

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2007 SPECIAL 301 REPORT

DOMINICAN REPUBLIC

Special 301 Recommendation: IIPA recommends that the Dominican Republic be elevated to the Priority Watch List in 2007.

EXECUTIVE SUMMARY

Copyright piracy rates remain high in the Dominican Republic. Piracy of recorded music on the streets is prevalent, and widespread “burning” of compact discs full of infringing copyrighted materials is reported. What has been most disturbing over the past year has been the administrative agency’s (ONDA) continued poor coordination with the police and prosecutors. ONDA’s actions border on obstructionist to effective investigations and inspections. ONDA refuses to work with the recording industry on its actions. ONDA inspectors do not have the technical expertise to conduct effective inspections involving software piracy. Two industries involved in anti-piracy actions both report good cooperation with the police and prosecutors. However, these criminal agencies need additional resources. There is much more room for improvement on criminal prosecutions, too; for example, the recording industry reports that there were half the number of criminal actions and prosecutions taken in 2006, compared to the year before. The judicial system is overloaded; the recording industry has over 100 cases which are backlogged, waiting for prosecution under the old criminal code. With respect to legislative reform, legislation which would implement the copyright-related and enforcement provisions of the Free Trade Agreement passed in late 2006. IIPA supports the Free Trade Agreement process and looks forward to the prompt entry into force of the CAFTA-DR with the Dominican Republic.

PRIORITY ACTIONS IN 2007

Enforcement

- Have the enforcement agencies (including the police (*Fiscalía*), ONDA and INDOTEL) conduct more regular and sustained actions, followed by prompt criminal prosecutions.
- Improve interagency communication and cooperation between ONDA and the Attorney General’s Office.
- Assign a squad of investigative law enforcement officers to follow up on the cases after ONDA or the *Fiscalía* has conducted a raid.
- Provide technical assistance and training to the IPR department in *Fiscalía* of Santo Domingo and the National District in order to strengthen its ability to investigate, file and prosecute IPR cases.
- Dedicate more resources and training to ONDA, including, but not limited to, more inspectors, more equipment, and expanding ONDA to include satellite offices.
- Support ONDA’s use of penalties under their regulations to fine and close down retail outlets where infringing actions have been identified or infringing products seized.
- Continue regular inspections of broadcast television stations and cable systems, and follow-up with criminal and administrative actions.
- Expedite prosecutions and judicial decisions in criminal cases.

- Improve training of judges, prosecutors and police on copyright matters in order to ensure proper implementation of the Criminal Procedure Code (2004), which also included *ex officio* authorizations of raids, inspections and closures of illegal activities.

DOMINICAN REPUBLIC										
Estimated Trade Losses Due to Copyright Piracy										
(in millions of U.S. dollars)										
and Levels of Piracy: 2002-2006 ¹										
INDUSTRY	2006		2005		2004		2003		2002	
	Loss	Level								
Sound Recordings & Musical Compositions ²	9.9	65%	10.8	75%	10.3	75%	9.9	65%	6.9	65%
Business Software ³	10.0	77%	5.0	77%	2.0	77%	3.0	76%	3.6	61%
Motion Pictures ⁴	NA	NA	3.0	89%	2.0	20%	2.0	20%	2.0	60%
Entertainment Software	NA	NA								
Books	1.0	NA								
TOTALS	29.9		19.8		15.3		15.9		13.5	

IIPA and its members support the IPR chapter in the U.S.-Central America-Dominican Republic Free Trade Agreement.⁵ Bilateral negotiations with the Dominican Republic were concluded in March 2004, and the agreement was signed on August 5, 2004. President Bush signed the implementing legislation for the DR-CAFTA on August 2, 2005, and entry into force for the U.S. was January 1, 2006. Entry into force for the Dominican Republic is still pending, but may possibly happen in early 2007. The CAFTA-DR is an important means encouraging compliance with other evolving international trends in copyright standards as well as outlining specific enforcement provisions.⁶ The Dominican Republic is currently is a beneficiary country of several U.S. trade programs which contain IPR standards, including the Generalized System of Preferences (GSP) and the Caribbean Basin initiative.⁷ Once the FTA is in force, these trade benefits will be phased out.

