

# INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

## 2008 SPECIAL 301 REPORT

### DOMINICAN REPUBLIC

**Special 301 Recommendation:** IIPA recommends that the Dominican Republic remain on the Watch List in 2008.

## **EXECUTIVE SUMMARY**

IIPA applauds the March 1, 2007, entry into force in the Dominican Republic of the Central American-U.S.-Dominican Republic Free Trade Agreement (DR-CAFTA). IIPA and its members acknowledge the progress made to date in recent years on copyright legislative reform, but must call attention to the continuing difficulties involving effective enforcement in this market. Copyright piracy rates remain high across all sectors in the Dominican Republic. Piracy of recorded music on the streets is prevalent and the widespread “burning” of compact discs containing infringing copyrighted materials is reported. The criminal and administrative enforcement agencies lack the sufficient resources required to take action to enforce the law. The continued poor communication and cooperation between the administrative agency (ONDA) and the police and prosecutors on cases involving music piracy continued, and this undercut the possibility of any effective enforcement for this sector. The judicial system remains overloaded, despite criminal code reform a few years ago aimed at providing streamlined processes. On a positive note, the business software industry appreciates the adoption of a software legalization decree (as required by CAFTA-DR), and looks forward to its effective implementation.

## **PRIORITY ACTIONS IN 2008**

### **Enforcement**

- Have the enforcement agencies (including the *Fiscalía* (police), ONDA and INDOTEL) conduct more regular and sustained actions, followed by prompt criminal prosecutions.
- Improve interagency communication and cooperation between ONDA and the Attorney General's Office.
- Implement the new software legalization decree.
- Assign a squad of investigative law enforcement officers to follow up on the cases after ONDA or the *Fiscalía* has conducted a raid.
- Provide technical assistance and training to the IPR department in *Fiscalía* of Santo Domingo, Santiago, and the National District in order to strengthen its ability to investigate, file and prosecute IPR cases.
- Dedicate more resources and training to ONDA, 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.
- Continue regular inspections of broadcast television stations and cable systems, and follow up with criminal and administrative actions.
- Expedite prosecutions and judicial decisions in criminal cases.
- Improve training of judges, prosecutors and police on copyright matters in order to ensure proper implementation of the Criminal Procedure Code (2004), which also included *ex officio* authorizations of raids, inspections and closures of illegal activities.
- Instruct ONDA to support the efforts of music collecting societies to collect performance rights.

IIPA and its members support the IPR chapter of the DR-CAFTA,<sup>1</sup> and the agreement entered into force between the Dominican Republic and the U.S. on March 1, 2007.<sup>2</sup> For many years, IIPA and its members have been working in the Dominican Republic to improve on-the-ground copyright enforcement which is critical to reducing the high levels of piracy in this country.<sup>3</sup>

| <b>DOMINICAN REPUBLIC</b><br><b>Estimated Trade Losses Due to Copyright Piracy</b><br><b>(in millions of U.S. dollars)</b><br><b>and Levels of Piracy: 2003-2007<sup>4</sup></b> |             |       |             |       |             |       |             |       |             |       |
|--|-------------|-------|-------------|-------|-------------|-------|-------------|-------|-------------|-------|
| INDUSTRY   | 2007        |       | 2006        |       | 2005        |       | 2004        |       | 2003        |       |
|  | Loss        | Level |
| Sound Recordings & Musical Compositions <sup>5</sup>   | NA          | NA    | 9.9         | 65%   | 10.8        | 75%   | 10.3        | 75%   | 9.9         | 65%   |
| Business Software <sup>6</sup>   | 12.0        | 79%   | 11.0        | 79%   | 5.0         | 77%   | 2.0         | 77%   | 3.0         | 76%   |
| Motion Pictures <sup>7</sup>   | NA          | NA    | NA          | NA    | 3.0         | 89%   | 2.0         | 20%   | 2.0         | 20%   |
| Entertainment Software   | NA          | NA    |
| Books  | NA          | NA    | 1.0         | NA    | 1.0         | NA    | 1.0         | NA    | 1.0         | NA    |
| <b>TOTALS</b>  | <b>12.0</b> |       | <b>21.9</b> |       | <b>19.8</b> |       | <b>15.3</b> |       | <b>15.9</b> |       |

The Dominican Republic is still a beneficiary of several U.S. trade programs which contain IPR standards, including the Generalized System of Preferences (GSP) and the Caribbean Basin Initiative.<sup>8</sup> Now that the DR-CAFTA is in force, these trade benefits will be phased out in favor of the lower tariff rates established in that regional agreement.

