

# INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE



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September 14, 2001

Ms. Gloria Blue  
Executive Secretary  
Trade Policy Staff Committee  
Office of the U.S. Trade Representative  
Room F516  
600 17<sup>th</sup> Street NW  
Washington, DC 20508

Re: Request for Public Comments on the  
Caribbean Basin Economic Recovery  
Act and the Caribbean Basin Trade  
Partnership Act: Report to Congress, 66  
Fed. Reg. 42250 (August 10, 2001)

To the Committee:

The Trade Policy Staff Committee (TPSC) of the Office of the United States Trade Representative (USTR) published a notice in the August 10, 2001 Federal Register requesting public comments on the upcoming Report to Congress on the Caribbean Basin Economic Recovery Act and the Caribbean Basin Trade Partnership Act. The International Intellectual Property Alliance (IIPA) hereby submits our comments on the intellectual property-related aspects of the CBI program, as amended by the CBTPA. This letter tracks a very similar submission IIPA made on June 29, 2001 to the International Trade Commission on this same topic.

## The International Intellectual Property Alliance

IIPA is a coalition of seven trade associations (listed below) that collectively represent the U.S. copyright-based industries -- the motion picture, music and recording, business and entertainment software, and book publishing industries -- in bilateral and multilateral efforts to improve copyright laws and enforcement around the world. These associations represent over 1,900 U.S. companies producing and distributing materials protected by copyright laws throughout the world -- all types of computer software including business software and entertainment software (such as video game CDs and cartridges, personal computer CDs and multimedia products); motion pictures, television programs, home videocassettes and DVDs; music, records, CDs and audiocassettes; and textbooks, trade books, reference and professional

publications and journals (in both electronic and print media). These U.S. copyright-based industries represent the leading edge of the world's high technology, entertainment and publishing industries.<sup>1</sup>

To combat the twin problems of piracy and market access barriers around the world, and especially in developing countries, the U.S. copyright-based industries joined with the Administration and Congress to fashion new legislation and negotiating tools. IIPA and its members have supported various trade tools with intellectual property rights (IPR) provisions over the years, including the CBERA (also known as the Caribbean Basin Initiative or CBI), the Generalized System of Preferences Program (GSP), Special 301, Section 301, the Andean Trade Preferences Act (ATPA), the U.S.-Caribbean Trade Partnership Act (CBTPA) and the African Growth Opportunities Act (AGOA).

### **The CBERA Program and the CBTPA are Important IPR Trade Tools**

The 1983 enactment of the CBERA<sup>2</sup> was a key point in the use of U.S. trade policy to promote exports of products and services protected by copyright, patents, trademarks, and other intellectual property laws. For the first time, Congress explicitly linked trade benefits to intellectual property protection by beneficiary countries. Under CBERA program, countries can only receive trade preferences if they satisfy statutory criteria which include intellectual property rights (IPR) standards. The CBERA IPR provisions contain both mandatory and discretionary criteria.

Last year, Congress passed the Trade and Development Act of 2000 which enhanced trade benefits for Caribbean and Central American countries.<sup>3</sup> Known as the United States-Caribbean Basin Trade Partnership Act (CBTPA), Title II of this law amended the CBERA<sup>4</sup> to authorize the President to designate countries in this region to be eligible for preferential tariff treatment for certain articles by (1) extending duty-free and quota-free treatment for certain textile and apparel goods and (2) extending NAFTA-equivalent tariff treatment to a number of other products previously excluded from the CBERA program. In order to qualify for these benefits, the countries must meet certain designation criteria. Specifically, to be a "CBTPA beneficiary country," a country must meet the original CBERA criteria which include two IPR criteria, three mandatory and two discretionary.

