



November 15, 2007

Via email FR0803@ustr.eop.gov
Kent Shigetomi
Office of the U.S. Trade Representative
600 17th Street, NW., Room 523
Washington, DC 20508

Re: Public Comments to the TPSC on the Caribbean Basin
Economic Recovery Act and the Caribbean Basin Trade Partnership
Act: Report to Congress, 72 Fed. Reg. 60696 (October 25, 2007)

To the Trade Policy Staff Committee:

The International Intellectual Property Alliance (IIPA) takes this opportunity to respond to the request of the Trade Policy Staff Committee for comments in preparation of the President's biennial report to Congress on the impact of the Caribbean Basin Economic Recovery Act (CBERA) and the Caribbean Basin Trade Partnership Act (CBTPA) on U.S. industries, consumers and beneficiary countries.

The International Intellectual Property Alliance (IIPA) submits our comments regarding recent developments related to copyright piracy, legal reform and enforcement measures taken by CBERA members. This letter comments on the copyright-related provisions in the CBERA and notes recent copyright-related developments in the region.

About the IIPA

The IIPA is a coalition of seven trade associations (listed below), each representing a significant segment of the U.S. copyright-based industries. These member associations collectively represent over 1,900 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, trade books, 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 President 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.

The copyright-based industries are among the fastest growing and most productive of any sector of the U.S. economy, employing new workers in higher paying jobs faster than the rest of the economy, creating new revenue at rapid rates, and contributing \$110 billion to the economy through foreign sales and exports.

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 right holders as well as foreign right holders. Simply said, we can conclude that comprehensive, modern copyright laws, combined with effective enforcement of those laws, are necessary for the copyright industries – both U.S. and local industries – to flourish.

With respect to the strength of the copyright industries in our domestic economy, IIPA released earlier this year an economic report entitled *Copyright Industries in the U.S. Economy: The 2006 Report*, the eleventh 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 the following:

- The “core” U.S. copyright industries¹ accounted for an estimated \$819.06 billion or 6.56% of the U.S. gross domestic product (GDP) in 2005. These “core” industries were responsible for 12.96% of the growth achieved in 2005 for the U.S. economy as a whole (this means that the growth contributed by these core industries (12.96%) was almost double their current dollar share of GDP (6.56%)).
- The “core” copyright industries employed 5.38 million workers in 2005 (4.03% of U.S. workers) in 2005. And the report, for the first time, provides data on the estimated average annual compensation for a worker in the core copyright industries: \$69,839 in 2005, which represents a 40% premium over the compensation paid the average U.S. worker.
- Estimated 2005 foreign sales and exports of the core copyright industries increased to at least \$110.8 billion, leading other major industry sectors. Those sectors include: chemicals and related products (not including medicinal and pharmaceutical products); motor vehicles, parts and accessories; aircraft and associated equipment; food and live animals; and medicinal and pharmaceutical products.

CBERA Membership and Regional FTAs

The CBERA, launched in 1983, was substantially expanded in 2000 through the U.S.-Caribbean Basin Trade Partnership Act (CBTPA). As of a few years ago, there were 24 countries benefiting from the CBERA and CBTPA programs. As Free Trade Agreements enter into force, countries receiving preferential trade benefits under the GSP, CBERA and CBTPA programs are graduated, or removed, as eligible beneficiary countries for these trade programs (there may be some tariff lines which still receive some coverage for a small period of time). Over the past year, the CAFTA-DR has entered into effect with five of its six countries – Dominican Republic, El Salvador, Guatemala, Honduras and Nicaragua (not yet with Costa Rica).

As a result, there are now 19 CBERA beneficiary countries: Antigua and Barbuda, Aruba, Bahamas, Barbados, Belize, British Virgin Islands, Costa Rica, Dominica, Grenada, Guyana, Haiti, Jamaica, Montserrat, Netherlands Antilles, Panama, St. Kitts and Nevis, St. Lucia, St. Vincent and the Grenadines, and Trinidad and Tobago. According to the USITC’s DataWeb, these 19 countries imported \$2.59 billion under the CBERA program in calendar year 2006. Imports under CBERA for the first eight months of 2007 were up 8.0% compared to the same time period in 2006 -- to a total of \$1.85 billion.

¹ The “total” copyright industries include the “core” industries plus those that, under conservative assumptions, distribute such products or other products that depend wholly or principally on copyrighted materials. The “core” copyright industries are those that create copyrighted materials as their primary product. *The 2006 Report* is posted on the IIPA website at <http://www.iipa.com>.

Copyright Law and Enforcement Standards in the CBERA, as Amended

IIPA continues to report to the TPSC that, unfortunately, 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. 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.