## COPYRIGHT PIRACY IN THE DOMINICAN REPUBLIC

**Internet piracy:** Informal industry reports indicate that Internet-based piracy appears to be growing in the Dominican Republic. The Internet is used in many ways, including the promotion and/or sales of illegal hard copies of copyrighted materials as well as the unauthorized uploading and downloading of copyrighted materials from websites. There are approximately 1.2 million Internet users in this country, representing about 16% of the population (according to internetworldstats.com).

<sup>1</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>.

<sup>2</sup> 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](http://www.ustr.gov/Trade_Agreements/Bilateral/CAFTA/CAFTA-DR_Final_Texts/Section_Index.html). The Dominican Republic also signed a Side Letter on IPR procedures.

<sup>3</sup> For more details on the history of the Dominican Republic on IPR issues under Special 301 and other trade programs, see IIPA's summary in Appendix D (<http://www.iipa.com/pdf/2008SPEC301USTRHISTORY.pdf>) and Appendix E (<http://www.iipa.com/pdf/2008SPEC301HISTORICALSUMMARY.pdf>) of this submission.

<sup>4</sup> The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2008 Special 301 submission at [www.iipa.com/pdf/2008spec301methodology.pdf](http://www.iipa.com/pdf/2008spec301methodology.pdf).

<sup>5</sup> 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.

<sup>6</sup> BSA's 2007 statistics are preliminary. They represent the U.S. software publishers' share of software piracy losses in the Dominican Republic, and follow the methodology compiled in the Fourth Annual BSA and IDC Global Software Piracy Study (May 2007), available at <http://w3.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 2006 piracy statistics were preliminary at the time of IIPA's February 12, 2007 Special 301 filing and were finalized in June 2007 (see <http://www.iipa.com/statistics.html>) as reflected above.

<sup>7</sup> 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>.

<sup>8</sup> Here is a summary of 2007 bilateral trade. As expected, trade under GSP and CBI dropped and trade under the CAFTA-DR code increased. During the first 11 months of 2007, \$18.9 million worth of Dominican goods entered the U.S. under the duty-free GSP code, along with \$149.1 million worth under the CBI; and \$161.0 million entered under the CBTPA. Meanwhile, \$1.78 billion entered the U.S. under the CAFTA-DR in this timeframe.

At the present time, Dominican enforcement agencies do not have the resources to conduct Internet investigations. INDOTEL in coordination with the District Attorney and ONDA should have cyber authority in the Dominican Republic.

**Piracy of recordings and musical compositions:** Record and music piracy is escalating at an alarming rate, making it impossible for record companies to invest in the Dominican Republic. Though CD-R piracy continues to be the main source of recording medium utilized, there has been detected a growing presence of pirated, replicated CDs. The presence of high quality counterfeit CDs found in established retail outlets is seen as a direct threat to a shrinking legitimate market. Music pirates continue to increase the availability of pirated music DVDs to consumers. Street vendors continue to operate throughout popular shopping areas and in the tourist areas around the country.

The government's anti-piracy campaign has been very ineffective, resulting from lack of sufficient government support. In frustration, RIAA suspended anti-piracy operations in the Dominican Republic beginning in May, 2007. Despite nearly full funding of all music piracy enforcement actions in the Dominican Republic since 1999 by the RIAA, there has been an established pattern of declining enforcement in the country for the past three years. Increased operational costs during the same period, due largely to both a lack of assistance by ONDA and a backlogged court system, have made it difficult for the RIAA to continue executing what should be the responsibility of the government, namely music piracy prosecution. Due to the fact that RIAA has effectively withdrawn from the Dominican Republic in 2007, it is unknown to what degree trade losses due to piracy of sound recordings may have grown.

