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INTELLECTUAL PROPERTY RIGHTS' AND TRADE ENFORCEMENT PROCEDURES IN COSTA RICA¹

INTRODUCTION

In the judiciary, there is an institutional awareness that the Costa Rican model of justice needs to be changed and, in the face of demands from citizens, that justice must be administered not only quickly but also efficiently, based on current situations; different attempts have been made to combat judicial delays, and efforts made by this institution to guarantee the requisite transparency on the part of those providing a service to the community and to update systems in line with the situation in the national, regional and global society, in accordance with the important changes that have taken and are taking place.

The subject of intellectual property rights is, *inter alia*, of great importance owing to the process of globalization in which the Republic of Costa Rica is immersed and, as a result of the country's international trade relations, its laws have required adjustment, in an attempt to guarantee the protection of the relevant rights. Social and cultural changes are also required so that both users and those who form part of the mechanism of the administration of justice, be it directly or as assistants, become aware of what is a very topical situation.

In order to support the work of this body, and in particular the interest and role of the Supreme Court of Justice, in view of the shared conviction and importance of the protection of intellectual property rights, the judiciary of the Republic of Costa Rica considers it important to disseminate such ideas among all the officials of this authority, be they magistrates, judges, legal representatives, public prosecutors, advocates or the other members of this institution, and believes that this task could be achieved in part by means of coordination and through cooperation, in order to disseminate international agreements and treaties, joint recommendations and different projects administered by WIPO. Said activities should be carried out by means of training (seminars, workshops or courses) for this discipline.

¹ This report has been compiled, in terms of preparation of materials and partly with ideas, with the assistance of Luis Fernando Fernández, First Civil Judge in San José; Gina García, Parliamentary Advisor and manager of the Intellectual Property News Service; Sylvia Hernández Soto, Public Prosecutor for Various Crimes and Intellectual Property Coordinator; Mauren Vega Sánchez, Ministry of Justice Advisor; Loretta Rodríguez Muñoz, Director General for Customs Registration and Borders; Román Brescianni Quirós, Judicial School Advisor and Ariana Araya Yockhen, Director of the National Registry of Copyright and Related Rights.

INTELLECTUAL PROPERTY RULES IN FORCE IN COSTA RICA²

The following list contains the most relevant intellectual property rules (agreements and laws) in force in Costa Rica, although such provisions are only referred to in brief since a subsequent attempt is made to complete and describe them in detail.

The list does not include other important relevant agreements since, at the time of writing, they have not been formally ratified in Costa Rican domestic law; however, work is also being done to establish a framework which contains the relevant rules on this discipline, organized according to each category of intellectual property.

SUBJECT MATTER OF ENFORCEMENT PROCEDURES

From the time the World Trade Organization (WTO) was set up together with Annex 1-C regarding trade-related aspects of intellectual property rights, and with the structure of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), an attempt was made to harmonize and fix certain minimum standards, whereby henceforth States had complete freedom to adjust their legislation in many areas. It is important to determine the effectiveness of the law following such reforms.

- Costa Rica complied with the TRIPS Agreement in this regard, when it enacted new legislation in the form of LAW NO. 8039 ON PROCEDURES FOR ENFORCEMENT OF INTELLECTUAL PROPERTY RIGHTS, of October 5, 2000, in which all the procedural matters based on the structure of the TRIPS Agreement were incorporated. Thus, in relation to the detailed content of the Law, it is worth mentioning its sphere of application, as per Section one:

- *"The infringement of any intellectual property right established in the national legislation or in current international agreements shall give rise to administrative action by the Industrial Property Registry or the National Registry of Copyright and Related Rights, and also to the judicial action specified in this Law being taken, without prejudice to other provisions of the legal order. Similarly, this Law shall govern the powers of the Court of Administrative Registration in relation to appeals against all registrations made by the National Registry".*

²GARCÍA ROJAS, Georgina, property@racsa.co.cr. Intellectual Property News Service: <http://www.geocities.com/propertynoticias/>

- In addition, this paragraph requires that **the authorization of the owner of an intellectual property right is always express and given in writing**; the structure of the content of the Law is described below.
- **Border measures** (the work duly coordinated with other State institutions and even with rights' owners is especially relevant) (Article 10).
- **Administrative powers** granted to the Registries as well as to the court authorities (Precautionary Measures), prior to any proceedings being initiated, during such proceedings, or at the stage of enforcement of any proceedings for infringement of an intellectual property right (paragraphs 3, 4, 5 and 7).
- **Civil proceedings** (intellectual property was included in shortened and summary proceedings).
- **Criminal sanctions**. This Law established new types of crimes in all the protected categories of substantive Costa Rican law, using the scenario of a sample type of crime, in fulfillment of the precise features required in these crimes in the light of the guarantees established in the Political Constitution and in constitutional law, for which reason the legislator improved the existing crimes and created new types of crimes.

CIVIL LAW:

DEVELOPMENT OF CASES AND EXPERIENCE FROM THE YEAR 2000 TO DATE (JUNE 2004)

INTELLECTUAL PROPERTY PROTECTION

Details are provided below of the Costa Rican legal framework, the rules in force and standards being discussed, in order to summarize the standard-setting context for intellectual property (IP) protection, which includes interrelated segments, but also for methodological purposes perceived as various fields of protection. It is necessary to clarify the context of the legal culture into which said protection fits, within the Roman-Germanic law and not in the English-speaking "Common Law" tradition. The law of "Copyright" with its particular features is not therefore applicable. Jurisdictional antecedents will be divided as follows: **Copyright and Related Rights, Industrial Property** and, within the latter: **the protection of trademarks and distinctive signs, patents, drawings and industrial designs, and unfair competition**. To date, no case has been settled by the highest courts with reference to the subject of undisclosed information and evidence.

COSTA RICAN STANDARD-SETTING FRAMEWORK

In Costa Rica intellectual property is based, in constitutional terms, on Article 47 of the Political Constitution, which provides as follows:

"Any author, inventor, producer or merchant shall temporarily enjoy exclusive ownership of his work, invention, trademark or trade name, in accordance with the law."

Article 121 states:

"...of the other tasks entrusted to it by this Constitution, the Legislative Assembly shall have sole responsibility for: (18) Promoting the progress of the sciences and the arts and guaranteeing, for a limited period, for authors and inventors, the ownership of their respective works and inventions..."

The body of rules is completed by the following international agreements, laws and decrees:

- 1982 Law No. 6683 on Copyright and Related Rights
- 1994 Regulation under Article 50 of the Law on Copyright, Executive Decree 23485-MP
- 1995 Regulation No. 24611-J under the Law on Copyright and Related Rights
- Law on Patents, Industrial Designs and Utility Models, Decree 6867
- Regulation under the Law on Patents, Industrial Designs and Utility Models
- Law on Trademarks and other Distinctive Signs, Decree 7978
- Regulation under the Law on Trademarks and other Distinctive Signs (Decree No. 30233-J of April 4, 2002), No. 7978
- Law on Protection of Topographies of Integrated Circuits, Decree 7961
- Law on Undisclosed Information, Decree 7975
- Law No. 8039 on Procedures for Enforcement of Intellectual Property Rights
- Law on Biodiversity, Decree 7788 [E:\COSTARICACR-Biodiversidad.pdf](#)
- Decree No. 30151-J, Regulation on Software Protection in the Central Government
- Law No. 8020 of September 29, 2000. Law to Reform Articles 94 and 95 of Law No. 7978
- Free Trade Agreements between Central America and Chile, Central America and the Dominican Republic, and Costa Rica and Mexico.

- Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement), to which Costa Rica acceded on January 10, 1995.
- Lisbon Agreement for the Protection of Appellations of Origin and their International Registration, to which Costa Rica acceded on July 30, 1997.
- Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (Rome Convention), to which Costa Rica acceded on September 9, 1971.
 - Berne Convention for the Protection of Literary and Artistic Works (Berne Convention), to which Costa Rica acceded on June 10, 1978.
 - Geneva Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms (Geneva Convention), to which Costa Rica acceded on June 17, 1982.
 - Paris Convention for the Protection of Industrial Property (Paris Convention), to which Costa Rica acceded on October 31, 1995.
 - WIPO Copyright Treaty (WCT), to which Costa Rica acceded on March 6, 2002.
 - WIPO Performances and Phonograms Treaty (WPPT), to which Costa Rica acceded on May 20, 2002.
 - Washington Treaty on Intellectual Property in Respect of Integrated Circuits (Washington Treaty), Costa Rica is not a contracting party; however, in accordance with Article 35 of the TRIPS Agreement it is obliged to apply the following provisions: Articles 2 to 7 (apart from Article 6(3)), Article 12 and Article 16(3).
- International Classification of Goods and Services for the Purposes of the Registration of Marks (Nice Classification) 8th Edition, 2002.
- Joint Recommendation Concerning the Provisions on the Protection of Well-Known Marks.

The subject of new varieties of plants is pending regulation; a draft law does exist however, designed to recognize and protect the rights of the breeders, or their

beneficiaries, of a plant variety.³ A *sui generis* system appears to exist and, in relation to the TRIPS Agreement, the system of patents is standardized⁴.

Costa Rica has an Intellectual Property Registry, structured in independent sections: livestock marks, trademarks and patents. Matters relating to copyright and related rights are recorded in a different database. These Registries have administrative power to issue precautionary measures, in order to protect the rights of the owners of these rights. In order to resolve instances of non-conformity with the decisions taken, the Court of Registration was recently set up, at a higher level.

The Supreme Court of Justice of Costa Rica consists of four divisions that are responsible for settling, in the final instance, the jurisdictional disputes referred to it. These divisions are as follows: the Constitutional Division safeguards fundamental rights; civil cases, administrative challenges, agrarian cases and remedies of invalidation for arbitration proceedings are dealt with by the First Division; labor-related cases by the Second Division and criminal cases by the Third Division and Criminal Appeal Court. There is a range of courts and tribunals that are competent to deal with the various facets of intellectual property protection.

As regards the enforcement of intellectual property rights, it is also possible to seek protection from the administrative authorities (police and customs).

BRIEF STATEMENT ON THE CHANGES IN COSTA RICAN INTELLECTUAL PROPERTY RULES

Intellectual property as a subject of legal study, as a sector rather than a branch of the law, is governed within the Costa Rican legal framework, by a series of standard-setting compilations including international agreements, laws and decrees.

The changes to industrial property have been positive and marked by the **World Trade Organization (WTO) *Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)***, where for the first time intellectual property standards were incorporated in the multilateral trading system, in addition to other international instruments. Since 2000, more appropriate rules have existed for the protection of the rights relating to industrial property, as well as the adoption of effective measures for the protection and security of such rights.

Law No. 8039 on Procedures for Enforcement of Industrial Property Rights (2000) was enacted in accordance with the reasoning interpreted from the TRIPS

³CABRERA MEDAGLIA , Jorge. **INFORME SOBRE EL MARCO REGULATORIO NACIONAL EN MATERIA DE BIOTECNOLOGIA Y BIOSEGURIDAD (REPORT ON THE NATIONAL REGULATORY FRAMEWORK FOR BIOTECHNOLOGY AND BIOSAFETY)**. 2004.

⁴ In complete accordance with the discussions held at the Joint UPOV, WIPO and WTO Symposium on **the Protection of New Varieties of Plants**, held in Geneva on February 15, 1999.

Agreement, in the part relating to the “Enforcement of Intellectual Property Rights”. The member States agreed to adopt effective measures against infringements, with the inclusion of flexible resources to prevent such infringements and dissuasive means through the classification of new infringements (Article 41.1). Similarly, it contains compulsory provisions as regards procedures, evidence, judicial decisions, both precautionary and final, and border measures.

In the same way, the **1996 WIPO Copyright Treaty (WCT)** (Article 14) and the **WIPO Performances and Phonograms Treaty (WPPT)** (Article 23) oblige the contracting parties to introduce the measures necessary for the implementation of said Treaties, by means of enforcement procedures and the adoption of effective measures against any unlawful act, with flexible resources to prevent infringements such as an effective dissuasive mechanism against new infringements.

In order to achieve effective protection for intellectual property, copyright and related rights, since the end of 2001 Costa Rica has taken a series of measures to develop a concerted State strategy in order to improve the enforcement of those rights. Specialized public prosecutors exist, together with training for officials responsible for enforcing these standards and the regulation of computer programs used in public institutions.

