



June 9, 2000

Dr. Jon Rosenbaum
Chairman of the GSP Subcommittee
of the Trade Policy Staff Committee
600 17th Street, NW, Room 518
Washington, DC 20508

Re: Post-Hearing and Rebuttal Brief in Support of
the GSP 1999 Country Practices Review
Against the Dominican Republic
65 Fed. Reg. 7410 (Feb. 14, 2000), 65 Fed.
Reg. 11104 (Mar. 1, 2000) and 65 Fed. Reg.
18418 (Apr. 7, 2000)
Case: Dominican Republic 007-CP-99

To the Chairman and the Entire Subcommittee:

The International Intellectual Property Alliance (IIPA) submits this Post-Hearing and Rebuttal Brief to the GSP Subcommittee to supplement the written record and the oral testimony which IIPA, along with representatives from two of our member associations, the Business Software Alliance (BSA) and the Recording Industry Association of America (RIAA), provided at the GSP Hearing on May 12, 2000. Below are the several issues which we wish to report for the record.

Business Software: Continuing Enforcement Issues and the Cyberpark Development

The BSA and its member companies are concerned that there is not a comprehensive, sustained government response to intellectual property (IP) protection in the Dominican Republic. Dr. Francisco Dominguez Brito, the *fiscal* or District Attorney for Santo Domingo, and Dr. Pedro Féliz Montes de Oca, Director of ONDA (the Copyright Office, Oficina Nacional de Derechos de Autor), have been particularly effective in their enforcement efforts against business software piracy. BSA hopes to see concerted, sustained support for intellectual property rights from the legislative and judicial branches in the form of swift passage of the Copyright Reform bill, better procedural safeguards for

intellectual property rightsholders in Dominican courts, and a permanent end to high bond requirements for foreign litigants. BSA also looks forward to a continuation of enforcement actions against business software piracy taken by Dr. Brito and Dr. Féliz.

However, other branches of the government must be involved if IP rights are to be adequately protected in the Dominican Republic. As for the judicial branch, BSA still encounters difficulties in conducting cases against software pirates. It is not unusual for cases to take more than two years to reach trial and judgment, with many intervening hearings, delays, and dilatory litigation tactics driving up the costs for rightsholders to protect their copyrights in Dominican courts. BSA currently has about 30 cases pending at various stages throughout the court system. High bonds, which are imposed only on foreign litigants in Dominican courts, are still an obstacle to rightholders who are attempting to bring and effectively pursue litigation against pirates. In one recent case in Puerto Plata, the judge required BSA to post a bond of 200 percent of the damages BSA was seeking in the case. Furthermore, no insurer will write these bonds, which means that BSA is forced to place a cash bond in the registry of the court for an undetermined period of time while the litigation is moving through the court system. The Dominican civil code allows judges to impose these onerous bond requirements only on foreign litigants. This unequal treatment violates the Dominican Republic's international treaty obligations. The new copyright bill would remove this burden in copyright cases.

At the GSP hearing on May 12, the GSP Subcommittee expressed interest in gaining more information from BSA about the Cyberpark high technology free trade zone initiative in the Dominican Republic and the IP protection that would be afforded to companies doing business in the Cyberpark. One of the major benefits of the Cyberpark for high technology tenants is that all companies with operations in the zone will privately contract to abide by international IP norms, in addition to whatever protection is offered under Dominican law. While these covenants are currently being drafted, the current proposal is that Cyberpark tenants will be expected to abide by a Code of Conduct which would include a covenant to abide by international IP norms, and to accept surprise inspections to verify their compliance with these norms and sanctions for violating the agreed-to terms. Similar private contracting arrangements have been enacted for other high technology free trade zones around the world. The opening of the Cyberpark, which will be located near the Santo Domingo airport, is scheduled for August 2000.

Registration of Video Film Titles Undermines Business Dealings and Legal Protection

The Dominican Copyright Office (ONDA) and the Dominican Attorney General have insisted on the need for the distributors of video product to file contracts and authorizations demonstrating the existence of copyright in order to establish copyright protection for audiovisual works in video format. At the May 12 GSP Hearing, IIPA spoke generally about this issue (which, due to its recent development, had not appeared in prior

IIPA papers in this case), and indicated that the Motion Picture Association (MPA), an IIPA member, would provide additional information on this matter. The details of this problem are outlined below.

