

# INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE



1747 PENNSYLVANIA AVENUE, NW • SUITE 825 • WASHINGTON, DC • 20006-4637 • TEL (202) 833-4198 • FAX (202) 872-0546 • WWW.IIPA.COM • EMAIL: INFO@IIPA.COM

September 26, 2003

*Via electronic submission: fr0052@ustr.gov*

Steven Falken  
Chair, GSP Subcommittee  
Office of the U.S. Trade Representative  
1724 F Street, NW  
Washington, DC 20508

Re: Dominican Republic, 012-CP-02,  
GSP Country Practices Review, Notice of  
Intent to Testify and Pre-hearing Brief

To the GSP Subcommittee:

The International Intellectual Property Alliance (IIPA) hereby submits this Notice of Intent to Testify at the public hearing on the GSP country practices review of the Dominican Republic, which is scheduled to be held on October 7, 2003. As you know, IIPA was the original petitioner of the GSP/CBI review of the Dominican Republic's intellectual property rights practices in June 1999. Attached to this letter is IIPA's Pre-Hearing Brief.

The IIPA witness will be: Maria Strong  
Vice President and General Counsel  
International Intellectual Property Alliance  
1747 Pennsylvania Avenue, NW, Suite 825  
Washington, DC 20006  
Tel: (202) 833-4198; Fax: (202) 872-0546  
Email: mstrong@iipa.com

Thank you.

Sincerely,

Maria Strong



## Pre-hearing Brief of the International Intellectual Property Alliance in the GSP Review of the Intellectual Property Rights Practices of the Dominican Republic

Before the GSP Subcommittee  
Case 012-CP-02, Dominican Republic  
September 26, 2003

The International Intellectual Property Alliance (IIPA) appreciates this opportunity to provide the GSP Subcommittee with an update on the progress, and lack of progress, made by the Dominican Republic in its efforts to improve its copyright legislation and, importantly, enforce its copyright law. In sum, we believe that the Dominican Republic continues to fail to provide “adequate and effective” copyright protection and enforcement, as required by U.S. trade laws, including the Generalized System of Preferences and the Caribbean Basin Initiative.

### I. Interest of the IIPA in this GSP/CBI IPR Review

The International Intellectual Property Alliance is an “interested party” in this review. IIPA represents associations and companies which have a significant economic interest in the adequate and effective protection of copyrights in the Dominican Republic. Specifically, the IIPA is a private sector coalition formed in 1984 to represent the U.S. copyright-based industries in bilateral and multilateral efforts to improve international protection of copyrighted materials. The IIPA is comprised of six trade associations: the Association of American Publishers (AAP), AFMA, the Business Software Alliance (BSA), the Entertainment Software Association (ESA), the Motion Picture Association of America (MPAA), and the Recording Industry Association of America (RIAA). Several of these associations and their member companies already undertake active anti-piracy campaigns in the Dominican Republic.

These member associations represent over 1,300 U.S. companies producing and distributing materials protected by copyright laws throughout the world – all types of computer software including business applications software and entertainment software (such as videogame CDs and cartridges, personal computer CD-ROMs and multimedia products); theatrical films, television programs, home videos and digital representations of audiovisual works; music, records, CDs, and audiocassettes; and textbooks, tradebooks, reference and professional publications and journals (in both electronic and print media). The copyright-based industries are a vibrant force in the American economy.<sup>1</sup>

<sup>1</sup> According to Copyright Industries in the U.S. Economy: The 2002 Report, prepared for the IIPA by Economists, Inc., the core U.S. copyright industries accounted for 5.24% of U.S. GDP or \$535.1 billion in value-added in 2001. Between 1977-2001 (24 years), the core copyright industries’ share of GDP grew at an annual rate more than twice as fast as the remainder of the economy (7.0% vs. 3.0%). Also over those 24 years, employment in the core copyright industries more than doubled to 4.7 million workers (3.5% of total U.S. employment), and grew nearly three times as fast as the annual employment growth rate of the economy as a whole (5.0% vs. 1.5%). In 2001, the U.S. copyright industries achieved foreign sales and exports of \$88.97 billion, a 9.4% gain from the prior year. The copyright industries’ foreign sales and exports continue to be larger than almost all other leading industry sectors, including automobiles and auto parts, aircraft, and agriculture. IIPA’s 2002 economic report can be accessed in its entirety at [http://www.iipa.com/copyright\\_us\\_economy.html](http://www.iipa.com/copyright_us_economy.html).

