

COSTA RICA

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2010 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that Costa Rica be elevated to the Priority Watch List in 2010.

Executive Summary: The most pressing problem for the copyright industries in Costa Rica continued to be the complete lack of criminal copyright enforcement taken by Costa Rican authorities. This lack of priority given by prosecutors remains a stark reality. While it is true that many criminal procedures and sanctions were amended in late 2008 to make prosecutions easier, the industries did not see any shift toward a more proactive enforcement stance from the Attorney General's office in 2009. Creation of a specialized IP prosecutors office is long overdue. Yet this abdication of enforcement responsibility must not obscure the fact that it remains the responsibility of all branches of the government of Costa Rica to effectively protect and enforce copyright. Furthermore, no progress was made on implementing government-wide software legalization, as required by CAFTA. In addition, the government has taken several recent actions that would limit the rights that should be afforded to sound recording producers, artists and performances. The music industry is also struggling to collect fees for the public performance of its music, as required by Costa Rican law and court decisions. In sum, the copyright enforcement situation in Costa Rica is dire, and especially disturbing given that this country is our CAFTA-DR (the Central America-Dominican Republic-U.S. Free Trade Agreement) partner. The presidential election may prove pivotal. Now that Laura Chinchilla, the former Minister of Justice, won the February 7th election, there is hope that attention will be paid to copyright and intellectual property in her administration.

Priority actions requested to be taken in 2010: The copyright industries recommend that the following actions be taken in the near term in Costa Rica in order to improve the adequate and effective protection of copyrighted materials there:

Enforcement

- Create a Public Prosecutor's Office specialized in IP matters and assign resources and personnel to the office. This continues to be a top priority.
- Implement in practice, the software asset management practices in government agencies called for in the 2002 Decree and required by CAFTA.
- Create a specialized IP unit within the police.
- Reduce unwarranted delays in investigations, prosecutions and sentencing.
- Improve training of enforcement officials on criminal and civil copyright cases (including police, officials from the Judicial Investigation Office (OIJ), prosecutors and judges).

Legislation

- Create and fund a Specialized IP Prosecutor Office.
- Pass pending legislation to amend the Ley de Observancia in order to clearly grant criminal protection to the neighboring rights of recording artists and broadcasters.
- Oppose the bill that unfairly aims to regulate the promotion and broadcast of sound recordings and performances of Costa Rican artists and producers by broadcasters.
- Work with rights holders on developing legislation to the remaining CAFTA issue – implementation of liability of Internet service providers – an issue that is still subject to transition.
- Oppose pending legislation that would impose a series of financial duties to all record producers in the country that hire studio musicians and singers on a temporary basis.



COPYRIGHT PIRACY IN COSTA RICA

Hard goods piracy: The music industry reports that piracy of sound recordings and music continues to be rampant in Costa Rica. The level of optical disc piracy is approximately 75%, which represents almost 1.5 million illegal units sold every year in this relatively small market. Much of this OD piracy involves CD-R burning. The primary areas of concern are San José and Heredia. 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. Although it is difficult to come up with a precise number of OD importations due to the lack of a specific customs classification for blank media, and confidentiality about details of some of the importations, some local experts estimate that approximately 25 million units of CD-Rs and DVD-Rs enter Costa Rica annually.

Business software piracy and lack of CAFTA implementation: 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. Software legalization in government agencies should be an important public policy goal, and it is a CAFTA obligation not yet implemented. BSA reports that it has not seen pirated software products on the streets. At the present time, business software piracy in Costa Rica is among the lowest in Latin America, at an estimated 58% piracy level. This low level, however, is due mostly to cultural reasons rather than effective enforcement actions. Given the challenging financial times, there is a concern that more legitimate businesses may be tempted to use infringing software instead of purchasing legitimate product or licenses. BSA's preliminary estimate of trade losses due to piracy in Costa Rica are \$14 million for 2009.¹

Internet piracy: There are about 1.5 million Internet users in Costa Rica, about 34% of the population in 2009 (according to www.internetworldstats.com). More home and business users now have access to the Internet, and this increases access to pirated products being sold for download or in hard copy from the Internet. Internet piracy, as everywhere else in the region, is a growing problem despite the low penetration of broadband.

