



March 26, 2003

Via Electronic Submission to FR0030@ustr.gov

Mrs. Regina Vargo
Assistant U.S. Trade Representative for the Americas
Office of the U.S. Trade Representative
600 17th Street N.W.
Washington, DC 20508

Re: ATPDEA Beneficiary Eligibility: Request
for Public Comment Regarding the Andean
Trade Promotion and Drug Eradication Act
Beneficiary Countries, 68 Fed. Reg. 8791
(February 25, 2003)

Dear Ms. Vargo:

The International Intellectual Property Alliance (IIPA)¹ takes this opportunity to respond to your request for comments on whether the countries designated as beneficiary countries under the Andean Trade Promotion and Drug Eradication Act are meeting their eligibility criteria. Under the ATPDEA, the criteria related to intellectual property rights protection originally found in the Andean Trade Preferences Act (ATPA) have been enhanced.

IIPA believes that the four ATPDEA beneficiary countries have failed to comply fully with their ATPDEA obligations to provide “adequate and effective protection” to U.S. copyright owners, as required under this program’s eligibility criteria. U.S. copyright owners estimate that trade losses due to piracy in these four ATPDEA-eligible countries exceeded \$263 million in 2002 alone. For example, Bolivia has totally failed to provide adequate and effective substantive copyright protection in its law and has one of the highest levels of business software piracy in

¹ The International Intellectual Property Alliance (IIPA) is a private sector coalition formed in 1984 to represent the U.S. copyright-based industries in bilateral and multilateral efforts to improve international protection of copyrighted materials. IIPA is comprised of six trade associations, each representing a significant segment of the U.S. copyright community. These member associations represent over 1,100 U.S. companies producing and distributing materials protected by copyright laws throughout the world – all types of computer software including business applications software and entertainment software (such as videogame CDs and cartridges, personal computer CD-ROMs and multimedia products); theatrical films, television programs, home videos and digital representations of audiovisual works; music, records, CDs, and audiocassettes; and textbooks, tradebooks, reference and professional publications and journals (in both electronic and print media).

the entire hemisphere. In Peru, the piracy of recorded music is so notorious that legitimate music businesses have left the market in droves.

For years, IIPA and its members have reported on the piracy and enforcement difficulties in all of these Andean countries as well as on their legal reform efforts. Before the ATPDEA benefits were extended to these four countries last year, IIPA submitted its comments to the Trade Policy Staff Committee (TPSC), highlighting its view that Bolivia, Colombia, Ecuador and Peru all failed to provide the level of adequate and effective protection for U.S. copyright owners that are required under the eligibility standards in the ATPDEA.² There IIPA indicated that it would be appropriate to deny eligibility status to each of these countries. Nonetheless, IIPA recognized at that time that the TPSC may feel that U.S. interests are best served by extending present benefits, and we recommended that such benefits be conditioned on a clear and tangible commitment by beneficiary states to modify their practices so that they conform to the requirements of the statute. IIPA proposed that the U.S. government should obtain from these potential beneficiary countries written commitments on the specific actions they intend to take to meet the IPR standards of the ATPDEA, on how that country is addressing its copyright law and enforcement obligations before designation is officially conferred.

IIPA understands that these countries did make certain commitments on copyright-related issues in bilateral discussions and exchanges. However, we remain very concerned that these non-statutory commitments also have not been fully met.

The ATPDEA's Strong Criteria on Copyright Protection

The ATPDEA provides clear and definitive criteria relating to the protection for intellectual property. To summarize, the enhanced trade benefits under the ATPDEA are available to countries that the President designates as "ATPDEA beneficiary countries." The criteria that the President had to consider in designating countries as ATPDEA beneficiary countries included the criteria already existing under the ATPA, as well as the new criteria added by the ATPDEA.

