

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE®



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September 30, 2009

Submitted to www.regulations.gov

Gloria Blue
Executive Secretary
Trade Policy Staff Committee (TPSC)
Office of the U.S. Trade Representative
1724 F Street, N.W.
Washington, D.C. 20508

Re: CBI Report to Congress
Caribbean Basin Economic Recovery Act and
Caribbean Basin Trade Partnership Act: Report to
Congress, 74 Fed. Reg. 41482 (August 17, 2009)

Dear Ms. Blue:

The International Intellectual Property Alliance (IIPA) takes this opportunity to respond the Trade Policy Staff Committee's request for comments in preparation of its biennial report to Congress on the impact of the Caribbean Basin Economic Recovery Act.

IIPA focuses our post-hearing comments on developments related to copyright piracy, legal reform and enforcement measures taken by certain CBERA beneficiary countries. 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.

About the IIPA

The International Intellectual Property Alliance (IIPA) is a private sector coalition, formed in 1984, of trade associations representing U.S. copyright-based industries in bilateral and multilateral efforts working to improve international protection and enforcement of copyrighted materials and open up foreign markets closed by piracy and other market access barriers. IIPA's seven member associations are: the Association of American Publishers (AAP), the Business Software Alliance (BSA), the Entertainment Software Association (ESA), the Independent Film & Television Alliance (IFTA), the Motion Picture Association of America (MPAA), the National Music Publishers' Association (NMPA) and the Recording Industry Association of America (RIAA). These associations, in turn, 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 applications software and entertainment software (such as videogame discs and cartridges, personal computer CD-ROMs, and multimedia products); theatrical films, television programs, DVDs and home video 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).

The copyright-based industries are among the most productive of any sector of the U.S. economy. On July 20, 2009, IIPA released an economic report entitled *Copyright Industries in the U.S. Economy: The 2003-2007 Report*. This report, the twelfth in a series of reports dating back to 1990, details the economic impact and contributions of U.S. copyright industries to U.S. Gross Domestic Product, employment, and foreign sales/exports.¹ Key findings include the following:

Real Growth of the U.S. Economy and Gross Domestic Product (GDP)

- In 2004, 2005, 2006 and 2007, the real annual growth rates achieved by both the core and total copyright industries were more than twice the real growth rates achieved by the U.S. economy as a whole.
- The copyright industries have positively contributed to real U.S. growth in a disproportionate manner. In 2006-2007, the core copyright industries contributed 22.74% of the real growth achieved for the U.S. economy as a whole. In the same period, the total copyright industries contributed an astounding 43.06% of total real U.S. growth.
- In 2007, the value added by the core copyright industries was \$889.1 billion, approximately 6.44% of U.S. GDP.
- The value added for the total copyright industries rose to \$1.52 trillion, or 11.05% of GDP, in 2007.

Foreign Sales and Exports

- Sales of U.S. copyright products continue to expand in overseas markets. The total core copyright sales in foreign markets exceeded \$116 billion in 2006 and nearly \$126 billion in 2007, an 8% increase.
- As a comparison, the foreign sales of the copyright industries significantly exceed foreign sales of other U.S. industries including aircraft (\$95.6 billion), automobiles (\$56.8 billion), agricultural products (\$48.1 billion), food (\$39.4 billion) and pharmaceuticals (\$27.9 billion).

Strong Employment and Wages

- The core copyright industries employed nearly 5.6 million workers in 2007, that is, 4.05% of the U.S. workforce.
- In 2007, 11.7 million people were employed by the total copyright industries, or 8.51% of the U.S. workforce.
- The annual 2007 compensation paid to core copyright workers (\$73,554) exceeded the average annual compensation (\$56,817) paid to all U.S. workers by 30%. The average compensation paid to employees of the total copyright industries (\$66,498) exceeded the U.S. average by 18%.

Increasingly, many copyright sectors look to grow their markets overseas. As a result, the obligation to provide adequate and effective protection in the CBERA has 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. In sum, comprehensive and modern copyright laws, combined with effective enforcement of those laws, are necessary for the copyright industries – both U.S. and local industries – to flourish.

Copyright Law and Enforcement Standards in the CBERA

IIPA has highlighted the fact that 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. For the first time, Congress explicitly linked trade benefits to intellectual property protection by beneficiary countries.