Inadequate copyright laws and ineffective anti-piracy enforcement adversely affects employment, job creation and revenues, both in the United States as well as abroad. With many of these U.S. companies increasingly relying on foreign licensing and sales revenues, piracy combined with inadequate enforcement, has become a major impediment to this continued revenue growth and has become the major market access barrier for the copyright industries. As the GSP Subcommittee is aware, the challenges faced by the copyright industries and national governments to enforce copyright laws grow exponentially as the forms of piracy shift from hard-goods and toward digital media and unauthorized electronic transmissions.

In June 1999, the IIPA filed a petition with the U.S. government to initiate a review under both the GSP and the CBI trade laws of the eligibility of the Dominican Republic to participate in these programs due to its failures to provide adequate effective copyright protection for U.S. copyright owners and to provide equitable and reasonable market access.<sup>2</sup> Since our 1999 filing, the U.S. Congress has amended the intellectual property rights (IPR) criteria in the CBI, to heighten the level of protection expected from beneficiary countries of the Caribbean Basin Trade Partnership Act (CBTPA) benefits, including the Dominican Republic.<sup>3</sup> GSP hearings were held in April 2000.

IIPA has publicly acknowledged that there were copyright legislative advances in the Dominican Republic several years ago, as a result of comprehensive law reform accomplished in late 2000. However, progress on effective enforcement to deter piracy in-practice has been much slower, and significant piracy problems remain in several copyright sectors. In our February 2003 Special 301 submission on the Dominican Republic,<sup>4</sup> we asked USTR as well as the GSP Subcommittee to swiftly schedule another GSP review hearing. This Pre-Hearing Brief focuses primarily on the continuing problems of ineffective copyright law enforcement in the Dominican Republic.

## **II. Inadequate and Ineffective Copyright Enforcement in the Dominican Republic**

Progress on actual enforcement measures to deter piracy in-practice has been slow in the Dominican Republic, and high levels of piracy remain. Because of the copyright industry sectors' unique experiences in the Dominican Republic, our description below outlines each industry's experiences.

**Motion picture industry:** The motion picture industry reports that broadcast piracy in the Dominican Republic remains the worst in the entire hemisphere. Broadcast piracy has been a serious problem for over a decade. In fact, the MPAA filed a GSP IPR petition against the Dominican Republic in 1992 which was accepted by the U.S. government and then terminated in 1994.<sup>5</sup> MPAA brings both criminal and administrative actions in-country.

---

<sup>2</sup> The intellectual property rights provisions in the GSP statute appear at 19 U.S.C. §§ 2462(b) and (c).

<sup>3</sup> The IPR provisions in the Caribbean Basin Initiative (CBI), as amended by the U.S.-Caribbean Basin Trade Partnership Act (CBTPA), as well as surrounding legislative history, outline very high standards/criteria for copyright protection and enforcement. 19 U.S.C. §§ 2702 *et seq.* For a more detailed discussion of the CBI's enhanced IPR standards, see IIPA's submission to the U.S. International Trade Commission on its Annual Report on the Impact of the Caribbean Basin Economic Recovery Act on U.S. Industries, Consumers and Beneficiary Countries, Investigation No: 334-227 (filed June 30, 2003), available at [http://www.iipa.com/rbi/2003\\_Jun30\\_CBERA\\_ITC\\_REPORT.pdf](http://www.iipa.com/rbi/2003_Jun30_CBERA_ITC_REPORT.pdf).

<sup>4</sup> IIPA's February 14, 2003 Special 301 submission is posted on the IIPA website at [http://www.iipa.com/gsp/2003\\_Feb14\\_GSP\\_DomRep.pdf](http://www.iipa.com/gsp/2003_Feb14_GSP_DomRep.pdf).

<sup>5</sup> In June 1992, the Motion Picture Association (MPA, the international arm of the MPAA) filed a GSP IPR petition against the government of the Dominican Republic for its failure to afford adequate and effective copyright protection to U.S. copyright owners of motion pictures, specially caused by the unauthorized retransmission of U.S. films and television programming by broadcasters and cable system operators. USTR accepted that petition, and in 1993 the Dominican Republic took a number of initial steps to address those serious problems. Although broadcast and cable piracy remained a serious concern to the MPA/MPAA, the Dominican government made promises to improve the situation, and as a result, the MPA withdrew its GSP petition in September 1994.