The ATPA³ contained provisions for the protection of intellectual property rights similar to those in the Caribbean Basin Initiative⁴ and the Generalized System of Preferences.⁵ The ATPA had two mandatory IPR criteria and two discretionary IPR criteria. Section 3202(c)(5) states that the President shall not designate a country as an ATPA beneficiary country

if a government-owned entity in such country engages in the broadcast of copyrighted material, including films or television material, belonging to the

² See International Intellectual Property Alliance (IIPA), Public Comments Regarding the Designation of Eligible Countries as Andean Trade Promotion and Drug Eradication Act Beneficiary Countries, September 16, 2003, available at http://www.iipa.com/rbi/2002_Sep16_ATPDEA.pdf.

³ Andean Trade Preferences Act of 1990, Pub. L. No. 102-182 (codified at 19 U.S.C. § 3201 et seq.). Bolivia and Colombia became eligible to receive ATPA preferential duty treatment on July 2, 1992, Ecuador on April 13, 1993, and Peru on August 11, 1993.

⁴ The Caribbean Basin Economic Recovery Act, Pub. L. No. 98-67, Section 212 (codified at 19 U.S.C. § 2701 et seq.) (CBERA or the Caribbean Basin Initiative or CBI).

⁵ See the Generalized System of Preferences Renewal Act of 1984, Pub. L. No. 98-573, as amended (codified at 19 U.S.C. § 2462(c)).

United States copyright owners without their express consent or such country fails to work toward the provision of adequate and effective protection of intellectual property rights.

19 U.S.C. § 3202(c)(5) (emphasis added). In addition, in determining whether to designate a country as a beneficiary country, the President shall take into account the following two discretionary IPR criteria in Section 3202(d)⁶:

the extent to which such country provides under its law adequate and effective means for foreign national to secure, exercise, and enforce exclusive rights in intellectual property, including patent, trademark and copyright rights;

the extent to which such country prohibits its nationals from engaging in the broadcast of copyrighted material, including films or television materials, belonging to United States copyright owners without their express consent; ...

The ATPDEA IPR-related provisions are found in the revised Section 203(b)(6)(B).⁷ The President, in considering his designation of ATPDEA beneficiary countries shall take into account the following provisions in addition to the criteria in the pre-existing ATPA (cited above). For ATPDEA eligibility purposes, the President shall take into account:

- (i) Whether the beneficiary country has demonstrated a commitment to –
 - (I) undertake its obligations under the WTO, including those agreements listed in section 101(d) of the Uruguay Round Agreements Act, on or ahead of schedule, and;
 - (II) participate in negotiations toward the completion of the FTAA or another free trade agreement;
- (ii) The extent to which the country provides protection of intellectual property rights consistent with or greater than the protection afforded under the Agreement on Trade-Related Aspects of Intellectual Property Rights described in section 101(d)(15) of the Uruguay Round Agreements Act.

Here again, IIPA makes several observations about these standards. First, the WTO TRIPS Agreement is widely recognized as containing the minimum standards of IPR protection. With respect to copyright,⁸ the TRIPS Agreement incorporates the level of copyright protection found in the Berne Convention (1971 Paris text), adds explicit protection for computer programs as literary works, adds a rental right, and also affords protection for performers and producers of sound recordings. Perhaps most important, TRIPS also adds an entire new set of obligatory standards of enforcement, including measures on civil remedies, administrative measures, border measures and criminal penalties. In addition to obliging WTO members to have these enforcement measures in statutory law, TRIPS also requires that they be implemented in-practice in such a manner as to actually deter further infringements.

⁶ See 19 U.S.C. §§ 3202(d)(9) and 3202(d)(10).

⁷ Andean Trade Promotion and Drug Eradication Act, Title XXXI of the Trade Act of 2002, Pub. L. No. 107-210 (2002).

⁸ All references to “copyright” herein are meant to include subject matter protected under neighboring rights’ regime, which is often the case in many, but not all, countries in Latin America.