As we have remarked before, the 1983 enactment of the CBERA² was a pivotal moment 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 because for the first time, Congress explicitly linked trade benefits to intellectual property protection by beneficiary countries. In 2000, Congress enacted the CBTPA, amending the CBERA 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.³ In order to qualify for these added benefits, the countries must meet certain designation criteria. Specifically, to be a “CBTPA beneficiary country,” a country had to meet the original CBERA criteria which include two IPR criteria, three mandatory and two discretionary.

The CBERA IPR provisions contain both mandatory and discretionary criteria. 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.⁴ 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:

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

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

⁴ 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.

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.⁵

The bottom line was that each country had to 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 CBERA beneficiaries (then 24 nations) as eligible CBTPA beneficiary countries on October 2, 2000.

Copyright Piracy in the Central American and Caribbean Region in 2005-2007

Piracy and ineffective enforcement: The most pressing problem for the copyright industries in the Central American and Caribbean region, as is the case throughout the Americas, is the failure of many of these countries to adequately enforce their existing copyright laws. Such enforcement efforts remain challenging for all countries in this region, including those which have completed FTAs with the U.S.

The unauthorized “burning” of CDs has grown rapidly throughout Central America and the Caribbean, 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. In addition, the copyright industries and national governments face increasing challenges to enforce copyright laws as the forms of piracy shift from hard-goods and toward digital media and unauthorized electronic transmissions via the internet.

IIPA has provided the U.S. government with public comments on recent developments in Costa Rica (in our 2007 Special 301 submission to USTR) and Panama (in recent IIPA comments to the USITC). For your ease, we append both these documents to this filing.⁶ Below is a summary of the copyright sectors’ major problems in this 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.

⁵ 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.

⁶ These two documents are also available on the IIPA website: IIPA’s 2007 Special 301 report on Costa Rica is posted at <http://www.iipa.com/rbc/2007/2007SPEC301COSTARICA.pdf>, and IIPA’s May 22, 2007 Panama letter is available at <http://www.iipa.com/pdf/IIPAPanamaFTALettertoITCEconomicEffectsfinal05222007.pdf>.

- **Piracy of sound recordings and music** remains high in this region. While audiocassette piracy (analog) had been the preferred business of pirates for many years, the industry reports that the levels of CD piracy and DVD piracy have plagued this region. The increased sale of CD-R and DVD burners are a recent development that continues to elevate piracy levels for sound recordings. As online distribution models for recorded music continue to develop, they compete against unauthorized music distributed on websites and via illicit file-sharing.
- **Satellite signal theft and cable piracy** continue to cause significant damage to the motion picture industry throughout the Caribbean. The unauthorized reception and retransmission of encrypted U.S. domestic satellite signals is widespread. Cable operators, homeowners, hotels, resorts and bars have erected satellite dishes to receive programming intended for reception only in the U.S., without obtaining the authorization from the copyright holders. Signal theft in this region has completely disrupted the orderly sequential distribution windows (i.e. release of motion pictures first to theaters, followed by home video, pay television and free television release) of MPA member company programming. As a result, theaters continue to be on the decline throughout the region. Signal theft also has harmed the establishment of a legitimate home video industry. **Video piracy** remains at significantly high levels throughout the region, and especially in Central America. Taking enforcement actions against street vendors and other distributors is often perceived by governments as unpopular steps. Finally, legislation to prohibit unauthorized **camcording** in theaters is needed in many of these countries.
- 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.
- The U.S. entertainment software industry suffers from inadequate enforcement by governmental and judicial authorities. Panama has in the past 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. The growth of **online gaming** is an important part of the legitimate market, and internet cafés promoting unlicensed games or illegally reproduced software threaten this growing market.

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.

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 in the Internet and digital world that countries merely meet their obligations under the WTO TRIPS Agreement. 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. Those countries

which have signed up for FTAs have obligations to improve their copyright and enforcement laws up to high standards.

The U.S. government has been working at all levels to encourage countries to sign, ratify and implement both WIPO Treaties.⁷ In this region, so far Costa Rica, Dominican Republic, 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 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.

In sum, bilateral improvement in heightening legal reform and enforcement measures has been accomplished in those countries which have entered into FTAs with the U.S. The IPR chapter in the CAFTA-DR and the Panama TPA contain high levels of substantive copyright obligations as well as specific enforcement mechanisms. As noted above, the challenge remains effective enforcement in-practice such that high levels of copyright piracy are significantly reduced.

Conclusion

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 IPR standards, is not sufficient in and of itself.

