

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2003 SPECIAL 301 REPORT

BAHAMAS

EXECUTIVE SUMMARY

Special 301 recommendation: The Bahamas should be named to the Priority Watch List. The United States Government also should immediately initiate a process to withdraw trade benefits the Bahamas receives under the Caribbean Basin Economic Recovery Act (CBERA) and to remove its country eligibility under the U.S.-Caribbean Trade Partnership Act (CBTPA).¹ The Bahamas, which was placed on the Special 301 Watch List last year, made no progress in 2002 towards meeting commitments it undertook in a trade agreement with the United States concluded in November 2000.

Overview of key problems: Bilateral negotiations between the governments resulted in an exchange of letters between the Government of The Bahamas and the Government of the United States of America dated October 26 and November 9, 2000. Over two years have elapsed and the Government of The Bahamas has yet to enact that amendment.

One of the key problems is the 1998 Copyright Act itself. The act included an overbroad compulsory license that violated numerous international copyright standards and established an unacceptable precedent. Furthermore, the regulations fail to provide adequate and effective remuneration to rightsholders. The Government of The Bahamas also failed to consult with affected U.S. rightsholders regarding the issue of equitable remuneration for the compulsory licensing for free over-the-air broadcasts. Therefore, The Bahamas is in breach of a trade agreement with the United States

Required actions for 2003:

- USTR should name The Bahamas to the Special 301 Priority Watch List;
- An investigation should be initiated to withdraw trade benefits under the CBERA and remove its eligibility under the CBTPA;
- The Bahamas must immediately implement the bilateral agreements it made with the U.S. in 2000;
- The Bahamas should ratify the two WIPO treaties and amend its copyright legislation to reflect the modern obligations in both treaties.

¹ The Bahamas has been designated as a "CBTPA beneficiary country" under Presidential Proclamation 7351 but has not yet been determined eligible to receive CBTPA preferential tariff treatment.

COPYRIGHT LEGAL ISSUES

The Problem: Overbroad Compulsory License and Inequitable Remuneration Rates in the January 2000 Regulations to the Copyright Act

On January 5, 2000, the Government of The Bahamas implemented its 1998 Copyright Act (“the Act”) through publication of regulations that, *inter alia*, authorized a new compulsory license for retransmission of television programming by persons who are licensed cable operators. This new compulsory license expands the scope of a compulsory license far beyond the internationally accepted limits of such a license (e.g., authorizing retransmission of free-over-the-air broadcasts) to the unprecedented step of permitting retransmission of *any* copyrighted work transmitted over its territory, including the encrypted signals of U.S. basic cable and pay TV services. The regulations also would have permitted Internet retransmission of all signals via Internet.

The introduction of such a broad compulsory license is inconsistent with the obligations of the Berne Convention for the Protection of Literary and Artistic Works, to which The Bahamas is a signatory. By adopting a Berne-inconsistent compulsory license, The Bahamas denies U.S. copyright owners of audiovisual and other works adequate and effective protection of their intellectual property rights. The Bahamas’ compulsory license sets an extremely harmful precedent. It threatens to disrupt commercial markets for programming and to cause serious harm to U.S. producers of filmed entertainment, providers of programming packages, and other U.S. rightsholders in The Bahamas and around the world.

The equitable remuneration rates for the compulsory license fixed in the Regulations also have to be addressed. These rates are unreasonably low and inconsistent with the Berne Convention.

- Under the Act, cable operators are required to pay fixed rates as equitable remuneration to the copyright owners in accordance with the Berne Convention. The rates established in the regulations are far lower on a per-signal basis than rates paid for television broadcast signals under compulsory licenses permitted by international norms, and fail to meet the “equitable” standard under Berne.
- The regulations made a bad situation worse by permitting cable operators to pay only 25% of the already low rates of equitable remuneration otherwise payable when the subscribers are hotels. The Berne Convention’s compulsory license provisions for retransmission of broadcasts do not provide any exemptions for retransmission to hotel rooms. The normal careful balancing of the interests of the users and rightholders is, in this situation, inordinately out of balance. A hotel is a commercial enterprise. There is no legitimate need for a reduction in the equitable remuneration payable and no public interest that justifies the exception. Thus, there is no basis under international law or a legitimate need that would support such an abridgement of the copyright owners.
- Under the regulations, cable operators are exempt from paying to the rightholders these already low rates of equitable remuneration when the premises are rooms in

hospitals, nursing homes, schools and any other health or educational facility. There are no “for profit” restrictions on this very broad exemption. For example, a school could show a copyrighted work on the school premises and charge an entrance fee to that premise to view or listen to the work.

New technological advances in the means of reproduction and distribution require careful consideration of the scope of allowable exemptions under the Act. Even if the Bahamian compulsory license were limited to television broadcast signals, by eliminating entirely the requirement to pay equitable remuneration in some cases such as hospitals and educational facilities, and by requiring a meager payment of 25% of the fees when the served premises are hotels, the Act renders meaningless the Berne Convention’s requirement of equitable remuneration and is therefore inconsistent with Article 11*bis*(2).

WIPO Treaties

IIPA recommends that The Bahamas should make all efforts to ratify the two WIPO treaties, the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT). In addition, The Bahamas should amend its 1998 Copyright Act to respond to the challenges of the rapidly evolving marketplace for copyrighted materials by implementing the substantive obligations found in these treaties.