Second, the ATPDEA-eligible countries must provide protection “consistent with or greater” than the levels found in the WTO TRIPS Agreement.⁹ One of the copyright industries’ most critical substantive challenges is to ensure that levels of protection available in any country accounts for the important changes made by digital, networked environment. The Internet fundamentally transforms copyright piracy from a mostly local phenomenon to a potential global plague. In order for protection to be “adequate and effective,” modern copyright laws must respond to this fundamental change by providing that creators have the basic property right to control the reproduction, distribution and transmission of their creations, whether those works are in analog or digital form and whether they are distributed as permanent copies or via transmission over electronic networks like the Internet. It is no longer sufficient, therefore, in the Internet and digital world, that countries merely meet their obligations under TRIPS. The new means by which protected works can be reproduced digitally and globally transmitted electronically without authorization has given rise to the negotiation of the two new “Internet” treaties under the auspices of the World Intellectual Property Organization (WIPO). The WIPO Copyright Treaty (WCT) entered into force on March 6, 2002, and the WIPO Performances and Phonograms Treaty (WPPT) entered into force on May 20, 2002 and together they provide the legal infrastructure for this new digital and Internet environment. Because the standards of protection to be afforded by ATPDEA beneficiaries must incorporate these modern standards of protection and enforcement, including those contained in the WCT and WPPT, the U.S. government has been working at all levels to encourage countries to sign, ratify and implement both WIPO Treaties.¹⁰ Of the ATPDEA beneficiary countries, Colombia, Ecuador and Peru are members of the WCT and the WPPT; Bolivia is not. All countries must implement these new obligations and IIPA again strongly recommends that the U.S. government request Bolivia to make a specific commitment to ratify these two WIPO treaties and implement their obligations.

Third, the U.S. government, supported by the U.S. copyright industry, is seeking specific obligations (both substantive and enforcement-related) in the IPR chapter of the Free Trade Area of the Americas. IIPA and its members are on-the-record with respect to these measures we believe should be included in the FTAA IPR Chapter.¹¹ All four of the Andean countries are participating in the FTAA negotiations.

Finally, copyright law reform, while critical to meeting the ATPA and ATPDEA standards, is not sufficient in and of itself. IIPA believes that one of the most immediate problems in this region is the failure of all four Andean countries to adequately and effectively enforce even their current copyright laws. The point is that laws, even good laws, which are not effectively enforced on-the-ground do not satisfy the IPR criteria in the ATPDEA, the ATPA, other U.S. trade programs nor the TRIPS Agreement or WIPO “Internet” Treaties.

On October 31, 2002, President Bush issued Presidential Proclamation 7616 designating Bolivia, Colombia, Ecuador and Peru as ATPDEA beneficiary countries.¹² In addition, USTR

⁹ This new standard in the ATPDEA tracks that found in the CBTPA.

¹⁰ Press Release 02-48, Office of the U.S. Trade Representative, “USTR Releases Annual ‘Special 301’ Report on Global Intellectual Property Protection,” April 30, 2002.

¹¹ See IIPA Public Comments on the Preliminary Draft Consolidated Texts of the Free Trade Area of the Americas (FTAA) Agreement, August 22, 2001, available at http://www.iipa.com/rbi/2001_Aug22_FTAA.pdf.

¹² The text of the Presidential Proclamation is posted on the White House website at <http://www.whitehouse.gov/news/releases/2002/10/20021031-9.html>.

recently proposed an interim rule that September 15, 2003 be the deadline for filing a petition to review a country's eligibility under the ATPA, as amended by the ATPDEA.¹³

Copyright Piracy, Legal Reform and Enforcement in the ATPDEA Beneficiary Countries

Strong and comprehensive copyright protection and enforcement are the key ingredients to robust economic growth and development. Copyright gives creators the basic property rights that enable them to authorize and control the copying, distribution, performance and display of the works they create. Exercising these exclusive rights themselves, or licensing someone else to exercise them, is the main way that creators earn a living and generate revenue. That revenue is needed to underwrite the hefty investments related to producing and distributing motion pictures; developing, testing and maintaining computer software; scouting, recording, and promoting musical talent; and all the other activities that are indispensable to bringing creative products to the public. The U.S. copyright industries are one of the largest sectors contributing to the U.S. economy.¹⁴ Inadequate laws and ineffective anti-piracy enforcement abroad adversely affects employment, job creation and revenues, both here in the States as well as in foreign countries.