Furthermore, countries entering FTAs with the U.S. should act to enforce their current IPR laws, and not use the permitted transition periods to slacken those efforts against piracy. IIPA and its members strongly support the copyright- and enforcement-provisions in the IPR chapters of the CAFTA-DR and the Panama TPA.

Finally, IIPA appreciates this opportunity to provide the TPSC 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.

Sincerely,



Maria Strong
on behalf of the
International Intellectual Property Alliance (IIPA)

Attached: Costa Rica & Panama

⁷ See Office of the U.S. Trade Representative, 2007 Special 301 Report, April 30, 2007, page 7, posted at http://www.ustr.gov/assets/Document_Library/Reports_Publications/2007/2007_Special_301_Review/asset_upload_file230_11122.pdf.

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2007 SPECIAL 301 REPORT

COSTA RICA

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

EXECUTIVE SUMMARY

The copyright industries report that no significant improvement to halt widespread copyright piracy in Costa Rica occurred in 2006. Optical disc piracy is on the rise and street piracy remains pervasive. Most disturbingly, there has been little-to-no prosecutorial interest in pursuing criminal copyright cases, and this problem rests at the higher levels of the Costa Rican Government. Despite many efforts by copyright industries, including meetings with the Costa Rican ambassador to the U.S., to raise awareness about the level piracy and lack of enforcement, the Costa Rican Government has not taken any effective measures to address the issue. Further work will be needed to amend the legislative package which is being put forth to implement the CAFTA-DR IPR chapter. IIPA supports the Free Trade Process and urges Costa Rica to complete its ratification. To that end, proper implementation of the CAFTA-DR IPR Chapter, both in terms of copyright law and enforcement reform, is needed.

PRIORITY ACTIONS IN 2007

Enforcement

- Urge the Attorney General to instruct his prosecutors to process and expedite copyright violation cases, and promptly take action on the dozens of cases that have been submitted to his prosecutors.
- Reduce unwarranted delays in investigations and prosecutions.
- Reduce delays in sentencing in criminal copyright cases.
- Increase and apply vigorously criminal sanctions for copyright infringement (the improved statutory basis was included in the now defunct industry-supported Bill No. 15.076).
- Create a Public Prosecutor's Office specialized in IP matters (as found in Bill No. 15.077) and assign resources and personnel to the office.
- Improve training of enforcement officials and technical experts in Costa Rican agencies.
- Implement in-practice the software asset management practices in government agencies called for in the 2002 Decree.

Legislation

- Improve the proposed CAFTA-DR IPR implementation legislation (Bill No. 16.117) to match the obligations found in the CAFTA-DR IPR Chapter. If needed, resurrect and reintroduce Bill No. 15.076 which would bring back the "public action" for copyright infringements and extend felony sanctions for criminal copyright violations to a minimum of three years and a maximum jail time of five years (the maximum is now three years). FTA-compatible provisions on TPMs and RMIs should be included.
- Modify Bill No. 16.117 to delete "minimum statutory damage of one legal salary" as included in Article 40 which is insufficient and not a deterrent against piracy.
- Support adoption of Bill No. 15.077 which would create a Specialized IP Prosecutor Office.

COSTA RICA
Estimated Trade Losses Due to Copyright Piracy
(in millions of U.S. dollars)
and Levels of Piracy: 2002-2006¹

INDUSTRY	2006		2005		2004		2003		2002	
	Loss	Level								
Sound Recordings & Musical Compositions ²	15.1	60%	18.3	60%	NA	NA	7.2	56%	7.0	50%
Business Software ³	12.0	65%	10.0	66%	9.0	67%	10.0	68%	6.7	61%
Motion Pictures ⁴	NA	NA	2.0	100%	2.0	40%	2.0	35%	2.0	40%
Books	NA	NA								
Entertainment Software	NA	NA								
TOTALS	27.1		30.3		11.0		19.2		17.6	

IIPA and its members also support the U.S.-Central America-Dominican Republic Free Trade Agreement.⁵ 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 This FTA was signed on August 2, 2004, and entered into force with the U.S. on January 1, 2005.⁷ Costa Rica is the only CAFTA country which has not yet completed its ratification of this agreement. Also of note, Costa Rica 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.⁸ Once CAFTA is in force with Costa Rica, 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 Costa Rica 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 Estimated trade losses for the recording industry in 2002 reflect the impact of significant currency devaluation that year.

³ BSA's 2006 statistics are preliminary. They represent the U.S. publishers' share of software piracy losses in Costa Rica, 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.

⁷ USTR Press Release on CAFTA-DR Implementation, December 30, 2005 at http://www.ustr.gov/Document_Library/Press_Releases/2005/December/Statement_of_USTR_Spokesman_Stephen_Norton_Regarding_CAFTA-DR_Implementation.html.