¹ IIPA's *Copyright Industries in the U.S. Economy: The 2003-2007 Report* is posted on the IIPA website at www.iipa.com.

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.).

As the TPSC knows all too well, the CBERA IPR provisions contain both mandatory and discretionary criteria. We review these criteria for the record here. 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.³

Second, CBERA beneficiary countries must meet the two discretionary IPR criteria, found in 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 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 these intellectual property rights provisions when it passed the Caribbean Basin Trade Partnership Act (CBTPA) in 2000.⁴ In order to be a “CBTPA beneficiary country,” a country had to meet the original CBERA criteria and more. Here, 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.⁵

³ 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.

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

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.

The bottom line was that each country had to re-meet all the CBERA IPR criteria as well as the explicit TRIPS-or-greater criteria and bilateral IPR agreement standards in order to enter the CBTPA.⁶

Importantly, as the various Free Trade Agreements enter into force with some of the countries also eligible under the CBERA and CBTPA, countries receiving preferential trade benefits under these programs are graduated, or removed, as eligible beneficiary countries (there may be some tariff lines which still receive some coverage for a small period of time). IIPA continues to be a strong supporter of the free trade agreements, like CAFTA-DR, all of which include a strong IPR chapter.

Copyright Law Developments in this Region

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) and the WIPO Performances and Phonograms Treaty (WPPT) entered into force in early 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 the higher standards in the WCT and WPPT.

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, St. Lucia and Trinidad and Tobago have deposited their instruments of ratification/accession with WIPO. All countries must implement these new obligations, and several of these countries (especially those FTA partners) already have done so. IIPA again strongly recommends that the U.S. government urge the other CBERA countries to promptly ratify these two WIPO Treaties and implement those obligations into domestic law.

Certainly 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 contains high levels of substantive copyright obligations as well as specific enforcement mechanisms. And as discussed below, the primary challenge is to ensure that there is effective enforcement in-practice such that high levels of copyright piracy are significantly reduced.

⁶ We note, however, that as a matter of political reality, the President on October 2, 2000 declared all CBERA beneficiaries (then 24 nations) as eligible CBTPA beneficiary countries.

⁷ See Office of the U.S. Trade Representative, 2009 Special 301 Report, April 30, 2009, page 5, posted at <http://www.ustr.gov/about-us/press-office/reports-and-publications/2009/2009-special-301-report>.

Here we highlight here some more notable copyright legislative developments in this region:

COSTA RICA: The last country to sign onto the CAFTA-DR, Costa Rica made numerous legislative changes to its copyright laws and related laws, in order to have that FTA enter into force earlier this year. IIPA has provided the U.S. government with detailed public comments on recent developments in Costa Rica in our 2009 Special 301 submission to USTR.⁸ In general, we note that significant legislative improvements have been made, yet there needs to be more effective criminal anti-piracy enforcement taken in-practice.

PANAMA: IIPA continues to support Congressional approval of the U.S.-Panama Trade Promotion Agreement; in fact, two years ago IIPA filed comments before the ITC in favor of the Panama TPA.⁹ While its copyright law is relatively modern, it will need refinement in order to fully upgrade to the IPR standards in the TPA. On the enforcement side, there are a variety of Panamanian agencies that have taken anti-piracy and anti-counterfeiting actions, especially within the Canal Zone, and undoubtedly continued vigilance is necessary there.

THE BAHAMAS: USTR recently indicated in its April 2009 Special 301 Report that it also will examine protection and enforcement in The Bahamas in the context of that country's compliance with its CBERA IPR obligations.¹⁰ For almost a decade, The Bahamas maintained, both in-law and in-practice, a Berne-incompatible compulsory license in its 1998 Copyright Act that it applied to pay television programming. Amendments to correct this deficiency were passed by the Parliament in 2004 but were not signed by the Prime Minister, thus the amending law did not enter into force. As a result, local cable operators retransmitted premium U.S. pay television programming for years, without authorization, causing harm to U.S. companies in this sector. This situation flew in the face of both international rules (Berne) and its bilateral IPR obligations (CBERA), and also violated the WTO TRIPS Agreement, although The Bahamas is one of the very few countries that is not yet a WTO member. However, as a result of heightened bilateral attention this year, the Prime Minister very recently signed the 2004 Copyright Law Amendments (which includes specific language that indicates that the compulsory license cannot apply to pay television programming), and they will enter into force tomorrow, October 1, 2009. This recent action is positive progress, certainly. Continued vigilance, however, as to how the new law is implemented in practice, remains imperative.

