

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2005 SPECIAL 301 REPORT

DOMINICAN REPUBLIC

EXECUTIVE SUMMARY

Special 301 Recommendations: IIPA recommends that the Dominican Republic be elevated to the Priority Watch List.

Overview of Key Problems/Challenges: The IIPA and its members have been monitoring the response of the government of the Dominican Republic to its commitments since the March 2004 initialing of the U.S.-Dominican Republic Free Trade Agreement (FTA) and the August 2004 signing of the U.S.-Dominican Republic-Central American FTA (DR-CAFTA). IIPA remains seriously concerned about the slow pace and lack of progress of copyright enforcement reform in the Dominican Republic, especially regarding two key issues identified in the FTA itself: widespread broadcast piracy, and the need for expeditious resolutions of pending criminal copyright infringement cases. Underlying our concern is the questionable commitment of both the prior Mejia administration and the new Fernandez administration toward resolving these issues once and for all. While investigations and raids against broadcasting stations involved with the unauthorized transmission of copyrighted programming were initiated back in 2003 by administrative and criminal enforcement agencies, the ensuing criminal actions taken against certain politically connected stations remain stymied. Criminal trials in key copyright infringement cases involving the music and film industry have been postponed numerous times under an antiquated court system, which permits such delays. The government of the Dominican Republic needs to act swiftly and effectively to significantly reduce the piracy levels, including halting broadcast piracy and improving its prosecutorial and judicial results in criminal copyright cases. Estimated trade losses due to piracy in the Dominican Republic amounted to US\$16.3 million in 2004.

Actions for the Dominican Republic to Take in 2005

- Have the enforcement agencies (including ONDA, INDOTEL and the police—*Fiscalía*) conduct more regular and sustained actions, followed by prompt criminal prosecutions;
- Focus particular attention on inspecting/monitoring those broadcast television stations which continue to broadcast U.S. programming without authorization, and follow-up with criminal and administrative actions;
- Assign a squad of investigative law enforcement officers to follow up on the cases after ONDA or the *Fiscalía* has conducted a raid;
- Dedicate more resources and training to ONDA inspectors, including, but not limited to, more inspectors, more equipment, and expanding ONDA to include satellite offices;
- Support ONDA's use of penalties under their regulations to fine and close down retail outlets where infringing actions have been identified or infringing products seized;
- Assure proper implementation of the new Criminal Procedure Code, which entered into effect in August 2004 (i.e., training of judges, prosecutors and police officers in

intellectual property matters and *ex officio* authorizations of raids, inspections and closures of illegal activities);

- Expedite prosecutions and judicial decisions in criminal cases;
- Complete the deposit process to join the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty.

DOMINICAN REPUBLIC Estimated Trade Losses Due to Copyright Piracy (in millions of U.S. dollars) and Levels of Piracy: 2000-2004¹										
INDUSTRY	2004		2003		2002		2001		2000	
	Loss	Level								
Motion Pictures	2.0	20%	2.0	20%	2.0	60%	2.0	60%	2.0	60%
Records & Music ²	10.3	75%	9.9	65%	6.9	65%	7.7	65%	2.0	80%
Business Software ³	3.0	76%	3.0	76%	3.6	61%	4.0	64%	6.7	68%
Entertainment Software ⁴	NA	NA	NA	NA	NA	NA	NA	NA	6.0	NA
Books	1.0	NA								
TOTALS	16.3		15.9		13.5		14.7		17.7	

Copyright and Bilateral Trade Obligations

Free Trade Agreement: IIPA and its members have long supported high-level, bilateral engagement between the U.S. and the Dominican Republic in several ways.⁵ IIPA supports the high levels of copyright obligations and enforcement found in the FTAs, like CAFTA. The Central America-Dominican Republic-U.S. Free Trade Agreement (DR-CAFTA) was signed on August 5, 2004, and contains strong provisions on copyright. It also contains provisions in the IPR chapter, and in a side letter, in which the government of the Dominican Republic has made specific commitments to improve broadcast piracy enforcement and resolve copyright infringement cases in the courts in advance of the FTA entering into force.⁶

¹ The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2005 Special 301 submission at www.iipa.com/pdf/2005spec301methodology.pdf.

² RIAA reports that in 2003, \$9.9 million represented the estimated sales displacement to the legitimate industry. In 2004, the losses to the legitimate market increased to \$10.3 million with an estimate of 1.53 million pirate CD and cassettes units available in the market.