⁸ During the first 11 months of 2006, \$106 million worth of Costa Rican products entered the U.S. under the duty-free GSP code, representing a 28.6% increase from the same period in 2005. In addition, \$959.9 million worth of Costa Rican goods entered the U.S. under the CBI, representing an increase of 60.3% from the same period in 2005, and \$321.7 million worth of Costa Rican goods entered the U.S. under the CBTPA.

COPYRIGHT PIRACY AND ENFORCEMENT IN COSTA RICA

IIPA and its members in recent years have identified numerous copyright enforcement deficiencies in the Costa Rican legal and enforcement system.⁹ Unfortunately, no progress was made in addressing these problems in 2006, and in fact, Costa Rican law enforcement authorities took several detrimental actions which undermine effective copyright enforcement

Piracy rates remained high in 2006: The recording industry reports that piracy of sound recordings and music continues to be rampant in Costa Rica, and the production of local talent has disappeared. CD-R burning is the most prevalent form of music piracy. The recording industry estimates piracy to be in excess of 60 percent of total units sold in the market mostly through street stands and flea markets, especially in San José, Heredia and Alajuela. Due to the lack of action of the Prosecutors in San Jose's metropolitan area, anti piracy efforts has been diverted to other areas such as Alajuela and Heredia where some police units and local governments are more receptive to industry complaints. There has been little to no action taken against Internet cafés. As a result, their growth has increased significantly, not only in the main cities, but also in the countryside.

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. Access to broadband Internet services constitutes a new medium for users to obtain unauthorized software from websites that offer low-priced pirate software for download. BSA's activities in Costa Rica include IPR training sessions, in coordination with the Judicial School. The motion picture industry reports that optical disc piracy (DVD) continues to grow, damaging legitimate theatrical and home video markets (MPA does not currently have an anti-piracy program in-country).

Enforcement remained very difficult in 2006: There are a variety of problems which interfere with effective copyright enforcement in Costa Rica. Some have been engrained in the system for years without resolution, and others have appeared within the past year. Simply put, enforcement of copyright infringement cases has declined, in both quantity and in quality. In general, lack of adequate resources to conduct an effective anti piracy campaign and the negative attitude from the prosecutors are the two main causes behind the disastrous situation of the enforcement of IPR in the country.

There have been no major prosecutions conducted or convictions issued in the last two years mainly because cases have not been pursued by prosecutors who apply the "non-significant-case" provision in the current Law on Enforcement. In addition, prosecutions remain weak because many pending cases were dropped by local prosecutors, as directed by the Attorney General in early 2005. As a result of this decision, 12 major music piracy cases were dropped by the prosecutors and all raids were conducted with the "voluntary" cooperation of the Municipal police. The business software industry also reports increased problems with enforcement due to the extremely low priority placed on copyright enforcement by the Attorney General's office.

Some legislative solutions to improve this situation remain pending (see discussion below), and include *ex officio* ("public") actions and creating a section of specialized IPR prosecutors. Unfortunately, the Government does not appear to be actively supporting these ideas.

Delays in criminal cases: Delays have recently turned into "no action," given the Attorney General's mandate to prosecutors not to bring IP cases. Historically, long delays in copyright enforcement cases continue to be a serious problem, since it normally takes several months

⁹ For more details on the history of bilateral engagement on copyright issues with Costa Rica, see Appendix D of this filing at <http://www.iipa.com/pdf/2006SPEC301USTRHISTORY.pdf> and Appendix E at <http://www.iipa.com/pdf/2007SPEC301HISTORICALSUMMARY.pdf>.

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.

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. 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.

Need for special IPR prosecutors: The creation of a specialized prosecutor’s office with nationwide jurisdiction has been urged by the copyright industries for years as a way which could significantly expedite IP criminal cases. Given the significant delays and lack of proficiency observed by prosecutors, judges and the OIJ, the creation of this office remains a priority. In addition, the copyright industries continue to support the need for these “link” prosecutors. Back in 2002, the Costa Rican General Prosecutor announced that 12 specialized “link” prosecutors, one for each public prosecutor’s office in the country, were going to be appointed to handle, “with priority,” intellectual property cases. Unfortunately such specialized IP prosecutors were not appointed, already existing prosecutors were given IP duties. The recording industry still supports the creation of a specialized prosecutor’s office because something is direly needed to correct the current unacceptable situation with prosecutors.

Inadequate civil remedies: BSA reports that civil procedures are very slow and onerous. In order to get a preliminary injunction, the *Ley de Observancia* (Law 8039) requires the rightsholder 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 say what is 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 use 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 bring any civil cases in 2006 in Costa Rica.