**SUBJECT MATTER OF ENFORCEMENT AND THE CENTRAL AMERICAN
FREE TRADE AGREEMENT (CAFTA). SOME OF THE POSSIBLE FUTURE
OBLIGATIONS IN THIS DISCIPLINE**

It is important to state that as regards ENFORCEMENT, a pattern has been observed in Costa Rica after the signing of the so-called “SOFTWARE DECREE” (as part of the copyright that protects computer programs). It is considered thus since interest is shown in Costa Rica in the protection of software, above all because a development policy has been launched in this regard, which is a source of innovation in the region.

For this reason, reference is made to the Software Protection Decree, since the Government’s interest may be observed in relation to respect for copyright and, in this case, computer programs.

Decree on Software Protection in the Central Government

Decree No. 30.151-J, which orders the whole of the Central Government to make every effort to combat and prevent the illegal use of computer programs, for the purposes of observing the provisions contained in the Law on Copyright and Related Rights and its reforms, the Law on Procedures for Enforcement of Intellectual Property Rights, and also current relevant international provisions.

A first stage of the Decree requires the **taking of an initial inventory** by the different Ministries, including information relating to existing computer equipment, the programs installed on computers, the number of authorized copies of each program, as well as certain other additional details such as the version, installation date and so on. Subsequently, each Ministry will establish effective systems and controls to guarantee respect for and safeguarding of copyright and related rights, specifically that relating to computer programs.

Once this stage is complete, the Registry of Copyright and Related Rights will, as a matter of course, conduct audits and must take regular inventories to determine whether the information system is accurate and whether the relevant rules in force are observed.

PROTECTION IN THE FREE TRADE AGREEMENT: CENTRAL AMERICA AND UNITED STATES OF AMERICA

Costa Rica has approved various agreements on intellectual property and international trade in the region (Canada, Chile and Mexico). A treaty has recently been signed which is still under discussion. This new free trade agreement with the United States of America contains a chapter devoted to intellectual property. Of all the obligations relating to intellectual property, the provisions present on ENFORCEMENT stand out. Its possible approval will imply the adoption of a series of changes in domestic legislation. These changes would generate a series of obligations relating to enforcement, such as the fact that there will be statistics relating to enforcement.

As part of the rules negotiated in the **Free Trade Agreement between Central America and the United States of America** (CAFTA), pending its approval, Article 1(7), Chapter 15, was regulated *de lege ferenda*, on the relationship with other agreements, and the content of the TRIPS Agreement is reiterated:

“Nothing in this chapter shall be interpreted as overriding the obligations and rights of a Party with respect to another Party under the TRIPS Agreement or other multilateral agreements on intellectual property, concluded under the auspices of the World Intellectual Property Organization and to which they are parties”.

The concept of national treatment is strengthened in Article 9:

"with respect to all the categories of intellectual property covered by this Chapter, each Party shall grant to the nationals of other Parties treatment no less favorable than that granted to its own nationals with respect to the protection and enjoyment of said intellectual property rights and any benefit derived therefrom”

Similarly, protection is defined as follows:

“...For the purposes of this paragraph, ‘protection’ shall include aspects which affect the availability, acquisition, scope, maintenance and observance of intellectual property rights, as well

as other subjects that affect the use of the intellectual property rights specifically covered by this Agreement. In addition, for the purposes of this paragraph, 'protection' shall also include the prohibition to avoid effective technological measures, in accordance with Article ___ and the provisions relating to the information on rights management, pursuant to Article ___."

When comparing what Costa Rica may agree to in relation to enforcement in the aforementioned Section 15.11 on enforcement of intellectual property rights with what already exists, the changes which CAFTA may involve as regards enforcement should be highlighted; basically, possible reforms to the law on enforcement will be required, for example the creation of new types of crimes as per the Agreement, such as those expressly stated in the following paragraphs: Article 8(a) and (b) on the protection of codified program-bearing satellite signals, and Section 5 on obligations relevant to copyright and related rights, paragraphs 7(i) and (ii).

CAFTA also recognizes, in relation to enforcement, the criterion of protection for undisclosed information, whereby such information is treated as confidential, as is the case for industrial property: **statistical information** with regard to the efforts to guarantee enforcement but confidential information should be protected. This is important because statistics are of vital importance when it comes to drawing up any criminal policy.

JURISDICTIONAL ANALYSIS OF INTELLECTUAL PROPERTY

The Registry of Industrial Property has access to the case law of the Third Division of the Higher Court of Administrative Challenge which, until December 2001, reviewed at second instance the decisions of the Directorate of the Registry of Industrial Property; this case law is now duly available in digital form (1999-2001).

Since 2000, the Court of Administrative Registration has been in operation, as a result of Law No. 8039 on Procedures for Enforcement of Intellectual Property Rights, which came into force in 2000. As regards organizational matters, this body has not settled industrial property cases and it does not currently have its own case law.

National case law is a valid source of information and study for judges, lawyers, public prosecutors and the Office of the Registry of Industrial Property. Article 9 of the Civil Code establishes it as a source of information subject to the law, with the reiterated doctrine established by the cassation chambers of the Supreme Court of Justice and the Full Court for the application of the law, custom and general legal principles. In turn, Section 13 of the Law on Constitutional Jurisdiction provides that "case law and precedents of constitutional jurisdiction shall be binding *erga omnes*, apart from for the Constitutional Division itself".

Aware of the economic importance involved in the settlement of disputes relating to intellectual property, judges and magistrates in Costa Rica have issued rulings, also in order to fill gaps in the law relating to certain legal standards.

GENERAL REMARKS ON INTELLECTUAL PROPERTY AS A REAL RIGHT.

Decision No. 2134-95, taken at 3pm on May 2, 1995. CONSTITUTIONAL DIVISION OF THE SUPREME COURT OF JUSTICE.

“Intellectual property is a real right, by virtue of which a legal power is exercised by a particular person, for the enjoyment of the personal and economic benefits which are the product of his creation, whereby that right may be binding erga omnes.”

COPYRIGHT AND RELATED RIGHTS. DEFINITION OF THE SCOPE OF AN AUTHOR’S MORAL RIGHT. Decision No. 376, taken at 2.50pm on September 30, 2002. SECOND CIVIL COURT, SECOND DIVISION

“The substance of a moral right consists of the author’s right to decide whether to disclose a work – to make it known or to keep it within the sphere of his own personal knowledge -, to demand that his status as creator and the integrity of his creation are respected, and to retract or reverse his opinions, and withdraw the work from circulation. The characteristics of the moral right are those which refer to rights of personality. This is an extra-economic, inherent and absolute right. It is extra-economic because it cannot be estimated in monetary terms, although it produces indirect or non-immediate effects such as the possibility of obtaining greater income – subject to normal conditions or where an attempt is made to fix compensation for damage to his rights – as a result of an increase in the author’s prestige and that of this work owing to the dissemination of the work together with the name of its creator. It is inherent in his status as author, i.e. it is combined with the person of the creator, for which reason it is not transferred mortis causa, the heirs receive only the exercise of some of the powers included in it – either negative or defensive – but not the moral right itself. It is absolute because it may be binding on any person – erga omnes – i.e. it allows the owner to challenge all other persons, including a third party who has received the full right in the work. The content of the powers of which the moral right consists is different. They are divided into two categories: positive and negative. The positive ones are the right of disclosure and the right of retraction or reversal. They are referred to as positive since they require a decision to be taken, or an initiative on the part of the right owner: amending the work, destroying it or publishing it, reversing his opinion and settling a contract and so on. They are not transferred to heirs and are therefore known as exclusive. The negative or defensive ones are the right to recognize the paternity and the right to integrity

of the work, referred to by French authors generically as the right to respect for the name of the author and the work. They are characterized as negative because they are translated into a right to prevent or a simple abstention on the part of passive subjects. They are defensive because, even after the author's death and after the work has entered the public domain, they allow action to be taken to safeguard the moral right in order to protect the individuality and integrity of the intellectual creation in which the general interest of the community is involved. As regards artistic paternity, this consists of the author's right to have his status as creator of the work recognized. The close link existing between the author and the fruit of his spiritual activity is protected, as referred to unambiguously with the expressions ² paternity ² or ² artistic paternity ², commonly used in legislation. The author may wish – or simply accept – that his name is not mentioned, in which case the work will be disseminated anonymously or under a pseudonym. The right to respect for and integrity of the work allows any change, distortion or attack against the work to be prevented. Its basis lies in the respect owed to the personality of the creator, which is manifested in the work, and to the work in itself. The author has the right to his thought not being changed or distorted and the community has the right to the products of creative intellectual activity reaching him in their authentic expression. This right, together with that of disclosure and recognition of paternity, constitute the basic powers embodied in the moral right, its spinal column, and in certain sectors of creative activity changes are frequently introduced, such as in relation to works created as a result of a contractual labor relation, audiovisual works, computer programs, works of architecture and design of objects in common use. Thus for example, as regards television works Spain establishes that, in contracts, authorization shall, unless otherwise agreed, be presumed to have been granted to make, in the form of a broadcast of the work, the changes strictly required by the programming means for the medium; respect for computer programs provides that, the author may, unless otherwise agreed, not oppose the transferee of the operating right making successive versions or derived programs. Sweden and Finland establish that the owner may change them without the author's consent, where this is required for technical considerations or reasons of usefulness (cf. seminar referred to, pp.4, 5, 8, 9, 12, 16 and 17 of the document entitled Moral Rights, prepared by Professor Delia Lipszyc, professor of Private International Law and Copyright and Related Rights, Faculty of Law, University of Buenos Aires, Argentina).”

INTERNATIONAL TRANSFER DOES NOT MODIFY OWNERSHIP

Decision No. 376, taken at 2.50pm on September 30, 2002. SECOND CIVIL COURT, SECOND DIVISION.

“The mere fact that the work in question is transferred, if it may be referred to in that manner, in the international sphere, does not make the gentleman (...) the author of the work and therefore provide the right to demand economic and moral rights, since actually being the author of the work would confer the right to demand such rights domestically and internationally.”

REGISTRATION OF A TRADE NAME WITH THE TITLE OF A WORK DOES NOT MAKE THE AUTHOR THE OWNER

Decision No. 376, taken at 2.50pm on September 30, 2002. Second Civil Court, Second Division. San José.

“...the performers’ society, (...), the only thing which it has done is to register the trade name (...). That sole fact does not make it the owner of economic or moral rights, or copyright, in the television program in question”.

EMPOWERMENT TO MANAGE CASES RELATING TO UNCONSTITUTIONAL ACTIONS

The Association of Composers and Musical Authors of Costa Rica received recognition of its empowerment to defend rights of composers and musical authors, in agreeing to initiate proceedings for unconstitutional actions relating to the protection of the rights of its representatives, as per Decision 364-98, taken at 4.12pm on January 21, 1998 by the Constitutional Division.

EMPOWERMENT OF COLLECTIVE MANAGEMENT SOCIETIES. PROTECTION OF COPYRIGHT BY COLLECTIVE MANAGEMENT SOCIETIES

The Costa Rican legislature provides broad coverage for collective management societies. However, recognition is given to case law, with the particular features derived from general legal principles (Article 5 of the Basic Law on the Judiciary). In Costa Rica, in the aforementioned decision relating to the defense of corporate interests, the interest shown by the Association of Composers and Authors was considered to be a source of empowerment to initiate proceedings, as a corporate body, characterized by the representation and defense of core interests, belonging to the members of the particular community or common activity.