Attached as appendices to this letter are the reports on all four of these ATPA countries, which appeared in the IIPA's February 2003 Special 301 submission to USTR. Each country report contains detailed discussions on piracy, weaknesses (and improvements made) in the enforcement system over the last year, as well as the status of copyright and related law reform measures. The reports also include lists of specific actions that that government could take to address the issues/problems highlighted in the report.

Copyright Legislation: Many of the Andean countries have engaged in copyright law reform efforts in recent years. Generally speaking, copyright legislation in Colombia, Ecuador and Peru provide an adequate basis to permit basic copyright enforcement. However, this is not to say that these laws are perfect and without problems; in fact, further revisions will be needed to fully incorporate the WIPO Treaties as well as provisions likely to be included in the FTAA IPR Chapter – both incorporated in the criteria for eligibility in the ATPDEA statute.

¹³ See Office of the United States Trade Representative, Establishment of a Petition Process to Review Eligibility of Countries for the Benefits of the Andean Trade Preference Act, as Amended by the Andean Trade Promotion and Drug Eradication Act, 68 Fed. Reg. 5542 (February 4, 2003).

¹⁴ In April 2002, the IIPA released an economic report entitled Copyright Industries in the U.S. Economy: The 2002 Report, the ninth such study written by Stephen Siwek of Economists Inc. This report details the economic impact and contributions of U.S. copyright industries to U.S. Gross Domestic Product, employment, and trade. The latest data show that in 2001, the U.S. copyright industries accounted for 5.24 percent of U.S. Gross Domestic Product (GDP), or \$535.1 billion – an increase of over \$75 billion from 1999 and exceeding 5 percent of the economy and one-half trillion dollars for the first time. Over the last 24 years (1977-2001), the U.S. copyright industries' share of the GDP grew more than twice as fast as the remainder of the U.S. economy (7 percent vs. 3 percent). Between 1977 and 2001, employment in the U.S. copyright industries more than doubled to 4.7 million workers, which is now 3.5 percent of total U.S. employment, and the U.S. copyright industries' average annual employment grew more than three times as fast as the remainder of the U.S. economy (5 percent vs. 1.5 percent). In 2001, the U.S. copyright industries achieved estimated foreign sales and exports of \$88.97 billion, again leading all major industry sectors, including: chemicals and allied products, motor vehicles, equipment and parts, aircraft and aircraft parts, and the agricultural sector.

However, the copyright law in Bolivia falls far short of these eligibility criteria and of that country's current bilateral and multilateral copyright obligations in numerous respects. Bolivia is long overdue to remedy its inadequate copyright law and fix serious deficiencies in its enforcement regime. Ecuador passed an Education Law in 1999, which includes a poorly drafted, TRIPS-incompatible provision that purports to grant free software licenses to high educational institutions.

Piracy and Enforcement: Over the last two years, unauthorized "burning" of CDs has grown rapidly in Latin America, thus challenging the ability of legitimate businesses engaged in the creation and distribution of copyright materials – recordings, software, videogames, books, and to a lesser extent, DVDs – to compete against these pirated products. Inadequate and ineffective copyright enforcement has failed to stem this problem and continues to result in significant trade distortions in the Andean region.

U.S. companies suffered estimated trade losses due to piracy in these four ATPDEA-eligible countries exceeding **\$263 million** in 2002 alone. With many of these companies increasingly relying on foreign licensing and sales revenues, piracy combined with inadequate enforcement, has become a major impediment to this continued revenue growth and has become the major market access barrier for the copyright industries. The challenges faced by the copyright industries and national governments to enforce copyright laws grow exponentially as the forms of piracy shift from hard-goods and more toward digital media and unauthorized electronic transmissions. Criminal and civil justice systems must work in a transparent and expeditious manner and result in deterrent penalties and remedies.