Copyright office reinstates the license of collecting society: The Head of the Copyright Office (*Registradora de Derecho de Autor*) in December 2005 revoked the license to the phonogram producers’ and performers’ collecting society based on a non-existent legal requirement. The collecting society for producers and performers (*Asociacion Costaricense de la Industria Fonografica y Afines*), also known as ACOGEF, had been operating for over a year. The revocation questioned the approval given by the same office (under the direction of a different director) to the original filing. As a result of this decision, ACOGEF stopped collecting all funds and issuing licenses for broadcasting and public performances, thereby in effect making international sound recordings free for use in Costa Rica. The parties applied reconsideration, and subsequently received notice that a reinstatement was issued

COPYRIGHT AND LEGAL ISSUES IN COSTA RICA

Given the higher standards of copyright obligations and enforcement measures contemplated in the TPA, however, Costa Rica will have to make additional reforms to its copyright and enforcement-related laws in order to fully comply (taking note that CAFTA-DR does contain transitional periods). Ideally a comprehensive initiative to integrate the enforcement provisions which were in Bill No. 15.076 plus adding comprehensive provisions to protect technological protection measures and rights management information would be advisable (but it is not known whether the current legislative environment would support such an idea). Especially important is increasing the minimum penalty of three years for all piracy crimes in order to secure deterrent sanctions.

CAFTA-DR Implementation and Bill No. 16.117: Costa Rica has developed legislation to implement the IPR provisions of CAFTA. Bill No. 16.117 was presented to Congress in February 2006,¹⁰ then processed by the Legal Affairs Committee, and is to be forwarded to the full Congress soon. Specifically, this bill would amend the Law on Enforcement (discussed below). One very positive amendment addresses methods to quantify civil damages in absence of an expert study; this would definitely aid civil enforcement efforts. The bill also contains proposals affecting liability and sanctions for the circumvention of technological protection measures (TPMs) and rights management information, and the reception and distribution of program-carrying satellite signals.

However, there are several troubling points in this bill. First, the provisions on technological protection measures fail to rise to the standards in CAFTA in many respects (e.g, no coverage of services, no provisions for access controls, no coverage of components, overly broad exceptions to criminal liability, failure to clearly afford civil liability for circumvention, no definitions for what is a TPM, for example). Second, while the bill would add statutory damages, they are too low to be deterrent. The bill offers 1-50 times the minimum wage of unskilled workers (one wage is about US\$195, so the range would be US\$195-\$9,750. Third, proposed criminal penalties are too low to be deterrent; the bill proposes only a minimum one-year penalty, which makes it impossible to ever imprison any defendants. The industries have advocated for many years that a minimum penalty of three years is needed in order to ensure possible jail time in criminal cases (refer to industry support of failed Bill No. 15.076, below). Fourth, another provision makes a general (and disturbing) statement about ISP liability, with reference to regulations which apparently have not been developed. Costa Rica does have a permitted 30-month transition period to implement the ISP liability provision; if the Government decides to implement it now, then the legislation must track the CAFTA-DR requirements. The industries do not support an incomplete implementation of this critical obligation. In sum, further work on these problematic issues, as well as refining other enforcement-related issues (such as border measures) is needed.

Efforts to amend the Law on Enforcement (*Ley de Observancia*), then and now: 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 not in compliance with TRIPS and an impediment to effective enforcement;¹¹ efforts to amend the bill before its adoption failed. The copyright industries continued

¹⁰ The text of the Costa Rican bill to implement the CAFTA-DR IPR Chapter is available, in Spanish, on the Costa Rican legislature's website at <http://www.asamblea.go.cr/proyecto/16100/16117.doc>.

¹¹ The copyright industries identified four major deficiencies in the 2000 Law on Enforcement: (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 provides that the "minor" ("*insignificante*") and "without profit" ("*gratuito*") use and reproduction of illegal products will not be penalized. This is probably the most harmful provision of the law because these terms are undefined and it was easy for pirates to avoid liability by simply

to work to introduce amendments to fix the *Ley de Observancia*. In 2002, the copyright industries, working with Congressional officials, developed a bill (Bill No. 15.076) which would increase criminal sanctions and make other necessary amendments to improve enforcement. However, the Costa Rican Government also presented its own bill (Bill No. 15.556) which would, unfortunately, reduce the minimum penalty for copyright piracy, making it nearly impossible to incarcerate pirates. Time lapsed, and both these bills have fallen off the legislative agenda. Nevertheless, it is important to keep in mind that the industries continue to support the key elements that were in Bill No. 15.076, many of which have not yet been reflected in the Costa Rican legislative effort to implement CAFTA (see above).

