

# COSTA RICA

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

### 2014 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that Costa Rica be elevated to the Priority Watch List.<sup>1</sup>

**Executive Summary:** Enforcement efforts are lacking and copyright piracy remains at unacceptable levels in Costa Rica, particularly for a country that has now been an FTA partner of the United States for five years. In addition to the resources and coordination that are badly needed among Costa Rica's enforcement authorities, two areas of acute difficulty in Costa Rica for IIPA's members are particularly frustrating given the simplicity of the needed reforms. First, 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 issued decrees that foreclose important sources of revenue to the industry, forcing many to make detrimental decisions about their investments in the country. The resulting halt of payments pinches producers and artists already battered by high piracy rates and limited digital sales in the market. Now that the underlying legislative initiative for the decrees has been withdrawn from the legislature, all that is needed to resolve this outstanding concern is political will. Second, local software developers in Costa Rica are growing, selling, and exporting their goods, a fact that makes all the more disappointing the country's failure to tackle enterprise end-user software piracy by, for example, forging concrete alliances with the industry to raise awareness, and by implementing a government-wide software legalization program with adequate budgetary appropriations. These steps toward legal government software use would allow Costa Rica to fully comply with its FTA obligations.

Pirated music accounts for more than half of the records sold or downloaded in Costa Rica. Meanwhile performers and record labels remain unable to collect payments from broadcasters for the performance of their works as provided in the copyright law. Government efforts to coordinate IPR enforcement policy slowed to a halt in 2012, as a unit specialized in IP within the local Prosecutor's Office expected to be launched officially in 2012 failed to materialize. Attention is needed to resume those plans and to eliminate major obstacles that still remain for rights holders taking action in Costa Rica's courts.

#### **PRIORITY ACTIONS REQUESTED IN 2014**

- Repeal Executive Decree No. 36.014-MP-COMEX-J (May 2010), which executes now-withdrawn legislation to implement reservations to international obligations that would result in denying compensation to U.S. performers and record labels; and require performance rights payments from commercial broadcasters to performing artists and record producers to resume immediately.
- Revise past government initiatives and push forward a decree to properly implement Costa Rica's remaining CAFTA-DR obligation to adopt Internet Service Provider (ISP) liability provisions, with speedier deadlines by which ISPs must 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.
- Fully comply with commitments in the CAFTA-DR in practice by effectively implementing Decree 37549 JP (2013), including by institutionalizing concrete software asset management practices in government agencies and providing adequate budgetary appropriations.

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<sup>1</sup>For more details on Costa Rica's Special 301 history, see previous years' reports at <http://www.iipa.com/countryreports.html>. For the history of Costa Rica's Special 301 placement, see <http://www.iipa.com/pdf/2014SPEC301HISTORICALCHART.pdf>. For a discussion of IIPA's 2014 Key Initiatives and Challenges, see IIPA, *2014 Special 301 Submission*, at <http://www.iipa.com/pdf/2014SPEC301COVERLETTER.pdf>.



## **COPYRIGHT PIRACY IN COSTA RICA**

The copyright industries report no change whatsoever in the levels of piracy present in Costa Rica. Both physical and online piracy in Costa Rica have caused such major losses that many in the content industries have been forced to leave the market.

**Hard goods piracy:** The sale of pirate CDs on the streets is still a significant problem for the recording industry in Costa Rica. Street vendors placed on strategic squares in downtown San Jose can offer these and pirate DVDs without the risk of police intervention. The level of physical piracy in Costa Rica increased to approximately 95% by early 2013. Much of this optical disk (OD) piracy involves local CD-R burning. Several groups are involved in the importation of blank media and equipment, but customs authorities have not been able to disclose information about the individuals and companies involved in the massive importation of blank media destined to piracy. Local experts estimate that approximately 22 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, particularly via links to music files stored on cyberlockers, and peer-to-peer (P2P) piracy via BitTorrent networks such as ARES. Internet piracy is particularly damaging because of its harm to the development of legitimate online distribution services. Currently there are no discussions between the content community and ISPs regarding Internet piracy on their networks, and this growing problem is completely ignored by authorities and ISPs in the country.

**End-user software piracy and lack of effective CAFTA implementation:** The software market in Costa Rica continues to expand, fueled by growth among local developers, but the overall software piracy rate remains steady in Costa Rica, at 58% in 2011, and, as a result, the losses for the software sector have also increased.<sup>2</sup> The software industry remains particularly concerned about the high level of unlicensed software use by legitimate businesses and government agencies. BSA | The Software Alliance (BSA) reports that it has not seen pirated software products on the streets, but hard disk loading is becoming common, primarily in the “Gran Area Metropolitana” region in the central valley of Costa Rica, which comprises the capital and surrounding provinces.

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. Notably, 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.

## **COPYRIGHT AND LEGAL ISSUES IN COSTA RICA**

**Recent reservations to two treaties and withdrawn legislation affecting the recording industry:** The main source of concern for the music industry in Costa Rica is an Executive Decree, No. 36,014-MP-COMEX-J published in the official Gazette in 2010, that implements 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 Decree has the odd distinction of implementing legislation that was introduced in 2009 but was never adopted; in fact, during 2013 Bill No. 17,719 received a negative vote at the Legal Affairs Committee in Congress, and was withdrawn from the legislative queue. Still, the Decree remains in force and performance rights payments to performing artists and record producers have been halted since its issuance in 2010. The government could simply repeal the Decree to allow these payments to resume immediately.

