

# INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

## 2005 SPECIAL 301 REPORT

### COLOMBIA

#### EXECUTIVE SUMMARY

**Special 301 Recommendation:** IIPA recommends that Colombia be elevated to the Priority Watch List in 2005.

**Overview of Key Problems:** Piracy continues to dominate the Colombian market, adversely affecting legitimate sales, particularly in the music sector. Pirates are increasingly turning to new media—primarily CD-R and DVD-R, as the medium for piracy, and the government has demonstrated little, if any, determination to address this large and growing problem. Colombia is also the region's worst book piracy haven, with blatant and open illegal photocopying flourishing in and around university campuses.

Unfortunately, Colombia's enforcement efforts to combat widespread piracy have been inadequate, ineffective and not deterrent. CD-R replication continues to expand and threaten the remaining legitimate music market, such as it is. Despite some raids by the police in Bogotá and Medellín, local flea markets like San Andresitos are infested with pirate product. Colombian authorities have done little to investigate pirate duplication and distribution facilities, which continue to feed a vast network of street vendors. Illegal use of business software in small and medium-sized businesses is widespread, with rates higher in areas outside the major cities. Paramilitary groups controlling the pirate sale of CDs in some flea markets in Bogotá is a major new concern. While criminal raids continue at a modest level, one breakdown is that few effective prosecutions for copyright infringement are pursued. Courts do not impose deterrent penalties and cases can last five years or more. With respect to administrative enforcement of cable piracy and signal theft, CNTV's efforts continue to require improvement. With regard to book piracy, universities and schools tacitly, and sometimes actively, encourage illegal commercial-scale photocopying by students and neighboring shops. Furthermore, the regulatory agencies and the tax authority must improve efforts to enforce Law No. 603, which requires Colombian corporations to certify compliance with copyright laws in annual reports they file with regulatory agencies. To make matters worse, customs authorities have not taken any action against the inflow of blank CD-Rs that are clearly imported for piracy purposes. Above all, the Colombian government has not taken any real interest in fighting piracy as a priority or developed a policy that would involve all the different agencies that need to take an active part in an effective campaign.

Negotiations for a U.S.-Andean Free Trade Agreement are nearing completion. If Colombia aspires to be an FTA partner with the U.S., it must begin immediately to address the deteriorating situation. Should Colombia fail to act, it will create tremendous uncertainty surrounding its preparedness to take on the obligations of an FTA, and will cast doubt on their reliability as an FTA partner. We hope that this will not be the case.

## Actions Which the Colombian Government Should Take in 2005

- Pressure the *Fiscalía General de La Nación* (Attorney General) to adopt measures to expedite the prosecution of criminal copyright infringement (e.g., when a person is caught with pirate goods, that person should be accused immediately before the criminal court);
- Have the President instruct the Attorney General, Customs and the Finance Ministry to escalate their investigations and actions to enforce the copyright law by going after infringing activities both in the streets and against larger, organized distributors of pirated materials;
- Encourage the office of the Attorney General and the *Consejo Superior de la Judicatura* to investigate administrative and judicial authorities for negligence and non-application of the law in piracy related matters;
- Engage municipal authorities to clean up flea markets offering pirated product;
- Grant civil *ex parte* search orders more swiftly (inspectors generally take at least six months from the time a written request is made before orders are carried out, during which time leaks to the target frequently occur);
- Encourage more actions by CNTV, both administratively and in coordination with the criminal authorities, to combat television piracy;
- Encourage CNTV to restrict the grant of licenses to TV communication associations since some of these associations are involved in the theft of TV signals;
- Encourage universities and schools to crack down on illegal photocopying by commercial enterprises in and around campuses, as well as photocopying of entire books by students;
- Implement border measures to prevent entry into the country of blank CD-Rs (which are often used for piracy) and halt the flow of pirated products entering Ecuador and Venezuela;
- Establish minimum prices for importation of blank media that at least reflect real manufacturing and patent royalty costs;
- Insist that the regulatory agencies (*superintendencias*) and the tax authority (DIAN) enforce Law No. 603 (a fiscal law which requires Colombian corporations to certify compliance with copyright laws in annual reports which they file with agencies); and
- Develop and promote legislation which will address the higher standards of copyright protection and enforcement which will be expected as Colombia continues FTA negotiations with the U.S. Among other things, the copyright law should include, for example, exclusive making available, rental, importation, and distribution rights for sound recording producers, statutory damages, express protection of temporary copies, and ISP liability along with notice and take down procedures.

