

COSTA RICA

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2009 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that Costa Rica remain on the Watch List in 2009.

Executive Summary: IIPA and its members congratulate Costa Rica upon the January 1, 2009 entry into force of the Dominican Republic-Central America-U.S. Free Trade Agreement (CAFTA-DR). This agreement contains a comprehensive intellectual property rights chapter that contains high standards for copyright protection and enforcement, many of which were implemented upon entry into force. Over the past several years, the most pressing problem for the copyright industries has been the complete lack of criminal copyright enforcement taken by Costa Rican authorities. For example, the recording industry did not make any significant progress in the criminal prosecution of music piracy cases during 2008. The lack of priority given by prosecutors in general remains the same. This abdication by the prosecutors should not obscure the fact that it remains the responsibility of all branches of the Republic of Costa Rica to effectively protect and enforce copyright. While it is true that many criminal procedures and sanctions were amended in late 2008 to make prosecutions easier, the industries have not yet seen any promising shifts toward a more proactive enforcement stance from the Attorney General that his office will pursue cases in 2009. It will be important to evaluate Costa Rica's work on taking effective criminal enforcement measures against copyright piracy, as this is an important component of Costa Rica's CAFTA obligations.

Priority actions requested to be taken in 2009: The copyright industries recommend that the following actions be taken in the near term in Costa Rica in order to improve the adequate and effective protection of copyrighted materials there:

Enforcement

- Create a Public Prosecutor's Office specialized in IP matters and assign resources and personnel to the office.
- Create a specialized IP unit within the police
- Apply the new criminal sanctions for copyright infringement in-practice.
- Improve training of enforcement officials on criminal and civil copyright cases (including police, officials from the Judicial Investigation Office (OIJ), prosecutors and judges).
- Reduce unwarranted delays in investigations, prosecutions and sentencing.
- Implement in practice, the software asset management practices in government agencies called for in the 2002 Decree.
- Engage state and municipal governments in the anti-piracy campaign through the cancellation of operating licenses for any locale selling pirate product.

Legislation

- Create and fund a Specialized IP Prosecutor Office (see above).
- Work with rights holders on developing legislation to the remaining CAFTA issue – implementation of liability of Internet service providers – that is still subject to transition.

COPYRIGHT AND LEGAL ISSUES IN COSTA RICA

CAFTA implementation in 2008: In order to implement the copyright- and enforcement-related aspects of CAFTA, Costa Rica accomplished amendments to two separate laws -- its Copyright Law (which was included in a broader intellectual property rights reform package) and its Law on Enforcement. In sum, the 2008 amendments to the Law on Enforcement went through the Congress without any problems of process, but a constitutional challenge to parts of the IP reform package (not the copyright components) resulted in a delay of its final adoption until November 2008. Below is a brief summary of these two laws (IIPA has not reviewed English translations of these laws).



The Law on Enforcement (*Ley de Observancia*): For years, the copyright industries have been working to amend enforcement procedures in Costa Rica. In October 2000, Costa Rica passed the *Ley de Procedimientos de Observancia de los Derechos de Propiedad Intelectual*, with the objective of complying with the TRIPS Agreement. Unfortunately, the industry found numerous provisions that were not TRIPS-compliant and were impediments to effective enforcement.¹ Efforts to amend this law continued for years. Finally, in August 2008, amendments to this Law on Enforcement were adopted (Law No. 8656 of 11 August 2008 amending Law No. 8039 of 12 October 2000) to implement numerous CAFTA obligations. Below is a summary of some of the key provisions and some of the continuing legal concerns reported to IIPA by its members:

