



June 30, 2003

Secretary
International Trade Commission
500 E Street SW
Washington, DC 20436

Investigation No: 334-227
Re: Annual Report on the Impact of the Caribbean
Basin Economic Recovery Act on U.S.
Industries, Consumers and Beneficiary
Countries, 68 Fed. Reg. 19847 (April 22, 2003)

To the Commissioners:

The International Intellectual Property Alliance (IIPA) takes this opportunity to respond to the ITC's request for comments in preparation of its Annual Report on the impact of the Caribbean Basin Economic Recovery Act on U.S. industries, consumers and beneficiary countries.

About the IIPA

The International Intellectual Property Alliance (IIPA) is a private sector coalition formed in 1984 to represent the U.S. copyright-based industries in bilateral and multilateral efforts to improve international protection of copyrighted materials. IIPA is comprised of six trade associations (listed below), each representing a significant segment of the U.S. copyright community. These member associations represent over 1,100 U.S. companies producing and distributing materials protected by copyright laws throughout the world – all types of computer software including business applications software and entertainment software (such as videogame CDs and cartridges, personal computer CD-ROMs and multimedia products); theatrical films, television programs, home videos and digital representations of audiovisual works; music, records, CDs, and audiocassettes; and textbooks, tradebooks, reference and professional publications and journals (in both electronic and print media).

Actual or Probable Effect of the CBERA on the U.S. Economy

Section 215(a) of the CBERA requires that the ITC submit biennial reports to the Congress and the President regarding the actual and/or probable impact the CBERA has and/or will have on the U.S. economy generally and on the domestic industries affected by the Act.

IIPA cannot point to specific attributes connecting the strength of the U.S. copyright-based industries here in the U.S. to the actual implementation of the CBERA. At the same time, we cannot say definitively that there has not been some positive economic impact created by the CBERA over the last two decades.

We can, however, confidently conclude that comprehensive, modern copyright laws, combined with effective enforcement of those laws, are the twin pillars necessary for copyright industries – both U.S. and local industries – to flourish. Increasingly, many copyright sectors look to grow their markets overseas. As a result, the IPR standards in the CBERA (as amended) have provided, and can continue to provide, a good foundation for these eligible countries to improve both their copyright laws and enforcement mechanisms, in order to protect both their domestic rightholders as well as foreign rightholders.

The U.S. copyright industries are major contributors to the U.S. economy. In the United States, the domestic copyright industries constitute one of the most vibrant sectors of our economy. In April 2002, the IIPA released an economic report entitled Copyright Industries in the U.S. Economy: The 2002 Report, the ninth such study written by Stephen Siwek of Economists Inc. This report details the economic impact and contributions of U.S. copyright industries to U.S. Gross Domestic Product, employment, and trade. The latest data show:

- In 2001, the U.S. copyright industries accounted for 5.24 percent of U.S. Gross Domestic Product (GDP), or \$535.1 billion – an increase of over \$75 billion from 1999 and exceeding 5 percent of the economy and one-half trillion dollars for the first time.
- Over 24 years (1977-2001), the U.S. copyright industries' share of the GDP grew more than twice as fast as the remainder of the U.S. economy (7 percent vs. 3 percent).
- Between 1977 and 2001, employment in the U.S. copyright industries more than doubled to 4.7 million workers, which is now 3.5 percent of total U.S. employment.
- The U.S. copyright industries' average annual employment grew more than three times as fast as the remainder of the U.S. economy (5 percent vs. 1.5 percent).
- In 2001, the U.S. copyright industries achieved estimated foreign sales and exports of \$88.97 billion, again leading all major industry sectors, including: chemicals and allied products, motor vehicles, equipment and parts, aircraft and aircraft parts, and the agricultural sector.