The administrative authorities (including the Copyright Office, ONDA, and the telecommunications authority, INDOTEL) have met with difficulty in taking actions against the larger television broadcast stations because of their political importance to the Government. In April 2003, at the initiative of INDOTEL, a new anti-piracy campaign was initiated in which these two authorities began inspecting broadcast stations to verify they had contracts to authorize broadcasting of all, including U.S., programming. After some delay, these authorities presented criminal complaints to the prosecutors. In August 2003, INDOTEL conducted another series of inspections of broadcast stations. So far, sixteen (16) criminal complaints have been filed. However, the Attorney General has demonstrated little effort in prosecution. The first criminal hearing against one of the larger broadcast stations, Channel 40-Canal del Sol, was scheduled for August 20, 2003, but was postponed until October 20, 2003. And the criminal process has had no deterrent effect against this station's action because infringing U.S. programming continues to be broadcast.

The motion picture industry is also concerned about the fair and transparent handling of some its video piracy cases, which have been progressing – at least up until the summer of 2003 – rather smoothly. This problem was illustrated by the Ministry of Culture's non-transparent issuance of objectionable copyright regulations in July 2003, portions of which have since been reversed due to a loud outcry by the copyright community and the U.S. government (see discussion, below). The MPAA is very concerned that preferences are being given to political and family connections over even-handed law enforcement, something which has happened for years in broadcast piracy cases and, more recently, in video cases.

**Recording industry:** The recording industry continues to experience severe enforcement roadblocks, primarily at the judicial level. The RIAA's three-tier effort in the Dominican Republic includes education, training and enforcement (bringing criminal and administrative actions). Based on its anti-piracy experience, the Dominican judiciary is the weakest link and requires the most urgent attention. So far, 70 criminal cases for copyright infringement of sound recordings brought were pending trial in August 2003; 15 of which were added during this year alone. Since 1999, the RIAA has been successful in obtaining only 16 prosecutions, including prison sentences, court fines and restitution in the amount of US\$122,000. All these adjudicated cases are on appeal, and no review dates have been scheduled by the Court of Appeals. As a result, there is in fact no practical deterrence against music piracy in the Dominican Republic.

RIAA reports that ONDA reduced operations in music-related activities by 227% in 2002, with total seizures dropping 87% from 2001 to 2002. Through August of 2003, ONDA seized less than 30,000 pirate units. To date, ONDA has not used the law enforcement specialist/detective assigned to follow-up on investigations in this capacity. Due to the drastic decreases in operations and seizures by ONDA, RIAA has been working with ADOPROFONO, a local group of music labels brought together as a coalition, to address the increasing piracy problems in the Dominican Republic. Through this group, which was formed in July 2002, ADOPROFONO with the assistance of the Fiscalia (Prosecutor's Office), conducted 11 operations and seized 284,000-pirate/counterfeit music CDs and 11,000 audiocassettes through December 2002. As of August 2003, ADOPROFONO conducted 28 operations with the following results: 402,144 pirate music CDs and cassettes seized, 48 CD-R Burners seized, and 34 individuals detained for questioning. RIAA is encouraged by the formation of a task force that would include members of the Fiscalia, ONDA, ADOPROFONO, and the National Police, to address music piracy issues and work together in the identification, arrest, seizure and prosecution of illicit manufacturers, distributors and vendors of music pirates. The Government is encouraged to provide budgetary support to ONDA so they may increase the level of inspections to pre-2002 levels.

**Business Software:** Although the business software industry has reported some enforcement successes in the Dominican Republic, piracy levels of its copyrighted works remain high (61%) as well. BSA runs a campaign involving criminal actions, administrative actions as well as civil actions. With respect to criminal/administrative actions this year, BSA reports it continues to be able to work very effectively with ONDA and the *Fiscalia* in this new enforcement regime. During 2002, ONDA and the *Fiscalia* were proactive on software industry cases, with ONDA conducting inspections and seizures and referring evidence to the

Fiscalia for criminal prosecution. Working with Dominican prosecutors in the Fiscalia offices, BSA achieved 12 convictions of software piracy in recent years. Other prosecutions for piracy and counterfeiting are working their way through the Dominican courts. Since the beginning of 2003, ONDA continues to be helpful and supportive in performing inspections not only in Santo Domingo but also in other cities such as Santiago, La Vega, San Pedro de Macorí, La Romana, and San Francisco de Macorís.