Copyright Piracy and Enforcement -- Current Trends/Problems

Below is a summary of the copyright sectors' major piracy problems in this region:

- In general, the **unauthorized "burning"** of CDs has grown rapidly throughout this region in recent years, challenging the ability of legitimate businesses engaged in the creation and

⁸ IIPA's 2009 Special 301 report on Costa Rica is posted at <http://www.iipa.com/rbc/2009/2009SPEC301COSTARICA.pdf>, and appended here as well. Please note that the BSA has recently finalized the preliminary statistics for Costa Rica that it reported in our filing, with \$14.0 million in estimated trade losses due to business software piracy in 2008 with 60% piracy levels. This update is posted on the homepage of the IIPA website, www.iipa.com.

⁹ IIPA Comments to the USITC, Inv. No. TA-2104-025 regarding the U.S.-Panama Trade Promotion Agreement, May 22, 2007 at <http://www.iipa.com/pdf/IIPAPanamaFTALettertoITCEconomicEffectsfinal05222007.pdf>.

¹⁰ See USTR 2009 Special 301 Report, April 30, 2009, at pages 3-4, posted at <http://www.ustr.gov/sites/default/files/Full%20Version%20of%20the%202009%20SPECIAL%20301%20REPORT.pdf>. USTR noted there: "As part of its bi-annual review of the operation of the Caribbean Basin Economic Recovery Act, USTR will review the IPR practices of beneficiaries, including The Bahamas, to assess compliance with the preference program's eligibility criteria, which include the extent to which a country prohibits its nationals from broadcasting U.S. copyrighted materials without permission."

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.

- 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.
- **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 remedies as well as civil ex parte search remedies.
- **Piracy of sound recordings and music** remains high throughout the Caribbean. 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 now plague this region. The increased sale of CD-R and DVD burners is a recent development that continues to elevate piracy levels for sound recordings. As online distribution models for recorded music continue to develop, they face massive unfair competition websites that distribute unauthorized music and from 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. Unfortunately, governments are often reluctant to take the unpopular step of taking enforcement action against street vendors. Finally, legislation to prohibit unauthorized **camcording** in theaters should be considered in these countries.
- The major form of piracy afflicting the U.S. book publishing industry in the region is unauthorized **commercial photocopying**. Photocopying shops near universities often fill requests for illegal reproductions of entire textbooks.
- The U.S. entertainment software industry suffers from inadequate enforcement as well. For example, 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.
- It is important for the local criminal, civil and customs authorities to work in a transparent and expeditious manner and apply deterrent penalties and remedies.

Conclusion

Domestic copyright law reform, while critical to meeting the CBERA IPR criteria, is not sufficient in and of itself. A continuing problem inflicting economic harm is the failure of many of the Caribbean region countries to adequately and effectively enforce their current copyright laws in-practice.

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.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Maria Strong". The signature is fluid and cursive, written in a professional style.

Maria Strong
International Intellectual Property Alliance (IIPA)

Attached:
IIPA 2009 Costa Rica Special 301 filing

COSTA RICA

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

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

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

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

Enforcement

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

Legislation

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

COPYRIGHT AND LEGAL ISSUES IN COSTA RICA

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



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

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

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

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

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

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

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

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

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

COPYRIGHT PIRACY IN COSTA RICA

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

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

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

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

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

COPYRIGHT ENFORCEMENT IN COSTA RICA

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

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

³ BSA's 2008 statistics are preliminary, represent the U.S. software publishers' share of software piracy losses in Costa Rica, and follow the methodology compiled in the Fifth Annual BSA and IDC Global Software Piracy Study (May 2008), available at www.bsa.org. These figures cover, in addition to business applications software, computer applications such as operating systems, consumer applications such as PC gaming, personal finance, and reference software.

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

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

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

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

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

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

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

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

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

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

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