Internet cafés continue to offer a forum for consumers to download files containing unauthorized copies of copyrighted materials. For example, internet cafés, especially in the capital city area, offer burning music CDs services to customers; last year the recording industry filed over two dozen criminal complaints, all of which were dropped by the prosecutors. In addition, music is downloaded from the Internet using peer-to-peer (P2P) networks (eDonkey, ARES and Limewire).

Currently there are no discussions between the content community and the internet service providers regarding internet piracy on their networks. Costa Rica still has a transition period under CAFTA to address ISP liability matters.

COPYRIGHT ENFORCEMENT IN COSTA RICA

IIPA and its members over the years have identified numerous copyright enforcement deficiencies in the Costa Rican legal and enforcement system. The main problem for copyright industries is at the prosecutorial level. Prosecutors maintain a poor level of cooperation due to the political decision adopted by Attorney General to not pursue copyright piracy. Hence only some very limited anti-piracy actions are conducted, many of them with the cooperation of the municipality of San Jose. There is no political will to pursue piracy, and the situation worsened during the Arias Administration.

The national police and prosecutors are responsible for the anti-piracy actions in Costa Rica. The sound recording and the business software industries both continue to have anti-piracy operations in Costa Rica, but there are little to no results to report. Beyond the major problem at the prosecutorial level, enforcement authorities lack equipment

¹ BSA's 2009 statistics are preliminary, represent the U.S. software publishers' share of software piracy losses in Costa Rica, and follow the methodology compiled in the Sixth Annual BSA and IDC Global Software Piracy Study (May 2009), available at www.bsa.org. 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. Final 2009 BSA statistics will be available later in 2010.

(hardware and software) to investigate Internet piracy cases. The Costa Rican judicial system is very weak, and courts, both criminal and civil, lack the expertise and experience necessary to enforce the copyright and criminal laws. Training programs are necessary for prosecutors, judges and the police authorities.

Police cooperation is positive but need more resources: Some municipalities with their own police forces have confiscated hundreds and sometimes thousands of music and video CDs from street vendors, in response to pressure from local businesses. These efforts, however, do not go so far as to investigate the supply chain of the pirated and counterfeit merchandise. In addition, BSA is not aware of any pirated business software being seized in such raids.

The recording 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 last year in markets and warehouses with the support of municipal police forces. In 2009, the industry reports 48 raids, resulting in 240,000 music (mostly CD-R) seizures and 350,000 film (mostly DVD-R) seizures and the arrests of 30 individuals. These results, although a little better than last year's numbers, do not represent deterrent levels due to the high volume of piracy.

Prosecutors will not take criminal copyright cases: 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 remains inadequate resources in the government agencies necessary to conduct any kind of effective anti-piracy campaigns.

For years, the recording industry faced roadblocks by the Office of the Attorney General such that no major prosecutions were conducted nor were convictions issued. That problem with the Attorney General, along with the lack of *ex officio* provisions in the current law, made it impossible for the recording industry to run any kind of anti-piracy campaign. For example, in 2008, the recording industry did work with the police to conduct some raids against hard goods piracy, but none of these cases have yet moved forward toward prosecution. During 2009, the recording industry filed approximately 30 criminal complaints with Prosecutors' offices in San Jose, Alajuela and Heredia, but all of them were dropped based on "insignificance of the crime" element. As a result of the serious deficiencies in copyright enforcement, no convictions in music cases were issued during 2009. BSA did not seek any criminal actions in 2009.

The need for complaints and other delays: 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 as allowed by the Criminal Procedural Code. For example, the municipal police in San José are taking some actions on their own without requiring the presentation of complaints. Most of these operations are aimed at small, street distributors. The police authorities may (but do not have to) bring cases *ex officio*; such actions have largely been used by the authorities as a tool to clean up street piracy of video and music discs. *Ex officio* action is not used for more complex cases involving the use or fixation of unauthorized copies of software.

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. This unfortunate practice existed in previous years and continues. 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 OIJ; this procedure is consistent with Costa Rican legislation.

In addition, long delays in copyright enforcement cases have been a historically 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.

Need for specialized IPR prosecutors: The copyright industries have supported the creation of a specialized prosecutor's office with nationwide jurisdiction so that criminal IP cases could move forward more swiftly and with more specialized expertise. The 2008 legislation uses a vague concept of "perjuicio" as a requirement to constitute a crime; prosecutors can then use "insignificance" of economic damage as an excuse to close out a case. Given the significant delays and lack of proficiency observed by prosecutors and judges, the creation of this special office remains a pressing priority.