Similarly, Decision No. 273, taken at 2.35pm on July 12, 2000 by the Second Division of the Second Civil Court of San José, provided that:

“Paragraph 132 idem grants collective management societies the status of “agents” with broad and sufficient representation, for the purpose of granting licenses, collecting royalties, making requests, representing them in court, and any other act necessary to defend the interests of their members, while paragraph 17 idem grants the party to the proceedings the power to establish unilaterally an amount which the user of the work that constitutes a compendium of the various items must pay, owing to and for its use in public. This cannot be refused and, since Costa Rica is a signatory to the Berne Convention and has enacted domestic laws, it is obliged to protect those works. The company Composers and Musical Authors of Costa Rica S.A. (Sacam) is empowered to request and, moreover, to prohibit the defendant from using the compendium of Spanish, Mexican, United States, United Kingdom, Brazilian and Argentinean authors, as long as the royalties are not paid to the party taking the action. It also has the right to recover the damages caused as a direct consequence of the unlawful use of those works. (...) This is an economic right granted to authors for the purposes of collecting the profits from the use of their works in public, whereby the form adopted is that of a collective exercise of copyright through authors’ societies, which are associations including a single class of copyright owners, administered and supervised by those owners, with interconnected worldwide networks, and the rights continue to belong to the authors, since the “management societies” in question carry out rights-administration activities. This whole form of association is designed to enable authors to control the profits generated by their works. (...) This is a legal representation contract, since it is the specific law pursuant to the Berne Convention which created that type of representation contract or mandate with specific powers for the collection and protection of royalties, collective management societies. (...) It may be inferred from the above that the legislature granted the right of representation of domestic authors and composers to an extremely broad range of agents, with no limitations other than the need for the group in question to have been set up as a trading company or association, or any legal entity managed collectively. (...) Furthermore, these are not the differing interests of the authors and composers of musical works, but specific interests governed by the law. (...) Any party that has a representation contract may collect profits, be it a limited company as in this case, or a record company, and the authors themselves who do not lose the ownership of their rights, but delegate the right to collect; the law authorizes such collection, it is not a tax according to the party against which action is taken, but the economic value which must be paid for the use of such works, since the failure to pay those royalties constitutes an infringement of the economic rights which authors have and this is consolidated in the law and agreement referred to. The defendant

has not paid the royalties to use the works in the compendia of pieces of music of authors, and so compensation is appropriate, in addition to the fact that further use without the authorization of the party to the proceedings may be lawfully prohibited”.

THE CONSTITUTIONALITY OF THE CRIMINAL SUPPRESSION OF COPYRIGHT INFRINGEMENT

Decision No.1065-95, taken at 3.06pm on February 23, 1995, by the CONSTITUTIONAL DIVISION OF THE SUPREME COURT OF JUSTICE, analyzed the rules contained in the Law on Copyright, in the face of questions concerning its adaptation to the Political Constitution.

SENSE OF THE VERB TO TRANSPORT

Decision 2002-0674, taken at 11.45am on August 29, 2002. Court of Criminal Appeal:

“In the context of the Law on Copyright and Related Rights as referred to, §119.f being interpreted systematically with §14.c, there is no doubt that the use of the verb to transport corresponds to its third meaning as established by the Spanish Royal Academy. If this were not the case, an absurd definition would result, unacceptable in legal terms: a person who buys a book, a computer program, oil painting, etc. would immediately commit a crime, if he took it from the shop to his home or office without the author’s authorization, or if the object were moved to another place where the purchaser wished to have it; or worse still, the author would decide where the purchaser may take the book.”

THE CONSTITUTIONALITY OF A SEARCH TO SEIZE VIDEO CASSETTES

Decision No. 3309-95, taken at 11.12am on June 23, 1995 by the CONSTITUTIONAL DIVISION OF THE SUPREME COURT OF JUSTICE, in the face of questioning by the interested party, concluded that a search for the purposes of copyright protection was appropriate.

RIGHT TO PROTECTION BY MEANS OF PRECAUTIONARY MEASURES

Decision 2001-10985, taken at 10.44am on October 26, 2001, by the CONSTITUTIONAL CHAMBER OF THE SUPREME COURT OF JUSTICE, provided

that:

“...the applicant claims that the administration did not grant him the previous hearing indicated by the law in question, although in this sense it should be noted that within the procedures established by the Law, the Administration may choose – at the time a precautionary measure is imposed – as to whether to inform the infringing party and, should he not be informed, he must be notified within three days of the precautionary measure being imposed. This is the case of the person protected, since the Administration chose not to inform him of the procedure of imposing the precautionary measure. (...) He will therefore be able to exercise his right to defense from that time onwards and he must discuss whether or not the measure is relevant and whether or not this places a lesser burden on the interests of the protected person, within the administrative proceedings initiated for that purpose so that those extremes are defined there and not in this courtroom.”

COMPUTER PROGRAMS PRODUCED AS A RESULT OF LABOR RELATIONS

Decision No. 415, taken at 9am on December 22, 1994, by the SECOND DIVISION OF THE SUPREME COURT OF JUSTICE, analyzes in similar vein the case of a work to order whereby the inalienable nature of the author’s moral right is noted and ownership of the moral right in the computer programs created by the worker, as part of a labor contract, does not, unless otherwise agreed, authorize him to remove the “source codes” from the programs and prevents the economic owner from having access thereto, since they determine its value as legal property. The author of the work already communicated may only request from the owner that he assigns a reserved rights notice in favor of the author of the work.

RULES APPLICABLE TO FOOTBALL AS A SPORTING SPECTACLE

Decision No. 224, taken at 9.30am on October 8, 1993 by the SECOND DIVISION OF THE SUPREME COURT OF JUSTICE, stated:

“...the law offers protection for the right held by performers etc. to authorize or prohibit the transmission, reproduction etc. of their works or performances. In the case of amateur and professional athletes, it will be the club or sporting body to which they belong that exercises the right to grant or refuse this authorization. However, according to what may be noted from the transcriptions, none of the cited articles, nor any other article of said Law, establishes that the signing-on fees of professional football players are emoluments separate to the salary, as shown by the defendant.”

MORAL RIGHT OF THE AUTHOR IN ARCHITECTURAL WORKS

Decision No. 360, taken at 10.05 am on September 1, 2000, by the SECOND DIVISION OF THE SECOND CIVIL COURT, stated that:

“The preliminary draft, plans and calculation memory can be used only to complete the unfinished installations of (...), but not for a different purpose, and even less to reproduce or change them, since the authors retain the author’s moral rights therein, only to be recognized as such and prevent his work being used for other purposes.”

SUITABILITY OF A PRISON SENTENCE FOR HOLDING OR DEPOSITING UNLAWFULLY REPRODUCED PHONOGRAMS

Decision No. 410-F-93, taken at 3pm on July 22, 1993. THIRD DIVISION OF THE SUPREME COURT OF JUSTICE. San José.

DISCUSSION PENDING ON THE PREREQUISITE FOR AUTHORIZATION FOR USE OF A MUSICAL COMPENDIUM, FOR INSTITUTIONS WHERE MUSICAL WORKS ARE USED IN PUBLIC

The Constitutional Division is currently discussing the constitutionality of the stipulated requirement of authorization for a musical compendium, for institutions that use musical works for commercial purposes. This has been extended in the municipalities to subsequent patent renewals; however, various cases have been brought against said provision, Article 17 of Law No. 6683 on Copyright and Related Rights, as well as paragraphs 2 and 4 of the Regulations under Article 50 of Law No. 6683 and its reforms (Executive Decree No. 23.485-MP).

Decision 2003-13695, taken at 3.45pm on November 28, 2002. CONSTITUTIONAL DIVISION. San José.

“The standards are challenged insofar as ACAM and SACAM were set up from them, and whereby those private law entities were in a position of power, since any public body which grants and renews operating licenses or permits, or which grants concession and operating contracts for institutions in which musical works of any kind are used publicly, shall demand as a prerequisite the authorization for use of a musical compendium. In view of the above, a private body is given complete freedom to establish tariffs unilaterally, and a license for use of a musical compendium is created, which should be the sole reserve of the law. It is stated that authorization should be given by each author of the works that will be performed or globally by the

body which lawfully represents it. The National Registry of Copyright does not have a recorded list of names of each and everyone of the authors and musical composers of each of the countries indicated above, nor does ACAM have registered performance contracts with national authors and musical composers. ACAM represents the authors and musical composers of certain countries, not of the whole world, although it collects royalties for the music of all authors throughout the world.”

In the following instances, judgment of the case has been reserved, so that it may be settled once the constitutionality of the applicable standard has been decided:

Decision 2003-09267, taken at 2.59pm on September 3, 2003, by the CONSTITUTIONAL DIVISION OF THE SUPREME COURT OF JUSTICE.

Decision 2003-02834, taken at 2.59pm on April 9, 2003, by the CONSTITUTIONAL DIVISION OF THE SUPREME COURT OF JUSTICE.

PATENTS AND TRADEMARKS⁵

TEMPORARY PROTECTION OF INVENTIONS, PRIORITY RIGHT, TRANSFER OF TECHNOLOGY AS A SOCIAL FUNCTION OF PATENTS

Decision No. 4848-96, taken at 3.15pm on September 17, 1996. CONSTITUTIONAL DIVISION OF THE SUPREME COURT OF JUSTICE.

“A patent is an official document which recognizes or justifies industrial property. Such certification is used to protect an invention or some other activity or industrial property subject matter and this title testifies to the priority which its inventor has in relation to the Registry and which gives him the right to exclusive and temporary use of his invention. In granting a patent for an invention, the State guarantees its protection for the patent owner for a short period of time, during which he enjoys temporarily exclusive use of his invention, thereby creating a type of monopoly protected by the law for a particular period of time, following which the invention enters the

⁵ For a detailed reference to Costa Rican case-law, in relation to industrial property, see the report, drawn up for the Regional Seminar on Industrial Property for Judges and Public Prosecutors in Latin America, organized jointly by the World Intellectual Property Organization (WIPO), European Patent Office (EPO) and the Spanish Patent and Trademark Office (OEPM), with the collaboration of the General Council of the Judiciary (CGPJ) of Spain, in Madrid, from November 18 to 22, 2002, **Chaves Villalobos (Juan Manuel)**, Report on Current Trends in Costa Rican Industrial Property Case Law.

public domain, something which fulfils the social function of patents, i.e. technology transfer. (...) the author is entitled to a share of the economic success of his creation, work or invention, and he is therefore able to recover all the resources he has invested in terms of time devoted to research, effort, creativity and economic investment, deployed in the creation of his invention. Furthermore, the author must repay the community for what he has received from it, since the inventor's personal and intellectual contribution is less than that which he has received from the community and from the fund of human knowledge. Once the period of temporary enjoyment of the right to a patent expires, the inventor compensates the common fund of knowledge with all the knowledge which he has obtained therefrom and that helped him to create his invention. In view of the above, the patent has a restricted duration which, in turn, constitutes the essential feature of this type of ownership, i.e. the temporary nature of the right. Article 47 of the Political Constitution protects that essential content of the intellectual property right as follows: "Any author, inventor, producer or trader shall temporarily enjoy exclusive ownership of his work, invention, trademark or trade name, in accordance with the law."

ATTRIBUTIVE TRADEMARK SYSTEM DIMINISHED IN RELATION TO STATES WITH A DECLARATORY SYSTEM

Decision 764-F-01, taken at 3.45pm on September 26, 2001, by the FIRST DIVISION OF THE SUPREME COURT OF JUSTICE.

"... this Division has expressed its views on the trademark system in Costa Rica and has characterized it as attributive and diminished in relation to the foreign States in which the declaratory system is used. The Division also declared contrary to good faith, and the normal and honest development of trade, the taking possession of a trademark owned for years by another person, thereby giving rise to the doctrine of the "well-known trademark". (...) In Decisions nos. 46, taken at 2pm on May 28, 1982, and 116, taken at 2pm on April 6, 1990, this Division considered: "...that certain unregistered trademarks are not therefore devoid of all value and are not shorn of any efficiency or of any protection, in accordance with the decisions made in cassation, nos. 2, taken at 10.40am on January 18, 1955, and 68 taken at 4pm on August 9, 1956. It has also been resolved that, although our system is attributive, the Central American Convention "should also include the foreign trademarks of States that follow the declaratory system and, for that reason, Article 85 established not only the registered trademark but also the adopted trademark.... Furthermore, in accordance with the wording of the aforementioned second decision in cassation, good faith is seriously affected and the circumstance, whereby the denomination that has been held for years by another

person from among traders and public consumers is registered as a trademark of this class to distinguish goods of the specific nature, is contrary to the normal and honest development of trade; thus the doctrine and the case-law relating to such a system, in constant development of concepts and legal constructions, have managed to recognize the protection necessary for trademarks that may be characterized as such, especially in the face of unlawful or unfair competition, for whomsoever the existence of such characteristics is favorable, if this is justified in terms of form and thereby give rise to the greed of competitors. (...)The company may not now therefore claim, in line with a formalist argument and in contrast to the doctrine, the registration and therefore use of a trademark previously used and marketed by another body, since the above would be harmful to commercial good faith and would confuse consumers”.

EXTRATERRITORIAL SPHERE OF PROTECTION FOR A WELL-KNOWN TRADEMARK COVERED BY THE CONVENTION OF THE PARIS UNION

Decision No. 2001-9133, taken at 2.44pm on September 12, 2001, by the CONSTITUTIONAL DIVISION OF THE SUPREME COURT OF JUSTICE.