¹ The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2007 Special 301 submission at www.iipa.com/pdf/2007spec301methodology.pdf. For information on the history of the Dominican Republic under Special 301 review, see Appendix D at (<http://www.iipa.com/pdf/2007SPEC301USTRHISTORY.pdf>) and Appendix E at (<http://www.iipa.com/pdf/2007SPEC301HISTORICALSUMMARY.pdf>) of this submission.

² RIAA reports that in 2003, \$9.9 million represented the estimated sales displacement to the legitimate industry. In 2004, the losses to the legitimate market increased to \$10.3 million with an estimate of 1.53 million pirate CD and cassettes units available in the market.

³ BSA's 2006 statistics are preliminary. They represent the U.S. publishers' share of software piracy losses in the Dominican Republic, and follow the methodology compiled in the Third Annual BSA/IDC Global Software Piracy Study (May 2006), available at <http://www.bsa.org/globalstudy/>. These figures cover, in addition to business applications software, computer applications such as operating systems, consumer applications such as PC gaming, personal finance, and reference software. BSA's 2005 piracy statistics were preliminary at the time of IIPA's February 13, 2006 Special 301 filing; the 2005 data was revised and posted on the IIPA website in September 2006 (see <http://www.iipa.com/statistics.html>), and the 2005 revisions (if any) are reflected above.

⁴ MPAA's trade loss estimates and piracy levels for 2006 are not yet available. However, such numbers will become available later in the year and, as for 2005, will be based on a methodology that analyzes physical or "hard" goods and Internet piracy. For a description of the new methodology, please see Appendix B of this report. As the 2006 loss numbers and piracy levels become available, they will be posted on the IIPA website, <http://www.iipa.com>.

⁵ IIPA Press Release, "IIPA applauds the signing of the U.S.-Central American-Dominican Republic FTA," Aug. 2, 2005, at <http://www.iipa.com/pdf/IIPA%20CAFTA%20DR%20Signing%20by%20Pres%20Bush%20FINAL%2008022005.pdf>.

⁶ The final text of the CAFTA-DR IPR Chapter is posted on USTR's website at http://www.ustr.gov/Trade_Agreements/Bilateral/CAFTA/CAFTA-DR_Final_Texts/Section_Index.html. The Dominican Republic also signed a Side Letter on IPR procedures.

⁷ IIPA has used several U.S. trade laws over the past decade to encourage improvement in the piracy and legal situation in the Dominican Republic. For example, in June 1999, the IIPA filed a petition with the U.S. government to initiate a review

COPYRIGHT PIRACY IN THE DOMINICAN REPUBLIC

For many years, IIPA and its members have been working in the Dominican Republic to improve on-the-ground copyright enforcement which, we believe, is imperative to reducing the high levels of piracy in this country.⁸

Piracy of recordings and musical compositions: Record and music piracy continues to plague the legitimate marketplace, making it impossible for record companies to invest in the Dominican Republic. The number of vendors on the streets continues to climb, with little pro-active intervention visible by this current administration. Nearly all of the music piracy found is burned onto CD-Rs. There has been noted a dramatic increase in the number of CD-R burner labs operating, propagating the availability of pirated CD-Rs. Additionally, music pirates have added pirated music DVDs to their inventories of available product. Street vendors continue to operate throughout popular shopping areas and in the tourist areas around the country. The estimated trade loss due to piracy of sound recordings and music in the Dominican Republic was \$10.8 million in 2005.