The creation of a specialized prosecutor's office is extremely necessary to correct the current unacceptable situation with prosecutors. Legislation is needed to authorize budgetary funding for such an office, and pending legislation to accomplish that has fallen off the docket. Although the Attorney General can create this unit internally, specific authority and funding to establish this office is preferred. The industries hope that the new Chinchilla Administration will allocate funds and create this office. For example, even a small start-up of two to three specialized prosecutors (along with the proper media attention surrounding such an action) may have a significant impact on IP crimes.

The business software industry awaits the opening of a specialized IP section in the Attorney General's office. Until it is launched, BSA believes that criminal enforcement of software piracy will remain weak due to the extremely low priority it receives in the Attorney General's office and because prosecutors decline to bring criminal cases.

Inadequate civil remedies and long delays. The civil courts in Costa Rica have practically collapsed; a simple procedure can take months or years. There is no chance at the present time to pursue copyright cases civilly (civil actions are sometimes taken by the software industry, but very rarely by the music or audiovisual sectors).

BSA has submitted civil infringement cases, but the civil courts are in a state of virtual collapse. BSA is waiting for results, and will probably be waiting for a long time. The civil procedures are very slow and onerous. In order to get a preliminary injunction, the Law on Enforcement (*Ley de Observancia*, Law 8039) -- before its 2008 amendment -- required 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.

No court results: Because criminal copyright cases are not investigated by the prosecutors, they do not reach the judiciary. Judges at present do not have the expertise to handle IP cases. We are not aware of any final judgments in criminal or civil copyright cases last year.

COPYRIGHT AND LEGAL ISSUES IN COSTA RICA

CAFTA implementation in 2008 but problems remain: In 2000, Costa Rica amended its 1982 Copyright Law to comply with TRIPS and some of its WIPO Treaties (WIPO Copyright Treaty and WIPO Performances and Phonograms Treaty) obligations. In order to implement the copyright- and enforcement-related aspects of CAFTA, Costa Rica passed amendments to two separate laws -- its Copyright Law (which was included in a broader intellectual property rights reform package) and its Law on Enforcement. The copyright law amendments Law No. 8686 (2008) accomplished the following: extending the term of protection for works, performances and producers of phonograms; improving definitions; amending certain provisions regarding contracts and transfers; modernizing the scope of certain exclusive rights, and; updating exceptions and limitations, all aimed at comporting with the CAFTA obligations.

Government software asset management not completed yet: Government legalization of software is a CAFTA obligation that was due upon CAFTA's entry of force. The Costa Rican government commenced efforts on this

issue in 2002.² Unfortunately, no real progress on putting such a plan in-place was made in 2009. Last year was a political year and there was a lack of leadership to address government software legalization. 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.

Recent reservations to two treaties affecting the recording industry and pending legislation: The main source of concern for the music and recording industry in Costa Rica is the government's August 2009 action to adopt reservations to the two international treaties protecting neighboring rights (Rome Convention and WPPT). Those reservations have the immediate effect of exempting broadcasters of performance rights payments to recording artists and record companies. The decision was taken in the middle of judicial battles between right holders and broadcasters and looked as an unfair benefit given by the government to broadcasters. The Ministry of Culture never called copyright sectors to participate in these legislative initiatives. In fact, the reservations made to the Rome and WPPT treaties were decided during secret meetings held between the Ministry of Justice and COMEX (the Ministry of Foreign Commerce) without any consultation process.

Legislation has been introduced to implement the above decision by the government. In October 2009, a bill (Bill No. 17.574) was presented that would "regulate the promotion and broadcast of musical works and performances of Costa Rican artists and authors by broadcasters." This aims to amend Articles 78 and 82 of the 1982 copyright law in order to create a new exception to the communication to the public right of recording companies, artists and performers in favor of traditional over-the-air broadcasters. It looks to reflect in national legislation the reservations made by Costa Rica to Article 12 of Rome Convention and Article 15.1 of the WPPT. The bill is pending before the Science and Technology Commission of the Legislative Assembly. In an environment in which the licensing of signals is largely replacing the sale of recorded music, the government of Costa Rica should refrain from introducing these limitations which will have a very prejudicial impact on Costa Rica's music community. This is hardly an appropriate time to reduce the ability of performers and record companies to obtain compensation for the commercial use of their performances and recordings. The recording industry is considering a constitutional challenge to the August 2009 decision, and also hopes to meet with the Minister of Justice to discuss this situation.