**Business software piracy:** The Business Software Alliance (BSA) reports that end-user piracy, including under-licensing, in conjunction with hard-disk loading are its two primary problems in this market. End-user piracy rates remain high among Dominican businesses of all sizes. With hard-disk loading, Dominican resellers load unlicensed software onto computer hardware and sell the package to consumers. Software piracy has adversely affected research and development activities of small- and medium-sized Dominican companies that are trying to expand their operations in the local market. Preliminary estimated trade losses to the business software industry were \$12 million in 2007, with a piracy level of 79%. Only the use of massive legalization campaign done by BSA in 2007 stopped piracy from getting worse, BSA believes.

On October 23, 2007, President Fernandez issued Decree No. 615-07, in which he ordered all public institutions in the Dominican Republic to acquire legal computer programs. All specified institutions have to prepare in 90-day inventories of all their installed software, including evidence of its acquisition or transfer. The decree also requires the Oficina Presidencial de Tecnologías de la Información y Comunicación (OPTIC) to establish a procedure for the registry of such inventories and to further dictate the manner public institutions should acquire and use legal software. BSA has signed an agreement with OPTIC and is working with that agency on the software inventory procedures as well as the policies to be used by the government for software licensing.

**Film piracy and broadcast piracy:** Broadcast, pay-TV piracy and video piracy present problems to the audiovisual industry. The broadcast/cable transmission of movies prior to release in theaters in the Dominican Republic or during their theatrical run greatly reduces legitimate business opportunities in other media by disrupting the normal release sequence to theatrical exhibitors, retail video outlets and legal cable operators. The Dominican authorities (including INDOTEL and ONDA) have been taking actions against cable operators and broadcasters. More and more street vendors are selling pirate DVDs. In the last few years, the video piracy market has shifted to DVD piracy, and this type of piracy produces market distortions as the use of pirate DVDs can harm the theatrical, home entertainment and TV markets.

## **COPYRIGHT ENFORCEMENT IN THE DOMINICAN REPUBLIC**

Two continuing problems remained a constant in 2007. First, there is a general lack of resources for enforcement agencies. Both of the prosecutors assigned to handle IPR cases in Santo Domingo simply do not have the staff or resources to perform a heavy workload. There were three IPR prosecutors assigned in Santo Domingo -- one in the National District, one in the Eastern District, and one in the Southern District. Second,

there remains an ongoing lack of coordination by ONDA with other enforcement agencies. At no point during the last three years has ONDA attempted to communicate with the RIAA, nor have they accepted offers to collaborate on music piracy issues. In April 2007, an informal notation was received by local a RIAA representation that ONDA was allegedly being pressured from high-level government officials to actively pursue music piracy leads; nevertheless, there were no reported instances of ONDA interventions in music piracy operations

**Business software reports good cooperation and satisfactory results:** BSA reports continued excellent cooperation with the *Fiscalía* in 2007. The *Fiscalía* gave their full support to the legalization campaign organized by the BSA. BSA completed two end-user actions and 12 reseller actions in 2007. Dominican authorities took *ex officio* action at the border (Customs) and also in country (District Attorney). *Ex officio* actions by the District Attorney are a positive improvement; in prior years that office was not willing to take actions on their own initiative (and without a private party complaint, *denuncia*), even though such authority existed in the copyright law and the criminal procedure code.

In 2007, BSA did not take any actions with ONDA. BSA has identified three problems with ONDA and administrative enforcement: (1) the inspectors do not have the technical knowledge to conduct a software inspection, (2) lack of resources, and (3) a continuing problem of not coordinating with other agencies, such as the District Attorney.

**Recording industry reports continuing difficulties in 2007:** Although the recording industry enjoyed a outwardly cooperative relationship with the police department in 2007, the police did not take any self-initiated actions. The majority of criminal raids that took place in 2007 were through the industry's partnership with ADOPROFONO, the local group representing Dominican record labels. Through March 2007, RIAA's anti-piracy operations netted 42,928 pirate music CD-Rs and 40 CD-R burners used in the manufacturing of illicit product. There have been 61 people arrested during these operations. In comparison, since RIAA ceased its operations, there have only been five criminal enforcement actions that yielded the seizure of 1000 CD-Rs, 64 music DVDs, and six arrests. The number of individuals formally charged in 2007, as well as total convictions obtained in music piracy cases during 2007, are unknown.

