

# INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE



1747 PENNSYLVANIA AVENUE, NW • SUITE 825 • WASHINGTON, DC • 20006-4637 • TEL (202) 833-4198 • FAX (202) 872-0546 • WWW.IIPA.COM • EMAIL: INFO@IIPA.COM

October 30, 2003

*Via electronic submission: fr0090@ustr.gov*

Gloria Blue  
Executive Secretary  
Trade Policy Staff Committee  
Office of the U.S. Trade Representative  
1724 F Street, NW  
Washington, DC 20508

Re: Dominican Republic FTA: Post-Hearing Brief on the  
Proposed U.S.-Dominican Republic Free Trade  
Negotiations, 68 Fed. Reg. 51823 (Aug. 28, 2003)

To the Trade Policy Staff Committee:

The International Intellectual Property Alliance (IIPA) appreciated the opportunity to testify before the TPSC at the October 8, 2003 public hearing on the proposed U.S.-Dominican Republic Free Trade Agreement. As you know, we also testified before the GSP Subcommittee on October 7 regarding the pending review of the Dominican Republic's intellectual property rights practices under the GSP and CBI trade programs. Our post-hearing briefs to you and that Subcommittee are identical in substance.

In this post-hearing brief, IIPA updates the TPSC on a few new developments in the Dominican Republic and respond in more detail to several questions asked and answered at the hearings.

Criminal hearing in broadcasting piracy case: As IIPA and the Motion Picture Association of America (MPAA) reported to both the TPSC and the GSP Subcommittee, the Dominican Republic authorities conducted a series of inspections of broadcast stations in April and August 2003. Sixteen (16) criminal complaints against broadcast stations have been filed to-date. The first criminal hearing against one of the larger broadcast stations, Canal del Sol-Channel 40, was originally scheduled for August 20, 2003, but was continued by the prosecution, with the date set for October 20, 2003. We reported in our pre-hearing briefs and at the hearings that this station continues to steal U.S. programming, despite the fact of its imminent criminal prosecution.

The October 20 hearing date has come and gone, and the defendant did not make an appearance in-court. Because the defendant failed to appear, the prosecution was again postponed, with the next hearing date now set for December 16, 2003. You will recall that the MPAA warned the TPSC and the GSP Subcommittee that this important broadcast piracy case may not be seriously pursued, given high-level political connections between the defendant and political leaders in both the current and prior government administrations. This second delay again reflects serious problems in the judicial system which severely interferes with the adequate and effective protection of U.S. copyrights.

Performance by the judiciary in general and in recording anti-piracy cases specifically: IIPA elaborated at both hearings that the performance of the judiciary in enforcing the law is a critical component of "adequate and effective" protection under the GSP and CBI statutes. At the TPSC hearing, IIPA emphasized that effective enforcement is a trade negotiating objective for IPR under Trade Promotion Authority. Merely having laws on-

the-books means nothing if those laws are not enforced in-practice. Of course, IIPA and our member associations and companies respect the independence of all judiciaries. The question at-hand is not one of independence, it is one of results. Is the judiciary in the Dominican Republic working to provide effective deterrence against piracy? It is not.

The TPSC inquired if there were any specific reasons for the delays experienced in the recording industry's cases. We reported at the hearings that the recording industry continues to experience severe enforcement roadblocks, primarily at the judicial level. So far, 70 criminal cases for copyright infringement of sound recordings brought were pending trial in August 2003. Since 1999, the RIAA has been successful in obtaining only 16 prosecutions, including prison sentences, with court fines and restitution in the amount of US\$122,000. All these adjudicated cases are on appeal, with no appellate review dates set.

RIAA confirms that the criminal judicial system in the Dominican Republic allows for virtually unlimited continuances based on any excuse imaginable, with little to no review of the merits. These continuances are sometimes two and three months long. (The current criminal broadcast piracy case against Canal del Sol confirms the continuance saga in a vivid manner). RIAA adds that these delays cover both the actual start-date of the trial as well as the length of the trial. Once a sentence is handed down (and RIAA did obtain a conviction in every single case which was concluded), a request for appeal from the defendant is granted automatically. Now, RIAA cases rest at the mercy of the Court of Appeals, which has yet to hear or address any of the 16 cases pending before it. If and when the Court of Appeals hears the case and affirms the sentence, the defendant is then entitled to appeal that decision to the Supreme Court, an appeal which is also granted automatically -- and the process continues.