Continuing problems with the Law on Enforcement (*Ley de Observancia*): For years, the copyright industries worked 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 that were not TRIPS-compliant and were impediments to effective enforcement.³ Efforts to amend this law continued for years. Finally, in August 2008, amendments to this Law on Enforcement were adopted (Law No. 8656 of 11 August 2008 amending Law. No. 8039 of 12 October 2000) to implement numerous CAFTA obligations. For example, this law addressed the following CAFTA points in a generally positive manner:

- ***Ex officio*:** The law establishes *ex officio* authority for the police to conduct investigations on their own initiative. This is a critical correction that will hopefully improve criminal enforcement significantly.
- ***Anti-circumvention*:** It provides protection and remedies against the circumvention of technological protection measures (TPMs) (this was done in advance of 3 years transition for CAFTA Article 15.5.7).

² In February 2002, 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. In 2007 BSA was informed that the National Registry's Copyright Office was receiving data from other Government agencies about their software inventories.

³ Years ago the copyright industries identified four major deficiencies in the 2000 Law on Enforcement when it was originally adopted: (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 provided that the "minor" (*insignificante*) and "without profit" (*gratuito*) use and reproduction of illegal products will not be penalized. This point may have been 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 products in small amounts, using a variety of CD burners and retail outlets; (4) the failure to provide for statutory, or pre-established, damages.

- Statutory damages: It provides for pre-established damages (statutory damages) in civil judicial proceedings (this was done in advance of 3 years transition for CAFTA Article 15.11.8).
- RMI: It provides for protection of rights management information (RMI) (this was done in advance of the 2 years transition for CAFTA Article 15.5.8.a).
- Satellite signals: The law provides criminal sanctions regarding encrypted program-carrying satellite signals (this was done in advance of the 18 months transition for CAFTA Article 15.8.1.b).
- Other civil remedies: The 2008 law provides for civil remedies, including seizures, actual damages, court costs and fees, destruction of devices and products (this was done in advance of the 3 years transition for CAFTA Article 15.11.14).
- Injunctive relief: The law includes other provisions involving injunctive relief, destruction of infringing materials and equipment, and border measures.

Unfortunately, as feared by the industries, other key elements of these 2008 amendments have not gone well. Below is a summary of some of the continuing legal concerns reported to IIPA by its members:

- Criminal penalties: The weak implementation of the revised criminal penalties has caused the most concern. The way Costa Rica structured and applied its criminal sanctions has long been a concern of the copyright industries. The 2008 amendments revised the criminal sanctions for copyright and industrial property infringement, but left open many continuing questions for copyright owners about their effectiveness in practice. In fact, all four fears highlighted below in IIPA's 2009 Special 301 filing remain true.
 - First, the level of economic sanctions (fines) for criminal copyright piracy was generally raised for most infringing acts but the maximum jail terms were lowered in some cases. For example, the new law actually reduced the minimum penalty from one year down to two months, for certain cases. IIPA members had long argued that the minimum penalty for criminal copyright infringement should be increased from one year in jail to a minimum three years, believing that the three-year term was needed in order to ensure the possibility of jail time and not suspension. IIPA and its members had hoped that deterrent level sentences would be imposed in practice, but that did not happen. .
 - Second, the structure of these provisions unfortunately still provides for fines in the alternative of criminal sentences; this historically has allowed judges to decide between prison or fines, and this results, not surprising, usually in the issuance of fines (and hence few jail terms were ever issued). IIPA and its members believe that any fine imposed for infringement should be in addition to the prison sentence, and not in the alternative; it is unfortunate that the new law does not allay our concerns here.
 - Third, the new Article 55 includes a complicated a four-step provision, linking the amount of the damages to the level of penalty. There is not a single provision in the law that explains how the judges will calculate the damages in piracy cases.
 - Fourth, the copyright industries remain concerned that even with the new amendments, it is not certain that the historical problem of judges issuing suspended sentences because of low minimum sentences will stop.