An aggravating factor in the growing music piracy problem in the Dominican Republic is the fact that the country has become an exporter of music piracy. Anti-piracy operations in Puerto Rico and in the Northeastern region of the U.S. have led to the seizure of discs that were imported from the Dominican Republic. This indicates domestic consumption of pirated music goods in the country is saturated, resulting in the exportation of illicit sound recordings to new markets abroad.

For calendar year 2007, the RIAA documented arrests, but no record of convictions. The lack of complete records stems from the government's failure to take full advantage of the assistance the RIAA can offer in music piracy investigations and prosecutions, poor communication with ONDA concerning actions in the country, and a lack of RIAA assets in-country to cover for the government's and ONDA's timid response to the problem. We remain hopeful that changes to the criminal code made in 2004 will expedite the adjudication of pending cases. For its cases which predated the 2004 changes in the criminal code, the RIAA continues to experience great delays at the appellate level. For example, 105 criminal cases for music piracy filed between 1999 and September 2004 are still pending trial or appellate court review; we have no records to indicate that number has changed.

In addition, ONDA has not been very effective in implementing administrative actions against performance rights violators. The local performance rights society for performers and record producers, SODINPRO, has identified a number of locations where music is being exploited for commercial purposes and refer them to ONDA for inspection and verification. Unfortunately, the personnel at ONDA have not taken the appropriate actions to confirm the violation and/or apply administrative remedies.

**Audiovisual actions:** MPAA reports that five *ex officio* actions were taken by the *Fiscalía* and 15 by ONDA against DVD pirates. Three actions were taken against cable operators.

## **COPYRIGHT LAW AND RELATED ISSUES**

**Copyright Law (2000, as amended in 2006):** Dominican Republic adopted a new copyright law in October 2000 (Law 65-00), fulfilling many years of work to replace its inadequate 1986 copyright law. While the 2000 law raised the level of copyright protection up to WTO TRIPS levels and also integrated some elements found in the two WIPO "Internet" Treaties, further reform was anticipated in order to satisfy all the obligations of the CAFTA-DR IPR Chapter. Importantly, the Dominican Republic joined both the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty (WPPT), with January 10, 2006 as the dates of entry into force.

In November 2006, the Congress of the Dominican Republic approved its CAFTA-DR implementation legislation, including IPR-related amendments (Law No. 424-06). This legislation includes several refinements affecting the copyright law and its enforcement, including (for example): extending term of protection; expressly adding statutory damages; clarifying some contractual rights provisions; clarify and expand the scope of exclusive rights for rightsholders; increasing the minimum level of criminal sanctions from three (3) months to six (6) months; clarifying the scope of judicial authority and injunctive relief; affording other enforcement measures, including border measures; and expanding the chapters on technological protection measures (TPMs), rights management information (RMI), and encrypted program carrying satellite signals.<sup>9</sup>

The Dominican Republic has chosen to take advantage of the permitted transition periods for certain issues (including ISP liability). IIPA and its members ask that the industry and the U.S. government be kept apprised on when legislative consideration on these important issues will be contemplated.

**Criminal Procedural Code Amendments:** The amendments to the criminal procedural code (adopted in July 2002) entered into effect on September 21, 2004, and has helped to expedite new cases. The criminal cases underway at the time of the 2004 amendments will be adjudicated under the former procedural code.

**Constitutional Challenge to Copyright Law:** Years have passed and a constitutional challenge to the 2000 Copyright Law is still pending before the court. 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 filed a brief refuting these arguments, and ONDA also filed a brief against this challenge. As of early 2008, a decision from the Supreme Court is still pending.

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<sup>9</sup> The 2006 law also includes several elements of concern, especially with respect to implementation. For example, the legislation changed the calculation for criminal fines from "minimum wages" to a range with an indication of the amount in Dominican Pesos. With this, it not only lowered the minimum amount to receive as damages, but also means that the level of sanctions will be diluted due to local information. The minimum-wage-index ameliorated the inflation problem. This fixed peso number was also included in the statutory damages section, although the level of sanctions there is quite high (if imposed).