Business software piracy: The Business Software Alliance (BSA) reports that its 2006 problems continued to be primarily end-user piracy and hard-disk loading. End-user piracy rates remain high among Dominican businesses of all sizes, from small family businesses to large, prosperous financial institutions and industrial concerns. With hard-disk loading, Dominican resellers load unlicensed software onto computer hardware and sell the package to the consumer. In some cases, the software is represented as legitimate and the purchasers may be unaware that they are buying illegal software; in other cases, the purchasers are complicit in the piracy. Use of the Internet is growing in this market, and it is being used to either promote the sale of personal computers (including those with unauthorized pre-loaded software) as well as downloading software (thus far, the industry has not yet found a website based in this country which is engaged in such activity). Preliminary estimated trade losses to the business software industry jumped to \$10.0 million in 2006, with a piracy level of 77%.

Film piracy and broadcast piracy: MPA reports that broadcast, pay-TV piracy and video piracy remain key priorities for 2006 in the Dominican Republic. The broadcast/cable transmission of movies prior to release in theaters in the Dominican Republic or during their theatrical run greatly reduces legitimate business opportunities in other media by disrupting the normal release sequence to theatrical exhibitors, retail video outlets and legal cable operators. For several years, MPA and its member companies have taken action against television and video piracy in the Dominican Republic, many whom have been politically protected from effective enforcement. Since 2003, the Dominican Republic has taken some actions to reduce piracy in both of these areas. In addition to broadcast piracy, retail piracy is a growing problem, and more and more street vendors are selling pirate DVDs. In the last few years, the video piracy market has started to shift to DVD piracy, and this type of piracy has far-reaching market distortions as the use of pirate DVDs can harm the theatrical, home entertainment and TV markets.

under both the GSP and the CBI trade laws of the eligibility of the Dominican Republic to participate in these programs due to its failures to provide adequate and effective copyright protection for U.S. copyright owners and to provide equitable and reasonable market access. GSP hearings were held in April 2000 and in October 2003. As the Dominican Republic FTA negotiations moved forward, USTR terminated the GSP investigation on July 2, 2004. Regarding preferential trade benefits, here is a summary of 2006 activities. During the first 11 months of 2006, \$122 million worth of Dominican goods entered the U.S. under the duty-free GSP code; \$948.4 million worth of Dominican goods entered under the CBI; and \$1.3 billion worth of Dominican goods entered under the CBTPA,

⁸ For more details on the history of the Dominican Republic on IPR issues under Special 301 and other trade programs, see IIPA's summary in Appendix D (<http://www.iipa.com/pdf/2006SPEC301USTRHISTORY.pdf>) and Appendix E (<http://www.iipa.com/pdf/2007SPEC301HISTORICALSUMMARY.pdf>) of this submission.

Book piracy: The book publishing industry reports that problems in the Dominican Republic during 2005 continued to center around illegal photocopying, primarily of English language teaching (ELT) textbooks. Estimated trade losses to the publishing industry were approximately \$1 million in 2006.

COPYRIGHT ENFORCEMENT IN THE DOMINICAN REPUBLIC

Raids and inspections taken by both the police and administrative authorities: In the Dominican Republic, anti-piracy actions can be taken by the police as well as ONDA. Two continuing problems remain a general lack of resources for enforcement agencies and an ongoing lack of coordination by ONDA with other enforcement agencies.

Recording industry reports continuing difficulties in 2006: Although the recording industry has a good working relationship with the police department, the police do not take self-initiated actions. The majority of criminal raids taking place are via the industry's partnership with ADOPROFONO, the local group representing Dominican record labels. In 2005, RIAA's anti-piracy operations netted the following seizures: 113,764 pirate music CD-Rs, 4,770 music DVDs, 214 CD-R burners, and 16 computers used in the manufacturing of illicit product. There have been 41 people arrested during these operations. Criminal charges were brought against ten individuals by the prosecutor's office. There were four convictions that RIAA is aware of in 2006. These numbers represent more than a 50% decrease in seized music CD-Rs and persons arrested in 2005.