Judicial delays are a serious, systemic problem in the Dominican Republic. Delays affect all cases, not just IPR cases. As IIPA reported in our pre-hearing brief, the new Criminal Code in the Dominican Republic will enter into effect in August 2004. This code contains rules which are expected to expedite all new cases (but does not effect cases already in-progress, such as those cited above). The failure of the courts to afford adequate and effective protection is a present-day problem which requires present-day solutions.

INDOTEL Actions/Regulatory Review: IIPA reported in our written and oral testimony that INDOTEL was examining possibilities under its own legislation and regulations in order to strengthen its actions against those broadcast stations and cable companies which are infringing copyrights. INDOTEL suggested at the hearing that it might adopt additional regulatory measures to strengthen its authority in broadcast piracy and cablecast piracy cases in the November 2003 timeframe. At this time, IIPA does not have additional information regarding this process, and looks forward to seeing what INDOTEL may propose.

Intellectual Property Rights Protection in the CA-FTA: Negotiations remain underway on the IPR chapters of the Central American FTA (CA-FTA). The TPSC asked a question about the views of the industries on the copyright provisions in the Chile FTA. (IIPA understands from public reports that the Dominican Republic will sign-on/"dock" to whatever the Central America countries will devise in the IPR chapter; it is not anticipated that there will be separate and subsequent bilateral IPR-related negotiation on IPR).

As reported at the hearing, the good news is that the Chile FTA IPR chapter – as it applied to copyright and enforcement – contains very high standards of protection. It builds on the standards currently in force in the WTO TRIPS Agreement and in NAFTA, with the goal to update and clarify those standards to take into account not only the experiences gained since those agreements entered into force, but also the significant and rapid technological and legal developments that have occurred since that time. The Chile FTA incorporates the obligations set out in the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT). The full implementation of the WCT and WPPT on a global basis at the earliest possible date is a critical goal of the copyright industries. These treaties provide the essential legal infrastructure for e-commerce through obligations that assist right holders in safeguarding the transmission of valuable copyrighted works

over advanced networks like the Internet and by providing higher standards of protection for digital products generally.

IIPA has noted our disappointment with two key provisions of the Chile FTA text: (1) lengthy transition periods which adversely affect the scope and enforcement of several copyright-related provisions; and (2) a limitation on the application of national treatment with respect to the rights of performers and record companies. We would strongly oppose any reiteration of those provisions in the CA-FTA IPR chapter.

Estimated trade losses due to piracy versus preferential benefits: A question by the Treasury Department official at the GSP hearing seemed to indicate her sympathetic concern about the large gap between the almost \$14 million in estimated 2002 losses due to copyright piracy in the Dominican Republic and the over \$2.7 billion that country received in preferential trade benefits under the GSP, CBI and CBTPA trade programs in 2002. One key purpose of the GSP program and its duty-free treatment is to foster economic growth through the expansion of trade between the U.S. and the GSP beneficiary countries. Piracy does not promote trade, nor investment, nor economic growth. Rather, piracy is a major trade barrier. Simply because the industries' estimated losses due to piracy in the Dominican Republic do not amount to hundreds of millions of dollars does not mean that our piracy problem is, in any way, insignificant. Preferential duty treatment is not synonymous with the new trade phrase "technical assistance." The failure to provide adequate and effective IPR protection is a breach of the bargain between trade program-eligible countries like the Dominican Republic and the United States under explicit IPR provisions in the GSP and CBI trade laws.

Recommendation on the DR-FTA: There has been no change in IIPA's ultimate recommendation to the TPSC. IIPA believes that until the government of the Dominican Republic acts swiftly and effectively to significantly reduce the level of copyright piracy, including halting broadcast piracy, and significantly improving its prosecutorial and judicial results in criminal copyright cases, the reward of extending the Dominican Republic with additional trade concessions – such as this FTA – should be withheld.

Recommendation on the GSP/CBI Review: IIPA believes that the Dominican Republic currently fails to provide "adequate and effective" copyright protection and enforcement, as required by U.S. trade laws, including both the Generalized System of Preferences and the Caribbean Basin Initiative. Therefore, the Dominican Republic should be in serious jeopardy of losing its eligibility status or having benefits withdrawn or suspended because of its failure to meet the GSP and CBI standards on IPR.

\* \* \*

Thank you for giving us the opportunity to share the copyright industries' experiences regarding our ongoing problems with copyright piracy and inadequate and ineffective enforcement in the Dominican Republic, and the urgency we place on resolving these piracy and enforcement problems, once and for all.

Respectfully submitted,



Maria Strong  
Vice President and General Counsel  
International Intellectual Property Alliance