

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2007 SPECIAL 301 REPORT

COSTA RICA

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

EXECUTIVE SUMMARY

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

PRIORITY ACTIONS IN 2007

Enforcement

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

Legislation

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

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

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

IIPA and its members also support the U.S.-Central America-Dominican Republic Free Trade Agreement.⁵ The CAFTA-DR is an important means encouraging compliance with other evolving international trends in copyright standards as well as outlining specific enforcement provisions.⁶ This FTA was signed on August 2, 2004, and entered into force with the U.S. on January 1, 2005.⁷ Costa Rica is the only CAFTA country which has not yet completed its ratification of this agreement. Also of note, Costa Rica is currently is a beneficiary country of several U.S. trade programs which contain IPR standards, including the Generalized System of Preferences (GSP) and the Caribbean Basin initiative.⁸ Once CAFTA is in force with Costa Rica, these trade benefits will be phased out.

¹ The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2007 Special 301 submission at www.iipa.com/pdf/2007spec301methodology.pdf. For information on the history of Costa Rica under Special 301 review, see Appendix D at (<http://www.iipa.com/pdf/2007SPEC301USTRHISTORY.pdf>) and Appendix E at (<http://www.iipa.com/pdf/2007SPEC301HISTORICALSUMMARY.pdf>) of this submission.

² Estimated trade losses for the recording industry in 2002 reflect the impact of significant currency devaluation that year.

³ BSA's 2006 statistics are preliminary. They represent the U.S. publishers' share of software piracy losses in Costa Rica, and follow the methodology compiled in the Third Annual BSA/IDC Global Software Piracy Study (May 2006), available at <http://www.bsa.org/globalstudy/>. These figures cover, in addition to business applications software, computer applications such as operating systems, consumer applications such as PC gaming, personal finance, and reference software. BSA's 2005 piracy statistics were preliminary at the time of IIPA's February 13, 2006 Special 301 filing; the 2005 data was revised and posted on the IIPA website in September 2006 (see <http://www.iipa.com/statistics.html>), and the 2005 revisions (if any) are reflected above.

⁴ MPAA's trade loss estimates and piracy levels for 2006 are not yet available. However, such numbers will become available later in the year and, as for 2005, will be based on a methodology that analyzes physical or "hard" goods and Internet piracy. For a description of the new methodology, please see Appendix B of this report. As the 2006 loss numbers and piracy levels become available, they will be posted on the IIPA website, <http://www.iipa.com>.

⁵ IIPA Press Release, "IIPA applauds the signing of the U.S.-Central American-Dominican Republic FTA," Aug. 2, 2005, at <http://www.iipa.com/pdf/IIPA%20CAFTA%20DR%20Signing%20by%20Pres%20Bush%20FINAL%2008022005.pdf>.

⁶ The final text of the CAFTA-DR IPR Chapter is posted on USTR's website at http://www.ustr.gov/Trade_Agreements/Bilateral/CAFTA/CAFTA-DR_Final_Texts/Section_Index.html.

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

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

COPYRIGHT PIRACY AND ENFORCEMENT IN COSTA RICA

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

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

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

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

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

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

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

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

between the filing of a complaint, the day a raid or inspection takes place, and the issuance of an official inspection report. During this time, there is little incentive for the infringer to resolve the problem. Moreover, there are significant delays between the time an official inspection report is issued in a particular case and the time a sentence is handed down in the same case. Procedural delays in criminal cases could be avoided if prosecutors were to request, and judges were to order, *ex parte* raids based exclusively on sufficient evidence offered by private plaintiffs (“*querellantes*”), as allowed by the Criminal Procedural Code.

Querellantes and problems with prosecutors and judges in software cases: Despite the fact that private plaintiffs in criminal actions (“*querellantes*”) are parties to the criminal action and thus have standing to participate in all proceedings, public prosecutors and judges normally do not allow private plaintiffs to actively participate during software piracy raids. Apart from violating procedural due process rights accorded to private plaintiffs (“*igualdad procesal del acusador particular*”), this practice hampers the effectiveness of the prosecutors and jeopardizes the success of the action, since it prevents the plaintiffs and their experts from providing the much needed technical and licensing assistance that the prosecutors need to determine whether an infringement has occurred. Criminal judges should accept the information and evidence offered by private plaintiffs, and order the raid if such information and evidence is sufficient, without requesting prior investigation reports from the Judicial Investigation Office (OIJ); this procedure is consistent with Costa Rican legislation.

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

Inadequate civil remedies: BSA reports that civil procedures are very slow and onerous. In order to get a preliminary injunction, the *Ley de Observancia* (Law 8039) requires the rightsholder to (a) prove it is the legitimate owner and (b) to deposit a bond to protect the target in case the action is found to have no legal basis. The law does not say what is the rate or the percentage to be used in setting the amount of the bond. Therefore, the judge has discretion in setting the bond. Usually, the minimum rate that is use is 25% of the amount of damages claimed (this 25% figure comes from the preventive embargo figure, a civil procedure.) Another problem is that the judge may, prior to the injunction, inform the defendant of the proposed action, so he can oppose the action and request that a higher bond be set. BSA did not bring any civil cases in 2006 in Costa Rica.

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

COPYRIGHT AND LEGAL ISSUES IN COSTA RICA

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

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

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

Efforts to amend the Law on Enforcement (*Ley de Observancia*), then and now: For years, the copyright industries have been working to amend enforcement procedures in Costa Rica. In October 2000, Costa Rica passed the *Ley de Procedimientos de Observancia de los Derechos de Propiedad Intelectual*, with the objective of complying with the TRIPS Agreement. Unfortunately, the industry found numerous provisions not in compliance with TRIPS and an impediment to effective enforcement;¹¹ efforts to amend the bill before its adoption failed. The copyright industries continued

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

¹¹ The copyright industries identified four major deficiencies in the 2000 Law on Enforcement: (1) a lack of criminal ex officio authority, the ability to take action without the need for a complaint by a private party; (2) the need for deterrent-level penalties. The law only gave a maximum penalty of three (3) years of imprisonment for copyright violations, and sentences for crimes having a maximum penalty of three years of imprisonment can be commuted (suspended); (3) the law provides that the "minor" ("*insignificante*") and "without profit" ("*gratuito*") use and reproduction of illegal products will not be penalized. This is probably the most harmful provision of the law because these terms are undefined and it was easy for pirates to avoid liability by simply

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

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

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

Government software asset management: In February 2002, the then-President of Costa Rica Miguel Angel Rodriguez issued a Government Software Legalization Decree. Its aim was twofold: ensuring that all software in use in the federal government was duly licensed, and establishing and implementing sound and effective software procurement and software asset management policies. President Pacheco then reiterated his administration’s intention to fully implement that decree. Both the issuance of the decree and President Pacheco’s reiteration of it were important steps towards demonstrating the Government of Costa Rica’s increasing awareness of the value of managing their software assets. Unfortunately, to date there has been no further action taken to implement the decree. The Government of Costa Rica should continue down the path toward implementation of the software asset management practices called for in this decree.

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