- **Criminal penalties**: The way Costa Rica structured and applied its criminal sanctions has long been a concern of the copyright industries. The 2008 amendments revise the criminal sanctions for copyright and industrial property infringement, but leaves open many continuing questions for copyright owners about their effectiveness in practice.
 - First, the level of economic sanctions (fines) for criminal copyright piracy was generally raised for most infringing acts but the maximum jail terms were lowered in some cases. For example, the new law actually reduced the minimum penalty from one year down to two months, for certain cases. IIPA members had long argued that the minimum penalty for criminal copyright infringement should be increased from one year in jail to a minimum three years, believing that the three-year term was needed in order to ensure the possibility of jail time and not suspension. We understand that point was not reflected in the law, and expect that deterrent level sentences will be imposed in practice.
 - Second, the new Article 55 includes a complicated a four-step provision, linking the amount of the damages to the level of penalty. There is not a single provision in the law that explains how the judges will calculate the damages in piracy cases. The point was deferred to a future decree.
 - Third, the structure of these provisions unfortunately still provides for fines in the alternative of criminal sentences; this historically has allowed judges to decide between prison or fines, and this results, not surprising, usually in the issuance of fines (and hence few jail terms were ever issued). IIPA and its members believe that any fine imposed for infringement should be in addition to the prison sentence, and not in the alternative; it is unfortunate that the new law does not allay our concerns here.
 - Fourth, the copyright industries remain concerned that even with the new amendments, it is not certain that the historical problem of judges issuing suspended sentences because of low minimum sentences will stop. IIPA members hope for a major positive change in 2009 that will result in successful prosecutions and deterrent sanctions for criminal copyright infringement.
- **Ex officio**: The law establishes *ex officio* authority for the police to conduct investigations on their own initiative. This is a critical correction that will hopefully improve criminal enforcement significantly.
- **Anti-circumvention**: It provides protection and remedies against the circumvention of technological protection measures (TPMs) (this was done in advance of 3 years transition for CAFTA Article 15.5.7).
- **Statutory damages**: It also provides for pre-established damages (statutory damages) in civil judicial proceedings (this was done in advance of 3 years transition for CAFTA Article 15.11.8).
- **RMI**: It provides for protection of rights management information (RMI) (this was done in advance of the 2 years transition for CAFTA Article 15.5.8.a).
- **Satellite signals**: The law provides criminal sanctions regarding encrypted program-carrying satellite signals (this was done in advance of the 18 months transition for CAFTA Article 15.8.1.b).
- **Other civil remedies**: The 2008 law provides for civil remedies, including seizures, actual damages, court costs and fees, destruction of devices and products (this was done in advance of the 3 years transition for CAFTA Article 15.11.14).
- **Injunctive relief**: The law also includes other provisions involving injunctive relief, destruction of infringing materials and equipment, and border measures.

¹ Years ago the copyright industries identified four major deficiencies in the 2000 Law on Enforcement when it was originally adopted: (1) a lack of criminal *ex officio* authority, the ability to take action without the need for a complaint by a private party; (2) the need for deterrent-level penalties. The law only gave a maximum penalty of three (3) years of imprisonment for copyright violations, and sentences for crimes having a maximum penalty of three years of imprisonment can be commuted (suspended); (3) the law provided that the "minor" (*insignificante*) and "without profit" (*gratuito*) use and reproduction of illegal products will not be penalized. This point may have been the most harmful provision of the law because these terms are undefined and it was easy for pirates to avoid liability by simply reproducing and selling illegal products in small amounts, using a variety of CD burners and retail outlets; (4) the failure to provide for statutory, or pre-established, damages.

Apart from the lack of political will by prosecutors (discussed in the enforcement section, below), there are several other legal deficiencies that have contributed to the massive problems with poor copyright enforcement in Costa Rica through 2008. Additional issues not addressed in the CAFTA implementation packages, but long highlighted by the copyright industries, included the following:

- Public officials, not only injured parties, must be able to file criminal actions for IP violations ("*acción pública de instancia pública*"). This includes providing *ex officio* authority for police. Unfortunately, this has not changed; rights holders must still file a complaint (*denuncia*) in order to get a criminal prosecution.
- The objectionable "insignificance principle" ("*principio de lesividad e insignificancia*") was not removed from the Criminal Procedural Code so that it does not apply to intellectual property infringements. Prosecutors are allowed to drop cases based on their particular criteria about the importance of the case.
- Businesses engaged in piracy operations should be closed.
- The unauthorized "use" of copyrighted materials should be made a criminal offense.