**COLOMBIA**  
**Estimated Trade Losses Due to Copyright Piracy**  
*(in millions of U.S. dollars)*  
**and Levels of Piracy: 2000-2004<sup>1</sup>**

INDUSTRY	2004		2003		2002		2001		2000	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Motion Pictures	40.0	75%	40.0	75%	40.0	90%	40.0	90%	40.0	90%
Records & Music	51.6	71%	49.4	70%	56.3	65%	73.0	65%	60.0	60%
Business Software <sup>2</sup>	34.0	50%	37.0	53%	21.7	51%	19.5	52%	33.2	53%
Entertainment Software <sup>3</sup>	NA	NA	NA	NA	NA	NA	NA	NA	39.0	85%
Books	6.0	NA	5.4	NA	5.3	NA	5.3	NA	5.0	NA
<b>TOTALS</b>	<b>131.6</b>		<b>131.8</b>		<b>123.3</b>		<b>137.8</b>		<b>177.2</b>	

## Ongoing FTA Negotiations

On May 18, 2004, the first round of FTA negotiations began between the U.S. and the Andean region countries Colombia, Peru, and Ecuador.<sup>4</sup> The negotiating objectives specifically include high levels of copyright protection and effective enforcement measures, including criminal, civil/administrative and border enforcement. The FTA negotiations process provides a vital tool for encouraging compliance with other evolving international trends in copyright standards (such as fully implementing WIPO treaties obligations and extending copyright terms of protection beyond the minimum levels guaranteed by TRIPS) as well as outlining specific enforcement provisions which will aid countries in achieving effective enforcement measures in their criminal, civil, and customs contexts.

The previous deadline for concluding negotiations, January 2005, has been pushed back to at least March 2005. The sixth round of negotiations concluded in Tucson, Arizona in early December 2004. According to public reports, negotiators were unable to make significant progress on a number of IPR issues, primarily those involving patent matters. Negotiations on copyright and enforcement in the IPR chapter apparently are going well, with indications that negotiations on these issues may be resolved in the early 2005.

Presently, Colombia is a beneficiary country of several U.S. trade programs—the Generalized System of Preferences (GSP) and the Andean Trade Preference Act (ATPA), as

<sup>1</sup> The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2005 Special 301 submission at [www.iipa.com/pdf/2005spec301methodology.pdf](http://www.iipa.com/pdf/2005spec301methodology.pdf).

<sup>2</sup> BSA's final 2003 figures represent the U.S. software publisher's share of software piracy losses in Colombia, as compiled in October 2004 (based on a BSA/IDC July 2004 worldwide study, found at <http://www.bsa.org/globalstudy/>). In prior years, the "global" figures did not include certain computer applications such as operating systems, or consumer applications such as PC gaming, personal finance, and reference software. These software applications are now included in the estimated 2003 losses resulting in a significantly higher loss estimate (\$61 million) than was reported in prior years. The preliminary 2003 losses which had appeared in previously released IIPA charts were based on the older methodology, which is why they differ from the 2003 numbers in this report.

<sup>3</sup> ESA's reported dollar figures reflect the value of pirate product present in the marketplace as distinguished from definitive industry "losses."

<sup>4</sup> See Press Release 2004-35, Office of the U.S. Trade Representative, "Peru and Ecuador to Join with Colombia in May 18-19 Launch of FTA Negotiations with the United States," May 3, 2004, available at [http://www.ustr.gov/Document\\_Library/Press\\_Releases/2004/May/Peru\\_Ecuador\\_to\\_Join\\_With\\_Colombia\\_in\\_May\\_18-19\\_Launch\\_of\\_FTA\\_Negotiations\\_with\\_the\\_United\\_States.html](http://www.ustr.gov/Document_Library/Press_Releases/2004/May/Peru_Ecuador_to_Join_With_Colombia_in_May_18-19_Launch_of_FTA_Negotiations_with_the_United_States.html).

amended by the Andean Trade Promotion and Drug Eradication Act (ATPDEA).<sup>5</sup> Both programs have standards of intellectual property rights which must be afforded to U.S. copyright owners.

