

# INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

## 2006 SPECIAL 301 REPORT

# COSTA RICA

### EXECUTIVE SUMMARY

**Special 301 Recommendation:** IIPA recommends that Costa Rica be elevated from the Watch List to the Special 301 Priority Watch List in 2006.

#### **Actions Which the Government of Costa Rica Should Take in 2006:**

- Pass Bill No. 15.076, which would amend the 2000 "*Ley de Procedimientos de Observancia de los Derechos de Propiedad Intelectual*" to bring it into compliance with Costa Rica's obligations under TRIPS and the WIPO "Internet" Treaties; this bill has the support of the local copyright industries.
- Instruct the Attorney General to revoke his 2005 order to his prosecutors to stop bringing IPR cases, and act on the dozens of cases that have been submitted to his prosecutors;
- Reduce unwarranted delays in investigations, prosecutions and sentencing in copyright cases;
- Increase and apply vigorously criminal sanctions for copyright infringement (the improved statutory basis will be provided in Bill No. 15.076, above);
- Create a Public Prosecutor's Office specialized in IP matters, and assign resources and personnel to the office;
- Amend the enabling legislation for the Copyright Office so this office has the authority to conduct administrative enforcement (a power currently reserved for the judicial authorities);
- Improve training of enforcement officials and technical experts in Costa Rican agencies.

IIPA and its members in recent years have identified numerous copyright enforcement deficiencies in the Costa Rican legal and enforcement system.<sup>1</sup> Unfortunately, no progress was made in addressing these problems in 2005, and in fact, Costa Rican law enforcement authorities took several detrimental actions which undermine effective copyright enforcement in this country. For a country which receives significant preferential treatment under several U.S. trade programs, Costa Rica continues to make only sporadic and inconsistent efforts to improve its IPR enforcement regime.<sup>2</sup>

IIPA and its members also support the IPR chapter in the U.S.-Central America-Dominican Republic Free Trade Agreement;<sup>3</sup> it contains strong provisions on standards of copyright protection

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<sup>1</sup> For more details on the history of bilateral engagement on copyright issues with Costa Rica, see Appendix D of this filing at <http://www.iipa.com/pdf/2006SPEC301USTRHISTORY.pdf> and Appendix E at <http://www.iipa.com/pdf/2006SPEC301HISTORICALSUMMARY.pdf>.

<sup>2</sup> During the first 11 months of 2005, \$327 million worth of Costa Rican goods entered the U.S. under the CBTPA. During the first 11 months of 2005, \$83 million worth of Costa Rican goods (or 2.7% of Costa Rica's total exports to the U.S. from January to November) entered the U.S. under the duty-free GSP code, representing a 12.5% decrease from the same period in 2004. During the first 11 months of 2005, \$598.1 million worth of Costa Rican goods entered the U.S. under the CBI, representing an increase of 12.2% from the same period in 2004.

<sup>3</sup> IIPA Press Release, "IIPA applauds the signing of the U.S.-Central American-Dominican Republic FTA," Aug. 2, 2005, at <http://www.iipa.com/pdf/IIPA%20CAFTA%20DR%20Signing%20by%20Pres%20Bush%20FINAL%2008022005.pdf>.

and enforcement. This FTA was signed on August 2, 2004, and will enter into force sometime during 2006.<sup>4</sup> So far, however, Costa Rica is the only CAFTA country which has not ratified it.

## **COPYRIGHT ENFORCEMENT IN COSTA RICA**

There is a variety of problems which interfere with effective copyright enforcement in Costa Rica. Some have been engrained in the system for years without resolution, and others have appeared within the past year.

**2005 instruction to drop all IPR complaints:** At the beginning of 2005, apparently the Attorney General instructed all prosecutors around the country to “drop” all copyright complaints based on a claimed lack of resources. As a result of this decision, 65 music piracy cases were dropped by the prosecutors and no anti-piracy operations were conducted in 2005. The music industry has requested action on all the cases in different parts of the country many times, to no avail. The business software industry also reports increased problems with enforcement due to the extremely low priority placed on copyright enforcement by the Attorney General’s office.

**Copyright office revokes license of collecting society:** The Head of the Copyright Office (Registradora de Derecho de Autor) in December 2005 revoked the license to the phonogram producers’ and performers’ collecting society based on a non-existent legal requirement. The collecting society for producers and performers (Asociacion Costaricense de la Industria Fonografica y Afines), also known as ACOGEF, had been operating for over a year. The revocation questioned the approval given by the same office (under the direction of a different director) to the original filing. As a result of this decision, ACOGEF stopped collecting all funds and issuing licenses for broadcasting and public performances, thereby in effect making international sound recordings free for use in Costa Rica. The parties are applying for reconsideration of this revocation, and if approval does not come quickly, they will file for an injunction against the decision.