³ BSA's final 2003 figures represent the U.S. software publisher's share of software piracy losses in the Dominican Republic, as compiled in October 2004 (based on a BSA/IDC July 2004 worldwide study, found at <http://www.bsa.org/globalstudy/>). In prior years, the "global" figures did not include certain computer applications such as operating systems, or consumer applications such as PC gaming, personal finance, and reference software. These software applications are now included in the estimated 2003 losses resulting in a higher loss estimate (\$5 million) than was reported in prior years. The preliminary 2003 losses which had appeared in previously released IIPA charts were based on the older methodology, which is why they differ from the 2003 numbers in this report.

⁴ ESA's reported dollar figures reflect the value of pirate product present in the marketplace as distinguished from definitive industry "losses."

⁵ For more details on IIPA's summary of the history of the Dominican Republic on IPR issues under Special 301 and other trade programs, see Appendix D (<http://www.iipa.com/pdf/2005SPEC301USTRHISTORY.pdf>) and Appendix E (<http://www.iipa.com/pdf/2004SPEC301HISTORICALSUMMARY.pdf>) of this submission.

⁶ The U.S.-DR-CAFTA IPR Chapter text is posted on the USTR website at http://www.ustr.gov/assets/Trade_Agreements/Bilateral/DR-CAFTA/DR-CAFTA_Final_Texts/asset_upload_file934_3935.pdf (see Annex 15.11 on pages 15-32 and 15-33 to find the annex on "Procedures and Remedies Concerning Broadcast or Cable Retransmissions in the Dominican Republic"). The August 4, 2004 Side Letter on IPR Procedures is posted at

To date, the Dominican Republic government's implementation of the unilateral commitments it made in the DR-CAFTA Side Letter on IPR Procedures and the Annex to the IPR chapter have been very disappointing. For example, the Side Letter on IPR Procedures addresses the twin issues of halting broadcast piracy (including providing a written report on broadcast piracy within 60 days—October 5, 2004—and quarterly thereafter) and expeditiously resolving pending criminal copyright infringement cases. The government missed the October 5 deadline for sharing its broadcast piracy report, and the information it did later provide was cursory. No concerted inspections or actions were taken against broadcast stations suspected of piracy. The Annex to the IPR chapter addresses the application of administrative, civil and criminal procedures and remedies in the case of broadcast or cable transmissions or retransmissions.

GSP and Special 301: The copyright industries have used the Special 301 process since its invention to elevate the importance of copyright issues onto the trade agenda, and we were disappointed that USTR chose to place the Dominican Republic on the Watch List in 2004.⁷ 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 and effective copyright protection for U.S. copyright owners and to provide equitable and reasonable market access. GSP hearings were held in April 2000 and in October 2003,⁸ and IIPA urged that this investigation remain ongoing because the key piracy and enforcement issues had not been adequately resolved.⁹ Nevertheless, as the Dominican Republic FTA negotiations were moving forward, USTR terminated the GSP investigation on July 2, 2004.

The Motion Picture Association of America (MPAA) subsequently filed a new petition to USTR on December 13, 2004 to request that the U.S. Government initiate a new GSP IPR investigation against the Dominican Republic. The petition highlighted the continuing broadcast piracy problems faced by the MPAA member companies.

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MPAA reports that broadcast piracy and video piracy remain its key piracy problems in the Dominican Republic. The broadcast of movies prior to release in theaters or featuring motion pictures still in their theatrical release in the Dominican Republic greatly reduces legitimate business opportunities in other media by disrupting the normal release sequence to theatrical exhibitors, retail video outlets and legal cable operators. For many years, MPAA and its member companies have taken action against television and video piracy in the Dominican

http://www.ustr.gov/assets/Trade_Agreements/Bilateral/CAFTA-DR/CAFTA-DR_Final_Texts/asset_upload_file15_5851.pdf.

⁷ See IIPA's press release on the 2004 Special 301 decisions, May 3, 2004, posted at http://www.iipa.com/pressreleases/2004_May3_Sp_301_plus_chart-rev.pdf.

⁸ See IIPA's Pre-GSP Hearing Brief, October 1, 2003, posted at http://www.iipa.com/rbi/2003_Oct30_GSP_DomRep.pdf.