MPA has received copies of three documents, described below, which clearly demonstrate the Dominican Government's requirement that specific registrations be submitted as a condition of copyright protection for videos. This practice violates both the Berne Convention (no formalities rule) and the Dominican copyright law (which specifically does not require such registration for protection). Furthermore, this title registration practice for videos negatively impacts the motion picture industry for at least the following reasons:

1. Although this registration requirement has been limited to video, it directly harms the theatrical and television businesses. This practice allows the sale and rental of unauthorized works in video format without the coordination of the theatrical and television business divisions. This video registration regime also establishes a precedent that may be extended to these other businesses.
2. This registration practice creates a jurisprudence that turns the legal burden of proof upside down. The copyright law clearly states that it is a crime to engage in commercial activity with copyrighted product without the authorization of the titleholder. Clearly, the party taking the commercial action with the copyrighted material has the burden of demonstrating authorization. However, based on the documentation described below, the District Attorney does not conduct inspections for, nor requests documentation from, the video store that might show authorization. The D.A.'s focus is only on the documentation requirements placed on the distributor.

The documents showing the Government's requirements are described below:

1. A letter dated December 9, 1999 from the Dominican Copyright Office (Oficina Nacional de Derechos de Autor or ONDA), signed by the Director of ONDA, Dr. Pedro Feliz to World Video, the authorized distributor for Buena Vista (Disney), Warner Bros. and Sony Colombia/Tristar, stating, *inter alia* (direct quotes are in *italics*):

B) ONDA will recognize the copyrights only if all the documentation supporting them is registered and deposited in ONDA.

C) In terms of the method of claiming copyright infringement, the complaints must be presented in writing, attaching proof of the violation and a copy of the documents that certify the copyrights in question, even if those documents are already on file at ONDA.

D) World Video Corporation Dominicana must deposit in this institution, fully legalized, documents showing the renovation of contracts with Buena Vista and Colombia Tristar, because these expired last year.

E) The contracts with Buena Vista and Warner note that future titles will be considered part of the contract, for that reason, rights will be recognized only for those titles noted in affidavits registered and deposited at ONDA.

2. A November 19, 1999 decision of the Attorney General not to prosecute issued by Mayra Guzman de los Santos of the District Attorney of Santo Domingo, Department of Intellectual Property, on a complaint filed by World Video against the commercialization of original product without authorization from World Video:

The first paragraph recognizes that based on complaint by World Video, ONDA inspected a video store (Island Video) on September 2.

The second paragraph notes that the case concerns original material, imported and placed in commerce, according to the distributor, contrary to the distributor's licensing rights.

The third paragraph states that the Attorney General gave World Video sufficient time to demonstrate that it had acquired the specific rights to the titles in question, but that World Video had only presented a contract from the relevant Studios that only referred generally to 'certain motion pictures.' *"And not having legally demonstrated its rights over the titles in question, in the sense that they may have been included in the mentioned documents as 'certain motion pictures' at the time of presenting its complaint."*

The fourth paragraph recognizes that the video market is subject to certain programming (windows) but that World Video did not demonstrate any right or authority for that programming.

The fifth paragraph notes that: *"The National Copyright Office (ONDA) on October 28, 1999 by document number 6534 given to Mr. Conrado Sanquintin, president of Island Video, in which it indicates that 'in the files of this institution no document is found that certifies the rights of World Video for the commercialization of the titles in question.'"*

The sixth paragraph notes that the public action against Island Video is dismissed *"for the reasons mentioned above, under the understanding that World Video at the moment of presenting its complaint did not legally demonstrate having acquired rights for the titles in question."*

3. A "Certification" provided by ONDA to the Dominican Association of Video Stores dated March 10, 2000 which, at the request of the Association which had presented a list of titles, certifies:

First, that a file exists for World Video at the ONDA, and

Second, that in that file there is no documentation that denotes World Video as representative of the titles in question.

The "certification" is signed by Margarita Linares Amador of ONDA.

Based on this document and on the same date, the local video association sent a communication to World Video canceling all its orders. This local association began to purchase video product authorized only for the United States and Canada, in direct competition with the theatrical window. This group alleges that there was no copyright

protection for those works because there was no documentation filed to demonstrate such copyright.

The compulsory nature of this video title registration system contradicts international and Dominican law related to no-formalities required for the exercise of copyright. Furthermore, this practice, as administered by ONDA and the District Attorney, has resulted in the interruption and dislocation of business operations for the legitimate distributor of MPA member company product in the Dominican Republic. Video piracy enforcement efforts have also been hampered (as exemplified in the Island Video complaint).

Status of Copyright Legislative Reform

The pending copyright bill in the Dominican Republic does reflect much improvement over the current 1986 Copyright Law. IIPA has shared this view in several of our various submissions and again at the hearing. The copyright bill not only expands the scope of copyright protection, it also enhances the ability of both government authorities and rightsholders to enforce copyright rights in the Dominican Republic. However, legislative consideration of this bill has been quite slow, consuming at least two years of debate and inaction since it first appeared in the Market Order Code bill.