“...an aim which the Convention claims to achieve, i.e. the protection of industrial property rights of all the countries that are members of the Union. The well-known nature of the factory or trade mark may not be limited by a territorial aspect of national character, given that the reason for the existence of the Convention would be lost, said Convention envisaging even that the treatment for a national is granted to all the nationals of the countries of the Union (...) The important thing is that the trademark is well-known or famous in one of the member countries of the Union, fame which may have been obtained through disclosure or an advertising initiative and not necessarily through the use of the good or service. (...) The protection granted to well-known trademarks or trademarks of renown is consistent with the intention to protect good faith in international trade relations, especially in the face of unlawful or unfair competition. The legislature is fully competent to carry out its constitutional duties, i.e. to deal with matters relating to the protection of intellectual property rights which, according to information, are of constitutional rank. Nor is the standard challenged contrary to the international conventions used as a parameter by the party bringing the case, given that these conventions also aim at the international protection of well-known trademarks as an effort toward cooperation between countries faced with the development of international trade.”

UNFAIR COMPETITION

Decision No. 6992-97, taken at 1.33pm on October 24, 1997, by the Constitutional Division of the Supreme Court of Justice, San José.

Decision No. 29-f-96, taken at 10.45am on January 17, 1996, by the Higher Court of Criminal Cassation, San José.

Decision No. 114-f-98, taken at 4.10pm on February 24, 1998, by the Court of Criminal Cassation, San José.

UNFAIR COMPETITION CANNOT EXIST BETWEEN NON-COMPETITIVE ECONOMIC AGENTS AND REQUIRES ACTUAL DAMAGE, OR THE THREAT THEREOF, TO BE CAUSED

According to Decision No. 1027-N, taken at 7.50am on September 24, 2003, by the First Civil Court of San José, unfair competition cannot exist since the facts do not fit the suppositions contained in Article 17 of the Law on Consumer Protection, as they do not cause actual damage or a proven threat of damage. Both parties are not competing with each other, the party to the proceedings was affiliated to the defendant and both complemented each other.

SUITABILITY OF SEIZURE AS A PRECAUTIONARY INDUSTRIAL PROPERTY MEASURE

Decision No. 355-95, taken at 5.33pm on January 18, 1995, by the Constitutional Division of the Supreme Court of Justice, San José.

UNFAIR COMPETITION OWING TO THE UNLAWFUL USE OF A REGISTERED TRADEMARK

Decision No. 829-E., taken at 8.40am on September 3, 1997, by the First Higher Civil Court, San José.

UNFAIR COMPETITION OWING TO SIMILARITY OF A LABEL REGISTERED FOR A GOOD. RESPONSIBILITY OF COMPANIES WHICH LABEL, DISTRIBUTE AND MARKET

Decision No. 910-L, taken at 8.55am on July 22, 1998. First Civil Court of San José.

UNFAIR COMPETITION INVOLVING A TRADEMARK ON THE INTERNET. SUITABILITY

Decision No. 466-L, taken at 8.20am on June 20, 2002, by the First Civil Court of San José, stated:

“that procedure causes confusion for consumers who may easily be negotiating with a separate company. The court does not question free trade that offers consumers good and better services, since such fair competition in good faith gives rise to major benefits. In order to preserve the fair trademark, international law and the internal standards of each country condemn any form of conduct which endangers that aim”.

UNFAIR COMPETITION DOES NOT EXIST, CONFUSION AMONG CONSUMERS WAS NOT PROVEN, NO SPECIAL PERIOD OF LIMITATION EXISTS IN THIS REGARD

Decision No. 854 L, First Civil Court of San José, taken at 8.40am on October 2, 2002.

CONCEPT OF UNFAIR COMPETITION

Decision No. 208-G, taken at 7.45am on March 13, 2002, by the First Civil Court of San José.

“...a competitive act which, since it involves the use of means subject to censure in the light of criteria of correctness fitting the current circumstances, must be suppressed by the law, in defense of the interests of the other competitors and of the community in general. That involves a person, be it a trader, manufacturer or professional who is assumed to have clients, taking away from another person in the same profession all or part of his clients by means of acts that damage his integrity, whereby fraudulent, deceitful or at least guilty means are used for the purpose of carrying out an act of competition designed to produce confusion with the products or with the activity of another person, causing that person harm by discrediting him or by appropriating the fame stemming from the goods or enterprise of the other person”.

PASSIVE SUBJECT OF ACTION FOR UNFAIR COMPETITION

Decision No. 208-G, taken at 7.45am on March 13, 2002, by the First Civil Court of San José.

“...as regards the passive subject of the claims raised as a result of this case of unfair competition, it will always be the employer or competitor that benefits, or may benefit, with the improper behavior.”

REGISTERED TRADE NAME. COINCIDING WITH THAT OF A COMPETITOR, UNSUITABILITY OF UNFAIRNESS THROUGH REGISTRATION PROTECTION

Decision No. 831-R, taken at 7.30am on July 6, 2001 by the First Civil Court of San José.

“In the same way as the lower court, the Court does not find that the defendant is carrying out any activity that is covered by the concept of unfair competition such that this claim may be accepted; it is using its name since it is protected by its registration, and a decision may not be taken here regarding the invalidity of its registration and the removal thereof from the Trade Register, nor may it be forced not to use its name and less still expressly convicted, contrary to the request made in the application.”

CIVIL NATURE OF THE CLAIM FOR UNFAIR COMPETITION

Decision No. 803-C-00, taken at 2.35pm on November 1, 2000 by the First Division of the Supreme Court of Justice of San José.

“The simple fact that the removal of a registration entry is requested does not entail an administrative challenge dispute, unless a claim against the State is involved, which is not the case under examination. Here the dispute is between private individuals with no interest on the part of a public body. Note that according to the will of the parties, registration entries may be created and removed, without those acts transcending their private nature. It follows therefore that the invalidation claimed is a civil request and not an administrative challenge.”

THE USE OF A PHRASE WITH THE SENSE OF EXCLUSIVITY OF PRODUCTION IS UNFAIR COMPETITION

Decision No. 642-M-, taken at 7.45am on April 13, 2000, by the First Civil Court of San José.

“...when marketing spring water, and using in its advertising means and signs, the expression “spring water” instead of the name of the product, the possibility of creating confusion is generated among public consumers, and the other commercial producers of that same product are affected by the claim that the water which the defendants are selling is the only spring water.” In the Court’s opinion, the removal of the article “the” “allows the idea to be held whereby other makes of the same product exist, and unfair and misleading advertising would be avoided.” (...) “the order will be that each and every one of the advertising means and signs are corrected, so that the article “the” is removed from the phrase which has been used”.

VARIOUS ACTIVITIES FOR THE PROTECTION OF INTELLECTUAL PROPERTY

The standard-setting and jurisdictional framework does not contain sufficient elements for effective protection; further action has therefore been taken by the State to provide protection that is as broad as possible:

Interinstitutional Committee

In Costa Rica an Interinstitutional Liaison Committee for the Protection of Intellectual Property was set up, coordinated by the Ministry of Justice and which comprises representatives of the national public institutions involved in this area. The members of the Committee have joined forces to study existing legislation in the field of intellectual property, with the aim of identifying its strengths and weaknesses. Thus, in order to guarantee greater protection for intellectual property, the final revision of, *inter alia*, the Regulations under the Law on Procedures for Enforcement of Intellectual Property Rights has begun.

This Committee comprises the Registry of Industrial Property, the Office of the Attorney General, the Judicial Investigation Authority, the School of the Judiciary, the Directorate General of Customs, Ministry of Public Security, Ministry of External Trade, and Ministry of Science and Technology.

Legal reforms designed to make the penalty for non-performance of obligations stricter

The government authorities responsible for reforming the Law on Procedures for Enforcement of Intellectual Property Rights are studying an increase in the penalties, up to a maximum of five years, and the removal of the “**principle of harmfulness and insignificance**” from Article No. 70. However, a number of experts in the field consider that such measures run counter to the criminal procedural provisions as regards the criteria of timeliness and the theory of damage to legal property as a basis for criminal repression.

STATISTICS:

The Statistics Section of the Judiciary is currently analyzing the figures for the past two years relating to the claims filed. To illustrate the national interest in enforcing intellectual property rights, in 2002, 283 sets of judicial proceedings were initiated for infringement of the Law on Copyright. The majority were in the capital, with 97, followed by the Atlantic Region with 35 (port area) and the Southern Region with 34 (border area); after that the Pacific Region with 45 (border and port area) and, in the city where the main international airport is located, 45. There were 27 in other regions of the country. Of relevance is the fact that most of the cases of infringement of the Law on Copyright occurred in the border area or where there is a greater concentration of inhabitants.

The Office of the Attorney General dealt with 283 cases identified as infringing the Law on Copyright, as per the attached table⁶.

For its part, in accordance with the provisions of the Law on Procedures for Enforcement of Intellectual Property Rights, Section II, Border Measures, the National Customs Service submits for physical review nine per cent of imported goods, i.e. 91 per cent of imported goods are not reviewed physically and the goods subject to physical review are determined at random using an electronic system.

The following results have been obtained as a consequence of said unofficial action.

JUDICIAL CIRCUIT	NUMBER
First San José	82
Second San José	15
First Alajuela	35
Second Alajuela	10
Cartago	16
Heredia	10
Guanacaste	25
Puntarenas	20
Southern Region	34
First Atlantic Region	1
Second Atlantic Region	35
TOTAL	283

Place and No.	RecordDate	Type of merchandise	Procedure of conducted by Customs	Judicial body	Current situation
Sabanillas, 0023-04	13-05-150 04	various compact discs	Denunciation APC-620-04	Corredores Office	Investigation ofstage

⁶ Table 130, 2002 Directory of Judicial Statistics, Judiciary, San José, Costa Rica.

				Attorney	
				General	
				Corredores	
Place Km. 37,12-05-40		various	Denunciation	Office	of Investigation
No. 3712	04	compact discs	APC-623-04	Attorney	stage
				General	
AS-DT-SS-	22-04-		Denunciation	Alajuela	
299-02	02	Perfumes	AS-G-327-02	courts	

BORDER MEASURES:

The National Customs Service has also acted to seize *ex officio* compact discs reproducing information concerning 105 artists and record companies. 2,500 discs have been seized. Denunciations have not been made in court but the 105 corresponding sets of proceedings have been coordinated with the Association of Composers and Musical Authors.

Coordination work is done with the Section for Economic Crimes of the Office of the Attorney General to regulate the entry into Costa Rica of alcohol and to determine the origin of such products. Imports of goods bearing BIC trademarks are monitored, specifically biros and small knives and ink cartridges for printers bearing the trademark EPSON, and information has been received on these goods in order to detect whether or not they are counterfeit.

To date, the National Customs Service has not received from the Registry of Industrial Property, the National Registry of Copyright and Related Rights or a judicial authority, the order to suspend any dispatch of goods as a result of information provided by an intellectual property rights owner, concerning the entry of goods infringing his rights.⁷

REPORT ON PRECAUTIONARY MEASURES SUBMITTED TO THE REGISTRY OF COPYRIGHT AND RELATED RIGHTS

According to the appropriate information and records, the report relating to precautionary measures submitted to the Registry of Copyright and Related Rights, by virtue of the enactment of Law No. 8039, which came into force in October 2000 and is known as the Law on Procedures for Enforcement of Intellectual Property Rights, was also previously submitted to the National Registry.⁸

⁷ This information was supplied on June 17, 2004 in Memorandum DV A-DSI-177-2004, a report on the work done by the National Customs Service with respect to border measures, issued by **Loretta Rodríguez Muñoz**, Director General of Customs.

⁸ **ARAYA YOCKHEN, Ariana**; Director of the National Registry of Copyright and Related Rights, and **COTO OROZCO, Ana Grettel** and **RIVERA PLA, Pamela**. Advisors. **REPORT ON**

The precautionary measures are available as a guarantee that must be given by the parties making complaints on matters within this discipline. It is considered that such measures (monetary guarantees) have not been set at very high levels so that they do not prevent denunciation of possible infringements of intellectual property rights.

- Sphere of application: exercise of administrative and judicial action against the infringement of any intellectual property right;
- Adoption of precautionary measures: before, during or in the phase of enforcement of judicial proceedings for infringement of intellectual property rights. Precautionary measures may be decreed before the beginning of judicial proceedings, including by an administrative head office.

According to the reports there were:

2000: (year in which the Law referred to came into force):

- No applications for precautionary measures.