IIPA's report reflects almost yearly increases regarding the contribution of the "core" copyright industries to the U.S. GDP.¹

Economic Costs of Copyright Piracy in the Central American and Caribbean Region

Strong and comprehensive copyright protection and enforcement are the key ingredients to robust economic growth and development. Copyright gives creators the basic property rights that enable them to authorize and control the copying, distribution, performance and display of the works they create. Exercising these exclusive rights themselves, or licensing someone else to exercise them, is the main way that creators earn a living and generate revenue. That revenue is needed to underwrite the hefty investments related to producing and distributing motion pictures;

¹ IIPA's Copyright Industries in the U.S. Economy: The 2002 Report can be accessed in its entirety at the IIPA website at http://www.iipa.com/copyright_us_economy.html.

developing, testing and maintaining computer software; scouting, recording, and promoting musical talent; designing entertainment software; editing and distributing new books and journals; and all the other activities that are indispensable to bringing creative products to the public. Inadequate laws and ineffective anti-piracy enforcement adversely affects employment, job creation and revenues, both in the United States as well as abroad.

With many of these U.S. companies increasingly relying on foreign licensing and sales revenues, piracy combined with inadequate enforcement, has become a major impediment to this continued revenue growth and has become the major market access barrier for the copyright industries. The challenges faced by the copyright industries and national governments to enforce copyright laws grow exponentially as the forms of piracy shift from hard-goods and toward digital media and unauthorized electronic transmissions. Over the last two years in particular, the unauthorized “burning” of CDs has grown rapidly throughout Latin America and the Caribbean, thus challenging the ability of legitimate businesses engaged in the creation and distribution of copyright materials – sound recordings, computer software, videogames, books, and to a lesser extent, DVDs of audiovisual works – to compete against these pirated products. Inadequate and ineffective copyright enforcement has failed to stem this problem and continues to distort trade in this region. Criminal and civil justice systems must work in a transparent and expeditious manner and apply deterrent penalties and remedies.

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 these 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 software, and entertainment 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 system operators, broadcast television, hotels, resorts, bars and homeowners have erected satellite dishes to intercept programming intended for reception with the United States. In other cases, videos and DVDs are used at the station head-end to provide broadcast or cablecast programming, all done without authorization. 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 at the retail level 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 user 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. While audiocassette piracy (analog) has been the preferred business of pirates in recent years, the industry reports that the levels of CD piracy (digital) are rising throughout this region. The increased sale of CD-R burners is a recent development which has elevated piracy levels for sound recordings.

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

Recently, IIPA provided updates on the copyright situation in four CBERA countries in the context of the 2003 Annual Special 301 Review. A chart outlining a conservative \$54 million in estimated trade losses due to piracy of U.S. copyrighted materials in just three of the CBERA countries appears below:

2002 ESTIMATED TRADE LOSSES DUE TO COPYRIGHT PIRACY
(in millions of U.S. dollars)
and LEVELS OF PIRACY in SELECTED CBERA COUNTRIES

	Motion Pictures		Records & Music		Business Applications ²		Entertainment Software		Books	TOTAL LOSSES
	Loss	Video Piracy Level	Loss	Piracy Level	Loss	Piracy Level	Loss	Piracy Level	Loss	
Bahamas	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA
Costa Rica	2.0	40%	7.0	50%	8.3	61%	NA	NA	NA	17.3
Dominican Republic	2.0	60%	6.9	65%	4.4	61%	NA	NA	1.0	14.3
Guatemala	2.0	60%	4.8	NA	13.2	61%	NA	NA	NA	22.5

NA: Not Available

Copies of IIPA's four 2003 country 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 four countries.

DOMINICAN REPUBLIC: The Dominican Republic remains on the USTR Special 301 "Priority Watch List" and IIPA continues to request high-level bilateral engagement between the U.S. and the Dominican Republic to address the longstanding problems of high piracy levels and erratic enforcement experienced by some of our industries. In June 1999, the IIPA filed a petition with the U.S. government to initiate a review under the Generalized System of Preferences (GSP) and CBERA trade programs 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. The U.S. government accepted IIPA's petition, public hearings were held, and the review remains ongoing. IIPA notes that the leverage provided by this GSP/CBERA review did help

² BSA estimates for 2002 are final and reflect losses to U.S. publishers only; they do differ from the BSA trade loss numbers which it releases in its global survey. The BSA global numbers reflect losses to (a) all software publishers in that country and (b) losses to distributors/retailers in that country. BSA's latest report is its Eighth Annual BSA Global Software Piracy Study (2003), which is available at www.bsa.org.

foster progress in-country; for example, the Dominican Republic adopted a new copyright law in October 2000, fulfilling many years of effort to replace its inadequate 1986 copyright law. That legislative achievement 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 in the Dominican Republic.