ESTIMATED TRADE LOSSES DUE TO COPYRIGHT PIRACY
(in millions of U.S. dollars)
and LEVELS OF PIRACY (2002)
in the ATPDEA BENEFICIARY COUNTRIES

COUNTRY	Motion Pictures		Records & Music		Business Software Applications ¹⁵		Videogame Software		Books	TOTAL LOSSES
	Loss	Piracy Level	Loss	Piracy Level	Loss	Piracy Level	Loss	Piracy Level	Loss	
Bolivia	NA	NA	15.0	85%	6.0	74%	NA	NA	5.5	26.5
Colombia	40.0	90%	56.3	65%	16.2	50%	NA	NA	5.3	117.8
Ecuador	NA	NA	18.0	90%	5.5	59%	NA	NA	2.3	25.8
Peru	4.0	50%	70.2	98%	10.3	58%	NA	NA	8.5	93.0
TOTAL	44.0		159.5		38.0		NA		21.6	263.1

¹⁵ BSA's estimated piracy losses and levels for 2002 are preliminary, and will be finalized in mid-2003. BSA's trade loss estimates reported here represent losses due to piracy which affect only U.S. computer software publishers in this country, and differ from BSA's trade loss numbers released separately in its annual global piracy study which reflects losses to (a) all software publishers in this country (including U.S. publishers) and (b) losses to local distributors and retailers in this country.

The following summary provides an overview of the kinds of piracy found in the Andean region, with specific recent examples provided.

- Piracy of sound recordings and music remains very high in the Andean region. These four Andean countries each have piracy levels over 60% (see above chart), meaning that most of the copies of recorded music in these markets are piratical. While audiocassette piracy has been the preferred business of pirates for years, the levels of music CD piracy have been rising rapidly. A June 2002 report on music piracy by the International Federation of Phonographic Industries (IFPI) noted increases in commercial CD-R piracy (production and/or distribution) in Latin America during 2001.¹⁶ In Peru, the once-thriving legitimate record industry has almost entirely vanished, with piracy levels now at 98%.
- Business software piracy appears in various formats, including counterfeiting, resellers, mail order houses, bulletin boards, other internet-based distributions and corporate end-user piracy. The greatest threat is when a corporate or institutional entity copies software onto the hard disks of many more computers than the number authorized. Such end-user piracy occurs in government, education, and business enterprises throughout the Andean region. To address this problem, governments must lead the way in promoting legal software use within their ministries and offices. The Business Software Alliance (BSA) reports that software piracy is on the rise around the globe – growing from 37 percent in 2000 to 40 percent in 2001.¹⁷
 - Bolivia: The 74% piracy rate in Bolivia is one of the highest piracy rates for business software anywhere in Latin America; it far exceeds the 25% piracy level in the United States (which has one of the lowest levels in the world). Also in Bolivia, the lack of civil *ex parte* search measures remains a serious problem to effective software enforcement. In all of its civil cases, BSA has had to adhere to Bolivian procedures, which include notifying the defendants at least 24 hours prior to the inspection. In many cases the only evidence that the BSA found were traces of software that was previously installed but deleted a few hours before the inspection. Piracy levels within the government remain extremely high despite efforts by BSA member companies to legalize several agencies.
 - Ecuador: Ecuador's 1999 Education Law contains a poorly drafted provision that would appear to grant free software license to educational institutions. The industry has objected to this provision (Article 78 in that law) for years as it violates Ecuador's obligations under the Berne Convention as well as TRIPS.
 - Peru: Although Peru is to be commended for enacting a government software legalization decree in early 2003, protection of intellectual property rights by Peruvian government entities often continues to be inadequate and ineffective. In 2002, for the first time ever, the tax authority, SUNAT, participated in several criminal copyright infringement cases, finding that tax evasion had occurred. Despite this breakthrough, SUNAT has since been reluctant to take further action.
Enforcement in Peru would be improved with the continued involvement of SUNAT

¹⁶ IFPI Music Piracy Report 2002, available at <http://www.ifpi.org/site-content/library/piracy2002.pdf>.