COMMITMENTS UNDER THE 2000 BILATERAL AGREEMENT

The governments of The Bahamas and the United States engaged in bilateral negotiations regarding the compulsory license provisions in the Copyright Act and its regulations and reached an agreement to resolve these matters, as reflected in an exchange of letters dated October 26 and November 9, 2000. The Bahamas made a number of commitments that have not been redeemed.

1. The Bahamas promised to make necessary amendments to its legislation to clarify that it was not its intent to allow persons licensed to operate cable systems in The Bahamas to retransmit copyrighted works over the Internet or to transmit such works outside the territory of The Bahamas.

Status: This commitment has not been met.

2. The Government of The Bahamas further committed to suspend the operating license of any cable operator who retransmits any transmissions containing copyrighted works over the Internet without prior authorization and to refrain from issuing any licenses to any cable operator to permit such Internet retransmissions.

Status: This commitment has not been tested. To the best of our knowledge, no cable system in The Bahamas has sought to retransmit signals over the Internet pursuant to the compulsory license.

3. The Government of The Bahamas undertook “to make amendments to the Copyright Act and Regulations so as to narrow the scope of its compulsory licensing regime for the reception and transmission of copyrighted works to permit only the compulsory licensing of copyrighted works broadcast free over-the air.”

Status: This commitment has not been met.

4. The Government of the Bahamas further undertook to introduce such amendments into Parliament for consideration not later than December 31, 2000.

Status: Although “An Act to Amend the Copyright Act, 1998” was introduced into the Parliament of The Bahamas on 13 December 2000, Parliament failed to act on the bill. To the best of our knowledge, the bill has not been reintroduced after the elections in the spring of this year.

5. The Government of The Bahamas, through its Copyright Royalty Tribunal, undertook to begin consultations with affected U.S. rightsholders regarding the issue of equitable remuneration for the compulsory licensing for free over-the-air broadcasts and to amend the royalty rate structure.

Status: In April and May of this year, MPAA received calls from the Ambassador of The Bahamas to the United States and from the Office of the Attorney General proposing a meeting with the Copyright Royalty Tribunal. MPAA agreed to a meeting and proposed an agenda for that meeting. However, the change in government that resulted from the elections in The Bahamas interrupted this dialogue and the proposed meeting never occurred.

Bilateral IPR Obligations under the CBERA, as Amended

The Bahamas is a beneficiary country under the Caribbean Basin Economic Recovery Act (CBERA, also known as the Caribbean Basin Initiative or CBI), a U.S. trade program which includes criteria requiring beneficiary countries to afford adequate and effective intellectual property rights protection to U.S. copyright owners. The Bahamas also is a beneficiary country of the U.S.-Caribbean Basin Trade Partnership Act (CBTPA), which amended the CBERA.² To maintain these CBTPA benefits, The Bahamas must meet all the CBERA criteria, as well as the CBTPA’s explicit TRIPS-or-greater IPR criteria. Interestingly, in July 2000, IIPA recommended that The Bahamas should not be designated as an eligible CBTPA country, given that its copyright regime failed to meet the CBTPA statutory criteria.³

COPYRIGHT AND REGIONAL TRADE NEGOTIATIONS

The negotiation of bilateral and regional free trade agreements (FTAs) is assuming increasing importance in overall U.S. trade policy. These negotiations offer an important opportunity to persuade our trading partners to modernize their copyright law regimes so they can maximize their participation in the new e-commerce environment, and to improve

² For the first 11 months of 2002, \$63.9 million worth of Bahamian goods (or 15.6% of The Bahamas’ total imports to the U.S. from January to November) entered the U.S. under the CBERA program, representing a decrease of 7.2% from the same period last year.

³ See IIPA’s July 17, 2000 Comments to USTR Regarding Eligibility Criteria for Beneficiaries of the U.S.-Caribbean Trade Partnership Act, available at http://www.iipa.com/pdf/2000_Jul26_CBTPA.pdf.

enforcement procedures. The FTA negotiations process offers a vital tool for encouraging compliance with other evolving international trends in copyright standards (such as fully implementing WIPO treaties obligations and extending copyright terms of protection beyond the minimum levels guaranteed by TRIPS) as well as outlining specific enforcement provisions which will aid countries in achieving effective enforcement measures in their criminal, civil and customs contexts.

IIPA believes that the IPR chapter in the Free Trade Area of the Americas (FTAA) must be forward-looking, technologically neutral documents that set out modern copyright obligations. They should not be summary recitations of already existing multilateral obligations (like TRIPS). As the forms of piracy continue to shift from hard goods and more toward digital media, the challenges faced by the copyright industries and national governments to enforce copyright laws grow exponentially. The Internet has transformed copyright piracy from a local phenomenon to a global wildfire. CD-R burning is fast becoming a pirate's tool of choice throughout this region. Without a modern legal and enforcement infrastructure, including effective criminal and civil justice systems and strong border controls, we will certainly see piracy rates and losses greatly increasing in this region, thus jeopardizing more American jobs and slowing the growth of the copyright sectors both in the U.S. and the local markets.

Therefore, the IPR chapter in the FTAA should contain the highest levels of substantive protection and enforcement provisions possible. At a minimum, the IPR chapter should: (a) be TRIPS- and NAFTA-plus, (b) include—and clarify—on a technologically neutral basis the obligations in the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty (WCT and WPPT), and (c) include modern and effective enforcement provisions that respond to today's digital and Internet piracy realities. Despite the existence of these international obligations, many countries in the Western Hemisphere region fail to comply with the TRIPS enforcement obligations, both in their legislation and in practice. It is in the area of enforcement that some of the greatest gains for U.S. and local copyright creators can be achieved.