

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2003 SPECIAL 301 REPORT

GUATEMALA

EXECUTIVE SUMMARY

Special 301 recommendation: IIPA recommends that Guatemala remain on the Special 301 Watch List. Guatemala has been on the Watch List for the past four years without significant improvements in the overall piracy rate due to the continuing problems in IPR enforcement. Keeping Guatemala on the Special 301 Watch List will send a strong signal that a better effort is required of our potential FTA partners as the U.S. government works on the U.S. Central America FTA (CA-FTA) this year.

Overview of key problems: Although IPR enforcement has improved since the creation of the Special Prosecutor's Office for intellectual property crimes last year, Guatemala continues to experience high piracy levels. Estimated trade losses due to piracy were \$23.8 million in 2002. The time is now for the Guatemalan government to take immediate action to improve its IPR enforcement. In fact, the U.S. government should insist that the Guatemalan government immediately address all of the problems identified in this submission, including those highlighted below, prior to the finalization of CAFTA. Some of the problems in Guatemala include:

- Substantially decreased criminal penalties as a result of the amendments to the copyright law passed in 2001.
- Lack of statutory damages provision for civil copyright infringement. Also as a result of the amendments to the copyright law passed in 2001, this provision was abrogated.
- Legal remedies in civil actions are practically unavailable because information is often leaked and the surprise element of the *ex parte* search is lost.

The copyright industries are concerned that the current Guatemalan Congress may also amend other intellectual property laws, such as the copyright law, in a manner not consistent with relevant provisions of international treaties to which Guatemala is a member. For example, recent amendments (Decree No. 76-2002) suspended the patentability of pharmaceutical and chemical products and practically eliminated data protection, in contravention to international norms.

Actions which the government of Guatemala should take in 2003: To improve IPR enforcement in Guatemala, we recommend the following actions—

- Increase criminal penalties and reinstate the statutory damages provision for civil copyright infringement in its entirety.
- Amend the Civil Procedure Code to allow the filing of civil copyright infringement actions under seal.

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ESTIMATED TRADE LOSSES DUE TO PIRACY
(in millions of U.S. dollars)
and LEVELS OF PIRACY: 1998 – 2002¹

INDUSTRY	2002		2001		2000		1999		1998	
	Loss	Level								
Business Software Applications ²	14.5	67%	14.1	73%	12.3	77%	12.7	80%	8.0	82%
Motion Pictures	2.0	60%	2.0	60%	2.0	60%	2.0	70%	3.0	70%
Records & Music	4.8	NA	NA	NA	4.0	60%	4.0	60%	4.0	60%
Entertainment Software	NA	NA	NA	NA	0.1	60%	NA	NA	4.0	85%
Books	2.5	NA	2.5	NA	2.3	NA	2.5	NA	2.5	NA
TOTALS	23.8		18.6		20.7		21.2		21.5	

In April 2002, the USTR noted some of these copyright enforcement difficulties in Guatemala, stating: “[T]he amendments [to the 1998 copyright law] decreased criminal penalties in the case of infringement of intellectual property, and the provision for statutory damages was removed.”³ Guatemala is also a beneficiary country of three U.S. trade programs.⁴

COPYRIGHT PIRACY IN GUATEMALA

Software piracy by both resellers and end users is widespread in Guatemala. The estimated level of piracy of U.S. business applications software in Guatemala in 2002 was 67%, one of the highest piracy rates in Latin America. As a result of widespread piracy in Guatemala, U.S. copyright owners of business software lost an estimated \$14.5 million in 2002. BSA

¹ The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA’s 2003 Special 301 submission, and is available on the IIPA website at www.iipa.com/pdf/2003spec301methodology.pdf.

² BSA’s estimated piracy losses and levels for 2002 are preliminary, and will be finalized in mid-2003. In IIPA’s February 2002 Special 301 filing, BSA’s 2001 estimates of \$13.4 million at 75% were identified as preliminary; BSA finalized its 2001 numbers in mid-2002, and those revised figures are reflected above. BSA’s trade loss estimates reported here represent losses due to piracy which affect only U.S. computer software publishers in this country, and differ from BSA’s trade loss numbers released separately in its annual global piracy study which reflects losses to (a) all software publishers in this country (including U.S. publishers) and (b) losses to local distributors and retailers in this country.

³ Press Release 02-48, Office of the United States Trade Representative, “USTR Releases Super 301, Special 301 Report of Global Intellectual Property Protection,” April 30, 2002. Guatemala was kept on the Watch List in April 2002.