Copyright Law of 1982 (as amended in 2008): In 2000, Costa Rica amended its 1982 Copyright Law to comply with TRIPS and some of its WIPO Treaties obligations. Further amendments were developed in 2008 to implement CAFTA, and copyright law amendments were included in a larger intellectual property bill, which was adopted, subjected to constitutional review, and passed again in November 2008. Law No. 8686 (2008) encompassed provisions such as the following: extending the term of protection for works, performances and producers of phonograms; improving definitions; amending certain provisions regarding contracts and transfers; modernizing the scope of certain exclusive rights, and; updating exceptions and limitations, all aimed at comporting with the CAFTA obligations.

Future CAFTA implementation issues: The CAFTA IP Chapter contains several transition periods to implement the following enforcement obligations, and Costa Rica already has implemented most of its obligations (see above). However, one critical obligation, especially in the digital age, still has to be met. Costa Rica is obligated to adopt, within 30 months of the FTA entry into force, provisions on limitations of liability for Internet Service Provider (ISP) liability and notice and takedown provisions (CAFTA Article 15.11.23). The copyright industries believe that transparency in the development of the implementing legislation is important.

Now that CAFTA-DR is in force in Costa Rica, the trade benefits Costa Rica has received under various U.S. programs will be phased out. Costa Rica has been a beneficiary country of several U.S. trade programs, all of which require "adequate and effective" copyright protection and enforcement, such as the Generalized System of Preferences (GSP) and the Caribbean Basin Initiative and Caribbean Basin Trade Preferences Act. During 2008, the following quantities of imports under preferential trade programs entered the U.S. from Costa Rica: \$195.2 million under the CBTPA, \$1.05 billion million under the CBI, and \$99 million under GSP -- a total of \$1.32 billion, or about 33% of all trade with the U.S.

Government software asset management: Government legalization of software is a CAFTA obligation that is due upon CAFTA's entry of force, and the Costa Rican government commenced efforts on this issue years ago. In February 2002 the then-President of Costa Rica, Miguel Angel Rodriguez, issued a Government Software Legalization Decree. Its aim was twofold: ensuring that all software in use in the federal government was duly licensed, and establishing and implementing sound and effective software procurement and software asset management policies. President Pacheco then reiterated his administration's intention to fully implement that decree. Both the issuance of the decree and President Pacheco's reiteration of it were important steps towards demonstrating the Government of Costa Rica's increasing awareness of the value of managing their software assets. In 2007 BSA was informed that the National Registry's Copyright Office was receiving data from other Government agencies about their software inventories. BSA understands that this process is still ongoing, but does not know what recent steps have been taken towards legalization. BSA and its members look forward to working with the Government of Costa Rica towards the legalization of software used by all Costa Rican government agencies.

COPYRIGHT PIRACY IN COSTA RICA

Hard goods piracy: The recording industry reports that piracy of sound recordings and music continues to be rampant in Costa Rica. The level of optical disc piracy is approximately 60%, which represents almost 2 million illegal units sold every year in this relatively small market. Much of this OD piracy involves CD-R burning. The capital of San José is the main

center of pirate activity, followed by the state of Heredia. There have been no major changes in the distribution channels. Retail sales are concentrated in just two major chains. Several groups are involved in the importation of blank media and equipment, but the local recording industry has not been able to develop a case yet.

The business software industry reports that the most devastating form of piracy in Costa Rica continues to be the use of infringing or unlicensed software by legitimate businesses and government agencies. Software legalization in government agencies should be an important public policy goal, and is a current CAFTA obligation. BSA reports that it has not seen pirated software products on the streets.

