

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2001 SPECIAL 301 REPORT

EL SALVADOR

EXECUTIVE SUMMARY

Given the serious defects in civil and criminal enforcement and the legislature's efforts to eliminate criminal enforcement altogether, IIPA recommends that USTR place El Salvador on the Special 301 Watch List this year.

In November 2000, USTR completed a Special 301 out-of-cycle review of El Salvador to assess that government's efforts to improve enforcement procedures and promote the use of authorized software in all government ministries. At that time, the business software industry reported that progress was being made to work with Salvadoran criminal authorities to bring software anti-piracy actions. USTR acknowledged this development and noted, "Nonetheless, software piracy in El Salvador remains a serious problem, and it is vital that El Salvador maintain this new momentum and reduce current levels of piracy."¹

Despite increased raid activity by law enforcement authorities during the last six months, piracy levels remain high. For the business software industry, the estimated piracy rate in El Salvador is 82%, one of the highest in Latin America. To make matters worse, a bill is currently pending before the Salvadoran Legislative Assembly which would effectively eliminate criminal enforcement of copyright infringement altogether. This bill would leave copyright holders without any avenue whatsoever to enforce their rights. Such denial of criminal and civil remedies for copyright enforcement would conflict with El Salvador's multilateral and bilateral obligations.

Because of evidentiary burdens and delays in the civil system, rightsholders basically have had to rely on the Salvadoran criminal process to enforce their rights. Prosecutors and the courts do not move forward on copyright cases; there simply is no deterrence in the system. Rightsholders have to fight to prove their standing in some criminal cases. The Salvadoran government should amend its civil and criminal enforcement procedures to comply fully with the WTO TRIPS Agreement, and amend its copyright law to implement the requirements of the WIPO treaties. Until these reforms are made, both copyright owners and Salvadoran authorities will lack the protections and remedies necessary to combat the extremely high levels of piracy in El Salvador.

¹ Press Release 00-77, Office of the U.S. Trade Representative, "USTR Announces Results of Special 301 Out-Of-Cycle Reviews," November 8, 2000.

ESTIMATED TRADE LOSSES DUE TO PIRACY
(in millions of U.S. dollars)
and LEVELS OF PIRACY: 1999 - 2000

INDUSTRY	2000		1999	
	Loss	Level	Loss	Level
Business Software Applications ²	13.5	82%	13.6	83%
Motion Pictures	2.0	50%	2.0	80%
Sound Recordings / Musical Compositions	5.0	40%	5.0	40%
Entertainment Software ³	0.1	50%	NA	NA
Books	1.0	NA	NA	NA
TOTALS	21.6		20.6	

In October 2000, the U.S. Senate approved the Bilateral Investment Treaty with El Salvador, which was signed in March 1999. At the time of the BIT negotiation, El Salvador was required to have in place TRIPS-level protection, both in terms of its substantive intellectual property law requirements plus the enforcement obligations by the end of April 1999.

El Salvador is a beneficiary developing country under the Generalized System of Preferences (GSP) and Caribbean Basin Economic Recovery Act (CBERA) trade programs; both these programs contain criteria requiring adequate and effective protection for U.S. copyright owners.⁴ Recently, El Salvador also became an eligible beneficiary country of the U.S.-Caribbean Basin Trade Partnership Act (CBTPA).⁵ To maintain these CBTPA benefits, El Salvador must meet all the CBERA criteria, as well as the CBTPA's explicit TRIPS-or-greater criteria. As a WTO member, El Salvador also is currently obligated to meet both its substantive copyright obligations as well as the enforcement text of the TRIPS Agreement.

² BSA estimates for 2000 are preliminary.

³ IDSA estimates for 2000 are preliminary.

⁴ In 1999, \$3.1 million of Salvadoran imports to the United States benefited from the GSP program, accounting for less than 1% of its total imports to the U.S. An additional \$59.1 million worth of goods entered the United States under the CBI in 1999, representing 3.7% of its total imports to the U.S. For the first 11 months of 2000, \$19.9 million of Salvadoran goods entered the U.S. under the duty-free GSP code, representing a 276.6% increase over the same time period last year. Another \$41.9 million of goods entered the U.S. under the CBI.

⁵ Trade and Development Act of 2000, Pub. L 106-200 (May 18, 2000). USTR subsequently determined that El Salvador has implemented, or is making substantial progress toward implementing, certain customs procedures based on those found in NAFTA. This determination made El Salvador fully eligible for the CBTPA trade benefits. See Press Release 00-68, Office of the U.S. Trade Representative, "Caribbean Basin Trade Partnership Act: Customs Procedure Designation," October 5, 2000.