⁴ Regarding Guatemala’s use of these trade programs during the first 11 months of 2002: \$16.7 million worth of Guatemalan goods entered the U.S. under the duty-free GSP code (representing a 45.2% decrease from the same time period in 2001); \$300.5 million worth of Guatemalan goods entered under the CBI, representing a 38.5% increase (or 11.8% of Guatemala’s total imports to the U.S.); and \$644.5 million entered under the CBTPA, representing 25.3% of Guatemala’s total imports to the U.S. during this period.

believes that these losses are largely due to the fact that Guatemalan law (as discussed below) fails to establish effective deterrents for infringing acts.

During 2001, the Prosecutor's Office conducted, at BSA's request, ten raids against end-users and three raids against resellers of illegal software. All of these cases were settled out of court. In 2002, the Special Prosecutor for IP crimes conducted, at BSA's request, six criminal raids against end-users and six criminal raids against resellers of illegal software. These cases were also settled out of court.

Through July 2001 to September 2002, the Motion Picture Association's (MPA) anti-piracy program in Guatemala initiated more than 50 criminal actions. Only 15 raids were actually conducted. Unfortunately, in many cases, judges take a long time to grant the appropriate orders, a situation that favored the leak of information. In other cases, the IP Prosecutor entered into direct negotiations with infringers before a planned raid took place (without previously consulting the rightsholder) and even suspended the continuation of the procedure, thus weakening the expected deterrent effect of the criminal procedures.

COPYRIGHT ENFORCEMENT IN GUATEMALA

Copyright enforcement still remains inadequate in Guatemala despite a significant improvement since the creation of the Special Prosecutor's Office for IP crimes.

Lack of Deterrent Criminal Penalties

Under the new law in effect since November 1, 2000, both the minimum and maximum criminal penalties for infringing acts have been substantially reduced. Infringing acts that were subject to prison terms of four to six years and fines of 50,000 to 100,000 Quetzales (approximately US\$6,425 to \$12,850), are now subject to a term of imprisonment of one to four years and fines of 1,000 to 500,000 Quetzales (about \$128 to \$64,265). Lowering the minimum level of criminal fines sends the wrong message to the Guatemalan public and to the judiciary about the importance of protecting copyrights from unauthorized exploitation. Importantly, this does not satisfy the TRIPS Article 61 standard of providing for deterrent "criminal procedures and penalties to be applied" in piracy cases.

Inadequate and Ineffective Civil Enforcement

Because criminal enforcement is not always feasible or appropriate, copyright rightholders often use civil enforcement procedures—particularly civil *ex parte* search authority—to combat piracy. In Guatemala, however, this legal tool is practically unavailable because there is no way to maintain the confidentiality of the *ex parte* search petition. Court records are public and there are several companies that on a daily basis report the new cases that have been filed with the court. Unfortunately, under Guatemalan law a case cannot be filed under seal.

In addition, rightsholders also encounter the problem of very high bond requirements. Bonds are imposed before a court orders a search and seizure against a suspected infringer. These bonds, which have been as high as US\$20,000 for a single case, are an obstacle to enforcement, in violation of TRIPS Articles 41.1 and 41.2 (remedies which prevent effective action against infringement are unnecessarily costly and entail unreasonable delays) and Article

53 (high bond requirements are unnecessarily costly and unreasonably deter recourse to these procedures). They in essence block access to the civil legal system, leaving rightsholders with just one avenue for legal action: the criminal process. For these reasons, during 2000, 2001 and 2002, BSA did not file any civil actions for copyright infringement.

Inadequate Civil Copyright Damages

Before the copyright law amendments entered into effect on November 1, 2000, copyright owners were entitled to recover up to 10 times the retail value of the infringed work. With the enactment of the new copyright law, this system has been eliminated. This system was, in effect, a form of statutory damages, which prescribe that a court may use a fixed sum or multiple to determine damages in lieu of determining actual damages. Statutory damages are a feature of copyright legislation in a growing number of countries. For example, statutory damages incorporated in Brazilian copyright legislation—and recently increased—have resulted in penalties at deterrent levels.

Less than one (1) year after those amendments went into effect, the Guatemalan Congress repealed the statutory damages provision by eliminating it from the copyright law through a subsequent amendment. Now a rightsholder is only entitled to recover direct damages for civil copyright violations. Without the threat of significant damages, the new copyright law fails to provide an adequate deterrent to piracy, as required by TRIPS Articles 41 and 45.