¹⁷ Business Software Alliance, Seventh Annual BSA Global Software Piracy Study, 2002, available at <http://www.bsa.org/resources/2002-06-10.130.pdf>

- in anti-piracy actions. SUNAT's participation, particularly in ensuring that end user organizations are properly licensed, would contribute to adequate and effective enforcement.
- Video piracy remains a consistent problem in the Andean region, ranging from 50% in Peru to over 90% in Ecuador, Colombia and Bolivia. Ineffective enforcement is the principal cause.
 - Peru: In Peru, the administrative fine issued when pirate videotapes are seized is approximately US\$2/tape, which is the street price for a pirate videotape. This inadequate fine is simply not a deterrent to piratical activity.
 - Colombia: Unauthorized reception and retransmission of U.S. domestic satellite signals is a key concern of the U.S. motion picture industry. This problem is particularly acute in Colombia because that country is within the footprint of U.S. satellites. Cable system operators, hotels, resorts, bars and homeowners have erected satellite dishes to intercept, without authorization from the copyright owner, programming intended for reception only within the U.S. This signal theft/copyright infringement harms the theatrical exhibition of motion pictures in these markets and slows the development of a legitimate home video market as well.
 - The major forms of piracy afflicting the U.S. book publishing industry in the region are commercial photocopying piracy. Photocopying shops near universities often fill requests for illegal reproductions of entire textbooks.
 - The U.S. videogame industry suffers from inadequate enforcement by governmental and judicial authorities in the Andean region. Piracy and counterfeiting affects all platforms for playing videogames, including cartridges, personal computer CD-ROMs, and game consoles.

CONCLUSION

IIPA appreciates the opportunity to convey to you and your colleagues our views on the important copyright criteria upon which eligibility for ATPDEA benefits is conditioned. All four ATPA countries – Bolivia, Colombia, Ecuador and Peru – fail to provide adequate and effective protection to U.S. copyright owners. So long as the U.S. copyright owners continue to suffer these high levels of piracy, the U.S. government should not be providing these valuable preferential trade benefits.

We believe that the IPR criteria of the ATPDEA (and all U.S. trade programs, for that matter) should be applied to ensure that these countries substantially improve both their copyright laws as well as enforcement practices. IIPA is gravely concerned that recent copyright-related commitments made by these governments in order to secure ATPDEA benefits made these governments may not have been implemented fully and successfully in-practice. In IIPA's 2003 Special 301 filing, Bolivia is identified as the country which has most egregiously failed to live up to its bilateral and multilateral copyright obligations, whether in its law or in practice. If the requisite improvements are not forthcoming swiftly, IIPA may request the U.S. government to initiate a review of Bolivia's eligibility to obtain trade benefits under both the Generalized

System of Preferences (GSP) program as well as under the ATPA (as amended by the ATPDEA) program.

Thank you for your consideration.

Sincerely,



Eric H. Smith
President
International Intellectual Property Alliance

Attached: Country excerpts from IIPA's February 2003 Special 301 submission to USTR:

- Bolivia at <http://www.iipa.com/rbc/2003/2003SPEC301BOLIVIA.pdf>
- Colombia at <http://www.iipa.com/rbc/2003/2003SPEC301COLOMBIA.pdf>
- Ecuador at <http://www.iipa.com/rbc/2003/2003SPEC301ECUADOR.pdf>
- Peru at <http://www.iipa.com/rbc/2003/2003SPEC301PERU.pdf>

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2003 SPECIAL 301 REPORT

BOLIVIA

EXECUTIVE SUMMARY

Special 301 recommendation: IIPA recommends that Bolivia be elevated to the Special 301 Priority Watch List. Bolivia has been on the Watch List for the past six years and no progress on copyright reform has been made. Bolivia currently does not meet its current bilateral and multilateral obligations in that it fails to provide a TRIPS-compliant copyright law and adequate and effective copyright enforcement. If the requisite improvements are not forthcoming swiftly, we will request that the U.S. government to initiate a review of Bolivia's eligibility to obtain trade benefits under the Generalized System of Preferences (GSP) program, the Andean Trade Preferences Act (ATPA), and the Andean Trade Promotion and Drug Eradication Act (ATPDEA).