**Law still pending to amend the objectionable *Ley de Observancia*:** The amendments to the Law on Enforcement Procedures of IPR (*Ley de Observancia de los Derechos de Propiedad Intelectual*) is still pending at the Legislation Commission in the Legislative Assembly (Congress). However, it remains in 37th place on the legislative agenda; this means it will not be acted upon. The President of the Commission has made no effort to push for these amendments. Passage of the industry-supported legislation is essential to unraveling the mess that is Costa Rican criminal copyright enforcement. To review (further details appear in the law section, below):

- In 2000, Costa Rica enacted its “*Ley de Procedimientos de Observancia de los Derechos de Propiedad Intelectual*” – however, this intellectual property reform legislation diverged substantially from TRIPS requirements and actually scaled back the protection afforded to copyrighted materials. The copyright industries objected to this law but its recommendations were ignored; the bill as adopted in 2000 failed to meet TRIPS standards.
- The copyright industries, working with Congressional officials, developed a bill to amend the *Ley de Observancia* (Bill No. 15.076), increase criminal sanctions and make other necessary amendments to Costa Rican law to improve enforcement.

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<sup>4</sup> USTR Press Release on CAFTA-DR Implementation, December 30, 2005 at [http://www.ustr.gov/Document\\_Library/Press\\_Releases/2005/December/Statement\\_of\\_USTR\\_Spokesman\\_Stephen\\_Norton\\_Regarding\\_CAFTA-DR\\_Implementation.html](http://www.ustr.gov/Document_Library/Press_Releases/2005/December/Statement_of_USTR_Spokesman_Stephen_Norton_Regarding_CAFTA-DR_Implementation.html).

- However, the Costa Rican government also presented its own bill (Bill No. 15.556) to amend the 2000 law. Unfortunately, this bill reduces the minimum (maximum?) penalty for copyright piracy to one year, making it nearly impossible to incarcerate pirates, in large part because this allows judges to reduce any prison sentence to a mere fine. The Costa Rican government's attempts to make effective criminal enforcement more difficult is certainly not the correct path for it to take, especially given its upcoming CAFTA obligations.

**Need for Special IPR Prosecutor:** A Special Prosecutor's Office (*Fiscalía Especializada*) is required because existing prosecutors generally are not sufficiently trained to adequately enforce Costa Rica's intellectual property laws. In 2003, the Costa Rican legislature proposed a law to create a Special Prosecutor's Office, but the law failed to pass; no action was taken during 2005 to address this issue. The creation of a specialized prosecutor's office with nationwide jurisdiction may be the only way to significantly expedite IP criminal cases. Given the significant delays and lack of proficiency observed by prosecutors, judges and the OIJ, the creation of this office has become even more of a priority.

In February 2002, the Costa Rican General Prosecutor officially announced that 12 specialized "link" prosecutors, one for each public prosecutor's office in the country, were appointed to handle, "with priority," intellectual property cases. While this development appeared to be positive, by 2003 the Costa Rican Public Ministry had not appointed new "link" prosecutors, but instead commissioned already existing prosecutors. The copyright industries continue to support the need for these "link" prosecutors.

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

**Creation of the Inter-Ministerial Committee on IP matters by decree:** In early 2002, an Inter-Ministerial Committee on IP matters was created by resolution of the participating agencies which included representatives from the Ministry of Justice, Ministry of Foreign Trade, Public Ministry, OIJ, Customs Administration, and the Judicial School. Reports indicated that ratification of this committee through a presidential decree would empower it to act in front of other public agencies and private organizations and would be a further signal of the government's true commitment to IPR protection. This committee still exists, but it does not include representatives of the private sector. Local industries are not aware of any agenda this committee might be pursuing or any actions taken.

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

of the action, since it prevents the plaintiffs and their experts from providing the much needed technical and licensing assistance that the prosecutors need to determine whether an infringement has occurred. Criminal judges should accept the information and evidence offered by private plaintiffs, and order the raid if such information and evidence is sufficient, without requesting prior investigation reports from the OIJ; this procedure is consistent with Costa Rican legislation.