COPYRIGHT LAW ISSUES IN GUATEMALA

1997 Amendments to the Criminal Procedure Code

In late 1997, the Guatemalan Congress passed amendments to the Criminal Procedure Code which changed copyright infringement actions from public to “private” criminal actions (Decree No. 79-97 of October 15, 1997). As a result, copyright rightsholders were forced to initiate and prosecute criminal copyright infringement cases on their own initiative under a process that was established and designed for crimes against honor and therefore represented an obstacle to effective prosecution of IP infringements. Most disturbingly at the time, the Guatemalan government justified such action by claiming that it was not the responsibility of the government to prosecute criminal cases of copyright infringement. At the time, ministry officials told the private sector that this amendment was made to increase the speed of actions, since public prosecutors were overwhelmed with other cases. Fortunately, this legal regime has changed with the 2000 copyright law amendments. Copyright infringement actions are now considered to be “public” criminal actions. The copyright industries worked for years to achieve this result.

Copyright Law of 1998

The Guatemalan Congress adopted a new copyright law on April 28, 1998, which was published as Law No. 33/98 on May 21, 1998. The 1998 copyright law included amendments to modernize and strengthen the archaic 1954 copyright law. Unfortunately, the 1998 law omitted an amendment that would have reinstated “public actions” in the criminal code, as well as several other reforms needed to harmonize Guatemalan law with TRIPS and international copyright treaties.

Copyright Law Amendments of 2000

In September 2000, the Guatemalan Congress passed amendments to the Copyright Law of 1998, which were published as *Decreto* 56-2000. This new law was the result of a three-year effort to strengthen Guatemalan copyright law and to correct the omission of the “public action” in the criminal code. In brief, the law:

- Recognized criminal copyright crimes as “public actions,” thus authorizing law enforcement authorities to arrest suspected infringers and seize illegal copies and manufacturing equipment.
- Recognized a copyright owner’s exclusive right of “making available” its works and phonograms to the public for on-demand access.
- Substantially expanded the number of infringing acts, which track the rights afforded to rightsholders under the WIPO treaties. Specifically, it created new crimes that penalized the circumvention of copy-protection technologies and the removal or alteration of rights management information.
- Established procedures, including timelines, for the Public Ministry or an aggrieved copyright owner to request and obtain precautionary measures from the competent judicial authority. These procedures are critical to improving the efficacy of enforcement measures, both criminal and civil.
- Created a Special Prosecutor’s Office that would specialize in intellectual property offenses and have exclusive responsibility for prosecuting criminal copyright infringements.
- Revised the registration functions and expanded the scope of administrative authority for the Register of Intellectual Property.
- Clarified the work-for-hire provisions as they apply to computer programs.
- Revised the pertinent sections relating to the establishment and operation of collecting societies.

The WIPO Treaties

Guatemala has recently deposited its instruments of accession to the new “digital” treaties of the World Intellectual Property Organization: the WIPO Copyright Treaty (WCT)⁵ and the WIPO Performances and Phonogram Treaty (WPPT)⁶.

Decreto 56-2000 implemented several obligations found in the WIPO treaties. For instance, the new law provides for a copyright owner’s exclusive right of “making available” its

⁵ Guatemala deposited its instrument of accession to the WIPO Copyright Treaty (WCT) on 4 November 2002. This treaty entered into force, with respect to Guatemala, on February 4, 2003.

⁶ Guatemala deposited its instrument of accession to the WIPO Performances and Phonogram Treaty (WPPT) on 8 October 2002. This treaty entered into force, with respect to Guatemala, on January 8, 2003.

works or phonograms to the public for on-demand access. The new law makes clear that the traditional property rights of copyright owners apply in cyberspace and that only the copyright owner of a song, sound recording, audiovisual product, software program or video game can authorize it to be copied via the Internet, transmitted across the network, or downloaded by a computer or other device. In addition, the new law prohibits the circumvention of copy-protection technologies and the removal or alteration of rights management information.

Despite these reforms, however, the Guatemalan copyright law was significantly weakened by the amendments (described above), which reduce criminal penalties and eliminate statutory damages.

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 enforcement procedures. The FTA negotiation process offer 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 help countries in achieving effective enforcement measures in their criminal, civil and customs contexts.

IIPA believes that the IPR chapter in both the Free Trade Area of the Americas (FTAA) and the U.S.-Central American FTA (CA-FTA) must be forward-looking, technologically neutral documents that set out modern copyright obligations. They should not be summary recitations of already existing multilateral obligations under 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, IPR chapters in the FTAA and the CA-FTA 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 in intellectual property protection for U.S. and local copyright creators can be achieved.