Much more work needs to be done by El Salvador to meet its TRIPS and bilateral obligations, especially with respect to improving effective enforcement within the country and at its borders.

COPYRIGHT PIRACY IN EL SALVADOR

Business software piracy by both resellers and end users is rampant in El Salvador. The estimated level of piracy of U.S. business applications software in El Salvador in 2000 was 82%, one of the highest piracy rates in Latin America. Estimated trade losses in El Salvador due to business software piracy were \$13.5 million.

The sound recording and music industry reports estimated trade losses due to piracy of \$5.0 million, with a 40% level of piracy in 2000.

The home video market in El Salvador is experiencing a sharp decrease in piracy, now considered to be between 40% and 50%. The pirate video clubs used to announce the new releases in the media, but now that Blockbuster is present in the market with four stores, it is Blockbuster who announces its releases every week with a full-color page. Annual losses to the U.S. motion picture industry due to audiovisual piracy in El Salvador are estimated to be \$2 million in 2000.

The book publishing industry reports book piracy exists in the country, and is particularly noticed at the National University. Estimated losses due to book piracy are placed at \$1.0 million in 2000.

The estimated piracy level of entertainment software (including videogame CD-ROMs and cartridges, personal computer CD-ROMs and multimedia entertainment products) in El Salvador is 50%, causing an estimated \$100,000 in trade losses due to piracy in 2000.

COPYRIGHT ENFORCEMENT IN EL SALVADOR

Inadequate and Ineffective Criminal Enforcement

Because of onerous evidentiary requirements and excessive judicial delays, business software publishers are denied an effective civil enforcement mechanism to combat piracy. As a result, software publishers are completely dependent upon criminal enforcement by the *Fiscalía* to protect their rights. Up until May 2000, the *Fiscalía* refused to conduct almost all of the raids against software pirates requested by BSA, even though a special IP unit was created in 1997 to enforce intellectual property rights. However, during the second half of 2000 the *Fiscalía* became far more aggressive in combating piracy, conducting 14 criminal actions at BSA's request, including five reseller raids and nine end-user raids. In El Salvador, most of BSA's criminal cases have been settled out of court.

Although BSA applauds the recent increase in prosecutorial activity, there are still several problems that need to be addressed to achieve TRIPS compliance in El Salvador. Under Article 41 of TRIPS, procedures for the enforcement of intellectual property rights may not be

unnecessarily complicated or entail unreasonable time limits or unwarranted delays. Moreover, enforcement procedures must be effective and constitute a deterrent to further infringements.

El Salvador's criminal enforcement procedures fail to comply with these TRIPS requirements. Despite increased raid activity in El Salvador, the courts have thus far refused to convict or punish software pirates; thus, criminal enforcement provides no meaningful deterrent to piracy. For example, in January 2000, a criminal complaint was filed by BSA against a reseller who sold pirated software to an educational institution. After repeated requests by BSA, the *Fiscalía* raided the defendant's place of business in April 2000 and found evidence of software piracy. However, the judge provisionally found in favor of the defendant, claiming that the software publisher (a leading producer of widely used business software) had failed to provide sufficient evidence that it owned the copyright in the relevant software program. The court provisionally acquitted the defendant and ordered the software publisher to submit additional evidence of copyright ownership. Under Salvadoran law, an author's notice of authorship is sufficient evidence to be regarded as such and the burden is on the defendant to challenge such a presumption.⁶ In compliance with the court's request, the software publisher submitted sufficient evidence to merit a presumption of ownership under Salvadoran law; nevertheless, the court rejected the evidence, demanding further proof of ownership. The court's imposition of onerous and "unnecessarily complicated" evidentiary requirements illustrates the existing defects in the Salvadoran legal system.

In addition, Salvadoran law makes it difficult for U.S. copyright owners to obtain the legal standing necessary to file a criminal complaint or provide evidence in criminal proceedings. In particular, although Salvadoran law permits a U.S. copyright owner to assist the *Fiscalía* in prosecuting a criminal copyright offense, it requires the copyright owner to provide its legal representative with a special power of attorney for that criminal case. Based on this requirement, the *Fiscalía* has, in the past, refused to conduct criminal seizures requested by BSA's counsel, arguing that counsel's general power of attorney is inadequate, even though it clearly empowers Salvadoran counsel to represent BSA in all criminal infringement actions. For example, in December 1999, BSA filed a criminal complaint against a pirate reseller, providing direct evidence that the reseller had sold an investigator a computer with illegally installed software. Despite this evidence, the *Fiscalía* recommended that the judge deny BSA's request for an investigation of this target by law enforcement officials, arguing that BSA was not an interested party in the proceedings because it had failed to provide counsel with a special power of attorney for this particular case. The court decided in favor of the *Fiscalía* and was affirmed on appeal. The legal requirement of a special power of attorney for each criminal case results in significant delays and costs and plainly constitutes the kind of unnecessary complication prohibited under TRIPS.