During the first 11 months of 2004, \$85.5 million worth of Dominican goods (or 2.1% of the Dominican Republic's total exports to the U.S. from January to November) entered the U.S. under the duty-free GSP code, representing a 29.3% increase from the same period in the prior year. During this same period in 2004, \$796 million worth of Dominican goods entered under the CBI, representing a 2.4% increase over the same period in the prior year, and \$1.6 billion worth of Dominican goods entered under the CBTPA, representing a 1.3% decrease over the same period in the prior year.

⁹ See IIPA Letter to the GSP Subcommittee on the Dominican Republic GSP Review, May 20, 2004, posted at http://www.iipa.com/gsp/2004_May20_GSP_DomRep-rev.pdf.

Republic. Since 2003, the Dominican Republic has taken notable and successful action to reduce piracy in both of these areas. There remain, however, some broadcast stations which appear impervious to effective prosecution for piracy. Although piracy has been significantly reduced in video stores, these same stores continue to violate copyright law by using U.S.-only home-use DVDs for commercial use in the Dominican Republic. Annual losses to the U.S. motion picture industry due to audiovisual piracy in the Dominican Republic are estimated to be over \$2 million in 2004.

Piracy of sound recordings and music in the Dominican Republic increased in 2004, with piracy estimated at 75%. The estimated trade loss due to music recording piracy increased to \$10.3 million in 2004. The piracy rate estimate for audiocassettes (still sold in small quantities by independent labels) is 95%, compact discs (CDs) is 25% in retail stores. Street vendors in possession of large inventories of pirate music again plague many major shopping plazas in the tourist areas around the country. In 2003, the Recording Industry Association of America (RIAA) had its first full year of operations utilizing ADOPROFONO (a group or task-force made up of record labels, the IPR prosecutor's office, ONDA, and the National Police); that same year, ADOPROFONO and ONDA seized over 648,000 pirate units from Santo Domingo and Santiago. In 2004, however, the change in government led to a dramatic decrease in the number of operations concerning pirate music. The above organizations combined seized less than 145,000 pieces of product during 2004. Currently the enforcement activities are minimal, with the new government getting off to a slow start in re-initiating the level of enforcement enjoyed during 2003.

The Business Software Alliance (BSA) reports that computer software piracy in the Dominican Republic comprises primarily end-user piracy and hard-disk loading. With hard-disk loading, Dominican resellers load unlicensed software onto computer hardware and sell the package to an end user. In some cases, the software is represented as legitimate and the purchasers may be unaware that they are buying illegal software; in other cases, the purchasers are complicit in the piracy. End-user piracy rates remain high among Dominican businesses of all sizes, from small family businesses to large, prosperous financial institutions and industrial concerns. Preliminary estimated trade losses to the business software industry are \$3.0 million in 2004, with a piracy level of 76%.

The book publishing industry reports that problems in the Dominican Republic center around illegal photocopying, primarily of English language teaching (ELT) textbooks. Commercial piracy is diminishing as legitimate distributors increase. Estimated trade losses to the publishing industry stayed at approximately \$1.0 million in 2004.

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IIPA and its local colleagues harbored some concern that the summer 2004 elections might result in a slowdown in anti-piracy activities taken by Dominican authorities. At least with respect to broadcast piracy investigations, those concerns became reality, as no known inspections against broadcast stations took place in the months leading up to the August elections.

Broadcast piracy remains widespread: During 2004, broadcast piracy remained a huge problem in the Dominican Republic. For example, Telemicro broadcast recent theatrical releases, including *Shrek*—all without authorization. Canal del Sol changed its programming line-up to include more political programming and fewer films, but the films broadcast all appear

to be pirated. Reports indicate that smaller stations also continue to broadcast films without authorization. After the elections, there was an enforcement lull for some months but activity began to perk up late in the year. Interestingly, in December 2004, Canal del Sol actually stopped transmitting movies for three weeks, but has since resumed broadcasting pirated films. Currently, Telemicro and Digital 15 are the stations which are the most notorious for broadcasting MPA member company films without authorization. In December 2004, INDOTEL and ONDA, the District Attorney and the General Prosecutor indicated their intent to take actions against pirate broadcast stations.