2001:

- Applications filed: 8
- Applications accepted: 8
- Measures enforced: 8
- Measures concluded: 8
- Promoter: Association of Composers and Musical Authors (ACAM)
- Against: Various bars and restaurants
- Current status: Recorded by **extraprocedural agreement**.

2002:

- Applications filed: 5
- Applications accepted: 3
- Measures enforced: 3
- Measures concluded: 3
- Measures rejected (owing to failure to respect legal requirements and withdrawal): 2
- Promoter: Various
- Against: Various
- Current status:
 - Recorded by extraprocedural agreement: 1
 - Consideration by main judicial authority: 1

Revoked: owing to non-submission of request

2003:

Application filed: 1

Current status: withdrawn at the request of the party owing to initiation of proceedings for unconstitutional action.

Note: This year there were no applications owing to proceedings for unconstitutional action filed against various provisions of Law No. 8039.

2004: (To date: June 2004)

- Applications filed: 6
- Applications accepted: 6
- Measures enforced: 6
- Measures concluded: 6
- Measures rejected (owing to failure to respect legal requirements and withdrawal): 0
- Promoter: Various
- Against: Various
- Current status:
 - Recorded by extra-procedural agreement: 3
 - Consideration by main judicial authority: 3

CRIMINAL LAW

In this branch of the law it is worth referring to the following points:

- The items common to all crimes, which have generated discussion, are highlighted, including: **sentences of one to three years, prosecution through public right of action by private application** and the **principle of harmfulness**.
- Discussion has been generated regarding these three subjects because in view of the sectors involved they are of great interest:
 - 1. increasing the length of sentences;
 - 2. reforming the method of criminal prosecution;
 - 3. eliminating the principle of harmfulness.
- The efforts and interest of the sectors are recognized, since proposals have already been made for reforms to the Law on Enforcement in relation to those subjects (Record Nos. **14489 and 15076**).
- Another of the proposed projects is the creation of the **SPECIALIZED OFFICE OF THE ATTORNEY GENERAL for Intellectual Property Crimes (Record No. 15077)**. In relation to what the creation of a Specialized Office of the Attorney General claimed to produce, the decision taken on the plan was negative. The **opinion of the Supreme Court of Justice**, when consulted on these plans, especially that of establishing the Office of the Attorney General, can be summed up in two points:

- 1. The Full Court refers to the problem of a **lack of resources**.
- 2. In view of the previous economic limitation, in relation to the protection of legal property or rather in order to deal with all the crimes a system of “priority” or “a hierarchy” must be established where possible. The judiciary also refers to the following:

*"...We recall that although intellectual property is certainly worthy of protection, it is well known that the protection provided with the criminal standards which seek to safeguard it are eminently economic and generally the victims of the crimes concerned have sufficient means to benefit from the institutions set up by the legislature and, as far as those referred to here are concerned, their interests are satisfied. Consequently, **the excessive protection which is claimed to be provided against criminal acts such as those resulting from the infringement of intellectual property appears to us to be disproportional**, since most of the criminal acts endanger rights not of a general or collective nature but that are from a sector which is characterized precisely in that it has greater resources than certain sectors in Costa Rican society, and luckily they have been provided with a sufficient quantity of procedural remedies and resources to achieve their aims and protect those interests"⁹.*

What is the situation as regards causes of crimes? What is the function of criminal law in intellectual property protection?

From the point of view of the sectors involved which are rights owners: **as a whole the government and interested parties must place emphasis on an urgent analysis of this subject from the perspective of cost-benefit for the country**. It should also be examined whether in a situation whereby the **State will devote greater resources to effective "enforcement", "joint action" or "compulsory compliance", for the purposes of intellectual property protection, greater investment by companies is therefore guaranteed together with greater social and economic benefit for the country**. It is worth pointing out that despite the response of the Full Court when it looked at the project, the efforts and progress made by the judiciary in this regard, in order to fulfil obligations, should be recognized.

To conclude this first point it should be emphasized that another draft law (No. 15556) recently came into force, to reform the Law on Enforcement, which deals with the three subjects referred to above. This draft law is the brainchild of an **Interinstitutional Committee**. In relation to the other drafts it is novel in that it proposes changes to border measures and alternative punishments such as **FINES**.

REPORT OF THE OFFICE OF THE ATTORNEY GENERAL FOR VARIOUS CRIMES RELATING TO INTELLECTUAL PROPERTY

⁹ Memorandum No. SP-172-03 of August 11, 2003. Agreement reached by the Full Court at session No. 29-03 of August 4, 2003, in response to Record 15077 "Creation of a Specialized Office of the Attorney General for Intellectual Property", which is part of the Archive Department of the Legislative Assembly.

PRELIMINARY NOTES¹⁰

In 1998, with the entry into force of the new standards of criminal procedure, the Office of the Attorney General of the Republic of Costa Rica set up Specialized Offices and made each of them responsible for investigating the different crimes which the prosecuting body is obliged to investigate; the Office of the Attorney General specializing in various crimes was therefore set up and, by order of the Attorney General, is responsible for trying the crimes committed against intellectual property; the proviso is that, in addition to the crimes provided for by the relevant legislation, the Office of the Attorney General deals with 157 other crimes, all of which makes the resources available insufficient.

Despite the shortage of human and economic resources, public prosecutors in Costa Rica have joined in the fight against piracy in all its forms. In that regard, numerous operations have been conducted and significant convictions brought.

As will be explained below, various kinds of operations have been carried out and many different accusations made; however, a point of interest worth noting is that, in relation to intellectual property, conciliation has been applied, an institution provided for in legislation as an alternative solution to social disputes brought before the courts, which explains why Costa Rica¹¹ does not have a high incidence of criminal convictions.

Since October 2002, when the National Congress approved the **Law on Enforcement of Intellectual Property Procedures**, there has been an increase in the number of complaints made and therefore in police operations, all designed to track down the offences denounced.

As regards the new legislation, the interest of certain groups in reforming the Law in question has, at the same time, become clear. Such reforms have been put forward on three specific subjects:

- (a) repeal of the criterion of timeliness, established by the Law on Enforcement of Intellectual Property Procedures;
- (b) establishment of criminal action relating to intellectual property as a public right to action, thereby eliminating the public right to action by private application;
- (c) creation of the Office of the Attorney General Specializing in Intellectual Property.

In relation to these subjects, the criterion of the subscribing party is summarized below.

PRINCIPLE OF HARMFULNESS

The criminal system of any State or country must be in line with the chosen political system, which makes the introduction of standards that duly comply with the system a requirement.

¹⁰ **HERNÁNDEZ SOTO, Sylvia.** Coordinator, Office of the Attorney General. Intellectual Property in the First Judicial Circuit, San José, Costa Rica.

In the first section of its Constitution, Costa Rica introduces the DEMOCRATIC PRINCIPLE and declares itself to be a DEMOCRATIC REPUBLIC, which means that the State should provide a reasonable basis for its actions and limit to itself the use of power by the Government. As a complement to the democratic principle it establishes the PRINCIPLE OF RESERVATIONS MADE BY THE LAW (Article 28 of the Constitution), which makes clear the inadmissibility of criminal conduct that does not affect protected legal property. This means that each and every one of the prohibitions on conduct judged in accordance with the criminal law are founded on a reasonable basis: the protection of areas of fundamental importance for the survival of a social group (see decision of the Constitutional Division No. 6410-96, taken at 3.12pm on November 23, 1996).

As a result of the judgments handed down by the highest Constitutional Court in the country, the judgments of which are binding for all (section 13 of the Law on Constitutional Jurisdiction), the Office of the Attorney General, devoted to the principles enshrined in the Political Constitution and the court judgments referred to, considers that the judgments do not stem from a capricious political decision, but that **the principle of harmfulness** is taken from the Constitution. The prosecuting body considers that, for the purposes of consistency, the criminal system must be kept with the political system and this principle is the most vivid expression of such harmony; its removal would give rise to a reversal in the successful progress made in the past few years with regard to criminal prosecution.

Furthermore, it is important that prior to the repeal of such a principle in intellectual property legislation a comprehensive and reasoned study is conducted into the impact that the large number of cases without importance for prosecution purposes would have, something which would weaken the sparse resources available to deal with such crimes; thus, removing the principle referred to is a responsibility for the same government as to what then, in the face of an increasing number of cases, would be its capacity for providing an effective and efficient response.

In view of the above and taking into consideration the **principle of harmfulness** as one of the clearest limits to Ius Punendi, the Office of the Attorney General considers that the principle is a legal necessity which makes the system lawful and provides for dealing with other cases of equal importance for Costa Rican society.

BENEFITS OF AND THE NEED TO HAVE A SPECIALIZED OFFICE OF THE ATTORNEY GENERAL

As a result of the known economic crisis which the country in general is experiencing, the judiciary has been forced to restrict resources for all its dependent bodies. The shortage of resources allocated to each of the dependent Offices of the Office of the Attorney General limit the possibilities for dealing immediately with each case of intellectual property infringement, since such crimes are tried by the Office for Various Crimes of the Office of the Attorney General, which takes on such tasks as an extra duty but cannot

devote attention exclusively to them in material terms since it is responsible for trying other crimes.

Faced with the above situation, the Office of the Attorney General has considered that the proposal to establish an office specializing in intellectual property matters requires study and assessment, something which may not be alien to the reform proposals put forward by certain groups; thus for example the impact of an office specializing in the following circumstances should be analyzed:

- (a) an office with the valid criterion of timeliness (harmfulness);
- (b) an office for the public right of action by private application;
- (c) an office without the criterion of timeliness but with the right to public action.

It should be pointed out that the three variables will undoubtedly influence the efficiency and effectiveness of cases of criminal prosecution, as it is well known that where a country has a specialized office of the attorney general a large number of cases must be included in the statistics which are not now included.

Furthermore, the specialized Office of the Attorney General should be set up by means of legal reform, a reform which should include its own budget which must be divided up from the actual setting up and with a view not only to covering the immediate resources of an office in San José but the resources required for national integration, i.e. which allow the Office of the Attorney General to develop a national plan, thereby giving rise at least to public prosecutors in the capital and in each of the provinces, who will tackle head on the problem of piracy. At the same time, it should be mentioned that the establishment of a prosecution policy in relation to intellectual property requires specific and expert resources in addition to the infrastructure necessary for the Office of the Attorney General, police and experts to operate at the same time and in harmony.

Certain benefits which may be pointed out as arising from the setting-up of the office obviously have an impact on the treatment of each case, in terms of the following:

- (a) efficiency;
- (b) effectiveness;
- (c) exclusivity as a result of specialization, importance at the national level, thereby avoiding concentration in the metropolitan area;
- (d) facilitating the approach which must be taken to the policy of prosecution; giving priority to border posts, as the places where the majority of pirate goods enter the country;
- (e) facilitating the enforcement of the criminal prosecution policy, since this allows greater coordination with the other public and private bodies in eliminating crime;
- (f) collaborating in the improvement of coordination of national and international institutions, where a monopoly is held by criminal repression;
- (g) concentration and detection of strengths and weaknesses in investigating this type of crime.

PUBLIC RIGHT TO ACTION

The historical precedent of the right to criminal action for the crimes relating to copyright and related rights dates back to the enactment of Law No. 6683, Article 126 of which provided for the following:

“ARTICLE 126.- Criminal action, stemming from infringements of this Law, shall be public and may be taken by means of a complaint or indictment. This means "initiated".
(Repealed by Law No. 8039 on Procedures for Enforcement of Intellectual Property Rights, dated October 12).

Subsequently, Law No. 8039 introduces a larger number of crimes and also establishes that the public right to action at the request of an interested party governs criminal proceedings.

Such a radical change in the nature of punitive action has given rise to a sizable number of benefits in dealing with the intellectual property crimes which have been recorded during the actual application of Law No. 8039 to date, which allows a comparative table to be drawn up showing the major benefits achieved by the parties to disputes through public criminal action but at the request of an interested party. The following table contains an extract of how the law is applied in the courts and the result of one year and ten months of operation of the Law.