**Lack of personnel at OIJ:** Local updates on the most recent developments at the OIJ are not available. In the past, the industries have reported that the General Criminal Unit of the OIJ is in charge of investigating intellectual property crimes, and this unit's lack of specialized personnel prevents it from adequately performing its duties. It is imperative for the government to implement an extensive training program for official experts in IPR matters

**Trainings:** The recording industry organized an IPR piracy seminar for 50 police officers and prosecutors during September 2005, with participation of trainers from the United Kingdom.

## **COPYRIGHT LAW AND RELATED ISSUES IN COSTA RICA**

**The inadequate *Ley de Observancia* (2000):** On October 2, 2000, Costa Rica passed the *Ley de Procedimientos de Observancia de los Derechos de Propiedad Intelectual* ("*Ley de Observancia*"), with the objective of complying with TRIPS but which diverges substantially from those requirements. Some of the more harmful provisions of the *Ley de Observancia* are:

- **Lack of ex officio actions:** The competent authorities in Costa Rica should be able to initiate criminal actions *ex officio*, without the need for a complaint by a private party. Article 43 of the *Ley de Observancia* provides that criminal actions against intellectual property violations are considered public actions but can be initiated only by private parties ("*acción pública de instancia privada*"). This means that in the event that a public official detects any intellectual property violations, such official cannot initiate legal action. Only the injured party can initiate legal action. Public officials must be empowered to initiate legal actions for IP violations.
- **Penalties are not at deterrent levels:** Articles 54 and 59 of *Ley de Observancia* provide a maximum penalty of three (3) years of imprisonment for copyright violations. These articles provide the same maximum penalty for those who fix a work without authorization and sell infringing materials. Under other provisions of the Costa Rican penal law, sentences for crimes having a maximum penalty of three years of imprisonment can be commuted (suspended), and the defendants never have to serve time. These provisions violate Articles 41 and 61 of TRIPS (deterrent remedies).<sup>5</sup> Maximum imprisonment penalties should be high enough (four or more years) so as to prevent suspension.
- **Lack of criminalization of some forms of piracy:** Article 70 of the *Ley de Observancia* provides that the "minor" ("*insignificante*") and "without profit" ("*gratuito*") use and reproduction of illegal products will not be penalized. This is probably the most harmful provision of the law. There is no definition of "minor" use and reproduction, and it is not clear when the use and reproduction of illegal products is considered "without profit." It may be easy for pirate resellers to avoid liability by simply reproducing and selling illegal software in small amounts, using a variety of CD burners and retail outlets. For example, BSA may be forced to prove the illegal connection among the many CD reproduction centers to overturn

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<sup>5</sup> By comparison, Article 212 of the Costa Rican Criminal Code states a maximum penalty of six years of imprisonment for larceny, a kind of theft of physical property. Since intellectual property crimes are a form of theft of intangible property, the lesser sentence applied to them as compared to larceny indicates an inconsistency between the *Ley de Observancia* and other Costa Rican legislation.

the qualification of “minor” use and reproduction. This provision also violates various provisions of TRIPS and should be removed.

- **Failure to provide for statutory damages:** TRIPS Article 45.2 permits nations to authorize their courts to order payment of “pre-established damages” (e.g., statutory damages). The adoption of this remedy has proved to be an effective way to deter piracy in other countries, such as Brazil. The CAFTA-DR provides that pre-established damages shall be established as an alternative to actual damages.

**Bills to amend the *Ley de Observancia*:** There are two pending proposals to amend this 2000 law, only one of which should be adopted.

**Bill No. 15.076 (sponsored by the Congress and supported by the copyright industries):** This bill was first introduced on November 27, 2002, and is presently number 37 in the legislative queue, meaning it is very unlikely to receive consideration. The bill contains the following key provisions:

- A new Article 70 calls for closing pirate businesses and/or destruction of equipment used in the infringement. The objectionable “insignificance principle” (“*principio de lesividad e insignificancia*”) will be removed from the Criminal Procedural Code so that it does not apply to IP violations;
- Maximum imprisonment penalties for IP violations will be elevated from 3 to 5 years. Minimum penalties will be elevated from 1 to 3 years. This elevation is aimed at ensuring the imprisonment of copyright infringers.
- Public officials, not only injured parties, will be able to file criminal actions for IP violations (“*acción pública de instancia pública*”);
- The unauthorized “use” of protected works is a crime; and
- Any fine imposed for IP violations should be in addition to the prison sentence, and not in the alternative.