Legal monitoring of four channels (Telemicro, Digital 15, Canal del Sol and Virus) was ordered by a judge at requested of the Santo Domingo District Attorney, in accordance with the formal complaint and legal brief prepared by MPAA. The monitoring list was delivered to the D.A., which now has the legal obligation to apply to the judge for a shutdown order. The D.A. is expected to file against the Virus station first, and then against other stations subsequently (Virus Channel transmitted *2 Fast 2 Furious* during the monitoring).

MPAA wishes to highlight the excellent support by the U.S. Embassy Santo Domingo Economic Section for its cooperation and coordination with MPAA legal counsel, and for continuing to pressure the Dominican Republic government to comply with DR-CAFTA broadcast piracy reporting requirements. The importance the embassy placed on IPR issues in 2004 has helped to facilitate MPAA's work in addressing this long-standing television broadcast problem with key government agencies.

Investigations/actions taken by the GODR in broadcast piracy cases: In early to mid- 2004, neither ONDA nor INDOTEL took any inspections against broadcast stations. The reason for the lack of activity was not known; perhaps there are political motivations involved or perhaps the authorities were waiting for formal complaints (*denuncia*), even though such formalities are not required. The bottom line is that broadcast piracy—a 20-year problem—remains severe and governmental authorities are not willing to address this problem. Some inspections have been made of the small cable companies, shutting down their operations.

Status of criminal prosecutions against two key broadcasters: Sadly, there has been little progress on the two criminal prosecutions involving broadcast piracy. Inspections of Telemicro (Channel 5) and Canal de Sol (Channel 40) were conducted by administrative agencies in April 2003, and criminal charges were filed in August 2003. Since then, numerous hearings have been held, predominately on defense procedural motions. Finally, in late 2004, judgment was reached in the Telemicro case. Here is a summary of the pending television piracy cases in which MPAA is active:

- In the Telemicro case, the first criminal hearing was scheduled for August 20, 2003 but was postponed. More hearings were held on October 20, 2003, December 16, 2003, March 1, 2004, and April 2, 2004. At the April 2 hearing, the defendants requested that the court impose a bond to continue the case, even though the 2000 Copyright Law expressly exempts copyright holders from paying any bonds. The defendants also requested that the judge rule that provision in the copyright law unconstitutional. The judge rejected the defendant's motion, and the next hearing of this case was scheduled for August 5, 2004. On August 21, 2004, the court sanctioned Telemicro's representative (president Rafael Reynoso), with three months' jail and a fine of 50 times minimum wage (US\$4,915). Unfortunately, the judge did not order the cessation of the transmissions of infringing signals. MPAA had filed an accompanying civil suit, and was awarded US\$11,000. The defendant

has appealed the decision, and the next hearing of the appeal process will be held on March 1, 2005. Penalties and damages currently are suspended, pending this appeal.

- In the Canal del Sol case, the first hearing was held on October 20, 2003, followed by hearings on December 16, 2003, March 1, 2004, May 10, 2004, and June 11, 2004. On June 11, the judge decided in favor of the rightsholders and the prosecution and allowed the inclusion of the director of Canal del Sol as a named defendant. Another hearing was held on August 5, 2004, and additional suspensions have occurred; the new trial date is April 15, 2005.
- MPAA has filed criminal complaints with the District Attorney against two other stations, Digital 15 and Virus. New criminal complaints against Telemicro and Canal del Sol were filed on December 10, 2004.

Anti-piracy actions against cable and hotel piracy: INDOTEL continues to conduct investigations against cable systems and hotels in the larger tourist cities. Specifically, two cable actions have been taken: Ansonia Visión in the city of Azua, and Telecable Dominicano in Santo Domingo. These inspections resulted in the seizure of equipment used for the illegal transmission of satellite signals. To the best of our knowledge, these inspections have not yet resulted in any fines, closures or license suspensions. Additionally, there have been four actions taken against hotels transmitting unlicensed programming to their guests.

Anti-piracy actions taken against video piracy: MPAA reports that ONDA conducted four inspections against video retailers in the May-July 2004 time period. Three other inspections were done under the new administration of ONDA in the August-December 2004 time period. Results have been disappointing, with little measurable change in the level of video store piracy.