## **COPYRIGHT PIRACY**

The recording industry reports that the estimated level of music piracy in Colombia remained constant at the rate of 71% in 2004, with estimated losses due to music piracy placed at \$51.6 million. Although there was an immaterial increase in the value of trade loss estimates in the past year, piracy of music CDs in Colombia continues to increase, mostly due to local CD-R replication. CD-R piracy continues to flourish in Colombia, with pirates primarily copying local repertoire. Most of the blank CD-Rs are brought in to Colombia in containers from the Far East. The industry estimates that over 40 million blank CD-Rs came to Colombia during 2004. Pre-recorded pirate CD-Rs are also being smuggled in from Ecuador. A major problem is the hundreds of stalls in the street markets of San Andrecitos that continue to openly and brazenly sell and distribute pirate and counterfeit product. Street vendors sell pirate CDs on the traffic corners in Bogotá, Medellín and Cali. Because these vendors move around so much, it is difficult to locate them and get the police to conduct raids in a swift and efficient manner. Most of the record companies in Colombia are operating with minimum staff to keep promoting and selling a limited number of products. In view of the market crisis, for example, Warner Music decided to close its operation. The legitimate music market in Colombia shrunk again by 6.4% in 2004, which represents a total decrease in units of 50% over the last five years.

As concerns about television piracy have decreased, the Motion Picture Association (MPA) reports that there is increasing concern about the continued growth of optical disc piracy in Colombia. Though the country is capable of supporting a legitimate VHS market, the rate of video piracy in the format had been so high that some audiovisual producers simply abandoned the VHS market. MPA member companies returned to the market as increased purchases of DVD hardware players drove demand for DVDs. However, optical disc piracy (both CD-R and DVD-R) has grown considerably, especially in the major cities of Bogotá, Medellín, and Cali (which represent 70% of the total market), and threatens the new legitimate DVD market. The relative success in television actions, however, has reduced the urgency of television piracy, and the concurrent growth of DVD has led to renewed concern for video anti-piracy action. While there is still some television piracy, licensing and inspections by the CNTV (National Television Commission), coupled with MPA legal actions, have greatly reduced the incidence of systematic television piracy. Much of the remaining television piracy is in non-urban areas and in quasi-legal "community associations" where enforcement efforts are only of questionable effectiveness. The television piracy situation has improved due to consistent MPA action (over 60 cases brought in the last five years) and the legalization by those cable operators who received licenses in 1999-2000 of their signals. Some of these (now legal) operators have also "bought out" pirate systems to increase their subscriber base. There are still uncounted small unlicensed operators that have built their own pirate distribution systems; however, the prospects for receiving licensing fees by these actors may be slight, given that they are very small systems in remote areas or because they are legally protected under the Colombian law

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<sup>5</sup> During the first 11 months of 2004, \$174.6 million worth of Colombian goods (or 2.6% of Colombia's total exports to the U.S. from January to November) entered the U.S. under the duty-free GSP code (representing a 17.6% increase over the same period in the previous year) and \$3.5 billion worth of Colombian goods entered under the ATPA program (representing a 33.2% increase from the prior year). For more information on the history of Colombia's status on Special 301, see Appendix D (<http://www.iipa.com/pdf/2005SPEC301USTRHISTORY.pdf>) and Appendix E (<http://www.iipa.com/pdf/2005SPEC301HISTORICALSUMMARY.pdf>) of this submission.

that allows signal distribution on a “community, not-for-profit” basis. These pirate systems often use gray market decoders (legal decoders used outside of the territory for which they are licensed) to descramble U.S. signals and then distribute them to their own pirate customer base. With the increased availability of broadband Internet access, and the increased prevalence of Internet cafés, MPA has concerns that illegal Internet downloads and Internet-based hard goods sales of optical media (CD-R and DVD-R) will increasingly become a threat to legitimate sales and distribution. Annual losses to the U.S. motion picture industry due to audiovisual piracy in Colombia are estimated to be \$40 million in 2004.