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<sup>1</sup> According to the Copyright Industries in the U.S. Economy: The 2000 Report, prepared for the IIPA by Economists, Inc., these core copyright industries accounted for \$457.2 billion in value added to the U.S. economy, or approximately 4.94% of the Gross Domestic Product (GDP) in 1999 (the last year for which complete data is available). The total copyright industries<sup>1</sup> accounted in 1999 for \$677.9 billion in value added, or approximately 7.33% of GDP. The core copyright industries' share of the GDP grew more than twice as fast as the remainder of the U.S. economy between 1977 and 1999 (7.2% vs. 3.1%). Employment in the core copyright industries grew at close to three times the employment growth in the economy as a whole between 1977 and 1999 (5.0% vs. 1.6%). More than 4.3 million workers were employed by the total copyright industries, about 3.24% of the total U.S. work force, in 1999. The core copyright industries accounted for an estimated \$79.65 billion in foreign sales and exports in 1999, a 15% gain over the \$69.21 billion generated in 1998. IIPA's press release on the issuance of this report is available on IIPA's website, at [http://www.iipa.com/copyright\\_us\\_economy.html](http://www.iipa.com/copyright_us_economy.html).

<sup>2</sup> See Section 212 of the Caribbean Basin Economic Recovery Act, Pub. L. No. 98-67 (codified at 19 U.S.C. 2701 et seq.).

<sup>3</sup> Trade and Development Act of 2000, Pub. L. 106-200 (May 18, 2000).

First, regarding the mandatory criteria, the CBERA requires that beneficiary country status be denied if such country has nationalized, expropriated or otherwise seized ownership or control of property owned by a U.S. citizen (19 U.S.C. § 2702(b)(2)(A)) or has taken steps to repudiate or nullify any intellectual property (19 U.S.C. § 2702(b)(2)(B)). Furthermore, if a government-owned entity broadcasts U.S. copyrighted material, including films or television material, belonging to United States copyright owners without their consent (19 U.S.C. § 2702(b)(5)), the President shall not designate that country.<sup>5</sup>

Second, beneficiary countries must meet the two discretionary IPR criterion of the CBERA, found 19 § U.S.C. 2702(c)(9) and (10). According to these provisions, the President shall take into account

- (9) the extent to which such country provides under its law adequate and effective means for foreign nationals to secure, exercise, and enforce exclusive rights in intellectual property, including patent, trademark, and copyright rights;
- (10) the extent to which such country is prohibits its nationals from engaging in the broadcast of copyrighted materials, including films or television material, belonging to United States copyright owners without their express consent; [...]

The criterion requiring “adequate and effective” protection of intellectual property rights, including copyright protection and enforcement, is a flexible one that changes over time toward higher standards.

In fact, the U.S. Congress expanded the level of the intellectual property rights provisions when it passed the CBPTA. There Congress took the opportunity to spell out what it believes is covered by the “adequate and effective” criteria. Section 213(b)(5)(B)(ii) of the CBTPA (codified at 19 U.S.C. 2703(b)(5)(B)(ii) defines the IPR-related discretionary eligibility criteria to include:

the extent to which the country provides protection of intellectual property rights consistent with or greater than the protection afforded under the Agreement on Trade-Related Aspects of Intellectual Property Rights described in section 101(d)(15) of the Uruguay Round Agreements Act.

The reference to “greater than” TRIPS is explained in the conference report as follows:

With respect to intellectual property protection, it is the intention of the conferees that the President will also take into account the extent to which potential beneficiary countries are providing or taking steps to provide protection of intellectual property rights comparable to the protections provided to the United States in bilateral intellectual property agreements.<sup>6</sup>

Accordingly, each country must re-meet all the CBERA criteria as well as the explicit TRIPS-or-greater criteria and bilateral IPR agreement standards in order to

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<sup>5</sup> IIPA believes that the CBI program would be strengthened further if the statute were amended to classify explicitly the violation of a trade agreement as a mandatory criterion.

<sup>6</sup> See Conference Report of the House of Representatives on the Trade and Development Act of 2000 [to accompany H.R. 434], Joint Explanatory Statement of the Committee of Conference on Subtitle B—Trade Benefits for Caribbean Basin Countries.

enter the CBTPA. However, as a matter of political reality, the President declared all 24 current CBERA beneficiaries as eligible CBTPA beneficiary countries on October 2, 2000.<sup>7</sup>

Nevertheless, it is clear that many of the CBTPA-eligible countries fail to meet the higher IPR standards elaborated under the CBTPA.<sup>8</sup> These countries should be on notice that they must take appropriate action, both in terms of reforming their legislation as well as enforcing their laws, to meet their “part of the bargain” in receiving these unilateral preference trade benefits.