Apart from the lack of political will by prosecutors, there are several other legal deficiencies that have contributed to the problems with poor copyright enforcement in Costa Rica through 2009. Additional issues not addressed in the CAFTA implementation packages, but long highlighted by the copyright industries, include the following:

- Public officials, not only injured parties, must be able to file criminal actions for IP violations ("*acción pública de instancia pública*"). This means providing for full *ex officio* authority for police. Unfortunately, this situation has not changed; in general, rights holders must still file a complaint (*denuncia*) in order to get a criminal prosecution. (As mentioned above, *ex officio* authority is used sometimes by municipal police for simple street actions.)
- The objectionable "insignificance principle" ("*principio de lesividad e insignificancia*") was not removed from the Criminal Procedural Code so that it does not apply to intellectual property infringements. Prosecutors are allowed to drop cases based on their particular criteria about the importance of the case.

- Businesses engaged in piracy operations should be closed.
- The unauthorized “use” of copyrighted materials should be made a criminal offense.

New bill to amend the Ley de Observancia: In January 2009, the government submitted a new bill (Bill No. 17.264) that would amend Article 52 of the Ley de Observancia in order to clearly grant criminal protection to the neighboring rights of recording artists and producers, as required by CAFTA. At last report, this bill was still pending due to the February elections. This bill is supported by the recording and music industry and opposed by broadcasters.

Court case regarding performance rights of music: The music industry has been working for seven years to try to obtain the payment of public performance rights in Costa Rica. Last fall the music industry obtained an important legal victory over Costa Rican television stations in a dispute regarding public performance rights. An Administrative Court (TRA) in Costa Rica has recognized FONOTICA (the Costa Rican Producer’s Music Licensing Society) as a legitimate performance rights organization. The verdict was issued on September 21, 2009 and was published on October 5, 2009. The new sentence (#1194-2009) overrides a previous ruling (#551-2009) of June 2009 that blocked FONOTICA from collecting fees for the public exploitation of copyrighted music. The previous decision prompted television stations Repretel, Teletica, Amnet, and Sky to avoid paying royalties for the music that they transmitted for commercial purposes. The copyright and public performance rights law has been in effect in Costa Rica since 1982.

Unfortunately another dispute remains as the National Association of Radio (CANARA) refused to comply with the law (and the precedent of this FONOTICA ruling) because radio and television stations do not recognize the right of performers, musicians and producers to be compensated, and refuse to comply with the law. To make matters worse, CANARA has been running a misleading public campaign against FONOTICA, and insinuates that listeners would have to pay extra for the music they listen to on broadcasts (an untrue assertion). FONOTICA has proposed, as payment, a modest percentage of the stations’ advertising revenues as payment for the unlimited use of its repertoire, which includes both national and international artists and millions of songs. Costa Rican law required that 50% of FONOTICA’s total collections be paid to AIE, whose members include more than 260 Costa Rican musicians and performers and many international artists.

Bill to regulate labor rights and healthcare coverage for artists and performers: On July 19, 2009, a small group of representatives submitted a bill (Bill No. 17.521) to the Legislative Assembly that would include all recording artists and performers in the social security system and, in effect, impose a series of financial duties to all record producers in the country that hire studio musicians and singers on a temporary basis. This proposal represents a clear disincentive to the development of music businesses in Costa Rica. The bill currently is pending the International Affairs and Foreign Commerce commission at the Legislative Assembly. Although recording activity in Costa Rica is low, the recording industry opposes this bill because it would become an obstacle for labels (both majors and independent) to record locally.

More CAFTA implementation issues: Now that CAFTA-DR is in force in Costa Rica, the trade benefits Costa Rica has received under various U.S. programs have been phased out. During 2009, Costa Rican had \$1.17 billion in exports to the U.S. under the CAFTA-DR.

The CAFTA IP Chapter contains several transition periods to implement the following enforcement obligations, and Costa Rica already has implemented most of its obligations (see above). However, one critical obligation, especially in the digital age, still has to be met. Costa Rica is obligated to adopt, within 30 months of the FTA entry into force, provisions on limitations of liability for Internet Service Provider (ISP) liability and notice and takedown provisions (CAFTA Article 15.11.23). The copyright industries believe that transparency in the development of the implementing legislation is important.