

COSTA RICA

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

2012 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation:¹ IIPA again in 2012 recommends that Costa Rica be elevated to the Priority Watch List, primarily due to actions on the part of Costa Rica not to roll back existing protection for performers and record labels, and instead to replace a regime based on national treatment with a discriminatory one.

Executive Summary: Contrary to commitments that the Government of Costa Rica has made in past years to sound recording producers and artists that the full range of rights provided under international treaties would be available, President Laura Chinchilla has supported decrees that foreclose important sources of revenue to the industry, forcing many to make detrimental decisions about their investments in the country. The music industry's business model is transitioning from the sale of hard goods to the licensing of transmissions, and as a result removing existing rights to be remunerated for the transmission of music could not be more poorly timed. 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. Government efforts to coordinate IPR enforcement policy have been scant and produced few results. The government as a whole has failed to establish lines of communication with industry to resolve this and other needed reforms. As an FTA partner of the United States, Costa Rica should be implementing government-wide software legalization, as required by the Dominican Republic-Central America-United States Free Trade Agreement (CAFTA-DR), and generally be held to a high standard of effective copyright enforcement.

Copyright owners report two positive incremental developments in 2011: First, a unit specialized in IP within the local Prosecutor's Office has already begun work and is expected to be launched officially in 2012, a long-awaited development that copyright industries hope will lead to improved enforcement results. Second, pending legislation was passed to amend the Ley de Observancia, to provide criminal remedies for violations of neighboring rights. But major obstacles still remain in Costa Rica's court procedures that prevent effective and efficient copyright enforcement.

PRIORITY RECOMMENDED ACTIONS FOR COSTA RICA IN 2012

- Withdraw Bill No. 17,719, which implements reservations to international obligations that would result in denying compensation to U.S. performers and record labels, and creates a new exception to performance rights for commercial broadcasters, and retract the executive decree implementing this not-yet-adopted bill.
- Properly implement Costa Rica's remaining CAFTA obligation – to adopt Internet Service Provider (ISP) liability provisions – by amending the December 2011 executive decree to correct lengthy time periods by which ISPs forward notices to users for the unauthorized exchange of protected content over the Internet.
- Officially launch and support a new specialized IP Prosecutor's Office under the Attorney General.
- Implement in practice the software asset management practices in government agencies called for in the 2002 Decree and required by CAFTA-DR.
- Improve training of enforcement officials on criminal and civil copyright cases (including police, officials from the Judicial Investigation Office (OIJ), prosecutors and judges).

¹For more details on Costa Rica's Special 301 history, see IIPA's "History" appendix to this filing at <http://www.iipa.com/pdf/2012SPEC301HISTORICALCHART.pdf>, as well as the previous years' reports, at <http://www.iipa.com/countryreports.html>. For a summary of IIPA's 2012 global issues, see our cover letter at <http://www.iipa.com/pdf/2012SPEC301COVERLETTER.pdf>.



COPYRIGHT PIRACY IN COSTA RICA

Both physical and digital piracy in Costa Rica have caused such major losses that many in the content industries have been forced to leave the market. For example, only two international record companies still conduct operations through offices and staff employed in the country. Unfortunately, one of them has had to significantly reduce operations in 2011. Further cutbacks could be necessary in 2012. Local independent producers have practically disappeared because of the lack of real opportunities to sell recorded music profitably.

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 physical piracy in Costa Rica has increased to approximately 85% in the past year. 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.

Internet piracy: Internet piracy, as everywhere else in the region, is a growing problem in Costa Rica. It largely is concentrated on peer-to-peer (P2P) networks and via links to infringing content hosted on one-click hosting sites or “cyberlockers” posted on personal blogs and web forums. Internet piracy is particularly damaging because of its harm to the development of legitimate online distribution services. 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 P2P networks (such as eDonkey and ARES). Most of the digital market in Costa Rica involves “master-tones” and full tracks downloaded to smart phones and similar devices.

Currently there are no discussions between the content community and the ISPs regarding Internet piracy on their networks.

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, for its own sake and to set a good example for the private sector. Yet it is a CAFTA obligation that has not been implemented. The Business Software Alliance (BSA) reports that it has not seen pirated software products on the streets. In recent years, the PC software piracy in Costa Rica has been among the lowest in Latin America.² 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. Costa Rica produces and exports at least \$400 million worth of software per year, and there has recently been greater awareness by the government regarding protecting the IP industry for its overall economic health.

²BSA's 2011 software piracy statistics will not be available until after the filing deadline for this submission, but will be released in May 2012, at which time piracy rates and U.S. software publishers' share of commercial value of pirated software will be available at www.iipa.com. In 2010, the software piracy rate in Costa Rica was 58%, representing a commercial value of unlicensed software attributable to U.S. vendors of US\$33 million. These statistics follow the methodology compiled in the Eighth Annual BSA and IDC Global Software Piracy Study (May 2011), <http://portal.bsa.org/globalpiracy2010/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 2012 Special 301 submission at <http://www.iipa.com/pdf/2012spec301methodology.pdf>.

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 began with the government's August 2009 action to adopt reservations to the two international treaties protecting neighboring rights (Article 12 of the Rome Convention and Article 15.1 of the WIPO Performances and Phonograms Treaty (WPPT)). Those reservations effectively exempt broadcasters from performance rights payments to performing artists and record producers. 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. On May 3, 2010, President Oscar Arias signed Executive decree No. 36,014-MP-COMEX-J, implementing the reservations into Costa Rican law. Just days after President Laura Chinchilla took office, on June 17, 2010, her administration published the decree in the official gazette. This was 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, making the removal of existing rights to be remunerated for the transmission of music particularly detrimental to prospects for investments made in the country in reliance on those rights. 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.