### **The Economic Impact of Copyright Piracy and the Need for Adequate and Effective Copyright Protection and Enforcement in this Region**

Over the past few years, several Central American and Caribbean nations have taken positive steps toward achieving this goal by amending their copyright laws or passing entirely new laws. For example, the Bahamas, Costa Rica, El Salvador, Guatemala, Honduras, Jamaica, Nicaragua, Panama, St. Lucia and Trinidad & Tobago have passed new copyright legislation in recent years. It is important to note that legislative reform alone is not sufficient to meet the CBERA standard of “adequate and effective protection.”

#### **Overview of copyright piracy in this region**

IIPA believes that the most immediate problem in the Central American and Caribbean, as is the case throughout the Americas, is the failure of many of the countries to adequately enforce their existing copyright laws. High levels of piracy — of films, television programs, home videocassettes, music, sound recordings (audiocassettes and CDs), business, entertainment and multimedia software on all platforms, textbooks, trade books, reference and professional publications and journals — hurt both U.S. and local creators.

For example, the unauthorized reception and retransmission of U.S. domestic satellite signals in Central America and the Caribbean region remains a priority concern to the U.S. motion picture industry. Without authorization from copyright owners, cable

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<sup>7</sup> “USTR Announces AGOA/CBI Country Designations,” Press Release 00-67, Office of the United States Trade Representative, available at <http://www.ustr.gov/releases/2000/10/00-67.pdf>. See also 65 Fed. Reg. 60236 (Oct. 10, 2000). The USTR was authorized to make additional determinations regarding these countries’ abilities to implement certain customs procedures before the CBTPA preferential duties were activated. Also on October 2, 2000, USTR determined that Belize, Costa Rica, Dominican Republic, El Salvador, Guatemala, Haiti, Honduras, Jamaica, Nicaragua, and Panama were making substantial progress toward implementing and following the customs procedures required by the CBTPA and were therefore immediately qualified for the enhanced trade benefits. Subsequent designations have also been announced.

<sup>8</sup> On July 17, 2000, the IIPA filed comments with USTR responding to its June 19, 2000 public notice regarding the eligibility criteria for CBTPA beneficiaries. There we outlined our views on the eligibility of certain countries with respect to their compliance with the IPR criteria of the CBTPA. IIPA recommended that the Dominican Republic, Costa Rica, El Salvador and Bahamas should not be designated as eligible CBTPA countries, given the unacceptable copyright-related situations in each country. We also urged that full review of the 20 other countries’ satisfaction of the CBTPA IPR criteria be conducted before any benefits were granted. IIPA’s July 20 filing is available on our website at [http://www.iipa.com/pdf/2000\\_Jul26\\_CBTPA.pdf](http://www.iipa.com/pdf/2000_Jul26_CBTPA.pdf).

system operators, hotels, resorts, bars and homeowners have erected satellite dishes to intercept programming intended for reception with the U.S. This signal theft harms the theatrical exhibition of motion pictures in these markets and slows the development of a legitimate home video market as well. In addition, video piracy remains a problem throughout the region.

Business software piracy involves counterfeiting, resellers, mail order houses, bulletin boards, and end-user piracy. The greatest threat comes from end-user piracy, where typically a corporate or institutional use copies software onto the hard disks of many more computers than the number authorized. End-user piracy occurs in government, education, and business enterprises throughout this region. It is imperative that software producers have access to both criminal and civil *ex parte* search remedies.

Piracy of sound recordings and music remains high in this region. While audiocassette piracy (analog) has been the preferred business of pirates in recent years, the industry reports that the levels of CD piracy are rising in this region. The increased sale of CD-R burners is a recent development in the entire region which has elevated piracy levels for sound recordings.

The U.S. videogame industry suffers from inadequate enforcement by governmental and judicial authorities in the region. In particular, Panama has served as a major transshipment point for pirated and counterfeit video game products on all platforms, including cartridges, personal computer CD-ROMs and multimedia products.