ONDA has refused to provide any data/statistics to the industry that would reveal their music anti-piracy activities. RIAA is aware of only four music piracy seizures conducted by ONDA during 2006, all of which targeted low-level street vendors. The industry's understanding is that ONDA refuses to work with the Attorney General's office, because ONDA believes they have sole responsibility for anti-piracy cases. Therefore, it seemed the relationship between ONDA and the Prosecutor's Office is non-existent. Efforts to help reconcile this situation between these two agencies have not been successful, and this remains a problem as of early 2007. There is a need to have the current administration identify a law enforcement body within the National Police (perhaps the tourist police), provide the necessary training, and have them become a proactive force in anti-piracy operations. The recording industry believes that ONDA could use new leadership that understands IP laws and wants to work with the National Police, the Attorney General's office and ADOPROFONO to address its growing music piracy problems.

Business software reports good criminal results and cooperation but difficulties in administrative actions: The BSA reports continued excellent cooperation and relations with local enforcement authorities. During 2006, BSA took twelve resellers actions and five end-user actions, using criminal laws, and working with prosecutors (the *Fiscalía of Distrito Nacional and Provincia de Santo Domingo*). Although *ex officio* authority exists in the copyright law and the criminal procedure code, the District Attorney has not been willing to take such actions on his own initiative; his office is helpful and does take actions but prefers to have at least a complaint (*denuncia*). With respect to the prosecutor's office in Santo Domingo, the main problem is the lack of resources. Both of the prosecutors assigned to handle IPR cases do not have the staff needed to assist them. Nevertheless, BSA is pleased with the work the DA's office has taken in the past year.

BSA took only three (3) administrative inspections with ONDA last year. BSA has identified three problems with ONDA and administrative enforcement: (1) the inspectors do not have the technical knowledge to conduct a software inspection, (2) lack of resources, and (3) a continuing

problem of not coordinating with other agencies, such as the District Attorney. For at least two years, there has been a miscommunication between ONDA and the DA's office.

Results of criminal prosecutions are mixed. The judicial process in the Dominican Republic has improved under the amendments to the criminal procedural code that entered into effect on September 21, 2004. While the process is better, actual results are mixed.

Recording industry cases: Despite obtaining convictions of four individuals in early 2006, there were no other cases in which successful prosecutions were achieved. The RIAA remains hopeful that changes to the criminal code made in 2004 will expedite the adjudication of pending cases. For its cases which predated the 2004 changes in the criminal code, the RIAA continues to experience great delays at the appellate level. For example, 105 criminal cases for music piracy filed between 1999 and September 2004 are still pending trial or appellate court review.

Broadcasting piracy cases: Broadcast piracy has been one of the major piracy problems in the Dominican Republic over the last decade. Below is a summary of the pending television piracy cases in which MPA is active:

- In 2004, MPAA filed criminal complaints with the District Attorney against two broadcast stations, Digital 15 and Virus. However, in 2005, the only legal action filed was against Virus, which was settled; no other criminal actions were initiated. In 2006, cases were also prepared and are pending decisions by the District attorney to move forward.
- In the Canal del Sol case, the first hearing was held in 2003, followed by additional hearings in 2004. On June 11, 2004, the judge decided in favor of the right holders and the prosecution and allowed the inclusion of the director of Canal del Sol as a named defendant. The final decision is still pending. As of early 2006, Canal del Sol entirely changed its programming and, for the past year and currently, broadcasts only music videoclips and programs regarding politics. This positive, improved behavior is mainly due to three reasons: the MPA legal action; INDOTEL's intervention with the owner of Canal del Sol; and political interests of the owners which established a new political party.
- In the Telemicro case, hearings took place in 2003 and 2004. In 2004, the court sanctioned Telemicro's representative (with three months' jail and a fine of 50 times minimum wage (US\$4,915). Unfortunately, the judge did not order the cessation of the transmissions of infringing signals. MPA had filed an accompanying civil suit, and was awarded US\$11,000. The defendant has appealed the civil decision. Both penalties and damages currently are suspended, pending this appeal. In December 2005, the Court decided to review all evidence presented, which was expected to take place in March 2006.

