

COSTA RICA

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2011 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that Costa Rica be elevated to the Priority Watch List in 2011, primarily motivated by the unprecedented action on the part of Costa Rica to roll back existing protection for performers and record labels, and to replace a regime based on national treatment with a discriminatory one.

Executive Summary: Most disappointingly, the government has taken several recent actions that 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. The newly elected president, Laura Chinchilla, has maintained the same poor level of cooperation with industry as characterized the previous government. As an FTA partner of the United States within the CAFTA-DR, Costa Rica should be held to a high standard of effective copyright enforcement.

The single largest obstacle that the copyright industries face in developing an effective anti-piracy campaign in Costa Rica is the lack of enforcement action, particularly on the part of prosecutors. Many criminal procedures and sanctions were amended in 2008 to facilitate prosecutions, and rights holders are hopeful that the newly appointed Attorney General will follow-through with a more proactive IP enforcement stance. Creation of a specialized IP Prosecutor's Office is long overdue. No progress was made on implementing government-wide software legalization, as required by CAFTA-DR.

PRIORITY RECOMMENDED ACTIONS FOR COSTA RICA IN 2011:¹

- Withdraw bill No. 17,719, which implements reservations to international obligations that would result in denying compensation to US performers and record labels, and creates a new exception to performance rights for commercial broadcasters.
- Pass pending legislation to amend the *Ley de Observancia* in order to clearly provide criminal remedies for violations of neighboring rights
- The newly appointed Attorney General should sponsor legislation necessary for the creation and support of a new specialized IP Prosecutor's Office.
- Implement in practice the software asset management practices in government agencies called for in the 2002 Decree and required by CAFTA-DR.
- 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).
- Work with rights holders on developing legislation on the remaining CAFTA issue – implementation of liability of Internet Service Providers (ISPs) – an issue that is still subject to transition.

¹For more details on Costa Rica's Special 301 history, see IIPA's "History" appendix to this filing at <http://www.iipa.com/rbc/2011/2011SPEC301HISTORICALSUMMARY.pdf>, as well as the previous years' reports, at <http://www.iipa.com/countryreports.html>. For a summary of IIPA's 2011 global issues, see our cover letter at <http://www.iipa.com/pdf/2011SPEC301COVERLETTER.pdf>.



- Oppose pending legislation that would impose a series of financial duties on 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, particularly in the form of optical disc (OD) piracy. The level of OD piracy is approximately 60%, which represents over 1 million illegal units sold every year in this relatively small market. Much of this OD piracy involves local CD-R burning. The downtown San Jose area, in particular, is the site of uncontrolled distribution and sale of burned CDs on the streets and in flea markets. 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. Local experts estimate that approximately 20 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, the PC software piracy in Costa Rica is among the lowest in Latin America, at an estimated 59% according to preliminary 2010 data. This low level, however, is due more to cultural reasons 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 the commercial value of pirated U.S.-vendor software in Costa Rica is US\$20 million for 2010.²

Internet piracy: Internet piracy, as everywhere else in the region, is a growing problem in Costa Rica. There are about 2 million Internet users in Costa Rica, about 44.3% of the population in 2009 (according to www.internetworldstats.com). As Costa Rica continuously achieves wider access to the Internet, its attention to online enforcement will become more important. With more home and business users online, access to pirated products being sold for download or ordered in hard copy from the Internet will continue to rise.

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. 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 ISPs regarding internet piracy on their networks. Costa Rica still has a transition period under CAFTA to address ISP liability matters, but needs to take action in the near term to get ahead of growing online piracy.