The major forms of piracy afflicting the U.S. book publishing industry in the region are commercial and photocopying piracy. Photocopying shops near universities often fill requests for illegal reproductions of entire textbooks. This problem has been reported throughout much of Central America as well as the Dominican Republic.

A chart outlining the estimated trade losses due to piracy of U.S. copyrighted materials (in millions of U.S. dollars) and estimated levels of piracy for 2000 in some of the CBERA countries appears below.

	Motion Pictures		Records & Music		Business Applications <sup>9</sup>		Entertainment Software		Books	TOTAL LOSSES (\$millions)
	Loss	Video Piracy Level	Loss	Piracy Level	Loss	Piracy Level	Loss	Piracy Level	Loss	
<b>Costa Rica</b>	2.0	40%	3.0	40%	14.9	68%	0.2	50%	NA	42.0
<b>Dominican Republic</b>	2.0	60%	2.0	80%	6.7	68%	6.0	NA	1.0	17.7
<b>El Salvador</b>	2.0	50%	5.0	40%	9.7	79%	0.1	50%	1.0	17.8
<b>Guatemala</b>	2.0	60%	4.0	60%	12.3	77%	0.1	60%	2.3	20.7
<b>Honduras</b>	NA	NA	NA	NA	2.0	68%	NA	NA	NA	2.0+
<b>Nicaragua</b>	NA	NA	NA	NA	2.1	78%	NA	NA	NA	2.1+
<b>Panama</b>	6.0	20%	NA	NA	8.2	64%	NA	NA	NA	8.2+

IIPA, in our February 2001 Special 301 submission to the U.S. Trade Representative (USTR), focused on specific developments in five countries in the region: Costa Rica, Dominican Republic, El Salvador, Guatemala and the Bahamas. Copies of these full reports are attached to this submission. They can also be accessed at the IIPA website at <http://www.iipa.com/countryreports.html>. The following paragraphs summarize the problems faced by U.S. copyright industries in these five countries.

**COSTA RICA:** Criminal copyright enforcement efforts by Costa Rican authorities continue to decline. Prosecutorial and judicial delays have stymied the hopes of any tangible progress, especially in San José. Delays in judicial proceedings, lack of official investigators and public prosecutors specialized in intellectual property crimes, as well as the drastic budget cuts imposed on the judiciary caused serious enforcement problems in 2000 which are continuing in 2001. On the legislative front, efforts to raise the level of criminal sanctions for copyright piracy took a step backward. Over the objection of the copyright industries, Costa Rica passed intellectual property legislation in October 2000 which amended certain procedures and sanctions in intellectual property rights cases.

As a result, some industries already report difficulties in bringing criminal cases to prosecutors under this amended code. In the 2001 Special 301 review, IIPA recommended that Costa Rica be elevated to the Priority Watch List. On April 30, 2001, USTR agreed with IIPA's recommendation and also scheduled an "out of cycle" review for the Fall of 2001. IIPA has embarked on providing such an update on Costa Rican developments to USTR.

**DOMINICAN REPUBLIC:** As a result of lack of progress in both legislative reform and effective enforcement, IIPA filed a June 1999 petition with the U.S. government to initiate a review under the Generalized System of Preferences (GSP)

<sup>9</sup> BSA estimates for 2000 are final and reflect estimated U.S. losses only. BSA's losses for countries' entire market, include the local chain, can be found in the Sixth Annual BSA Global Software Piracy Study (May 2001), available at [www.bsa.org](http://www.bsa.org).

and CBERA trade program of the eligibility of the Dominican Republic to participate in these programs due to its failures to provide adequate effective copyright protection for U.S. copyright owners and to provide equitable and reasonable market access. A lack of effective legal mechanisms – such as low criminal penalties, very few criminal cases prosecuted, no civil *ex parte* remedy, high judicial bonds -- proved to be significant barriers to effective copyright enforcement. The IIPA's petition was accepted, hearings were held, and the review remains ongoing. IIPA notes that the leverage provided by this review has helped foster progress in-country. The Dominican Republic adopted a new copyright law in October 2000, fulfilling many years of effort to replace its inadequate 1986 copyright law. This legislative achievement represents 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 in the Dominican Republic. The effective implementation and enforcement of the new copyright law is critical to the copyright industries, which have struggled against widespread and endemic copyright piracy in the Dominican Republic for more than a decade. The copyright industries expect that the new enforcement tools and remedies provided in the new copyright law will bolster anti-piracy efforts, which will result in lowering the high piracy levels.