No criminal prosecutions involving video piracy are reported by the industry. There are some defendants from *ex officio* actions taken by the authorities.

COPYRIGHT LAW AND RELATED ISSUES

Copyright Law (2000, as amended in 2006): Dominican Republic adopted a new copyright law in October 2000 (Law 65-00), fulfilling many years of work to replace its inadequate 1986 copyright law. The GSP investigation clearly helped prompt legislative consideration of the new law. The 2000 law represented success in advancing higher levels of substantive copyright protection as well as expanding the battery of tools available for criminal, civil and administrative copyright enforcement. While the 2000 law raised the level of copyright protection up to WTO TRIPS levels and also integrated some elements found in the two WIPO "Internet" Treaties, further reform was anticipated in order to satisfy all the obligations of the CAFTA-DR IPR Chapter. Importantly, the

Dominican Republic joined both the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty (WPPT), with January 10, 2006 as the dates of entry into force.

In November 2006, the Congress of the Dominican Republic approved its CAFTA-DR implementation legislation, including IPR-related amendments (Law No. 424-06). These amendments will enter into effect when the CAFTA-DR enters into force for the Dominican Republic. The IPR legislation includes several refinements affecting the copyright law and its enforcement, including (for example): extending term of protection; expressly adding statutory damages; clarifying some contractual rights provisions; clarify and expand the scope of exclusive rights for rightsholders; increase the minimal level of criminal sanctions from three (3) months to six (6) months; clarify the scope of judicial authority and injunctive relief; delineate other enforcement measures, including border measures; expanded the chapters on TPMs (technological protection measures), RMI (rights management information), and encrypted program carrying satellite signals. The Dominican Republic also has chosen to take advantage of the permitted transition periods for certain issues (including protection of access controls/technological protection measures, government software legalization, and ISP liability). The 2006 law also includes a few elements which industry is concerned, especially with respect to implementation. For example, the legislation changed the calculation for criminal fines from “minimum wages” to a range with an indication of the amount in Dominican Pesos. With this, it not only lowered the minimum amount to receive as damages, but also means that the level of sanctions will be diluted due to local information. The minimum-wage-index ameliorated the inflation problem. For example, in the six years since the enactment of the 2000 Copyright Law, the exchange rate has dropped from RD\$12 per US\$1.00 to RD\$34 per US\$1.00. This fixed peso number was also included in the statutory damages section, though the level of sanctions there is quite high (if imposed).

Criminal Procedural Code Amendments: The amendments to the criminal procedural code (adopted in July 2002) entered into effect on September 21, 2004, and has helped to expedite new cases. The criminal cases underway at the time of the 2004 amendments will be adjudicated under the former procedural code.

Constitutional Challenge to Copyright Law: BSA is still defending against a constitutional challenge to the 2000 Copyright Law. A reseller defendant in a BSA case, Hard Soft, filed a constitutional challenge in the Supreme Court of Justice in Santo Domingo, alleging that portions of the 2000 Copyright Law are unconstitutional. Hard Soft argues that the copyright law protects software more stringently than other media, and is thus unconstitutional because of unequal protection, in addition to other arguments. BSA filed a brief refuting these arguments, and ONDA also filed a brief against this challenge. The hearing to consider whether Hard Soft committed a copyright infringement was scheduled for November 4, 2003, but was postponed until April 2004. A decision from the Supreme Court is still pending, as of early 2007.

IPR TRAINING AND PUBLIC AWARENESS

RIAA offered training to the IP Prosecutor in the National District and in the Santo Domingo District that would highlight identification of pirate product, impact on the music industry, artist, employees of labels, distributors and retailers. Although the offers were met with positive reactions, no training actually occurred realized during 2006.