Anti-piracy actions against music piracy: ONDA reported taking actions against music piracy during the last four months of operations. However, the new director has been reluctant to provide information on raids and their successes on a frequent basis. The director has set a quarterly time-table to release information on enforcement initiatives and their successes. To date, the RIAA has not received a report on ONDA operations. In addition, the director has been reluctant to commit to working with ADOPROFONO. In recent meetings, the RIAA re-committed to assisting ADOPROFONO, ONDA the National Police and the *Fiscalía* with training and operations in hopes that the level of enforcement enjoyed in 2003 would again be realized. Since August 2004, ONDA has not reported additional inspections/actions, although at recent meetings they advised seizing over 60,000 counterfeit music CD-Rs since the change in government (ONDA has not provided any supporting documentation).

Anti-piracy actions taken against business software piracy: ONDA and the *Fiscalía* have been conducting inspections against both business software resellers as well as taking *ex officio* actions against business end-users. To date, BSA is satisfied with the level of activity on these fronts. Since the beginning of 2004, ONDA has performed 26 inspections and the *Fiscalía* has carried out 16 raids (8 raids by the *Fiscalía Distrito Nacional* and another 8 by the *Fiscalía Provincia de Santo Domingo*).

Judicial process in recording cases: The judicial process in the Dominican Republic remains cumbersome. In 2004, 105 criminal cases for copyright infringement of sound recordings filed since 1999 are still pending trial or appeals court hearings. Four criminal judgments were obtained, during the year.

Since 1999, there have been 39 criminal convictions in cases involving music piracy,

including prison sentences, court fines and restitution in the total amount of some US\$104,700. Of these 39 cases, 21 of the convictions (with \$21,700 in total fines) were obtained in 2004. However, almost all of these convictions (34) are on appeal, with no review dates scheduled by the Court of Appeals. There is one piece of good news; in March 2004, a defendant in one of these sound recording cases was actually sentenced by a court to serve three months in jail. The defendant served his time and was released sometime in June 2004. In addition, there have been three cases recently heard by the appellate court in the Dominican Republic; they reaffirmed the sentences and pick-up orders were issued for the defendants. However, with the change in government and a new prosecutor in place, the *Fiscalía* needed to review the cases and reissue the arrest orders. The RIAA understands that the arrest of these individuals is imminent.

Judicial process in audiovisual cases: As of the end of 2004, MPAA reports that they have 21 criminal cases pending before the courts. These include the Telemicro and Canal del Sol broadcast piracy cases as well as several cable piracy cases.

Criminal procedural code amendments: The amendments to the criminal procedural code (adopted in July 2002) entered into effect on September 21, 2004. The criminal cases underway at that time will be adjudicated under the current procedural laws which certainly have not served to expedite criminal cases and prosecutions. The new cases against the TV stations have started under the new code.

A recent action in a trademark case has prompted some concern about the application of *ex parte* orders to stop infringing activities in copyright cases. On January 31, 2005, a criminal judge in a trademark case declined to issue an *ex parte* order to cease the illegal manufacturing of the counterfeited materials (pants). The explanation given was that the order to cease the activity would be against the presumption of innocence of the defendant. Nevertheless, a different judge in another case did allow the seizure of infringing products, as such seizures are permitted under the new criminal procedure code. Local counsel believes this January 31 decision is an erroneous application of law in its denial of this *ex parte* order. The copyright law, the trademark law and the new criminal procedure code all contain provisions that allow the judge to order the cessation of illegal manufacturing activities as well as the seizures of infringing goods and equipment. If this January 31 decision were applied in the broadcast piracy context, serious difficulties in effective enforcement might arise. For example, if the judge does not order the cessation of broadcasting in a TV piracy case, then it is up to the Dominican Republic enforcement agencies (ONDA, INDOTEL and the *Fiscalía*) to inspect that station and take further action to halt the infringing transmissions. The problem here is that because there is no judicial order, pressure (including political pressure) might adversely affect the agencies' decisions to take enforcement actions or not. Political influence has, sadly, been the determinant of broadcast piracy enforcement in the Dominican Republic for decades. It remains critical that the Dominican Republic courts issue complete orders for cessation of activities as well as seizures of infringing products and equipment, as permitted under current law.

WIPO Internet Treaties: The President has approved the accession of the Dominican Republic to both the WCT and the WPPT. It remains uncertain why there is a delay in completing the delivery of these documents to WIPO in Geneva. IIPA supports swift deposit of these documents.

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 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, but was postponed until April 2004. With respect to this constitutional challenge, BSA is still waiting for the Supreme Court's final decision.