ADVANTAGES OF THE PUBLIC RIGHT TO ACTION OVER SUCH A RIGHT OF ACTION BY PRIVATE APPLICATION. COMPARATIVE FRAMEWORK

Characteristics of the public right to action:	Characteristics of the public right to action by private application:
The State retains authority in the case and in investigations with an absolute monopoly over criminal action and no participation by interested parties.	Commercial companies, consumers and State retain simultaneous control over investigations.
Accessibility of criminal cases owing to the number of such cases becomes impersonal. Access of parties to criminal proceedings becomes impersonal, owing to the large volume of work existing in the criminal sphere.	The access of the affected parties is smoother and shared, thereby generating a situation where the judicial authorities keep the cases active and deal with them efficiently, owing to the direct assistance and involvement of the interested party.
The application of the victim for his case to be transformed from a public to a private action will require the authorization of the Office of the Attorney General.	Allows victims to be able to withdraw an application quickly. This helps to protect the party making the complaint since there are greater possibilities for resolving disputes more quickly. Also allows the victim to be able to choose against whom action is taken, which in the final analysis leads to

	democratization of criminal proceedings and rationalization of State resources.
The parameters for study of cases and facts will be based on State parameters which are not necessarily adjusted to the needs of copyright or related rights' interests, since account must be taken of State interests rather than particular interests specific to the nature of a type of action.	In the study of criminal cases assistance regarding knowledge of commercial companies is essential, all of which is facilitated through broad and full participation of the interested party, and the commercial and industrial secrets of the affected parties are safeguarded with greater security and more faithfully.
	Criminal complaints are not subordinated to police bodies which are greatly over-burdened with work and other duties. Commercial companies play a relevant role of great importance since, with each complaint, they perform a financial function which benefits not only enterprises but also consumers and the Ministry of Finance.
	The responsibility of the complainant is strengthened and overseen by the prosecuting body which, from the beginning, advises the victim and carries out the procedural acts which commercial companies cannot perform since they are the exclusive reserve of the Office of the Attorney General.
	The complainant party acquires greater control of the powers of the judicial authorities and even becomes a supervisory body of the Justice Administration, thereby at the same time promoting the constitutional principle of rapid and complete justice.
	The training of more highly skilled litigation attorneys and better advised commercial companies, as specialists in the area, is promoted.
	Knowledge of the private sector is integrated with the public sector, which, in the final analysis, establishes a system between the customs, Office

	<p>of the Attorney General, Judicial Police, jurisdictional authorities, administrative authorities and the private sectors most affected, so as to make the work as efficient as possible and satisfy international requirements.</p>
	<p>The complainant parties make a more active contribution to evidence gathered for the final settlement of a case.</p>
	<p>There are greater possibilities for applying various alternative solutions such as full compensation for damage, conciliation, suspension of proceedings for evidence, shortened proceedings and so on. These forms highlight the decision-making capacity of the injured parties.</p>

All the benefits granted by a public right to action by private application have an impact on the actions and resources available to the State to combat the crimes perpetrated against copyright and related rights.

Insofar as a State function is provided to cover and work for community interests, we will manage to view Costa Rica as a strict country devoted to the protection of intellectual and industrial property.

Procedural mechanisms are those which facilitate access to the administration of justice and, precisely where a criminal case is brought and appears to be public by private application, the work done is more efficient and effective, both in terms of the sanctioning of and solution to the problem of crimes known as intellectual piracy.

As is shown in the comparative table, the public right to action facilitates and promotes the participation of the victim, although with the public right to action by private application such participation increases, in accordance with Sections 308, 309 and 321 of the Code of Criminal Procedure.

MINIMUM RESOURCES FOR THE OFFICE OF THE ATTORNEY GENERAL

In order to give sufficient attention to the intellectual property cases dealt with by the Office of the Attorney General, as explained above a specialized Office of the Attorney General is required, responsible solely for dealing with matters in the above field; however, such an office must have its own resources allowing it to have both the requisite staff and also all the means suitable for investigating this type of crime since, with the mere

creation of an Office of the Attorney General with no economic support, the situation prevailing to date would not be resolved.

The problem with setting up a specialized Office of the Attorney General lies in the economic resources available for that purpose, which the State does not yet have; nevertheless, it would be possible to propose to the Full Court that financing comes from funds for legal reforms, for example the Law on Printing.

INFORMATION RELATING TO STATISTICS

Firstly, it should be clarified that the Office of the Attorney General for Various Crimes deals with the complaints submitted in the three judicial circuits in the capital and not with all the complaints submitted in the other judicial circuits in the country; however, as a result of the relationship and coordination between the Office of the Attorney General and the police, access to certain national statistical data is provided.

Owing to the lack of resources, the Office of the Attorney General does not have a statistician allowing the information on the results to be computerized. However, from the electronic book and the data which the police has on the work carried out, certain data can be obtained which allow the work that has been done in Costa Rica on intellectual property to be visualized.

The statistics from the Office of the Attorney General, the information from which is contained in this document, corresponds to a complete and literal reading of the electronic book of the Office, which holds a grand total of 325 complaints.

Year	1998	1999	2000	2001	2002	2003	2004
Received	40	34	28	84	74	43	32
Indicted	2	1	7	4	1	1	0
Rejected	13	9	10	19	17	2	5
Dismissed	3	7	2	7	9	2	0
Lack of jurisdiction	10	13	3	12	21	19	2
Criteria of Timeliness	4	2	2	33	5	1	0
Conciliation	4	0	0	1	5	1	0
Consolidated	2	1	3	1	1	3	1
Office records	2	1	1	5	6	1	1
Conversion of Action	0	0	0	2	1	1	0
Active (pending settlement)	0	0	0	0	2	12	23
Absences	0	0	0	0	3	0	0

In specific terms, as regards the proceedings conducted in relation to each complaint, no register has existed in the past for such operations; this year, with the help of

the Information Center of the forces of law and order, a statistical table has been created which provides up-to-date monthly information from said Office, corresponds to all the operational work done under the leadership of the public prosecutors, and provides details of operations and their results.¹²

In relation to the data for previous years, no strict registers exist, although it has been possible to come up with the following data supplied by the Statistics Section of the judiciary, which in any case is very small when compared with all the different matters dealt with by the judiciary. To illustrate the above, in 2002, 283 cases reached the Office of the Attorney General and were identified as infringing the Law on Copyright; one case was brought before the Court of Administrative Challenge.¹³

Moreover, two relevant convictions can be cited, i.e. the following summary judgements:

Case No. 00-4099-647-PE DECISION No. 536-04 of the Court of Justice, First Judicial Circuit of San José; date: May 31, 2004. This case refers to software.

Case No. 01-14131-042-PE DECISION No. 475-04 of the Court of Justice, First Judicial Circuit of San José; date: May 17, 2004.

LIMITATIONS IN INVESTIGATIONS

During the period in which the investigations into unlawful acts relating to intellectual property were conducted, the Office of the Attorney General encountered a restriction requiring the necessary attention; this is the subject of experts. The country has no experts that can carry out useful and relevant expert analyses to give substance to a well-founded accusation, as required by the Code of Criminal Procedure.

In many cases, these limitations correspond to the nature of the actual subject matter which, owing to the manufacturing specifications, protects a series of industrial secrets that prevent the investigation being continued since they are not disclosed. This explains the large number of rejections. Notwithstanding the limitation indicated, in order to resolve the previous limitations this year each attorney representing a company that has suffered harm has been requested to provide an expert to carry out search formalities and, subsequently, this person will provide the relevant expertise; thus, the problem is being reduced.

Moreover, the lack of relevant training has been a further impediment, mainly since the subject matter is essentially civil in nature and needs to be absorbed into criminal proceedings, since there is a direct clash between the principles on which one and the other discipline are based, a situation which is gradually being resolved, with a number of judgements that the courts of justice have handed down in specific cases. In this field,

¹² See ANNEX 1

¹³ Memorandum 108-EST-2004

national case-law plays an essential role, since it has managed to fill the gaps in these subjects, many of which are still being studied.

Public prosecutors have done a lot of work since, in order to conduct investigations, they have produced two investigation protocols, so as to give at least some direction to the investigations. These protocols were developed in workshops organized by the Training Office attached to the Office of the Attorney General and in which the relevant public prosecutors designated in each area of the country participated; faced with the lack of a **Specialized Office of the Attorney General**, the so-called **Attorney General liaison officer** was created in each region; and with the help of all concerned the two protocols were produced and facilitated efforts to bring together the experience acquired in investigations conducted.^{14 15}

GENERAL PROTOCOL
(November 27, 2003)

PROTOCOL FOR CRIMES AGAINST COPYRIGHT

In order to achieve efficiency in criminal prosecutions and provide effective protection of the exclusive rights conferred by the official registration of a trademark or distinctive sign, as recognized in the Law on Trademarks and other Distinctive Signs, and in the Law on Procedures for Enforcement of Intellectual Property Rights, the Attorney General liaison officers that deal with such matters, with the collaboration of the police, will observe the following list of guidelines for dealing with all those cases relating to forms of conduct that may be punished, characterized as follows:

Public prosecutors are informed that the current open list of guidelines is a series of practical and flexible rules, which may be revised and are general in nature, the aim of which is to guide investigations and find a solution to the social disputes that arise owing to the infringement of the Law on Procedures for Enforcement of Intellectual Property Rights. Therefore, the specific guidelines which the public prosecutor in a particular case may use according to the legal strategy, logic and suitability could change, reduce or broaden the action taken under this basic protocol. The following formalities to be conducted could vary according to the nature and specific circumstances of a case.

I. Preparatory criminal investigation phase.

I. (a) Preliminary proceedings

- Where there is uncertainty regarding the identity and/or liability of the person or persons responsible for distorting or falsifying a protected trademark or distinctive sign, or also protected models such as patents, industrial designs, utility models and appellations of origin, said cases being dealt with by the Office of the Attorney General,

¹⁴ General Protocol

¹⁵ Protocol

the public prosecutor will receive the complaint against an unknown person, and the formalities will be registered in the office electronic system. In the opposite case, where the individual responsible for the crime is identified, or where a complaint is received directly in writing against an identified person, the public prosecutor must assess the usefulness of ordering the complete or partial secrecy of the acts performed, in order to safeguard the general aims of the trial, in accordance with Article 296 of the Code of Criminal Procedure.

- In order to speed up the trial, the complainant party will be urged, at the time the formal complaint is received, to assist with the investigation, by submitting the following forms of proof and items:
 1. Original sample of the protected trademark or sign, or model protected by the registration of a patent, industrial secrets, industrial designs and utility models (in cases where the product so permits), that, according to the content of the complaint, reproduces or falsifies by means of fraudulent acts or procedures.
 2. National Registry and/or notarial certification of the establishment of the company involved in the distortion or falsification denounced, as well as details of its legal personality, and judicial and extrajudicial representation. In the case of real enterprises or companies, their existence shall be proved in accordance with the principle of freedom of evidence.
 3. National Registry and/or notarial certification of the establishment of the enterprise that has suffered harm, as well as details of its legal personality, and judicial and extrajudicial representation.
 4. Registration or Public Notary Certificate for the trademark and/or license for use of the trademark, patent and any other drawing, design, good or service that may be registered, as appropriate, in favor of the complainant parties, so that they may reproduce, use and exploit the trademark or distinctive sign (see Articles 19 and 35 of the Law on Trademarks, Article 3(4) of the Law on Patents, Articles 21, 22 and 43 of the Regulations under the Law on Patents, and Article 97 of Law No. 8039).
 5. The forms of certification referred to must not have been issued more than three months prior to submission.
 6. Technical and graphic proof of the false nature of the trademark, good or service.
- In the initial assessment of the complaint and of the forms of proof attached thereto, the public prosecutor will analyze, in the light of the theoretical crime, the scale of the damage done to the legal property, or the extent to which it has been endangered, as protected in the criminal standards contained in Articles 44 to 69 of the Law on Procedures for Enforcement of Intellectual Property Rights, in order to determine the

basis for rejecting the facts, by applying the principle of harmfulness or a criterion of timeliness, based on the principle of insignificance of the facts. The whole of the procedure complies with Article 70 of the special Law referred to, in relation to Article 22(a) of the Code of Criminal Procedure.