In October 2009, legislation was introduced that, if adopted, would codify the contents of this Executive decree. Bill No. 17,719, which was presented to "regulate the promotion and broadcast of musical works and performances of Costa Rican artists and authors by broadcasters," remains at Congress and saw no major movement in 2011. The draft 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: In 2011, Costa Rica implemented CAFTA provisions establishing limited liability of Internet Service Providers (ISPs) that take certain actions in response to copyright infringement committed by users of their networks and services. Decree 36,880-COMEX-JP, published in the official gazette on December 16, 2011, fulfills most of the requirements of such provisions. Nevertheless, the decree sets forth overly long time periods by which ISPs are to forward notifications sent by right holders, and in practical terms creates a serious obstacle for the enforcement of rights in the digital environment. As a matter of example, the decree allows an ISP up to 45 days just to forward a single notification to its subscriber. In the modern market for copyrighted works, the critical time for rights holders to recoup their considerable investment can be a matter of weeks before consumer interest begins to wane. If copyright owners must compete with free unauthorized copies that can remain online for over a month, that opportunity is lost.

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. It also responded to a number of matters needed for CAFTA implementation, including *ex officio* authority for police investigations; protection and remedies against the circumvention of technological protection measures and rights management information; pre-established (or statutory) damages in civil judicial proceedings; criminal sanctions regarding encrypted program-carrying satellite signals; civil remedies including seizures, actual damages, court costs and fees, and destruction of devices and products; and provisions for injunctive relief, destruction of infringing materials and equipment, and border measures. In 2011, pending legislation was passed to amend the *Ley de Observancia* further, to clearly provide criminal remedies for violations of neighboring rights.

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 2011. 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.

COPYRIGHT ENFORCEMENT IN COSTA RICA

IIPA and its members report that while some aspects of the legal system function well, enforcement authorities in Costa Rica are not dedicating resources to the music piracy problem, leaving a number of copyright enforcement deficiencies in the Costa Rican legal and enforcement system. The national police and prosecutors are responsible for the anti-piracy actions in Costa Rica, but street operations against points of sale for illegally burned CDs are rare. There are no major operations against digital jukeboxes that contain illegal music files despite complaints filed on a regular basis by industry representatives in San Jose. The recent creation of a specialized IP unit within the Prosecutor's Office, which is to be launched officially in early 2012, is a very positive move to address the lack of focus or cooperation that has been a major obstacle for the copyright industries at the prosecutorial level. In past years, only some very limited anti-piracy actions were conducted, many of them with the cooperation of the municipality of San Jose. Going forward, police forces will need training to direct reports to the IP prosecutor's office.

In what appeared to be a positive development that was confirmed by local representatives of the recording industry, the Government of Costa Rica in 2009 published an executive decree creating an Interministerial Committee to oversee and implement the country's IPR enforcement policies. The Committee operates within the Ministry of Justice, and also includes the Ministry of Foreign Trade (COMEX), the Investigations Police, the Copyright Registry, and the Attorney General's Office. Unfortunately, the Committee has met only twice since its creation, and nothing has come from those meetings.

On the heels of outgoing Attorney General Francisco Dalanese and a history of ineffective policy, the new Attorney General appointed in 2011, Jorge Echavarría, made an effort to change the course set by his predecessor, meeting with public IP officials including the Copyright Register in the summer of that year. As a result, the Attorney General's Office announced that it would increase attention to IPR enforcement, provide additional resources for border enforcement, and prosecute copyright violations as organized crime. At this time, local prosecutors are conducting investigations of copyright infringements, rather than dropping the cases as they have in the past. However significant results have not materialized. The Attorney General's resolution has yet to penetrate the lack of coordination between the investigation police and the judiciary, leaving, for now, Costa Rica's growing piracy problems unaffected.

The Costa Rican judicial system, both criminal and civil, suffers from a lack of expertise and experience necessary to enforce the copyright and criminal laws. Training programs are necessary for prosecutors, judges and the police authorities. Local copyright industries have taken their own steps to establish a committee at the Professional Bar of San Jose, which aims to advise enforcement authorities of emerging and urgent problems. The Government has taken no other steps to improve the overall enforcement of IPR.

Police cooperation is positive but needs 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, but only in response to requests from rights holders rather than at a systemic level. These efforts 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). Two raids were carried out by the recording industry in 2011, resulting in the licensing of one company dedicated to the importation of digital juke-boxes containing hard discs with pirate copies of sound recordings. 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. BSA is not aware of any pirated business software being seized in such raids.

The need for prosecutorial attention to copyright crimes: Prosecutors have historically had very negative attitudes toward pursuing copyright cases and lengthy delays are major impediments to effective criminal enforcement in Costa Rica.

Procedural delays in criminal cases might be avoided if it were not for the policy of the General Attorney's Office to require that piracy complaints be submitted to the prosecutor's office before being sent to police authorities. This policy results in many cases being dropped across the country. Further, court officials need to be able to order *ex parte* raids based exclusively on sufficient evidence offered by private plaintiffs, as allowed by the Criminal Procedural Code. 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.

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 participate actively during software piracy raids. Judges must grant court orders to do communications surveillance but are untrained in copyright investigations, impeding the collecting of information that will be admissible to prompt a raid. 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.

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. It has been reported that the Office has begun its work even though it has not been launched officially. The industries hope that the newly appointed Attorney General, Jorge Chavarria, will push forward legislation to allocate funds and publicly announce the creation of this office.

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.