**Bill No. 15.556 (sponsored by the Government):** On March 15, 2004, the Government of Costa Rica presented to the National Assembly (Congress) a new bill to amend the "Enforcement Procedures of Intellectual Property Rights Law" (File No. 15.556). This government-supported bill has two serious deficiencies, which is why the industries do not support it: (1) It includes penal sanctions from 1 to 5 years for all piracy crimes, which is a decrease in the level of penalties proposed in the industry bill (from 3 to 5 years), the longer term being necessary to ensure imprisonment and not suspended sentences; (2) This bill keeps the existing requirement that industry file complaints. Like the industry bill, this government bill is also low on the legislative queue.

**Government software asset management:** In February 2002, former Costa Rican President 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 reiterated his administration’s intention to fully implement that decree. Both the issuance of the decree and President Pacheco’s reiteration of it are important steps that demonstrate the Government of Costa Rica’s increasing awareness of the value of managing their software assets. The Government of Costa Rica should to continue down the path toward implementation of the software asset management practices called for in this decree.

## COPYRIGHT PIRACY IN COSTA RICA

The recording industry reports that music piracy is rampant in Costa Rica. The legitimate market for sound recordings has decreased by 59% since 2000. Only two multinational companies operate in Costa Rica and very few independents are in business. The local legitimate recording activity has almost come to a halt. CD-R burning is the most prevalent form of music piracy. The industry estimates piracy to be in excess of 50 percent of total units sold in the market mostly through street stands and flea markets. The key pirate markets include San Jose, Heredia and Alajuela. The business software industry reports that the most devastating form of piracy in Costa Rica remains the use of infringing or unlicensed software by legitimate businesses and government agencies. Lowering the business software piracy rate could contribute to the Costa Rican economy.<sup>6</sup>

<b>COSTA RICA</b>										
<b>Estimated Trade Losses Due to Copyright Piracy</b>										
<b>(in millions of U.S. dollars)</b>										
<b>and Levels of Piracy: 2001-2005<sup>7</sup></b>										
INDUSTRY	2005		2004		2003		2002		2001	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Records & Music <sup>8</sup>	18.3	60%	NA	NA	7.2	56%	7.0	50%	4.8	40%
Business Software <sup>9</sup>	9.6	67%	9.0	67%	10.0	68%	6.7	61%	6.9	64%
Motion Pictures <sup>10</sup>	NA	NA	2.0	40%	2.0	35%	2.0	40%	2.0	40%
Books	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA
Entertainment Software <sup>11</sup>	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA
<b>TOTALS</b>	<b>27.9+</b>		<b>11.0</b>		<b>19.2</b>		<b>17.6</b>		<b>13.7</b>	

<sup>6</sup> BSA and International Data Corporation (IDC) released a new study on December 8, 2005, which illustrates global economic gains from reducing software piracy. This report, Expanding the Frontiers of Our Digital Future: Reducing Software Piracy to Accelerate Global IT Benefits, using 2004 data, found the following: a 10-point drop in Costa Rica's piracy rate (from 67% to 57%) could add \$176 million to its economy, create hundreds more high-wage technology jobs, increase local industry revenues by \$130 million, and generate an additional \$13 million in tax revenues. See [http://www.bsa.org/idcstudy/pdfs/Costa\\_Rica.pdf](http://www.bsa.org/idcstudy/pdfs/Costa_Rica.pdf).

<sup>7</sup> The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2006 Special 301 submission at [www.iipa.com/pdf/2006spec301methodology.pdf](http://www.iipa.com/pdf/2006spec301methodology.pdf).

<sup>8</sup> Estimated trade losses for the recording industry in 2002 reflect the impact of significant devaluation that year.

<sup>9</sup> BSA's 2005 statistics are preliminary. They represent the U.S. publishers' share of software piracy losses in Venezuela, and follow the methodology compiled in the Second Annual BSA/IDC Global Software Piracy Study (May 2005), available at <http://www.bsa.org/globalstudy/>. These figures cover, in addition to business applications software, computer applications such as operating systems, consumer applications such as PC gaming, personal finance, and reference software. BSA's 2004 piracy statistics were preliminary at the time of IIPA's February 11, 2005 Special 301 filing; the 2004 data has been revised and is reflected above.

<sup>10</sup> MPAA's trade losses and piracy levels for 2005 are available for a limited number of countries and are based on a methodology that analyzes physical or "hard" goods and Internet piracy. For a description of the new methodology, please see Appendix B of this report. As loss numbers and piracy levels become available for additional countries at a later time, they will be posted on the IIPA website, <http://www.iipa.com>.

<sup>11</sup> ESA's reported dollar figures reflect the value of pirate product present in the marketplace as distinguished from definitive industry "losses." The methodology used by the ESA is further described in Appendix B of this report.