- Recall that **Bill No. 15.076** was the industry-supported bill to amend the *Ley de Observancia*, and contained these key provisions: (1) Maximum imprisonment penalties for IP violations would be elevated from three to five years. Minimum penalties would be increased from one to three years. This elevation is aimed at ensuring the imprisonment of copyright infringers; (2) Public officials, not only injured parties, will be able to file criminal actions for IP violations (“*acción pública de instancia pública*”); (3) A new Article 70 would call for closing pirate businesses and/or destruction of equipment used in the infringement. The objectionable “insignificance principle” (“*principio de lesividad e insignificancia*”) would be removed from the Criminal Procedural Code so that it does not apply to IP violations; (4) the unauthorized “use” of protected works is a crime; and (5) any fine imposed for IP violations should be in addition to the prison sentence, and not in the alternative. The industries would likely support the re-introduction of this bill, expanded to include relevant FTA-compatible provisions on TPMs and RMI.
- **Adopt Bill No. 15.077** which proposes to create a Specialized IP Prosecutor Office. IIPA encourages the Costa Rican government to make this a priority.

Copyright Law of 1982 (as amended): In 2000, Costa Rica amended its 1982 Copyright Law in large part to comply with TRIPS and the WIPO Treaties. Several positive improvements were made there, including: revising the right of reproduction; extending copyright term of protection; and recognizing the rightholder’s exclusive right to make a work or sound recording available to the public. Costa Rica was among the original set of countries to ratify the WIPO internet treaties. However, further refinements of the copyright law will be needed to comply with the comprehensive CAFTA-DR requirements. Issues which require attention include, for example: national treatment for performers and producers of sound recordings; expanded performers’ rights, including fixation of their unfixed performances; and an express and exclusive “right of making available” for performers and producers of sound recordings.

Government software asset management: 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. Unfortunately, to date there has been no further action taken to implement the decree. The Government of Costa Rica should continue down the path toward implementation of the software asset management practices called for in this decree.

reproducing and selling illegal software in small amounts, using a variety of CD burners and retail outlets; (4) the failure to provide for statutory, or pre-established, damages.



May 22, 2007

Secretary
United States International Trade Commission
500 E Street S.W.
Washington, DC 20436

USITC Inv. No. TA-2104-025

Re: U.S.-Panama Trade Promotion Agreement:
Potential Economy-wide and Selected Sectoral Effects,
72 Fed. Reg. 24327 (May 2, 2007)

To the Commission:

The International Intellectual Property Alliance (IIPA) supports the earliest adoption by the U.S. Congress of the U.S.-Panama Trade Promotion Agreement (Panama TPA).

As required by the Trade Act of 2002, the ITC has commenced an investigation to assess the likely impact of a comprehensive bilateral trade promotion agreement (TPA) between the U.S. and Panama. The ITC will prepare a report for release (in September 2007) that assesses the likely impact of proposed free trade agreements on the U.S. economy as a whole and on specific industry sectors and the interests of U.S. consumers. In this regard, IIPA hereby submits our comments on the contributions to the U.S. economy made by the copyright-based industries as well as some observations about the copyright law and enforcement situation in Panama.

About the IIPA

The IIPA is a coalition of seven trade associations (listed below), each representing a significant segment of the U.S. copyright-based industries. These member associations collectively represent over 1,900 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, trade books, reference and professional publications and journals (in both electronic and print media).

Economic Impact of the Copyright Industries in the U.S. Economy Generally

As the Commission knows, the copyright-based industries are among the fastest growing and most productive of any sector of the U.S. economy, employing new workers in higher paying jobs faster than the rest of the economy, creating new revenue at rapid rates, and contributing close to \$90 billion to the economy through foreign sales and exports.

On January 30, 2007, the IIPA released an economic report entitled *Copyright Industries in the U.S. Economy: The 2006 Report*, the eleventh 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 that the “core” U.S. copyright industries¹ accounted for an estimated \$819.06 billion or 6.56% of the U.S. gross domestic product (GDP) in 2005. These “core” industries were responsible for 12.96% of the growth achieved in 2005 for the U.S. economy as a whole (this means that the growth contributed by these core industries (12.96%) was almost double their current dollar share of GDP (6.56%)).

In addition, the “core” copyright industries employed 5.38 million workers in 2005 (4.03% of U.S. workers) in 2005. And the report, for the first time, provides data on the estimated average annual compensation for a worker in the core copyright industries: \$69,839 in 2005, which represents a 40% premium over the compensation paid the average U.S. worker.