However, progress on actual enforcement measures to deter piracy in-practice has been slow, and severe piracy problems remain for some of the copyright industries. The motion picture industry reports that broadcast piracy in the Dominican Republic remains the worst in the entire hemisphere. Administrative authorities (including the copyright office and the telecommunications authority) have met with difficulty in taking actions against certain television broadcast stations. In April 2003, a new anti-piracy campaign was initiated in which these authorities began inspecting broadcast stations to verify they had contracts to authorize broadcasting of all, including U.S., programming. The authorities have been preparing criminal complaints against several broadcasting stations, which we understand were recently presented to the prosecutors for further action. The motion picture industry is also concerned about the fair and transparent handling of some its video piracy cases, which have, until recently, been progression rather smoothly. The recording industry reports it is making some progress regarding seizing pirate product and obtaining "denuncias" (criminal complaints) of persons arrested during the raids. However, the recording industry experiences a roadblock at the judicial level. Approximately 17 adjudicated record piracy cases (some resulting in sentences imposing jail time of 3 months to one year) are all on appeal (some cases date back to 1999); as a result, this industry reports little deterrence in the Dominican criminal system. Meanwhile, the business software industry reports positive progress on criminal and administrative enforcement measures it takes to combat end-user and retail software piracy.

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 in 2000 and 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. Shortly thereafter, The Bahamas took its first steps toward correcting these problems by introducing amending legislation, but the legislation has stalled and other regulatory issues have not been satisfactorily resolved. Close attention must be paid to two issues in particular: (1) monitoring the adoption of the copyright amendment legislation 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. Because of the severe lack of progress by the Bahamas in implementing its copyright-related commitments, the U.S. Trade Representative elevated it to the Special 301 "Priority Watch List" on May 1, 2003.

COSTA RICA: Effective criminal copyright enforcement is the predominant problem in Costa Rica. Prosecutorial and judicial delays and the lack of specialized investigators in copyright cases present particular problems, although in early 2002, the Costa Rican government did announce steps to improve IPR enforcement. On the legislative front, Costa Rica passed intellectual property legislation in October 2000 (over the objection of the copyright industries)

which amended certain procedures and sanctions in intellectual property rights cases. Amendments to improve criminal sanctions for copyright infringement and to enhance the enforcement infrastructure remain pending. Costa Rica presently appears on USTR's Special 301 "Watch List."

GUATEMALA: The copyright industries continue to confront high piracy levels and inadequate copyright enforcement in Guatemala. Legislative reform in 2000 offered both positive steps forward and big steps backward. Amendments to the Guatemala copyright law (Decreto 56-2000) entered into effect on November 1, 2000. On a positive note, the 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. The software industry reports that there is no effective way to maintain the confidentiality of a civil *ex parte* search petition, thus completely undercutting the usefulness of this TRIPS-required tool. Guatemala presently is on USTR's Special 301 "Watch List."

Copyright Law and Enforcement Standards in the CBERA, as Amended

The 1983 enactment of the CBERA³ was a pivotal moment in time regarding 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.

Three years ago, Congress passed the Trade and Development Act of 2000 which enhanced trade benefits for Caribbean and Central American countries.⁴ Known as the United States-Caribbean Basin Trade Partnership Act (CBTPA), Title II of this law amended the CBERA⁵ 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.

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

³ See Section 212 of the Caribbean Basin Economic Recovery Act, Pub. L. No. 98-67 (codified at 19 U.S.C. 2701 *et seq.*).

⁴ Trade and Development Act of 2000, Pub. L. 106-200 (May 18, 2000).

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.⁶ 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.

The U.S. Congress expanded the level of the intellectual property rights provisions when it passed the CBTPA in 2000. 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.⁷

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 enter the CBTPA. However, as a matter of political reality, the President declared all 24 CBERA beneficiaries as eligible CBTPA beneficiary countries on October 2, 2000.⁸

⁶ 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.

⁷ 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.

⁸ “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).

Simply put, many of the CBTPA-eligible countries fail to meet the higher IPR standards – substantive levels as well as enforcement performance -- elaborated under the CBTPA, as amended.⁹ All countries in this region 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.