I. (b) Organization of the criminal investigation.

- The public prosecutor will take operational charge of the intelligence work that must be done by the police and will endeavor to ensure that the “experimental crime” investigation techniques are suited, insofar as is possible, to the specific case, for the purposes of gathering the following information:
 1. Precise location of the place where the crime is committed; identification of the owner or tenant of the building, and also of the person responsible or authorized to carry out the commercial activity in the place or establishment in question (by means of a municipal patent, studies of public limited companies in the Register, operating licenses for the establishment issued by the Ministry of Health, Direct Tax declarations, domain name consultations etc.). In addition to the above, other places related to the crime under investigation will be located (warehouses, marketing centers, domicile of the accused person etc). The places of interest in the investigation may be fixed by means of photographs and videos. The public prosecutor will analyze whether it is useful to request authorization to watch the videos from the criminal judge, depending on the circumstances specific to the case and the allocation of fundamental rights (include as an annex the operations planning format, which includes: ADD RECORDS).
 2. Monitoring operations (fixed and mobile) and registration thereof in a logbook and acts, the police record numbers for which must be included in the reports, for the purposes of identifying possible witnesses and other suspects.
 3. Registration of incoming and outgoing persons and vehicles in the places under investigation. The mobile monitoring or supervision will be as detailed and full as possible in order to locate the final destination of such persons and vehicles or to determine possible connections with other suspects and other information of interest for the investigation. With such information the police will produce the relevant table of relationships between subjects and places. The public prosecutor may, with the information provided, assess the usefulness of applying a criterion of timeliness based on Article 22(b) of the Code of Criminal Procedure (attach agreement between the parties for the application of the criterion, after the information has been verified).
 4. “Pre-purchase” of the fraudulent goods, subject to the direct control and supervision of the police in charge of the investigation for the purposes of the possible immediate seizure of the evidence. In such investigation work, and depending on the particular features of the specific case, the public prosecutor may authorize the participation of other staff in order to facilitate the proceedings. By means of this evidence the corresponding act will be drawn up

and the procedure for guaranteeing the continued safeguarding of the evidence shall be observed (carry out consultations so that the injured party may provide the money in cases of investigations requiring money for pre-purchases and to finalize the operation, contrary to the terms of Circular No. 7-2002 issued by the Office of the Attorney General).

5. The public prosecutor may be a member of the police investigation team subject to supervision by the Office of the Attorney General, and of any other police body required for the investigation.
- According to the specific circumstances of the case, the public prosecutor responsible for the investigation may, within the plan of operation, include the establishment of support groups so as to guarantee timely and efficient conduct of the formalities which will result in the preliminary investigation. For example, if the preliminary investigation is to end with a search, these support groups may take charge of the on-site interviews conducted, the confiscation, packing and continued safeguarding of evidence, the inventory, production of the respective acts and so on. In addition, the public prosecutor must, in the search, registration and confiscation procedure, select a sample of the evidence which is statistically relevant to the subsequent expert analysis or comparison with the genuine goods.
 - In case of searches and once the accused has been duly identified, the public prosecutor shall request the judge and the available defense lawyer to intervene, and once in the place to be investigated, he will endeavor to ensure that the accused is present during the conduct of the judicial proceedings and shall inform him personally of all his rights.
 - The public prosecutor will assess the suitability of requesting, from the criminal judge, authorization for the presence of the injured party during the conduct of the search, registration and confiscation in order to facilitate the identification and confiscation of the distorted product to which the complaint relates, as well as the finding of other registered trademarks or signs in the victim's name, which may be reproduced in a fraudulent manner; the whole procedure complies with Article 292 of the Code of Criminal Procedure. The public prosecutor will ensure that the operational activities are conducted normally and will prevent any interference by parties to the proceedings present during such activities.
 - From the very beginning of the proceedings until their conclusion, the public prosecutor shall request the injured party to respect the duty of loyalty, enshrined in Article 127 of the Code of Criminal Procedure, in order to obtain all the essential information for the social dispute to be resolved properly. In that connection, the public prosecutor will not allow the injured party to conceal relevant information for the success of the preparatory criminal investigation, nor will use evidence obtained as a result of torture, mistreatment, coercion, threats, deception, undue interference in the privacy of a domicile, correspondence, communications, private papers and records, or proof obtained by other means which harm the will of a person or infringe fundamental human rights (paragraph 2 of Article 181 of the Code of Criminal Procedure).

I. (c) Performance of operations

- In the case of searches of inhabited premises or houses, the following evidence shall be confiscated:
 1. Objects, assets or property directly relating to the subject of the complaint and the police investigation conducted;
 2. All equipment, machines and items relating to the crime under investigation, including computer equipment, programs, digital records and so on;
 3. Documentation relating to the accounts of the company being questioned, purchase of raw material (for example invoices for labels, fabrics, rivets and so on), marketing of seized goods (for example certificates relating to distributors and suppliers); and
 4. Cases, packages, bags, stamps and so on, both original and fraudulent where the goods are stored.
- Conduct of interviews with people who are on the site and have entitlement to be witnesses.
- Insofar as possible, prior coordination with the Judiciary Compound for the possible submission of confiscated evidence to said office or, failing that, stores belonging to the Office of the Attorney General, or general stores for police custody. In accordance with the information collected as part of intelligence work, the public prosecutor will estimate the number of vehicles necessary to transport the evidence to the place of storage referred to. In this connection, the provision of the resources referred to may be coordinated with the injured party.
- Under no circumstances may the public prosecutor appoint the injured party as the temporary depository of the instruments with which the crime was committed, or the fraudulent goods, items or assets resulting therefrom, or which constitute a benefit for the agent derived from the same criminal conduct. Such goods may be seized, in accordance with Article 110 of the Criminal Code, or even destroyed in the case of a conviction, in accordance with Article 41 of the Law on Procedures for Enforcement of Intellectual Property Rights.
- Based on the results of the preliminary investigation, including the performance and results of operations, the police will send the police report in question to the appropriate Office of the Attorney General, sufficiently in advance of the 24-hour period specified by the Constitution, where persons have been detained. In the opposite case, the police shall submit the report within 72 hours of operations being concluded. The public

prosecutor may request from the police a draft of the police report or a preliminary report.

I. (d) Expert opinions.

- In order to demonstrate how the type of crime is established, the public prosecutor must assess the usefulness and relevance of a qualified expert opinion or witness, for the purposes of determining the distortion or falsification of the evidence seized, by means of a comparison with the original samples provided by the injured party, together with the effect caused or harm to the exclusive rights conferred by the Intellectual Property Registry.
- In those cases where civil action is taken, by means of which an attempt is made to recover the damages resulting from the criminal conduct, the public prosecutor must consider the criteria established in Article 40 of the Law on Procedures for Enforcement of Intellectual Property Rights and Article 25 of the Law on Trademarks and other Distinctive Signs, No. 7978, published in the Official Gazette of February 1, 2000. Similarly, the public prosecutor must assess the usefulness and relevance of an expert accounting opinion so as to determine the economic damage, in accordance with the following minimum legal parameters:
 1. Benefits which the owner would have obtained if the criminal activity had not occurred.
 2. Benefits obtained by the accused person(s).
 3. Price, remuneration or reward which the infringer would have had to pay to the owner for lawful use of the rights infringed.
- In order to accelerate the proceedings and in accordance with the economic capacity of the injured party, the public prosecutor may suggest that such a party assists with the investigation such that he pays the corresponding expenses for the expert opinions that are necessary for the case to be successful.

I. (e) Precautionary measures.

- In accordance with Articles 3, 4 and 5 of the Law on Procedures for Enforcement of Intellectual Property Rights, the public prosecutor in the case will, *ex officio*, conduct the following formalities:
 1. Take responsibility, in relation to the criminal judge, for the application of the precautionary measures necessary to avoid serious harm which is difficult to compensate being done to the rights owner, and also to guarantee temporarily the achievement of the general aims of the proceedings.

2. Prior to requesting the precautionary measures urgently required, the public prosecutor must consider the interests of third parties and will analyze judiciously the proportional relationship between said measures and the harm which may result therefrom.

San José, November 28, 2003.

**PROTOCOL OF THE OFFICE OF THE ASSISTANT ATTORNEY
GENERAL OF ALAJUELA
(November 3, 2001)**

**PROTOCOL FOR CRIMES AGAINST INTELLECTUAL PROPERTY RIGHTS
DERIVED FROM TRADEMARKS AND DISTINCTIVE SIGNS**

In order to achieve efficiency in criminal prosecutions and provide effective protection of the exclusive rights conferred by the official registration of a trademark or distinctive sign, as recognized in Law No. 7978 on Trademarks and other Distinctive Signs, published in the Official Gazette on February 1, 2000, and in Law No. 8039 on Procedures for Enforcement of Intellectual Property Rights, published in the Official Gazette on October 27, 2000, and in accordance with Articles 67, 68, 69, 285, 286 and 288 of the Code of Criminal Procedure, and Articles 1, 4, 8, and 9 of the Regulations for Functional Operation, the public prosecutors of the Unit for Various Crimes of the Office of the Assistant Attorney General of Alajuela, with the collaboration of the judicial and administrative police, will observe the following list of guidelines for dealing with all those cases relating to forms of conduct that may be punished, as characterized in Articles 44, 45, 46, 47 and 48 of the first law referred to:

Public prosecutors are informed that the current open list of guidelines is a series of practical and flexible rules, which may be revised and are general in nature, the aim of which is to guide investigations and find a solution to the social disputes that arise owing to the infringement of the Law on Procedures for Enforcement of Intellectual Property Rights. Therefore, the specific guidelines which the public prosecutor in a particular case may use according to the legal strategy, logic and suitability, could change, reduce or broaden the action taken under this basic protocol. The following formalities to be conducted may vary according to the nature and specific circumstances of a case.

II. Preparatory criminal investigation phase

I. (a) Preliminary proceedings

- Where there is uncertainty regarding the identity and/or liability of the person or persons responsible for distorting or falsifying a protected trademark or distinctive sign, said case being dealt with by the Office of the Attorney General, the public prosecutor will receive the complaint against an unknown person, and the formalities will be registered in the office electronic system. In the opposite case, where the individual

responsible for the crime is identified, or where a complaint is received directly in writing against an identified person, the public prosecutor must assess the usefulness of ordering the complete or partial secrecy of the acts performed, in order to safeguard the general aims of the proceedings, in accordance with Article 296 of the Code of Criminal Procedure.

- In order to accelerate the proceedings, the complainant party will be urged, at the time the formal complaint is received, to assist with the investigation, by submitting the following forms of proof and items:
 7. Original sample of the protected trademark or sign that, according to the content of the complaint, is reproduced or falsified by means of fraudulent acts or procedures.
 8. National Registry and/or notarial certification of the establishment of the company involved in the distortion or falsification denounced, as well as details of its legal personality, and judicial or extrajudicial representation. In the case of real enterprises or companies, their existence shall be proved in accordance with the principle of freedom of evidence.
 9. National Registry and/or notarial Certification of the establishment of the enterprise that has suffered harm, as well as details of its legal personality, and judicial and extrajudicial representation.
 10. “Registration or Public Notary Certificate for a trademark” and/or “license for use of a trademark”, in favor of the complainant parties, so that they may reproduce, use and exploit the trademark or distinctive sign (see Articles 19 and 35 of the Law on Trademarks).
 11. The forms of certification referred to may not have been issued more than three months prior to submission.
 12. Technical and graphic proof of the false nature of the trademark.

In the initial assessment of the complaint and of the forms of proof attached thereto, the public prosecutor will analyze, in the light of the theoretical crime, the scale of the damage done to the legal property, or the extent to which it has been endangered, as protected in the criminal standards contained in Articles 44, 45, 46, 47 and 48 of the Law on Procedures for Enforcement of Intellectual Property Rights, in order to determine the basis for rejecting the facts, by applying the principle of harmfulness or a criterion of timelines, based on the principle of insignificance of the facts. The whole procedure complies with Article 70 of the special Law referred to, in relation to Article 22(a) of the Code of Criminal Procedure.