The publishing industry continues to suffer from widespread piracy, mostly in the form of illegal photocopying of academic textbooks in and around university and school campuses. There is virtually no enforcement against either photocopy shops located outside universities or those operated inside, where individual chapters of textbooks as well as entire books are reproduced without authorization. This phenomenon has increased as students from private universities have migrated to public schools, where photocopying is rampant. Reports also indicated that institutions themselves are sometimes “sponsoring” students or student associations in the sale or distribution of photocopied versions. These photocopied versions, which are obviously able to sell at a fraction of the legitimate price, are even found in some bookstores in major commercial areas. Enforcement against retail establishments dealing in these illegal photocopies is imperative. Publishers also encourage university and school administrations to implement and enforce policies encouraging lecturers, staff, and students to use legitimate materials. Administrations should also ensure that on-campus facilities are used for legitimate copying only. Estimated trade losses due to book piracy were \$6.0 million in 2004.

The piracy rate for business software still reflects an unacceptably high rate of illegal software use in Colombia, particularly within small to medium-sized organizations. Piracy in cities outside Bogotá is particularly high. In addition, the Business Software Alliance (BSA) has encountered sophisticated, high-volume software counterfeit production facilities in Bogotá. Estimated losses due to business software piracy amounted to \$34.0 million in 2004, with a 50% piracy level.

The Entertainment Software Association (ESA) reports that piracy of entertainment software (across all platforms) is a growing concern, with pirated products being imported from Southeast Asia.

## **COPYRIGHT ENFORCEMENT**

The National Anti-Piracy Campaign (*Convenio Nacional*), established by then-President Samper on February 25, 1999, involves a large number of governmental and independent agencies in the fight against piracy.<sup>6</sup> The campaign continues to meet and has achieved some limited success in coordinating the fight against piracy, but it is still far from being an effective anti-piracy force in Colombia. The Attorney General ordered the creation of a special unit of prosecutors and investigators (CTI) to work, at the national level, to fight copyright piracy and

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<sup>6</sup> The Colombian National Anti-Piracy Campaign is supported by the following agencies which coordinate anti-piracy efforts: The President’s Office, the Ministry of Foreign Commerce, the Ministry of Communications, the Ministry of Culture, the National Attorney General’s Office, the National Police Force, the National Author Rights Association, the National Television Commission, DIAN—the Tax and Customs Authority, the Colombian Record Producers Association, the Colombian Book Chamber, the Colombian Video Chamber (COLVIDEO), the Colombian Industrial Software Association and the Sayco Collection Society. This 1999 agreement reaffirmed the first anti-piracy agreement (known as CERLALC), which was signed in December 1995.

crimes involving telecommunications systems (Resolution No. 0-08888 of May 31, 1999). There are several special prosecutors, at least 25 judicial police in Bogotá, and an uncertain number in the provinces. These prosecutors coordinate action with special police forces. This unit continues to perform inspections, bring criminal actions against pirates, and issue expert reports on pirated products.

**Criminal raids do occur, but prosecutions are few.** MPA reports that some enforcement activity has actually improved in the last three years in Colombia, although there are few results in terms of sentences or reductions in piracy. For example, of the over 60 pending television piracy cases brought in the last several years, there have been only five sentences. The Special Unit for Copyright Crime continues to be active, and the MPA has coordinated with the unit for signal theft raids with good results. After the raids, however, prosecution procedures and sentencing prospects have not been a deterrent for pirates.