**EL SALVADOR:** 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 the Salvadoran criminal authorities to bring software anti-piracy actions. Despite increased raid activity by law enforcement authorities during the end of 2000 and early 2001, piracy levels remain high. For the business software industry, the estimated piracy rate in El Salvador is 79%, one of the highest in Latin America. To make matters worse, a bill is still 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.

**GUATEMALA:** The copyright industries continue to confront high piracy levels and inadequate copyright enforcement in Guatemala. Recent legislative reform undercut criminal sanctions and civil remedies for copyright infringement. In September 2000, amendments to the Guatemala copyright law were adopted in Decreto 56-2000, and entered into effect on November 1, 2000. On a positive note, this law reinstated "public" prosecution of copyright crimes; this issue had been at the top of the copyright industries' agenda for years. The Decreto also implemented certain requirements of

the WIPO treaties. Unfortunately, the amendments also seriously weakened existing civil and criminal remedies. Criminal penalties were substantially decreased, and the statutory damages provision was removed entirely. Unfortunately, the copyright law amendments have done little to improve copyright enforcement in-practice in Guatemala. The prosecutors (*fiscalías*) are overburdened and understaffed; it currently takes at least four weeks to obtain a search and seizure order to raid a suspected copyright infringer. This problem could be resolved with the creation of a Special Prosecutor's Office for intellectual property crimes; the Guatemalan government has until November 1, 2001 to create this office. Copyright piracy levels remain high for all industry sectors.

**THE BAHAMAS:** In January 2000, the Government of the Bahamas implemented its copyright law. The law included an overbroad compulsory license that violated numerous international copyright standards and established an unacceptable precedent. Cable operators were authorized to downlink and retransmit pay television signals from the U.S., including via the Internet. Bilateral negotiations between the governments took place during 2000. The Bahamas agreed to narrow the scope of its compulsory license to permit rebroadcast via cable only of copyright works that are broadcast free- over-the-air. The Bahamas has taken the first steps toward correcting these problems by introducing amending legislation, but the issue has not been finally resolved. Close attention must be paid to two issues in particular: (1) monitoring the adoption of the copyright amendment legislation recently presented to parliament, and (2) ensuring that consultations between the Copyright Royalty Tribunal and U.S. rightholders result in more equitable remuneration for the compulsory licensing of free-over-the-air broadcasts of copyrighted works. Prompt and effective implementation of bilateral agreements is a primary concern to all the U.S. copyright-based industries. IIPA understands that no significant progress has yet been made on these issues, and the Bahamas is scheduled for a Special 301 "out of cycle" review this Fall.

## **Conclusion**

IIPA appreciates this opportunity to provide the Trade Policy Staff Committee with information on the copyright aspects of the CBERA program. We look forward to working with the Administration and Congress to increase the effectiveness of this important trade policy tool to tackle copyright piracy and improve copyright reform efforts in this region.

Respectfully submitted,

Maria Strong  
Vice President and Associate General Counsel  
International Intellectual Property Alliance



## APPENDIX

IIPA submitted detailed reports on the following five countries in its February 16, 2001 submission to the U.S. Trade Representative (USTR) in its annual "Special 301" review. Copies of these reports are appended herein:

Costa Rica  
Dominican Republic  
El Salvador  
Guatemala  
The Bahamas

Country reports are available on the IIPA website at <http://www.iipa.com/countryreports.html> and for these five, specifically at:

<http://www.iipa.com/rbc/2001/2001SPEC301BAHAMAS.pdf>

<http://www.iipa.com/rbc/2001/2001SPEC301COSTARICA.pdf>

<http://www.iipa.com/rbc/2001/2001SPEC301DOMREPUBLIC.pdf>

<http://www.iipa.com/rbc/2001/2001SPEC301ELSALVADOR.pdf>

<http://www.iipa.com/rbc/2001/2001SPEC301GUATEMALA.pdf>