COPYRIGHT AND LEGAL ISSUES IN COSTA RICA

Recent reservations to two treaties and pending legislation affecting the recording industry: The main source of concern for the music industry in Costa Rica is the government's August 2009 action to adopt

²BSA's 2010 statistics are preliminary, representing U.S. software publishers' share of commercial value of pirated software in Costa Rica. They follow the methodology compiled in the Seventh Annual BSA and IDC Global Software Piracy Study (May 2010), <http://portal.bsa.org/globalpiracy2009/index.html>. These figures cover packaged PC software, including operating systems, business applications, and consumer applications such as PC gaming, personal finance, and reference software – including freeware and open source software. They do not cover software that runs on servers or mainframes, or routine device drivers and free downloadable utilities such as screen savers. The methodology used to calculate this and other piracy numbers are described in IIPA's 2011 Special 301 submission at www.iipa.com/pdf/2011spec301methodology.pdf. BSA's final piracy figures will be released in mid-May, and the updated US software publishers' share of commercial value of pirated software will be available at www.iipa.com.

reservations to the two international treaties protecting neighboring rights (Article 12 of Rome Convention and Article 15.1 of the WIPO Performances and Phonograms Treaty (WPPT)). Those reservations effectively exempt broadcasters from performance rights payments to recording artists and record companies. The Ministry of Culture did not engage the copyright sectors to participate in these legislative initiatives that will have a significant impact on the market for rights holders. In May 2010, the Chinchilla Government published an Executive Decree implementing the reservations into Costa Rican law, despite the President's statements earlier that year that she intended to reverse the reservations. The music industry's business model is transitioning from sale of hard goods to the licensing of transmissions, and removing existing rights to be remunerated for the transmission of music could not be more poorly timed. The Costa Rican Government should make every effort to ensure that performers and producers are being remunerated for the commercial exploitation of their music, and the United States should strenuously object to the introduction of practices that discriminate against U.S. interests.

Legislation has been introduced to codify the contents of this Executive Decree. In October 2009, Bill No. 17719 was presented that would "regulate the promotion and broadcast of musical works and performances of Costa Rican artists and authors by broadcasters." The legislation amends 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. In an environment in which the licensing of signals is largely replacing the sale of recorded music, the government of Costa Rica should reverse these limitations, which will have a very prejudicial impact on Costa Rica's music community.

CAFTA implementation: Costa Rica has yet to fully implement its IPR obligations under the CAFTA-DR. In 2000, Costa Rica amended its 1982 Copyright Law to comply with certain obligations under the TRIPS Agreement and the WIPO Internet treaties (WIPO Copyright Treaty and WIPO Performances and Phonograms Treaty). 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.

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 Rica had \$1.17 billion in exports to the U.S. under the CAFTA-DR. Meanwhile, two important areas among Costa Rica's FTA obligations still need to be addressed.

Internet piracy measures: Costa Rica is obligated to adopt, within 30 months of the FTA entry into force (i.e., July 1, 2011), provisions on the liability for ISPs, including notice and takedown provisions (CAFTA Article 15.11.23). Transparency in the development of the implementing legislation will be crucial to rights holders.

Government software asset management not completed yet: Government legalization of software is a CAFTA obligation that was due upon CAFTA's entry into force. The Costa Rican government commenced efforts on this issue in 2002 with a Government Software Legalization Decree. In 2007 BSA was informed that the National Registry's Copyright Office was receiving data from other government agencies about their software inventories, but the government has made no further progress in implementing the decree.

The Law on Enforcement (*Ley de Observancia*): Amendments to the Law on Enforcement (Law No. 8656 of 11 August 2008 amending Law. No. 8039 of 12 October 2000) went into force in 2010. These provisions address a number of elements of the 2000 law, *Ley de Procedimientos de Observancia de los Derechos de Propiedad Intelectual*, that were not TRIPS-compliant and were impediments to effective enforcement. This law addressed the following CAFTA points in a generally positive manner:

- Ex officio: Provides *ex officio* authority for police to conduct investigations on their own initiative.

- Anti-circumvention: Provides protection and remedies against the circumvention of technological protection measures (TPMs).
- RMI: Provides for protection of rights management information (RMI).
- Statutory damages: Provides for pre-established damages (statutory damages) in civil judicial proceedings.
- Satellite signals: Provides criminal sanctions regarding encrypted program-carrying satellite signals.
- Other civil remedies: Provides civil remedies, including seizures, actual damages, court costs and fees, destruction of devices and products.
- Injunctive relief: The law includes other provisions involving injunctive relief, destruction of infringing materials and equipment, and border measures.