BSA also has encountered situations where the procedures and actions of the *Fiscalía* have not been "fair and equitable" pursuant to TRIPS Article 42. In August 1999, BSA filed a complaint with the *Fiscalía* against a company that had refused to legalize its use of software despite repeated BSA warnings. The *Fiscalía* refused to grant BSA's *ex parte* seizure request and instead notified the defendant of the seizure request. Such notification violates TRIPS Article 50. This action, in effect, forced BSA to negotiate an "agreement" with the defendant. The *Fiscalía*'s actions in this case clearly denied BSA effective enforcement against an admitted pirate. However, since the appointment in mid-2000 of Ms. Berríos de Tablas as head of the *Fiscalía*'s IP crimes unit, BSA has not experienced these types of problems.

⁶ Ley de Fomento y Protección de la Propiedad Intelectual, Art. 32 *in fine*, and Berne Convention Art. 15(1).

Turning towards legislative threats, the Salvadoran legislature is considering a bill that would virtually eliminate criminal enforcement against piracy. The bill was introduced in September 1999 by three members of the Legislative Assembly in an effort to prevent BSA from initiating criminal raids against pirates. The bill would amend existing copyright law to require that copyright owners exhaust all civil remedies and obtain an initial finding in their favor *before* initiating any criminal proceedings. Given the inadequacy of civil enforcement under Salvadoran law (as described below) and the significant time required to obtain a civil finding (at least one year), this bill would effectively prevent any criminal enforcement against copyright infringement and leave copyright owners without any avenue whatsoever to enforce their rights. If enacted, this bill would clearly violate El Salvador's current obligations under TRIPS, as well as the GSP, CBI and CBTPA trade programs. BSA has been advised by local counsel that it is "unlikely" that this bill will move forward, although the legislation does remain pending in the Economic Commission of the Legislature.

Inadequate Civil Enforcement

Because criminal enforcement is not always feasible or appropriate, BSA member companies often utilize civil enforcement procedures -- particularly civil *ex parte* search authority -- to combat piracy. In El Salvador, however, software publishers have great difficulty obtaining civil *ex parte* search authority because of onerous evidentiary requirements. Moreover, the civil law fails to impose any time limits on the process for reviewing and approving civil seizure requests.⁷ BSA has found that, on average, it takes 45 days to obtain civil seizure authority in El Salvador, by which time news of the raid may have leaked to the defendant or BSA's evidence may have grown stale. This unwarranted delay, which is far longer than the average authorization process in other countries in Latin America, violates Article 41 of TRIPS, which requires that that remedies for copyright infringement be "expeditious." Due to these procedural obstacles, BSA conducted only one civil action in El Salvador during 2000.

In addition to unacceptable delays in the court process described above, BSA encounters the problem of the imposition of very high bond requirements. Bonds imposed before a court orders a search and seizure against a suspected pirate have been as high as \$20,000.. Such bonds are an obstacle to enforcement, in violation of TRIPS Articles 41.1 and 41.2 (remedies prevent effective action against infringement, are unnecessarily costly, and entail unreasonable delays), Article 53 (high bonds requirements are unreasonable deterrence).

Inadequate Civil Damages for Copyright Infringement

The Salvadoran copyright law permits only direct economic damages for civil copyright violations, and thus prohibits punitive, consequential or statutory damages. Without the threat of significant damages, the copyright law fails to provide an adequate deterrent to piracy, as required by TRIPS Articles 41 and 45.