### **Recent Structural Actions Taken and/or Underway to Improve Enforcement**

IIPA is aware of several actions taken to strengthen the anti-piracy infrastructure mechanisms. First, the Dominican Congress on July 2, 2002 passed a new Criminal Procedure Code which continues to allow ONDA and the Fiscalia to conduct *ex officio* actions; this law will enter into effect in August 2004. According to the MPA, both ONDA's and the Fiscalia's disposition to act on an *ex officio* basis has been good. That effort, however, is stopped by upper-level officials when it touches larger, more politically-connected violators (for example, the Minister of Culture prohibited ONDA from acting *ex officio* against video stores, then recanted under international pressure; the former Attorney General openly told the MPA that he would not take action against larger television stations), leaving these enforcement authorities only the ability to act against smaller less important violators.

Second, the Dominican authorities appointed a new specialized IPR prosecutor, with nationwide authority in the summer of 2003. This prosecutor will be in charge of IPR, E-Commerce and telecommunications prosecutions. Three ministries have ceded authority to this new centralized position. Creation of a nationwide IPR prosecutor has been high on the copyright industries' wish-list for years.

Third, sources indicate that INDOTEL is examining possibilities under its own legislation and regulations in order to strengthen its actions against those broadcast stations and cable companies which are infringing copyrights.

### **III. Questions about the Government's Commitment to Adequate Copyright Protection**

**Copyright Law of 2000:** IIPA notes that the leverage provided by this GSP/CBI review did help foster legislative progress in the Dominican Republic. Specifically, the Dominican Republic adopted a new copyright law in October 2000 (Law 65-00), fulfilling many years of effort to replace its inadequate 1986 copyright law. That legislative achievement represented success in advancing higher levels of substantive copyright protection as well as expanding the battery of tools available for criminal, civil and administrative copyright enforcement in the Dominican Republic. The law raised the level of copyright protection up to WTO TRIPS-level protection, and also integrated several obligations of the two WIPO Internet Treaties.

**Regulations undermining the Copyright Law were adopted (then reversed, in part) in 2003:** Much to the surprise and consternation of the copyright industries, the Ministry of Culture issued a series of resolutions to the copyright law on/about July 11, 2003 (Resolutions 4-03, 5-03, 6-03, 7-03). In particular, two of the more egregious provisions disallowed motion picture studios from determining their own method of distribution and eliminated the Copyright Office's (ONDA) ability to independently investigate copyright violations of audio-visual works (thus administratively weakening the 2000 Copyright Law itself).

Sadly, the rapid and non-transparent issuance of these July regulations showed the government's predisposition towards political and personal considerations over its legal commitments. All the copyright industries were very concerned about the July 2003 regulations and the adverse precedent they might have to undermine enforcement actions.

After much bilateral engagement, the Ministry of Culture revised its July 2003 regulations in August 2003 (Resolution No. 9-03) to correct the two most glaring problems: that the motion picture studios were not considered copyright holders (thus greatly interfering with their ability to take anti-piracy actions) and that ONDA lost its *ex officio* inspection authority.

**Constitutional challenge to the copyright law:** BSA is currently defending against a constitutional challenge to the 2000 copyright law. A reseller defendant in a BSA case, Hard Soft, filed a constitutional challenge in the Supreme Court of Justice in Santo Domingo, alleging that portions of the 2000 copyright law are unconstitutional. Hard Soft argues that the copyright law protects software more stringently than other media, and is thus unconstitutional because of unequal protection, in addition to other arguments. BSA has filed a brief refuting these arguments, and even ONDA also filed a brief against this constitutional challenge. The hearing in order to discuss whether Hard Soft committed a copyright infringement was scheduled for November 4, 2003. Regarding the constitutional challenge, BSA is still awaiting for the Supreme Court's final decision.

**WIPO Internet Treaties:** The Congress of Dominican Republic has passed legislation to ratify the two 1996 WIPO treaties, the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty. Currently the Treaties are pending for the President's signature into Law.