Overview of key problems: Estimated trade losses due to piracy amounted to \$26.5 million in 2002. Some of the problems that the copyright industries face in Bolivia include—

- Bolivia fails to meet basic TRIPS standards. The lack of civil *ex parte* measures remains the biggest problem in enforcing copyright in Bolivia.
- Significant improvements are needed to strengthen civil enforcement mechanisms, criminal enforcement and border measures.
- Copyright legal reform has been considered for years. A comprehensive intellectual property rights bill was introduced to the Bolivian Congress in early February 2001 but the Bolivian Congress has yet to commence its review, despite several requests from the copyright industry.

Actions which the government of Bolivia should take: To improve the copyright law and enforcement in Bolivia, we recommend the following actions for 2003—

- TRIPS- and WCT/WPPT-compliant law reform must be considered and approved. Passage of the pending bill will not suffice because it is not even TRIPS-compliant in its current form.
- Ratification of the WCT and WPPT and their implementation in the copyright law reform referenced above.

Bolivia is long overdue in meeting its bilateral and multilateral obligations regarding copyright protection and enforcement. In October 2000, the U.S. Senate approved the Bilateral Investment Treaty (BIT) with Bolivia, which was signed in April 1998 and ratified by Bolivia. At the time of the BIT negotiation, Bolivia was required to have TRIPS-level protection by the end of April 1999, both in terms of its substantive intellectual property law requirements and the requisite enforcement obligations.

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

INDUSTRY	2002		2001		2000		1999		1998	
	Loss	Level								
Business Software Applications ²	6.0	74%	4.9	77%	2.8	81%	4.1	85%	4.0	88%
Records & Music	15.0	85%	15.0	85%	15.0	85%	15.0	85%	20.0	85%
Motion Pictures	NA	NA	2.0	100%	2.0	100%	2.0	100%	2.0	100%
Entertainment Software	NA	NA	NA	NA	1.5	NA	NA	NA	3.9	93%
Books	5.5	NA	5.5	NA	5.5	NA	5.0	NA	5.0	NA
TOTALS	26.5		27.4		26.8		26.1		34.9	

Bolivia currently participates in the Generalized System of Preferences (GSP) program, the Andean Trade Preferences Act (ATPA), and the Andean Trade Promotion and Drug Eradication Act (ATPDEA), U.S. trade programs that offer preferential trade benefits to eligible beneficiary countries; all these programs have standards of intellectual property rights which must be afforded to U.S. copyright owners.³ Responding to the U.S. government's request for comments regarding countries' eligibility for ATPDEA benefits, IIPA reported in September 2002 that Bolivia had failed to provide adequate and effective protection for U.S. copyright owners, especially under the enhanced standards outlined in the ATPDEA.⁴ Given this failure to meet the standards established in the statute, IIPA indicated that it would be appropriate to deny eligibility status to Bolivia. Realizing, however, that the U.S. government may choose to serve U.S. interests by extending ATPDEA benefits, IIPA requested that the U.S. government obtain written commitments on Bolivia's actions to meet the IPR standards of the ATPDEA before

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

² BSA's estimated piracy losses and levels for 2002 are preliminary, and will be finalized in mid-2003. In IIPA's February 2002 Special 301 filing, BSA's 2001 estimates of \$3.0 million at 79% were identified as preliminary; BSA finalized its 2001 numbers in mid-2002, and those revised figures are reflected above. BSA's trade loss estimates reported here represent losses due to piracy which affect only U.S. computer software publishers in this country, and differ from BSA's trade loss numbers released separately in its annual global piracy study which reflects losses to (a) all software publishers in this country (including U.S. publishers) and (b) losses to local distributors and retailers in this country.

³ For the first 11 months of 2002, \$30.6 million worth of Bolivian goods (or 21% of Bolivia's total imports to the U.S. from January to November) entered the U.S. under the duty-free GSP code, representing a 391% increase over the same time period last year. Another \$32.6 million worth of Bolivian goods entered the U.S. under the ATPA in the first 11 months of 2002, representing a decrease of 37.9% from the same period last year. For a full history of Bolivia's Special 301 placements, see Appendices D and E of IIPA's 2003 Special 301 submission.