Finally, estimated 2005 foreign sales and exports of the core copyright industries increased to at least \$110.8 billion, leading other major industry sectors. Those sectors include: chemicals and related products (not including medicinal and pharmaceutical products); motor vehicles, parts and accessories; aircraft and associated equipment; food and live animals; and medicinal and pharmaceutical products. It is essential to the continued growth and future competitiveness of these industries that our trading partners provide not only free and open markets, but also high levels of protection to the copyrights on which this trade depends

IIPA Supports the Panama TPA

IIPA supports the Free Trade Agreement process and looks forward to the prompt and effective implementation of Panama’s obligations under the TPA. The U.S. began free trade agreement negotiations with Panama in April 2004, and negotiations concluded on December 19, 2006. On March 30, 2007, President Bush notified the U.S. Congress of his intent to enter into this agreement with Panama.

We believe that free trade agreements benefit local economies as well as U.S. companies. Comprehensive, modern copyright laws, combined with effective enforcement of those laws, are necessary for the copyright industries – both U.S. and local industries – to grow. The Panama TPA offers yet another tool for encouraging compliance with other evolving international trends in

¹ The “total” copyright industries include the “core” industries plus those that, under conservative assumptions, distribute such products or other products that depend wholly or principally on copyrighted materials. The “core” copyright industries are those that create copyrighted materials as their primary product. *The 2006 Report* is posted on the IIPA website at <http://www.iipa.com>.

copyright standards (such as fully implementing WIPO Treaties obligations and extending copyright terms of protection beyond the minimum levels guaranteed by TRIPS) as well as outlining specific enforcement provisions. Panama currently is a beneficiary country of several U.S. trade programs: the Generalized System of Preferences (GSP) and the Caribbean Basin Initiative (CBI) plus the Caribbean Basin Trade Partnership Agreement (CBTPA).² These programs have high standards of intellectual property rights (IIPA has previously provided our views on the ATPA/ATPDEA to the USITC). Once the TPA enters into force, Panama's trade benefits under these trade programs will cease.

The Panama TPA, once fully implemented, will assist Panama in attracting new foreign investment and new trade in valuable digital and other intellectual property-based products, particularly in the area of e-commerce. The private sector advisory committee to the U.S. government (ITAC-15) has already produced a favorable recommendation regarding the IPR Chapter of the Panama agreement.³ The ITAC-15 report does, however, identify some shortcomings in the Panama agreement, especially where the drafting deviates from the text in the three Middle Eastern FTAs, which contains the most comprehensive text for copyright law and copyright enforcement issues to-date.

Economic Impact: Problems of Copyright Piracy in Panama

IIPA realizes that this ITC review focuses on the potential economic impact here in the U.S. It is difficult for IIPA members to quantify an explicit domestic impact, other than noting, in general, the U.S. copyright-based industries continue to export their creative content to international markets and that export in turn supports U.S. employment and economic vitality.

In this section, we turn to some highlights regarding the situation in Panama which affects the ability of U.S. copyright owners to engage in the commercial distribution of their content as well as protect that from unlawful infringement in that market.

Copyright Piracy: Copyright piracy in Panama, combined with inadequate enforcement, has significantly limited legitimate revenues to right holders and has become a major market access barrier for the copyright industries. The challenges faced by these 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 few years, unauthorized "burning" of CDs has grown rapidly in Latin America, including Panama. The piracy of sound recordings and music in Panama remains high. While audiocassette piracy had been the preferred

² See IIPA submission to the Trade Policy Staff Committee on the Caribbean Basin Economic Recovery Act and the Caribbean Basin Trade Partnership Act, November 1, 2005, posted on the IIPA website at <http://www.iipa.com/pdf/IIPA%20CBERA%20CBTPA%20filing%20to%20TSPC%2011012005.pdf>.

³ See Report of the ITAC-15 on the U.S.-Panama Trade Promotion Agreement Intellectual Property Rights Provisions, April 27, 2007, at http://www.ustr.gov/assets/Trade_Agreements/Bilateral/Panama_FTA/Reports/asset_upload_file960_11234.pdf.

business of pirates for years, music CD piracy is clearly now the preferred format of choice. As a result, very few companies remain operating in the country. Hit albums that a few years ago sold in the thousands today sell a few hundred copies. Although no official figures exist for the level of music piracy, the industry conservatively estimates that it exceeds 50% of the total market.

Business software piracy takes various forms, including counterfeiting, illegal reproduction and/or distribution by resellers, mail order houses, bulletin boards, other Internet-based distribution and corporate end-user piracy. The Business Software Alliance (BSA) estimates that there was a 74% level of piracy for business software applications in 2006 in Panama. Panama's Ministry of Education has been leading the initiative among various Panamanian agencies to implement Decree 273 of 2000 which regulates the use of computer programs by public agencies.