The recording industry reports that the Colombian enforcement authorities still show interest in fighting piracy but good will alone will never contribute to decreasing the high levels of piracy. The industry's anti-piracy group (APDIF Colombia) has been able to prompt the police to carry out a street-level campaign that contributed to cleaning up some high traffic areas in Bogotá. Unfortunately, the authorities do not investigate pirate replication facilities and major distributors, which dilutes the effectiveness of street operations since any seized product is quickly replaced. Of 2,276 raids in 2004, only 200 were directed at labs or warehouses. The result of these actions has been the seizure of approximately 3 million pirated CD-Rs and 1,000 CD burners. Unfortunately, these seizures pale in comparison to the over 17 million units of pirate product sold per year in Colombian flea markets and street stalls. It is imperative that the police intensify investigations and raids against pirate production and distribution centers to have any hope of reducing piracy levels in Colombia. In addition, the Colombian government has not cooperated in implementing adequate border measures to prevent entry into the country of blank CD-Rs that are used for piracy purposes or stemming the flow of recorded pirate product coming from Ecuador and Venezuela. The current criminal code also presents an obstacle to fighting piracy because for those few cases that are prosecuted the penalties are so low that, for all intents and purposes, it prevents any type of incarceration and leads to suspension of any sentence.

BSA reports that its business software anti-piracy campaign continues to receive strong support in 2004 from the *Fiscalia* and SIJIN (Judicial Department of Intelligence of the National Police), but also from other government authorities such as CTI (Investigation Department of the Prosecutor Office), DIJIN (Direction of Intelligence of the National Police) and National Police. However, DAS (Security Department of the Ministry of Justice) suspended its support during 2004, explaining that its role is limited to the area of national security. All of these agencies proved critical to BSA's efforts to strengthen anti-piracy enforcement, within and outside Bogotá. In 2004, legal actions were conducted against more than 100 reseller pirates. BSA relied on Colombian law enforcement agencies to conduct most of these actions, in part because of the continuing difficulties in obtaining civil search authority in a timely manner. Government agencies conducted several criminal raids in Bogotá, Medellín, and Cali. Unfortunately, prosecutions are few and slow. Courts do not impose deterrent penalties and cases can last five years or more. Knowing the glacial pace of prosecution, and that even if found guilty, judges will suspend the sentence or fine, infringers have no incentives to cooperate and resolve their cases.

**Colombian courts fail to issue deterrent criminal sentences.** Even with all the criminal raids, the Colombian system does not result in deterrent penalties or criminal sentences. The Colombian judicial system remains a serious obstacle to effective enforcement. Increasing penalties, as was done in the recent 2004 amendments to the criminal code, is not enough. It is also important to expedite criminal prosecutions. It takes more than six years between the commencement of the criminal investigation and the final decision of the court; therefore pirates currently do not feel pressure when an action is filed against them.<sup>7</sup>

The recording industry states that it takes Colombian courts an average of 45 months to process most cases, before they end up being either suspended or dismissed. Some cases have taken over seven years in the judicial system, a period which far exceeds the normal statute of limitations of five years; as a result, those cases are also dismissed. In 2004, 31 sentences were issued against pirates, but none resulted in jail time.

**Border enforcement is weak.** Millions of blank CD-Rs enter Colombia for the sole purpose of being used in the creation of pirate music CDs. Some of the shipments are undervalued and in all likelihood include blank CD-Rs manufactured in rogue Taiwanese plants that are not licensed by Phillips and do not pay corresponding patent royalties. The recording industry has received estimates that over 40 million blank CD-Rs have been officially imported during 2004. Without taking into consideration a few more million that are probably being smuggled into the country, it is very doubtful that all of these blank CD-Rs are being used for legitimate purposes. It is extremely important for any effective anti-piracy campaign that custom authorities begin to implement measures to prevent entry of these blank CD-Rs. Enforcement at the Colombian borders still needs to be improved in practice, especially given the growth of optical media piracy in the region. According to MPA local counsel, customs authorities are taking some measures to block the entrance of blank digital media in Colombia. However, to obtain good results, interested parties should continue to encourage as well as monitor customs' activities.

**Administrative enforcement against signal theft piracy remains ineffective.** Licensing and inspections by the CNTV, the national television commission, have contributed to a significant reduction in systematic television piracy in Colombia.