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<sup>2</sup>Data on software piracy rates and commercial values are taken from the 2011 BSA Global Software Piracy Study at [www.bsa.org/globalstudy](http://www.bsa.org/globalstudy). This study assesses piracy rates and the commercial value of unlicensed software installed on personal computers during 2011 in more than 100 markets. The study includes a detailed discussion of the methodology used. BSA plans to release an updated study in the second quarter of 2014.

In 2009, the four major recording companies brought actions against two important commercial FM stations in San Jose for broadcasting sound recordings without the required performance rights license, in the case of *Fonotica vs. Radio Columbia/Radio Omega*. As a result of the actions, the court granted injunctions prohibiting the stations from further performing copyrighted sound recordings without the proper licenses, but the broadcasters ignored the injunctions and Costa Rica's courts failed to enforce them. In the second half of 2012, a court of first instance reaffirmed the right of the record producers to collect payments for the commercial broadcast of their recordings, pending the calculation of damages by an expert appointed by the court. The decision was appealed by the broadcasters and, as a result, rights holders have been unable to finalize the calculation of damages, let alone receive payments for what is now years of unpaid performances. The defendants in the case continue broadcasting international sound recordings without proper licenses. The case is a clear example of the failures within the judiciary in Costa Rica to enforce the copyright law, the *Ley de Observancia* (Enforcement of IPR Law) and the most basic civil law rules in the country. The music industry's business model is transitioning from sale of hard goods to the licensing of transmissions, making the removal of existing performance rights 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.

**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 Copyright Treaty and WPPT (collectively, the WIPO Internet treaties).

**Internet piracy measures:** Rights holders continue to face significant impediments in their efforts to address Internet piracy in Costa Rica due to the lack of an effective legal framework for the removal of infringing content. In 2011, Costa Rica implemented CAFTA-DR provisions establishing limitations of liability for ISPs that take certain actions in response to copyright infringement committed by users on 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 rights holders, and in practical terms creates a serious obstacle for the enforcement of rights in the online environment. As an example, the decree allows an ISP up to 45 days just to forward a single notification to its subscriber. In the modern market peak consumer demand for copyrighted works typically occurs within a matter of weeks after release, making this a crucial period of time for rights holders to generate revenue in an effort to recoup their considerable investment in creating, producing and distributing their works. 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-DR obligation that was due upon the agreement's entry into force. The Costa Rican Government commenced efforts on this issue in 2013 with a Government Software Legalization Decree. We welcome the enactment of Decree 37549 –JP, published on March 1, 2013 which has established that 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. However, in order to fully comply with its commitments in the CAFTA-DR, Costa Rica must accelerate the implementation of the decree and take concrete steps to ensure the use of authorized software by government agencies, including by forging concrete alliances with the industry to raise awareness and promote enforcement, initiating effective software asset management practices, and providing sufficient budgetary allocations. The only government agency to demonstrate progress in implementing the Decree has been the National Registry, whose Copyright Office has been receiving data for several years from other government agencies about their software inventories, and which in general has complied with its software licenses. The Government of Costa Rica could improve the overall rate of software legalization by requiring private contractors to submit proof of their software license compliance, a step that could achieve noticeable results without legislative hurdles.

**Poor Enforcement Results Under The Law on Enforcement (*Ley de Observancia*):** Key elements of enforcement under the *Ley de Observancia* have fallen short of deterring criminal copyright infringement in Costa

Rica. The jail terms for criminal copyright piracy are currently so low (in some cases as little as two months) as to pose negligible deterrence against infringement. It has become common practice for judges to use the discretion to choose fines rather than jail terms. Where low sentences are imposed, judges commonly use their discretion under the law to suspend them. Deterrent-level sentences at a minimum of three years should be imposed in practice. Meanwhile, fines are not consistently imposed under the *Ley de Observancia*, whose 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.

## **COPYRIGHT ENFORCEMENT IN COSTA RICA**

Many of the enforcement concerns that copyright holders have cited in years past remain a problem today. While some IIPA members report positive relationships with Costa Rica's enforcement authorities, key authorities have not dedicated adequate resources to the piracy problem, leaving a number of copyright enforcement deficiencies in the Costa Rican legal and enforcement system. In late 2011, sources indicated that the Attorney General had plans to launch a specialized IP unit within the Prosecutor's Office in early 2012, but those plans never materialized. Instead, resources dedicated to tackling piracy in Costa Rica are minimal, and the copyright industries continue to report a lack of focus or cooperation that has been a major obstacle at the prosecutorial level. 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 following actions are needed to improve the effectiveness of Costa Rica's enforcement regime:

- *Establish regular meetings of the Interministerial Committee on IPR Enforcement (established in 2009), and set coordinated objectives for participating government bodies – including 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. In practice, the Committee has met rarely since its creation, and nothing has come from those meetings.*
- *Officially launch and support a new specialized IP Prosecutor's Office under the Attorney General. Given the significant delays and observed lack of proficiency of prosecutors and judges, the creation of this special office remains a pressing priority. While there were reports in 2012 that such an Office would begin to work in an official capacity that year, that initiative has been all but forgotten.*
- *Continue to follow through with increased attention to IPR enforcement, additional resources for border enforcement, and prosecution of copyright violations as organized crime as initiated by Attorney General Jorge Echavarría in 2011. The Attorney General's resolution resulted in an initial increase in prosecutorial attention to copyright crimes, which needs to be reinvigorated, and the initiative 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.*
- *Provide needed training programs for police, prosecutors, and civil and criminal judges on proper enforcement of the copyright and criminal laws.*
- *Provide needed resources and ex officio authority for police forces to address intellectual property infringement. The police efforts that take place in municipalities to raid and confiscate pirate optical disks from street vendors do not pursue investigations of the supply chain for the pirated and counterfeit merchandise, and lack authority in the law for ex officio actions for copyright infringement.*