#### **IV. Estimated Trade Losses Due to Copyright Piracy in the Dominican Republic**

Below is a chart tracking the estimated trade losses due to copyright piracy and their estimated piracy levels in the Dominican Republic, tracking the years since the 1999 filing of IIPA's GSP/CBI IPR petition. Data for this chart is provided to IIPA by its member associations. The methodology, which is basically the same used when we filed our 1999 petition, is available on the IIPA website.<sup>6</sup>

**DOMINICAN REPUBLIC**  
**ESTIMATED TRADE LOSSES DUE TO PIRACY (in millions of U.S. dollars)**  
**and LEVELS OF PIRACY: 1999 – 2002**

INDUSTRY	2002		2001		2000		1999	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level
<b>Motion Pictures</b>	2.0	60%	2.0	60%	2.0	60%	2.0	80%
<b>Records &amp; Music<sup>7</sup></b>	6.9	65%	7.7	65%	2.0	80%	2.0	80%
<b>Business Software Applications<sup>8</sup></b>	3.6	61%	4.0	64%	6.7	68%	7.4	69%

<sup>6</sup> The methodology used by IIPA member associations can be accessed at [www.iipa.com/pdf/2003spec301methodology.pdf](http://www.iipa.com/pdf/2003spec301methodology.pdf).

<sup>7</sup> RIAA reports that \$7.65 million (rounded to \$7.7 million, above) for 2001 represents the estimated sales displacement to the legitimate industry. Actual revenue to music pirates is estimated at \$4.1 million. For the sake of comparison, the recording industry's loss estimate for 2000 of \$2 million was based on less complete information, and represented a projection of pirate revenue rather than industry losses.

<sup>8</sup> In IIPA's February 2003 Special 301 filing, BSA's 2002 estimates of \$2.9 million at 61% were identified as preliminary; BSA finalized its 2002 numbers in mid-2003, and those revised losses are reflected above. BSA's trade loss estimates reported here represent losses due to piracy which affect only U.S. computer software publishers in this country, and differ from BSA's trade loss numbers released separately in its annual global piracy study which reflects losses to (a) all software publishers in this country (including U.S. publishers) and (b) losses to local distributors and retailers in this country. With respect to this latter statistic, the BSA reported \$4.4 million in estimated retail software piracy in the Dominican Republic in 2002 in its Eighth Annual BSA Global Software Piracy Study, (released June 3, 2003), available at [http://global.bsa.org/globalstudy/2003\\_GSPS.pdf](http://global.bsa.org/globalstudy/2003_GSPS.pdf).

<b>Entertainment Software</b>	<b>NA</b>	<b>NA</b>	<b>NA</b>	<b>NA</b>	<b>6.0</b>	<b>NA</b>	<b>NA</b>	<b>NA</b>
<b>Books</b>	<b>1.0</b>	<b>NA</b>	<b>1.0</b>	<b>NA</b>	<b>1.0</b>	<b>NA</b>	<b>1.0</b>	<b>NA</b>
<b>TOTALS</b>	<b>14.7</b>		<b>14.7</b>		<b>17.7</b>		<b>17.5</b>	

## **V. Conclusion**

Copyright enforcement in the Dominican Republic continues to fail to conform to the “adequate and effective protection” standard demanded of our trading partners in our GSP and CBI trade laws.

Criminal and administrative enforcement by Dominican Republic authorities have failed to deter piracy and provide adequate and effective protection to U.S. copyright owners. Piracy levels remain high across the copyright sectors, with little decreases in piracy levels since 2000. The bottom line remains one of results – is the government taking effective actions against copyright infringements in order to deter piracy. While there have been sparks of welcome cooperation between Dominican authorities and the industries, positive anti-piracy results are slim and consistency in enforcement has been lacking. The Dominican Republic has been on notice for years that it must take appropriate action to meet its “part of the bargain” in receiving these unilateral preference trade benefits. So far, its part of the bargain has not been met.

With the announcement of the Dominican Republic’s docking to the U.S.-Central American Free Trade Agreement (which is still in the process of negotiation), IIPA and its members understand that the government of the Dominican Republic has a renewed sense of urgency to resolve the problems of widespread copyright piracy and ineffective enforcement. IIPA believes that, until the government of the Dominican Republic acts swiftly and effectively to significant reduce the piracy levels, including halting broadcast piracy, and improve its prosecutorial and judicial results in criminal copyright cases, the reward of extending the Dominican Republic with additional trade concessions – such as docking to the CA-FTA – should be withheld.

Respectfully submitted,

International Intellectual Property Alliance