney General, coupled with the lack of *ex officio* provisions in the current law, make any kind of anti-piracy campaign extremely difficult.

Other copyright actions also have not been pursued by prosecutors. Prosecutors are applying the "non-significant-case" provision in the current Law on Enforcement to every IPR case, which allows them to avoid moving cases forward per instructions from the Attorney General. The business software industry also reports increased problems with enforcement due to the extremely low priority placed on copyright enforcement by the Attorney General's office.

⁷ For more details on the history of bilateral engagement on copyright issues with Costa Rica, see Appendix D of this filing at <http://www.iipa.com/pdf/2008SPEC301USTRHISTORY.pdf> and Appendix E at <http://www.iipa.com/pdf/2008SPEC301HISTORICALSUMMARY.pdf>.

Delays in criminal cases: Delays have recently turned into “no action,” given the Attorney General’s mandate to prosecutors not to bring IP cases. Historically, long delays in copyright enforcement cases continue to be a serious problem, since it normally takes several months between the filing of a complaint, the day a raid or inspection takes place, and the issuance of an official inspection report. During this time, there is little incentive for the infringer to resolve the problem. Moreover, there are significant delays between the time an official inspection report is issued in a particular case and the time a sentence is handed down in the same case. 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.

Need for special IPR prosecutors: The industries still support the creation of a specialized prosecutor’s office with nationwide jurisdiction so that criminal IP cases could move forward more swiftly. Given the significant delays and lack of proficiency observed by prosecutors, judges and the OIJ, the creation of this office remains a priority. More than five years ago, the Costa Rican General Prosecutor announced in 2002 that 12 specialized “link” prosecutors, one for each public prosecutor’s office in the country, were going to be appointed to handle, “with priority,” intellectual property cases. Unfortunately such specialized IP prosecutors were not appointed, already existing prosecutors were given IP duties. The creation of a specialized prosecutor’s office is extremely necessary because something is sorely needed to correct the current unacceptable situation with prosecutors. Legislation is needed, however, to authorize budgetary funding for such an office, and pending legislation to accomplish that has fallen off the docket.

Inadequate civil remedies: BSA reports that civil procedures are very slow and onerous. In order to get a preliminary injunction, the *Ley de Observancia* (Law 8039) requires the rights holder to (a) prove it is the legitimate owner and (b) to deposit a bond to protect the target in case the action is found to have no legal basis. The law does not state the rate or the percentage to be used in setting the amount of the bond. Therefore, the judge has discretion in setting the bond. Usually, the minimum rate that is used is 25% of the amount of damages claimed (this 25% figure comes from the preventive embargo figure, a civil procedure.) Another problem is that the judge may, prior to the injunction, inform the defendant of the proposed action, so he can oppose the action and request that a higher bond be set. BSA did not bring any civil cases in 2007 in Costa Rica.

Querellantes and problems with prosecutors and judges in software cases: 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 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. Criminal judges should accept the information and evidence offered by private plaintiffs, and order the raid if such information and evidence is sufficient, without requesting prior investigation reports from the Judicial Investigation Office (OIJ); this procedure is consistent with Costa Rican legislation.

COPYRIGHT AND LEGAL ISSUES IN COSTA RICA

Given the higher standards of copyright obligations and enforcement measures contemplated in the FTA, Costa Rica will have to make additional reforms to its copyright- and enforcement-related laws in order to comply fully. The copyright industries desire legislation that is CAFTA-compatible and addresses several outstanding problems which have hindered effective criminal enforcement in Costa Rica for years, including the following:

- The minimum penalty for criminal copyright infringement should be increased from the current one year in jail to three years. This three-year term is needed in order to ensure the possibility of jail time (anything less than three years is a minor offense and judges can release the defendant).

- Any fine imposed for infringements should be in addition to the prison sentence, and not in the alternative.
- Public officials, not only injured parties, must be able to file criminal actions for IP violations ("*acción pública de instancia pública*"). This includes providing *ex officio* authority for police.
- Businesses engaged in piracy operations should be closed.
- Destruction of equipment used in the infringement must be permitted.
- The objectionable "insignificance principle" ("*principio de lesividad e insignificancia*") should be removed from the Criminal Procedural Code so that it does not apply to intellectual property infringements.
- The unauthorized "use" of copyrighted materials should be made a criminal offense.