The U.S. entertainment software industry reports that piracy and counterfeiting affects videogames on all platforms, including cartridges, personal computer CD-ROMs, and game consoles, especially those entering Panama from Southeast Asia. This transnational form of piracy points to the enhanced need for continued cooperation among governments in tracking infringing materials across borders. As optical disc piracy grows in the region, the motion picture industry is concerned about the possibility that Panama will become a transshipment point for optical disc piracy or pirate circumvention or other technology as the market for such pirate product grows. The major forms of piracy afflicting the U.S. book publishing industry involves commercial photocopying piracy, especially as photocopying shops near universities fill requests for illegal reproductions of entire textbooks.

Border Enforcement: Cooperation with Panamanian customs has been improving over the years, but more work is needed. To that end, in March 2005, Panama's General Directorate of Customs signed a cooperation agreement with the recording industry, IFPI-Latin America, to help stop the movement of piratical goods into Latin America. Panama serves as a transshipment point for blank CD-Rs into the region; estimates placed this at 40 million units/year (2005). This agreement provides for the exchange of statistical data and information, training by IFPI experts and the creation by Customs of a specialized IP unit. The Industrial Property Law (Law No. 35 of May 10, 1996), which entered into effect on November 19, 1996, allows Customs and CFZ officials to impose administrative sanctions and seize pirated and counterfeited products. Public prosecutors can act *ex officio* against infringements of copyright as well as industrial property. Industry does not have specific information regarding the results of such IPR actions.

Criminal Enforcement: Panama has established a variety of specialized IPR entities over the years, including: IP departments in the Colon Free Zone and at the Customhouse General Offices; specialized IPR groups at the local police level; and most recently (starting in December 2003), the Judicial Technical Police. The Specialized Superior Office on IP Infringements began its operations in January 2003. The Third Superior Court handles all IPR cases. The Inter-Institutional Commission on Intellectual Property continues its coordination and policy oversight efforts. A National Intellectual Property Prosecutor was named years ago, and this office has a permanent budget and staff and with national jurisdiction. Cooperation between the copyright industries and Panamanian police and prosecutors has generally remained good. Since the implementation of the new Industrial Property Law in November 10, 1996, copyright actions may now be taken *ex officio*, which has greatly aided anti-piracy enforcement efforts in Panama. The Office of the Tenth District

Public Prosecutor has been particularly vigilant in pursuing cases over the years, and we acknowledge its assistance. With some exceptions, however, much of the investigatory burden continues to be shouldered by private industry.

Copyright Law and Related Laws: Panama's Law on Copyright and Related Rights entered into effect on January 1, 1995 (Law No. 15 of August 8, 1994). This law represented a significant improvement over the prior law and enabled Panama to adhere to the Berne Convention (effective June 8, 1996). In general, this 1994 copyright law was a relatively progressive one in the region a decade ago, even though there were some immediate challenges launched against this law. The 1994 Copyright Law required the filing of a complaint by rightholders in order to initiate actions; however, this problem was alleviated by the passage of the Industrial Property Law in 1996, and copyright actions may now be taken *ex officio*. Panama was one of the first countries in this hemisphere to join the two WIPO Internet treaties, the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT). Given the higher standards contemplated in an FTA IPR chapter with the U.S., Panama's copyright law (and enforcement-related laws) will require some modification.

Various amendments to the copyright law have been proposed over the years (e.g., 1996, 1998 and 2002), but many have not been adopted (the 2002 exercise was aimed primarily at implementing the provisions of the WIPO treaties into Panamanian law, extending the term of protection, improving enforcement mechanisms and strengthening penalties). This project is still lingering in the Ministry of Education and has not been presented to the Panama's legislative body for evaluation and processing. Passage of these reforms is a crucial matter to protect intellectual property in a digital environment and give enforcement and prosecution teams the necessary tools to carry out an effective anti-piracy campaign. Legal reform to the penal codes and Industrial Property Codes (Law No. 1 of January 5, 2004) appears to have been accomplished to minimize prior confusion and clarify that criminal sanctions, including aggravated penalties, is available for both copyright and industrial property infringements. Under the Copyright Law, the level of administrative fines (from \$1,000 to \$20,000) and as imposed have been inadequate to deter pirates from engaging in commercial piracy. The level of penalties for piracy should track the higher levels available for trademark counterfeiting.

Conclusion

IIPA and its members continue to request U.S. government attention and engagement with the Panamanian government on reducing piracy and improving enforcement there. Thank you for the opportunity to comment on the Panama Trade Promotion Agreement. If you have any questions, please contact us.

Sincerely,



Maria Strong
on behalf of the
International Intellectual Property Alliance