Copyright Law Reform in the CBERA Countries

Copyright protection accomplishes a wide variety of public goals: it rewards creators; it develops local economies; it creates local jobs and income; it promotes foreign investment; it generates tax revenues; it establishes a structure for commercial practices; and it supports integration with the world trading system. In recent 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, the Dominican Republic, El Salvador, Guatemala, Honduras, Jamaica, Nicaragua, Panama, St. Lucia and Trinidad & Tobago have passed new copyright law legislation and/or amendments.

One of the copyright industries’ most critical substantive challenges is to ensure that levels of protection available in any country extend to the important changes made by digital, networked environments. In order for protection to be “adequate and effective,” modern copyright laws must respond to this fundamental change by providing that creators have the basic property right to control the reproduction, distribution and transmission of their creations, whether those works are in analog or digital form and whether they are distributed as permanent copies or via transmission over electronic networks like the Internet. It is no longer sufficient, therefore, in the Internet and digital world, that countries merely meet their obligations under the WTO TRIPS Agreement.

The new means by which protected works can be reproduced digitally and globally transmitted electronically without authorization has given rise to the negotiation of the two new “Internet” treaties under the auspices of the World Intellectual Property Organization (WIPO). The WIPO Copyright Treaty (WCT) entered into force on March 6, 2002, and the WIPO Performances and Phonograms Treaty (WPPT) entered into force on May 20, 2002 and together they provide the legal infrastructure for this new digital and Internet environment. The U.S. government has been working at all levels to encourage countries to sign, ratify and implement both WIPO Treaties.¹⁰

Of the CBERA beneficiary countries, only Costa Rica, El Salvador, Guatemala, Honduras, Jamaica, Nicaragua, Panama and St. Lucia have deposited their instruments of ratification/accession with WIPO. All countries must implement these new obligations and IIPA

⁹ On July 17, 2000, the IIPA filed comments with USTR responding to its 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, recommending 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. See http://www.iipa.com/pdf/2000_Jul26_CBTPA.pdf.

¹⁰ Office of the U.S. Trade Representative, 2003 Special 301 Report, May 1, 2003, page 5, available at <http://www.ustr.gov/reports/2003/execsummary.pdf>.

again strongly recommends that the U.S. government strongly urge the other CBERA countries to promptly ratify these two WIPO treaties and implement their obligations into domestic law.

A brief word is needed about additional, regional copyright developments which affect the CBERA countries. The U.S. government, supported by the U.S. copyright industry, is seeking specific obligations (both substantive and enforcement-related) in the IPR chapter of the Free Trade Area of the Americas. IIPA and its members are on-the-record with respect to the high levels of protection we believe should be included in the FTAA IPR Chapter.¹¹ Similarly, comprehensive copyright-related provisions should be included in the IPR chapter in the U.S.-Central American Free Trade Agreement (CA-FTA).

Conclusions

IIPA believes that one of the most immediate, economic problems in this region is the failure of many of the Caribbean region countries to adequately and effectively enforce their current copyright laws. It is important to keep in mind that domestic copyright law reform, while critical to meeting the CBERA (as amended) IPR standards, is not sufficient in and of itself.

IIPA appreciates this opportunity to provide the ITC with the copyright-based industries' view on the economic impact of the CBERA. 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 General Counsel
International Intellectual Property Alliance

Attached: Country excerpts from IIPA's February 2003 Special 301 submission to USTR:
The Bahamas: <http://www.iipa.com/rbc/2003/2003SPEC301BAHAMAS.pdf>
Costa Rica: <http://www.iipa.com/rbc/2003/2003SPEC301COSTA%20RICA.pdf>
Dominican Republic: <http://www.iipa.com/rbc/2003/2003SPEC301DOMINICANREPUBLIC.pdf>
Guatemala: <http://www.iipa.com/rbc/2003/2003SPEC301GUATEMALA.pdf>

¹⁰ See IIPA, Public Comments on the Second Draft Consolidated Text of the Free Trade Area of the Americas (FTAA) Agreement, February 27, 2003, available at http://www.iipa.com/rbi/2003_Feb27_FTAA.pdf.