Copyright Law of 1982 (as amended): In 2000, Costa Rica amended its 1982 Copyright Law in large part to comply with TRIPS and the WIPO Treaties. Several positive improvements were made there, including: revising the right of reproduction; extending copyright term of protection; and recognizing the rights holder's exclusive right to make a work or sound recording available to the public. However, further refinements of the copyright law are needed to comply with the comprehensive DR-CAFTA requirements. Issues which require attention include, for example: national treatment for performers and producers of sound recordings; expanded performers' rights, including fixation of their unfixed performances; and an express and exclusive "right of making available" for performers and producers of sound recordings.

The Law on Enforcement (*Ley de Observancia*): For years, the copyright industries have been working to amend enforcement procedures in Costa Rica. In October 2000, Costa Rica passed the *Ley de Procedimientos de Observancia de los Derechos de Propiedad Intelectual*, with the objective of complying with the TRIPS Agreement. Unfortunately, the industry found numerous provisions not in compliance with TRIPS and an impediment to effective enforcement.⁸ Efforts to amend the bill continued over the years, with industry developing several proposals. Now that CAFTA implementation is needed, more legislative proposals have been developed to improve the enforcement-related mechanisms (see CAFTA implementation, next).

CAFTA-DR Implementation (Bill No. 16.117): In February 2006, Costa Rica developed legislation to implement the IPR provisions of DR-CAFTA. COMEX (the Ministry of External Commerce) introduced a new bill to comply with DR-CAFTA that is being evaluated by the Legislative Assembly, and this bill, for the most part, has support from the local copyright industry. Bill No. 16.117 would amend the Law on Enforcement, including making a positive amendment to quantify civil damages in absence of an expert study. It also contains proposals affecting liability and sanctions for the circumvention of technological protection measures (TPMs) and rights management information, and the reception and distribution of program-carrying satellite signals. This bill increases criminal penalties for piracy to a minimum of four years. Unfortunately, it does not establish the much-needed *ex officio* action because it still requires complaints (*denuncias*) by the rights holders. There are several other problems with the bill, and apparently efforts are being made to address these issues before final adoption.⁹

⁸ Years ago the copyright industries identified four major deficiencies in the 2000 Law on Enforcement: (1) a lack of criminal *ex officio* authority, the ability to take action without the need for a complaint by a private party; (2) the need for deterrent-level penalties. The law only gave a maximum penalty of three (3) years of imprisonment for copyright violations, and sentences for crimes having a maximum penalty of three years of imprisonment can be commuted (suspended); (3) the law 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 because these terms are undefined and it was easy for pirates to avoid liability by simply reproducing and selling illegal software in small amounts, using a variety of CD burners and retail outlets; (4) the failure to provide for statutory, or pre-established, damages.

⁹ Specifically, the original version of Bill No. 16.177 contained provisions on technological protection measures that failed to satisfy the DR-CAFTA in several respects (e.g. no coverage of services, no provisions for access controls, no coverage of components, overly broad exceptions to criminal liability, failure to clearly afford civil liability for circumvention, no definitions for what is a TPM). Second, while the bill would add statutory damages, they were too low to be deterrent. The bill offers 1-50 times the minimum wage of unskilled workers (one wage is about US\$195, so the range would be US\$195-\$9,750). Third, proposed criminal penalties are too low to be deterrent; the bill proposes only a minimum one-year penalty, which makes it impossible to ever imprison any defendants. Fourth, another provision makes a general (and disturbing) statement about ISP liability, with reference to regulations which apparently have not been developed. Costa Rica does have a permitted 30-month transition period to implement the ISP liability provision; if the Government decides to implement it now, then the legislation must track the DR-CAFTA requirements.

Industry also is concerned that this bill may generate opposition despite the fact that the government's party has a majority in the Assembly. In addition, reports indicate that a flurry of legislation aimed at complicating and slowing down the CAFTA implementation has been introduced. In particular, a troubling bill introduced in January 2008 would exempt public establishments such as restaurants, hotels and bars from paying performance rights fees. This amendment would establish a extremely detrimental precedent for sound recordings and audiovisual rights holders in this region, if enacted.

Government software asset management: In February 2002 the then-President of Costa Rica, 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. President Pacheco then reiterated his administration's intention to fully implement that decree. Both the issuance of the decree and President Pacheco's reiteration of it were important steps towards demonstrating the Government of Costa Rica's increasing awareness of the value of managing their software assets. Unfortunately, to date there has been no further action taken to implement the decree. Active implementation of this decree is needed. BSA has recently been informed by First Vice President and Minister of Justice Chinchilla that the National Registry's Copyright Office is currently receiving data from other Government agencies about their software inventories. BSA was also told that next year's budget would include a special item for software licenses. Through both of these projects, BSA and its members look forward to working with the Government of Costa Rica towards the legalization of software used by all Costa Rican government agencies.