Unfortunately, other key elements of the 2008 amendments were not welcome. Weak implementation of the revised criminal penalties has caused the most concern. The 2008 amendments revised the criminal sanctions for copyright and industrial property infringement, but left many questions about their effectiveness in practice.

- First, the level of fines for criminal copyright piracy was generally raised for most infringing acts but the jail terms were lowered in some cases. For example, the new law actually reduces the minimum penalty from one year down to two months, for certain cases. IIPA and its members had hoped, by contrast, that deterrent level sentences at a minimum of three years would be imposed in practice.
- Second, the provisions provide for fines in the alternative of criminal sentences, allowing judges the discretion to choose fines rather than jail terms, which, not surprisingly, they often do.
- Third, the new Article 55 includes a complicated four-step provision, linking the amount of the damages to the level of penalty; however, nowhere does the law explain how judges will calculate damages in piracy cases.
- Fourth, the amendments do not explicitly put a stop to the common judicial practice of suspending low sentences.

Apart from the lack of political will by prosecutors, several other legal deficiencies have contributed to the problems with poor copyright enforcement in Costa Rica through 2010. 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 police with full *ex officio* authority. Unfortunately, rights holders must still file a complaint (*denuncia*) in order to get a criminal prosecution.
- The objectionable "insignificance principle" (*"principio de lesividad e insignificancia"*) was not removed from the Criminal Procedural Code so that it would no longer apply to intellectual property infringements.
- Businesses engaged in piracy operations should be closed.

MARKET ACCESS CONCERNS

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 before the International Affairs and Foreign Commerce commission at the Legislative Assembly. Although recording industry activity in Costa Rica is low, the industry opposes this bill because it would become an obstacle for labels (both majors and independent) to record locally.

COPYRIGHT ENFORCEMENT IN COSTA RICA

IIPA and its members have encountered 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 policy adopted by the Attorney General not to 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. The national police and prosecutors are responsible for the anti-piracy actions in Costa Rica. The business software industry continues to have anti-piracy operations in Costa Rica, but there are few to no results to report. Beyond the major problem at the prosecutorial level, enforcement authorities lack equipment (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 raided and 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, or to initiate prosecution.

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. Unfortunately, these actions have not had any impact on the piracy levels due to a lack of intensity in the raids. The recording industry reports that, in 2010, eight raids were carried out, resulting in about 8,000 music seizures (mostly CD-R) seizures. BSA is not aware of any pirated business software being seized in such raids.

The need for prosecutorial attention to copyright crimes: There are two main impediments to effective criminal enforcement in Costa Rica. First, the prosecutors have very negative attitudes toward pursuing copyright cases. Second, government agencies lack the resources necessary to conduct any kind of effective anti-piracy campaigns.

The recording industry has faced roadblocks with the Office of the Attorney General such that no major prosecutions were conducted nor were convictions obtained. The lack of *ex officio* provisions in the current law further impedes any anti-piracy activities. Rights holders continue to be stymied in bringing criminal complaints due to legal determinations of "insignificance of the crime," upon which cases are simply dropped. As a result of the serious deficiencies in copyright enforcement, no convictions in music cases were issued during 2010, and BSA did not seek any criminal actions in 2009.

Procedural delays in criminal cases could be avoided if court officials were to order *ex parte* raids based exclusively on sufficient evidence offered by private plaintiffs, as allowed by the Criminal Procedural Code. Indeed, 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.

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. This practice violates plaintiffs' right to due process, and jeopardizes the success of the action by removing experts who could otherwise provide prosecutors with valuable technical assistance 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, consistent with Costa Rican legislation.

In addition, long delays in copyright enforcement cases have been a historically serious problem. Several months typically pass 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. Given the significant delays and observed lack of proficiency of prosecutors and judges, the creation of this special office remains a pressing priority. The industries hope that the newly appointed Attorney General, Jorge Chavarria, will push forward legislation to allocate funds and create this office.

Inadequate civil remedies and long delays: The civil courts in Costa Rica have practically collapsed; a simple procedure can take months or years, making pursuit of such cases impractical.

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.