The day before the May 12 GSP hearing, the Embassy of the Dominican Republic shared with both the U.S. Government and IIPA a text of a copyright bill which was supposed to have been that which was passed by the Dominican Senate on March 29, 2000. The Subcommittee inquired at the GSP hearing whether in fact this text was the correct version. It was not. Subsequently, BSA was able to obtain the correct text of the copyright bill as passed by the Senate, and this Spanish text was given to USTR to distribute to the GSP Subcommittee.

It appears that this Senate-passed bill very closely tracks the bill which IIPA reviewed in October 1999 (which was about the time the copyright bill was split from the Market Order Code bill). The Senate appears to have made very few changes in the text since last Fall. There are a few technical yet important changes in the March 2000 bill which do improve the bill (generally, these relate to clarifying the scope of the reproduction right). The other positive features of this bill, which IIPA already has identified in prior briefing papers, do remain intact. Nevertheless, IIPA remains disappointed that the detailed comments which we submitted – all of which would clarify and enhance the bill's TRIPS-level of protection as well as better implement the provisions of the two WIPO Treaties – were not reflected in the Senate's bill as passed.

There is much activity currently underway in the Dominican Congress to approve all pending legislation before the new Administration takes office on August 16, 2000.

IIPA has been informed that the Chamber of Deputies continues to work toward approving the copyright bill.

Statistics for Business Software Piracy in 1999 Are Updated

Estimated 1999 trade losses and piracy levels due to piracy of business applications software in the Dominican Republic were flagged as "preliminary" in both IIPA's February 2000 Special 301 submission to USTR and our March 16, 2000 GSP Pre-Hearing Brief to this Subcommittee. BSA and its members companies usually report their final year-end statistics sometime in the second quarter of the following year.

On May 24, 2000, BSA released its 1999 Global Software Piracy Report which contains detailed information on estimated piracy levels and losses suffered by the business software industry around the world. This report was jointly commissioned by BSA and the Software & Industry Information Association (SIIA); it is the sixth such study conducted by the independent firm, International Planning & Research (IPR). This 1999 Report evaluated sales data and market information for 85 countries in the six major world regions, and was based on 26 different business applications programs.

Updated information on the Dominican Republic for 1999, and also for prior years, is included in this BSA 1999 Report. In the Dominican Republic, BSA reports an estimated loss of \$15.3 million with a 72% level of piracy in 1999. It is important to know that this number reflects the full distribution channel, which includes both the U.S. and the local distributor estimated losses. Because the U.S. government looks only to estimated losses affecting U.S. industries, BSA revises its statistics to reflect the estimated U.S. losses only. These U.S.-breakout estimates are those which BSA shares publicly with the IIPA and the U.S. Government in the context of Special 301 and other trade-related endeavors, such as this GSP hearing. Therefore, the BSA-revised U.S. estimated losses in the Dominican Republic are \$12.5 million for 1999; the 72% piracy level remains the same.

This \$12.5 million figure for 1999 reflects a significant increase from the \$7.4 million estimate for 1998. One reason for this increase is that the level of piracy in the Dominican Republic has remained at very high levels (over 70%) in recent years. Another reason for the increase in losses is that there are more personal computers in the Dominican Republic, and as a result, there are more personal computers on which infringing materials can reside. This trend of lower piracy levels with higher losses does follow the regional pattern. BSA reports that while the overall piracy level in Latin America declined slightly in 1999 to 59%, the total losses climbed eight percent to \$1.1 billion, among the countries surveyed.

ESTIMATED TRADE LOSSES DUE TO PIRACY
(in millions of U.S. dollars)

and LEVELS OF PIRACY: 1995 - 1999

INDUSTRY	1999		1998		1997		1996		1995	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Motion Pictures	2.0	80%	2.0	90%	2.0	100%	2.0	100%	NA	NA
Sound Recordings / Musical Compositions	2.0	80%	2.0	80%	NA	NA	NA	NA	NA	NA
Computer Programs: Business Applications ¹	12.5	72%	7.3	73%	NA	76%	NA	80%	NA	89%
Computer Programs: Entertainment Software	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA
Books	1.0	NA	1.0	NA	1.0	NA	1.0	NA	1.5	NA
TOTALS	\$17.5		\$12.4		\$3.0		\$3.0		\$1.5	

Conclusion

IIPA and its member associations appreciate the Subcommittee's consideration of both the legal and enforcement issues affecting the U.S. copyright industries' ability to protect our creative products in the Dominican Republic. We recommend that the Subcommittee continue its review of the intellectual property rights practices in the Dominican Republic.

Respectfully submitted,

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¹ This June 9 chart reflects the BSA's final numbers for 1999, as well as piracy levels reported for 1997, 1996 and 1995. Source: BSA 1999 Global Piracy Report, available at <http://www.bsa.org>. Because the estimated U.S. breakout of losses for 1997, 1996 and 1995 are not available, they are reported as "NA," above. Losses reported for piracy in the full channel (which goes beyond U.S. companies) are reported in BSA's 1999 Report.