Internet piracy: Internet piracy, as everywhere else in the region, is a growing problem despite the low penetration of broadband. Over the past year, access to broadband Internet services in Costa Rica increased. There are about 1.5 million Internet users in Costa Rica, about 36% of the population in 2008 (according to www.internetworldstats.com, up from 20% of the population reported in 2007). More home and business users now have access to the Internet, and this also increases access to pirated products being sold for download or in hard copy from the Internet. Internet cafés continue to offer a forum for consumers to download files containing unauthorized copies of copyrighted materials. Thus far the industries are not aware of any actions being taken against Internet cafés.

COSTA RICA Estimated Trade Losses Due to Copyright Piracy (in millions of U.S. dollars) and Levels of Piracy: 2004-2008 ²										
INDUSTRY	2008		2007		2006		2005		2004	
	Loss	Level								
Sound Recordings & Musical Compositions	14.8	60%	14.5	60%	15.1	60%	18.3	60%	NA	NA
Business Software ³	15.0	60%	13.0	61%	15.0	64%	10.0	66%	9.0	67%
Motion Pictures ⁴	NA	NA	NA	NA	NA	NA	2.0	100%	2.0	40%
Books	NA	NA								
Entertainment Software	NA	NA	NA	NA	15.1	60%	NA	NA	NA	NA
TOTALS	29.8		27.5		30.1		30.3		11.0	

COPYRIGHT ENFORCEMENT IN COSTA RICA

IIPA and its members over the years have identified numerous copyright enforcement deficiencies in the Costa Rican legal and enforcement system. The national police and prosecutors are responsible for the anti-piracy actions in Costa Rica. Also, enforcement authorities lack equipment (hardware and software) to investigate Internet piracy cases. IIPA members continue to report that in 2008 their working relationships with prosecutors was not very good, primarily because the prosecutors refuse to give any attention or priority to piracy cases, even important cases. The Costa Rican judicial system is very weak. Training programs are necessary for prosecutors, judges and the police authority. It is hoped that the recent legal amendments accomplished for CAFTA implementation (discussed above) will lead to much more proactive work by the entire Costa Rican criminal justice system.

² The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in Appendix B of IIPA's 2009 Special 301 submission at www.iipa.com/pdf/2009spec301methodology.pdf. For more information on Costa Rica under the Special 301 review, check out Appendix D at <http://www.iipa.com/pdf/2009SPEC301USTRHISTORY.pdf> and Appendix E at <http://www.iipa.com/pdf/2009SPEC301HISTORICALSUMMARY.pdf> of this submission. To read IIPA's cover letter to this Special 301 submission, go to <http://www.iipa.com/pdf/2009SPEC301COVERLETTER.pdf>.

³ BSA's 2008 statistics are preliminary, represent the U.S. software publishers' share of software piracy losses in Costa Rica, and follow the methodology compiled in the Fifth Annual BSA and IDC Global Software Piracy Study (May 2008), available at www.bsa.org. 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.

⁴ MPAA's 2005 data reflects a methodology that analyzed both physical/"hard goods" and Internet piracy.

Police cooperation is positive but need more resources: The copyright industries continue to recommend that a specialized IP unit within the police (*fiscalia*) be created.

The recording industry's relations with municipal police units remain positive; raids are taking place and infringing materials are being seized (these raids just do not go forward for prosecution). The local anti-piracy team did carry out some actions last year in markets and warehouses with the support of municipal police forces. In 2008, the industry reports 21 raids, resulting in 63,046 music (mostly CD-R) seizures and 36,781 film (mostly DVD-R) seizures and the arrests of 13 individuals; this, however, is a drop from 2007's results when the industry carried out 87 music piracy raids and seized 1.3 million units.