I. (b) Organization of the criminal investigation

- The public prosecutor shall take operational charge of the intelligence work that must be done by the police and shall endeavor to ensure that the “experimental crime” investigation techniques are suited, insofar as is possible, to the specific case, for the purposes of gathering the following information:
 6. Precise location of the place where the crime is committed; identification of the owner or tenant of the building, and also of the person responsible or authorized to carry out the commercial activity in the place or establishment in question (by means of a municipal patent for example). In addition to the above, other places related to the crime under investigation will be located (warehouses, marketing centers and so on). The places of interest in the investigation may be fixed by means of photographs and videos. The public prosecutor will analyze whether it is useful to request authorization to watch the videos from the criminal judge, depending on the circumstances specific to the case and the extent to which fundamental rights are affected (include as an annex the operations planning format).
 7. Monitoring operations (fixed and mobile) and registration thereof in a logbook, in order to identify possible witnesses and other suspects.
 8. Registration of incoming and outgoing persons and vehicles in the places under investigation. The mobile monitoring or supervision shall be as detailed and complete as possible in order to locate the final destination of such persons and vehicles, or to determine possible connections with other suspects and other information of interest for the investigation. With such information the police will produce the relevant table of relationships between subjects and places. The public prosecutor may assess the usefulness of applying a criterion of timeliness based on Article 22(b) of the Code of Criminal Procedure.
 9. “Pre-purchase” of the fraudulent goods, subject to the direct control and supervision of the judicial police, for the purposes of the possible immediate seizure of the evidence. In such investigation work, and depending on the particular features of the specific case, the public prosecutor may authorize the participation of other staff in order to facilitate the proceedings. By means of this evidence the corresponding act will be drawn up and the procedure for guaranteeing the continued safeguarding of the evidence will be observed.
 10. The public prosecutor may be a member of the police investigation team subject to supervision by the Office of the Attorney General.
- According to the specific circumstances of the case, the public prosecutor responsible for the investigation may, within the plan of operation, include the establishment of support groups so as to guarantee timely and efficient conduct of the formalities which will result in the preliminary investigation. For example, if the preliminary investigation is to end with a search, these support groups may take charge of the on-site interviews conducted, the confiscation, packing and continued safeguarding of evidence, the inventory, production of the respective acts and so on. In addition, the

public prosecutor may, in the search, registration and confiscation procedure, select the items which he considers relevant for the subsequent expert analysis or comparison with the genuine goods.

- In case of searches and once the accused has been duly identified, the public prosecutor will request the judge and the available defense lawyer to intervene, and once in the place to be investigated, he will endeavor to ensure that the accused is present during the conduct of the judicial proceedings and will inform him personally of all his rights.
- The public prosecutor will assess the suitability of requesting, from the criminal judge, authorization for the presence of the injured party during the conduct of the search, registration and confiscation in order to facilitate the identification and confiscation of the distorted product to which the complaint relates, as well as the finding of other trademarks or signs registered in the victim's name, which may be reproduced in a fraudulent manner; the whole procedure complies with Article 292 of the Code of Criminal Procedure. The public prosecutor will ensure that the operational activities are conducted normally and will prevent any interference by parties to the proceedings during such activities.
- From the very beginning of the proceedings until their conclusion, the public prosecutor will request the injured party to respect the duty of loyalty, enshrined in Article 127 of the Code of Criminal Procedure, in order to obtain all the essential information for the social dispute to be resolved properly. In that connection, the public prosecutor will not allow the injured party to conceal information relevant to the success of the preparatory criminal investigation, nor will use evidence obtained as a result of torture, mistreatment, coercion, threats, deception, undue interference in the privacy of a domicile, correspondence, communications, private papers and records, or proof obtained by other means which harm the will of a person or infringe fundamental human rights (Article 181(2) of the Code of Criminal Procedure).

I. (c) Performance of operations

- In the case of searches of inhabited premises or houses, the following evidence will be confiscated:
 5. Object, assets or property bearing the distorted or falsified trademark or sign;
 6. Equipment and machines that have been used to manufacture the fraudulent goods, including computer equipment, programs, digital records and so on;
 7. Documentation relating to the accounts of the company being questioned, purchase of raw material (for example invoices for labels, fabrics, rivets and so on), marketing of seized goods (for example certificates relating to distributors and suppliers); and

8. Cases, packages, bags, stamps and so on, both original and fraudulent where the goods are stored.

- Conduct of interviews with people who are on the site and have entitlement to be witnesses.
- Insofar as possible, prior coordination with the Judiciary Compound for the possible submission of confiscated evidence to said office or, failing that, stores belonging to the Office of the Attorney General, or general stores for police custody. In accordance with the information collected as part of intelligence work, the public prosecutor will estimate the number of vehicles necessary to transport the evidence to the place of storage referred to. In this connection, the provision of the resources referred to may be coordinated with the injured party.
- Under no circumstances may the public prosecutor appoint the injured party as the temporary depository of the instruments with which the crime was committed, or the fraudulent goods, items or assets resulting therefrom, or which constitute a benefit for the agent derived from the same criminal conduct. Such goods may be seized, in accordance with Article 110 of the Criminal Code, or even destroyed in the case of a conviction, in accordance with Article 41 of the Law on Procedures for Enforcement of Intellectual Property Rights.
- Based on the results of the preliminary investigation, including the performance and results of operations, the judicial police will send the police report in question to the appropriate Office of the Attorney General, sufficiently in advance of the 24-hour period specified by the Constitution, where persons have been detained. In the opposite case, the police shall submit the report within 72 hours. The public prosecutor may request from the police a draft of the police report or a preliminary report.

I. (d) Expert opinions.

- In order to demonstrate how the type of crime is established, the public prosecutor must assess the usefulness and relevance of a qualified expert opinion or witness, for the purposes of determining the distortion or falsification of the trademarks attached to the goods or evidence seized, by means of a comparison with the original supplies provided by the injured party, together with the effect caused or harm to the exclusive rights conferred by the registration of the trademark or distinctive sign.
- In those cases where civil action is taken, by means of which an attempt is made to recover the damages resulting from the criminal conduct, the public prosecutor must consider the criteria established in Article 40 of the Law on Procedures for Enforcement of Intellectual Property Rights and Article 25 of Law No. 7978 on Trademarks and other Distinctive Signs, published in the Official Gazette of February 1, 2000. Similarly, the public prosecutor must assess the usefulness and relevance of an expert accounting opinion so as to determine the economic damage, in accordance with the following minimum legal parameters:

4. Benefits which the owner would have obtained if the criminal activity had not occurred.
 5. Benefits obtained by the accused person(s).
 6. Price, remuneration or reward which the infringer would have had to pay the owner for lawful use of the rights infringed.
- In order to accelerate the proceedings and in accordance with the economic capacity of the injured party, the public prosecutor may suggest that such a party assists with the investigation such that he pays the corresponding expenses for the expert opinions that are necessary for the case to be successful.

II. (e) Precautionary measures.

- In accordance with Articles 3, 4 and 5 of the Law on Procedures for Enforcement of Intellectual Property Rights, the public prosecutor in the case will, *ex officio*, conduct the following formalities:
 3. Take responsibility, in relation to the criminal judge, for the application of the precautionary measures necessary to avoid serious harm which is difficult to compensate being done to the rights' owner, and also to guarantee temporarily the achievement of the general aims of the proceedings.
 4. Prior to requesting the precautionary measures urgently required, the public prosecutor must consider the interests of third parties and will analyze judiciously the proportional relationship between said measures and the harm which may result therefrom.

III. Intermediate proceedings phase.

II. (a) Possibility of alternative solutions to trials and mechanisms for simplifying proceedings.

- For the application of alternative measures to trials and mechanisms for simplifying proceedings, the public prosecutor in a case must consider the opinions and interests of the injured party, and also endeavor to provide compensation for damage in a rapid, fair and reasonable manner.

IV. Oral hearing phase.

- Whatever the main demand made by the public prosecutor in his conclusions, he will always request the court taking the decision to confiscate the falsified or unlawful goods, or the destruction of such goods, in accordance with Article 110 of the Criminal

Code and Article 71 of the Law on Procedures for Enforcement of Intellectual Property Rights.

San Antonio de Belén, November 4, 2001.

ALTERNATIVE SETTLEMENT OF DISPUTES BY MAIN JUDICIAL AUTHORITY

Finally, it is necessary to comment on the importance of the alternative settlement of disputes as an alternative means of bringing to an end such disputes in a more rapid and effective manner, through the program which the judiciary has set up via the so-called Alternative Dispute Settlement Commission and a group of conciliation judges specializing in these ways of settling disputes, through which the matters relating to this discipline of intellectual property rights may be concluded perfectly, and also the creation of specialized alternative settlement centers, for example for domain names and trademarks. This new vision of disputes is based on an institutional policy founded on the philosophy of the humanization of justice as one of the values which the judiciary has given itself the task of making effective in order to allow the parties to achieve a real solution, rather than one which is merely formal, to the different disputes, where this is feasible in accordance with the law.

INTELLECTUAL PROPERTY TRAINING

The problems which judges and public prosecutors face in dealing with criminal acts, together with the categories of damages relating to intellectual property and copyright, represent a challenge for the countries of Central America in terms of protection and human effort in the areas of invention and creation.

The members of the judiciary, judges, prosecutors, advocates, legal representatives and magistrates, together with officials of the Industrial Property Registry and the National Registry of Copyright and Related Rights, participate actively both in general and as lecturers in training activities planned by the Supreme Court of Justice itself or by the School of the Judiciary, in relation to rights' enforcement, designed for judges and public prosecutors.

In accordance with this aim, the School of the Judiciary, in the form of *Édgar Cervantes Villalta* who was the first of his kind in Central America, has provided training for judicial officials so that they may possess the instruments necessary for the correct application of rules and thus comply with the international standards established.

Various courses have been held: (1) A talk on intellectual property with 28 participants given on September 23, 1998. (2) Cycle of four Conferences on Intellectual Property, attended by 141 people. The subjects discussed were: **Basic Intellectual Property Concepts. Intellectual and Industrial Property Registration. Intellectual**

Property Legislation. New Trends in Intellectual Property in the Cybernetic Media, held on August 4, 11, 18 and 25, 2000. (3) On June 8, 15, 22 and 29, 2001 a cycle of four Conferences on Intellectual Property where the following subjects were discussed: **General Concepts, Criminal Standards, Electronic Commerce and Technology and Copyright** with 155 participants. (4) A talk on **undisclosed information-Secretariat for Central American Economic Integration (SIECA)**; 35 people attended; held on August 30, 2002. (5) Courses on copyright-Business Software Alliance (BSA), attended by 60 participants on September 27 and October 25, 2002. (6) On April 7, 14, 21 and 24, 2003, a cycle of four Conferences on Intellectual Property was held with 141 participants. The subjects discussed were: **Challenges and Opportunities in the Field of Intellectual Property. The Economic and Social Impact for the Country of Intellectual Property. Possible Reforms to Intellectual Property Laws. Piracy Practices in Costa Rica. History and Legal Implications of the Problem.** (7) Seminar on intellectual property given by the World Intellectual Property Organization (WIPO), attended by 70 participants on October 20 and 21, 2003. (8) Central American course on Intellectual Property for Judges and Public Prosecutors, given by the Secretariat for Central American Economic Integration (SIECA) with 42 participants, held on April 30, June 3 and 4, July 12 and 13, and August 19 and 20, 2004. (9) Course: **Intellectual Property Registration System – Office of the Attorney General, Judiciary**, with 17 participants to be held on November 13, 14, 27 and 28, 2004.¹⁶

The subject of training for judicial officials is important because by means of study and knowledge the requisite awareness is achieved of the various civil, agrarian, criminal and administrative actions within the field of intellectual property.

This discipline has already been established as a compulsory subject in university postgraduate courses and, in certain specialisms, knowledge of intellectual property rights is required.

In addition, the Office of the Attorney General of Costa Rica and the School of the Judiciary supported the so-called Secretariat for Central American Economic Integration (SIECA) and the United States Agency for International Development at the start of a training process intended for judges and public prosecutors from the Central American isthmus on the subject of intellectual property and copyright.

Such studies are divided into four modules, carried out in different stages, and will be completed by August 20, 2004. The courses are held in the auditorium of the College of Lawyers of Costa Rica.

The first phase was held on April 30 and dealt with introductory aspects of the subject.

¹⁶ **BRESCIANNI QUIRÓS, Román. REPORT ON SCHOOL OF THE JUDICIARY TRAINING COURSES.** Costa Rica. 1998 to 2004.

The second module will be held on June 3 and 4, and will concentrate on the subject of copyright and related rights.

The third corresponds to trademarks and industrial designs, and will be held on June 12 and 13. It will focus on aspects relating to inventions, undisclosed information and evidence, and will be held on August 19 and 20.

In the field of copyright aspects such as the content of moral and economic rights, criminal actions and the proof of harm caused will be analyzed.

In relation to trademarks, a distinction will be made between the different kinds of marks, and the classes and function of those marks will be specified.

Inventions, unfair competition and trade secrets will also be discussed.

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Costa Rica is a member of the World Intellectual Property Organization which is responsible for administering the relevant international treaties and promoting intellectual property.

In addition, Costa Rica is a member of the World Trade Organization (WTO). It undertook to respect obligations relating to intellectual property established in Annex 1-C of the Agreement setting up this Organization, referred to as “Trade-Related Aspects of Intellectual Property” and known by its English acronym (TRIPS).

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