In contrast, other countries have legislated a system of statutory damages which provide for an effective deterrent mechanism to combat piracy. In Brazil, for instance, the unauthorized reproduction or publication of a protected work may be subject to statutory damages

⁴ In contrast, El Salvador's copyright law does provide for some deadlines by which officials must act in processing a request for a criminal inspection of a suspected pirate.

equivalent to up to 3,000 times the retail value of the protected work.⁸ The same solution has been adopted by the United States (up to a maximum of \$30,000 per protected work).⁹ Bolivia is also considering such a solution in a bill prepared by the Ministry of Justice (between three to five times the retail value of the protected work).¹⁰

COPYRIGHT LAW AND RELATED ISSUES

Copyright Law of 1993

Copyright protection in El Salvador is based on its 1993 copyright law. As previously discussed, the two critical deficiencies with this law which result in little real copyright protection through civil channels in El Salvador are the lack of statutory damages and the absence of deadlines for government officials who undertake the various steps of authorizing a civil inspection of a suspected pirate. Both deficiencies are in violation of TRIPS Article 41.1, which requires that remedies for copyright infringement be “expeditious” and provide an effective deterrent to piracy.

Copyright Bill of September 1999

On September 27, 1999, three members of the Legislative Assembly submitted a bill that would virtually eliminate criminal enforcement of copyrights. This bill would reform existing copyright law to require that copyright holders first proceed through all civil avenues and obtain an initial finding in their favor¹¹ before any criminal process could be initiated against an infringer of a copyrighted work. Such civil litigation in El Salvador generally lasts at least a year.

This bill therefore would effectively eliminate all criminal enforcement of copyrights. Given existing deficiencies in civil enforcement, this bill would leave copyright holders without any avenue whatsoever to enforce their rights. It goes without saying that this bill, if enacted, would clearly violate TRIPS. Copyright protection in El Salvador must be increased, not decreased, in order for El Salvador to satisfy its multilateral and bilateral obligations.

Implementation of the WIPO Treaties

Internet piracy is increasingly prevalent throughout Latin America and a growing threat to software publishers and other copyright owners. El Salvador already has been commended for being the first country in the Americas to deposit its instruments of accession to the new “digital” treaties of the World Intellectual Property Organization: the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonogram Treaty (WPPT). These treaties, like all international treaties, are considered self-executing under Salvadoran law. However, as a practical matter, specific implementation in domestic law is needed to provide explicit

⁸ Ley de Derechos de Autor, No. 9610, Article 103.

⁹ U.S. Copyright Act, 17 U.S.C § 504 (c).

¹⁰ Anteproyecto de Código de Propiedad Intelectual, Art. 175 I.

¹¹ Such an initial court finding is called a *dolo*, which means the judge determines that the defendant has an “intent to cause harm/damage” to the plaintiff.

guidance to the public and the judiciary on the specific obligations contained in these treaties. The government of El Salvador has yet to amend its copyright legislation to implement fully the obligations of both WIPO Treaties. As a result, copyright owners are not assured adequate protection of their rights in the digital environment.

Industry-proposed Amendments to the 1993 Copyright Law

The business software industry has been working with the Ministry of Economy to amend the Copyright Law of 1993. In December 2000, BSA submitted a proposal to the Ministry of Economy which aimed to: (1) implement the WIPO treaties under domestic law providing for a copyright owner's exclusive right of "making available" its works (or phonograms) to the public for on-demand access; (2) set a deadline on which civil magistrates must issue search and seizure orders; and (3) establish statutory damages in cases of copyright infringement. BSA is not aware of any developments in the Ministry of Economy to pursue the proposed changes.

To address the defects identified in the Salvadoran legal system and promote stronger copyright protection and enforcement, IIPA and its members continue to encourage the Salvadoran government to adopt the following reforms and improvements:

- Amend the Ley de Fomento y Protección de la Propiedad Intelectual (civil law) to establish a deadline for judicial action on *ex parte* seizure requests and lower the evidentiary threshold for obtaining such orders.
- Amend the Ley de Fomento y Protección de la Propiedad Intelectual to permit statutory or punitive damages for piracy.
- Encourage the government to adopt a decree (comparable to the U.S. Executive Order) requiring all government agencies and public institutions to use only legal software.
- Amend the Código Procesal Penal (Criminal Law Proceedings) to allow foreign companies to file complaints and assist the *Fiscalía* in prosecuting a case without the need for a special power of attorney for every case (i.e., a general power of attorney that authorizes local counsel to act on behalf of the company should be deemed sufficient).
- Encourage the government to reject/terminate the proposed legislation that would eliminate criminal remedies for copyright piracy.
- Encourage the *Fiscalía* to continue investigating and prosecuting criminal copyright offenses, in cooperation with BSA and other IIPA members.
- Encourage the Salvadoran judiciary to convict pirate resellers and impose sanctions that adequately reflect the seriousness of the offense and deter future acts of piracy.
- Implement a copyright owner's exclusive right of "making available" its works or phonograms to the public for on-demand access.