Prosecutors will not take criminal copyright cases: The main impediments to effective criminal enforcement are simple. First, there remains a very negative attitude by the prosecutors in accepting and pursuing copyright cases. Second, there is general problem with lack of adequate resources in the government agencies necessary to conduct any kind of effective anti-piracy campaigns.

For years, the recording industry faced roadblocks by the Office of the Attorney General such that no major prosecutions were conducted nor were convictions issued for over three years. That problem with the Attorney General, along with the lack of *ex officio* provisions in the current law, made it impossible for the recording industry to run any kind of anti-piracy campaign. In 2008, the recording industry did work with the police to conduct some raids against hard goods piracy, but none of these cases have yet moved forward toward prosecution. And, as a result of the serious deficiencies in copyright enforcement, no convictions were issued during 2008, the recording industry reports.

Need for special IPR prosecutors: For years, the copyright industries have supported the creation of a specialized prosecutor's office with nationwide jurisdiction so that criminal IP cases could move forward more swiftly and with more specialized expertise. Historically, long delays in copyright enforcement cases continue to be a serious problem, since it normally takes several months between the filing of a complaint, the day a raid or inspection takes place, and the issuance of an official inspection report. During this time, there is little incentive for the infringer to resolve the problem. Moreover, there are significant delays between the time an official inspection report is issued in a particular case and the time a sentence is handed down in the same case. Procedural delays in criminal cases could be avoided if prosecutors were to request and judges were to order *ex parte* raids based exclusively on sufficient evidence offered by private plaintiffs ("*querellantes*"), as allowed by the Criminal Procedural Code.

Given the significant delays and lack of proficiency observed by prosecutors and judges, the creation of this special office remains a priority. The creation of a specialized prosecutor's office is extremely necessary because something is sorely needed to correct the current unacceptable situation with prosecutors. Legislation is needed, however, to authorize budgetary funding for such an office, and pending legislation to accomplish that has fallen off the docket. We are hopeful that the Ministry of Justice will take such action in 2009 to create these IP prosecutors.

The business software industry awaits the opening of a specialized IP section in the Attorney General's office, which has been announced as forthcoming. Until it is launched, criminal enforcement of software piracy will remain weak due to the extremely low priority it receives in the Attorney General's office and because prosecutors decline to bring criminal cases, citing difficult standards in the law (before its 2008 amendments).

Inadequate civil remedies: BSA reports that civil procedures are very slow and onerous. In order to get a preliminary injunction, the Law on Enforcement (*Ley de Observancia*, Law 8039) -- before its 2008 amendment -- required the rights holder to (a) prove it is the legitimate owner and (b) to deposit a bond to protect the target in case the action is found to have no legal basis. The law does not state the rate or the percentage to be used in setting the amount of the bond. Therefore, the judge has discretion in setting the bond. Usually, the minimum rate that is used is 25% of the amount of damages claimed (this 25% figure comes from the preventive embargo figure, a civil procedure). Another problem is that the judge may, prior to the injunction, inform the defendant of the proposed action, so he can oppose the action and request that a higher bond be set. BSA did not recently bring any civil cases in Costa Rica.

Querellantes and problems with prosecutors and judges in software cases: Despite the fact that private plaintiffs in criminal actions ("*querellantes*") are parties to the criminal action and thus have standing to participate in all proceedings, public prosecutors and judges normally do not allow private plaintiffs to actively participate during software piracy raids. Apart from violating procedural due process rights accorded to private plaintiffs ("*igualdad procesal del acusador particular*"), this

practice hampers the effectiveness of the prosecutors and jeopardizes the success of the action, since it prevents the plaintiffs and their experts from providing the much needed technical and licensing assistance that the prosecutors need to determine whether an infringement has occurred. This unfortunate practice existed in previous years and continued to occur in 2008. Criminal judges should accept the information and evidence offered by private plaintiffs, and order the raid if such information and evidence is sufficient, without requesting prior investigation reports from the Judicial Investigation Office (OIJ); this procedure is consistent with Costa Rican legislation.