**Civil actions and issuance of civil *ex parte* search orders is slow.** As part of its national enforcement campaign, BSA also uses civil remedies to pursue those persons and businesses engaged in end-user piracy. In violation of Articles 50(1) and 50(2) of the TRIPS Agreement (*ex parte* authority), inspections take at least six months to be carried out (from the date of the request). During that time, leaks frequently occur, severely hampering enforcement efforts. In fact, BSA's technical expert has even arrived at a given target on the day of the inspection, only to have the target present a certified list of software licenses. Moreover, it is not unusual for software plaintiffs to face such high bond requirements that copyright holders are forced to withdraw the request for provisional measures, another TRIPS violation. Finally, expert fees tend to be very high. Problems with the Colombian courts are inclined to be greatest in cities outside Bogotá, where judges show less understanding of intellectual property

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<sup>7</sup> The statute of limitations on criminal penalties benefits pirates who are able to remain out of prison on bail during the trial and appellate procedures. In essence, if the jail term to which the defendant is sentenced in first instance is shorter than the time between the commencement of the criminal investigation and the final conviction (after exhausting all appeals), then the statute of limitations expires and the defendant would not be required to serve any jail time.

rights, despite educational efforts. Because of the judicial delays in obtaining civil *ex parte* search authority, BSA historically was forced to rely heavily on criminal enforcement.

## **COPYRIGHT LAW AND RELATED ISSUES**

**Copyright Law of 1982:** Colombia's 1982 copyright law, as amended in 1993 and 1997, and including a 1989 decree on computer programs, is reasonably comprehensive. Amendments to the Colombian law made in 1993 increased the level of criminal penalties for piracy, and expanded police authority to seizing infringing product. Colombia already has deposited its instruments of ratification for both the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT). In fact, amendments to the criminal code actually provide sanctions in the form of fines for the circumvention of technological protection measures. Additional amendments to the copyright law and related laws (criminal codes, etc.) will be necessary to implement the high standards contemplated in an FTA IPR Chapter with the U.S.

**Fiscal Enforcement Legislation—Law No. 603:** In July 2000, Colombia enacted fiscal enforcement legislation (Law No. 603) that requires Colombian corporations to include in their annual reports their compliance with copyright laws. The Superintendency of Companies has the authority to audit the company and penalize it in case of non-compliance. Any corporation that falsely certifies copyright compliance could face criminal prosecution. In addition, the legislation treats software piracy as a form of tax evasion and empowers the national tax agency (DIAN) to inspect software licenses during routine tax inspections. Unfortunately, the law is drafted in such a way that the tax authority “*may*,” rather than “*must*” verify compliance with the copyright law. As a result, supervision by the tax authority of compliance with this provision has virtually disappeared. In fact, when asked why it has failed to enforce the law and conduct audits, the tax authority insists that it lacks the personnel and resources to carry out such audits.

**Criminal Code and Criminal Procedure Code:** Colombia's criminal code entered into effect in July 2001. It includes copyright infringements as a crime, and increases possible sanctions from a jail term of one to three years, up to two to five years. The code also contains provisions on the violation of technological protection measures and rights managements, both key obligations of the WIPO treaties, though infringements are only punished with fines. Unfortunately, in piracy cases, the penal code allows home arrests or bail during the process, and sentences of up to three years can be suspended. In practical terms, this scenario translates to no incarcerations for pirates.

In January 2005, Law No. 890 took effect and included two amendments to the Colombian criminal code in regard to copyright enforcement. First, Article 14 increased the prison sentences for all crimes in the criminal code (including copyright infringement) by one-third for the minimum sentence, and one-half for the maximum sentence. While copyright infringement previously carried a sentence of two to five years, the new range is now between two years eight months and up to seven and one-half years. Second, Article 5 modified Article 64 of the criminal code, which regulates parole requirements. Under the new amendment, judges may only grant parole if the convict has completed two-thirds of the prison term and shown good behavior. Nonetheless, granting parole will be subject to the full payment of fines imposed and indemnification of the victim.



Furthermore, Law No. 906 (Article 313 of the new Colombian Criminal Procedures Code) was passed on August 31, 2004, published in the *Official Gazette* on September 1, 2004, and effective as of January 1, 2005. This law imposes preventive incarceration in piracy cases where the value of the seized merchandise exceeds 150 times a set salary rate (approximately US\$20,000). IIPA is hopeful that passage of these laws will provide greater deterrents to copyright infringers and give enforcement authorities new tools to combat Colombia's pervasive piracy problem.

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