⁴ IIPA Comments to the Trade Policy Staff Committee regarding the Designation of Eligible Countries as Andean Trade Promotion and Drug Eradication Act Beneficiary Countries, September, 16, 2002, available on the IIPA website at http://www.iipa.com/rbi/2002_Sep16_ATPDEA.pdf.

designation was officially conferred. One of the key discretionary criteria of these programs is that Bolivia provide "adequate and effective protection of intellectual property rights." USTR has proposed an interim rule that September 15, 2003 be the deadline for filing a petition to review a country's eligibility under the ATPA, as amended by the ATPDEA.⁵

COPYRIGHT PIRACY IN BOLIVIA

Business software piracy by both resellers and end-users is widespread in Bolivia. Estimated losses due to piracy of U.S. business application software in Bolivia in 2002 were \$6.0 million. The level of business software piracy remained at a high 74% level. The recording industry also reports high losses of \$15 million, with an 85% piracy rate. The book publishing industry estimates its annual losses at \$5.5 million.

COPYRIGHT ENFORCEMENT IN BOLIVIA

Lack of Commitment from the Government to Protect Copyright

Despite promises from the new administration to combat all forms of piracy, the government has yet to show its commitment to truly reduce piracy levels across the board in Bolivia. In 2002, the Bolivian government launched a Departmental Commission for the Defense of Intellectual Property Rights (*Comisión Departamental de Defensa de los Derechos de Propiedad Intelectual* (COMDEPI). Unfortunately, the COMDEPI has announced that it will prioritize the protection of some protected works over others. The government stated, for instance, that reducing movie and sound recording piracy levels are more important than reducing software piracy levels. While IIPA applauds the government's announcement of its intention to reduce the levels of piracy of copyrighted products, it also reminds the government of its obligation to combat piracy in a non-discriminatory fashion. Otherwise, the public may perceive that the government acquiesces to the piracy of certain protected works leading to even more widespread piracy of those works not deemed "as important."

During 2001, the Bolivian government failed to adequately and effectively protect IPR within its borders on numerous occasions. In March 2001, for instance, the BSA launched a massive legalization campaign in Bolivia. Throughout the campaign, which was originally sponsored by the Ministry of Foreign Trade, several TV, radio and printed press commercials communicated to the Bolivian companies the legal consequences of using illegal software. During the campaign, some companies and a trade association complained to the Bolivian government that they should not be obligated to license the illegal software they were using because of the economic situation the country was going through. Without notice to the BSA, the Ministry of Sustainable Development called a press conference and stated that the BSA did not have the right to operate in Bolivia and that any software publisher wanting to enforce its copyrights in Bolivia needed to register them locally. Both statements were in clear contradiction with Bolivian and international law. After several meetings, document productions and

⁵ See Office of the United States Trade Representative, Establishment of a Petition Process to Review Eligibility of Countries for the Benefits of the Andean Trade Preference Act, as Amended by the Andean Trade Promotion and Drug Eradication Act, 68 Fed. Reg. 5542 (February 4, 2003).

negotiations with the government, the Ministry of Sustainable Development issued a press release correcting the minister's previous statements. The ministry's original statements, however, sent the dangerous message to the Bolivian business community and the public in general that computer software piracy will be tolerated by the government.

In addition, during the period of the legalization campaign, the Ministry of Justice ordered the suspension of any piracy investigations submitted to the Prosecutor's Office by the BSA. Several criminal complaints that were filed against resellers of illegal software were put unduly on hold for over four months. No written decision explaining the reasons for the order was ever issued.

Despite several executive decrees mandating that government agencies use only licensed software, unlicensed software use by the government continues to be a problem.

Failure to Provide TRIPS-compatible Civil *Ex Parte* Search Measures

Concerning civil actions, the BSA has encountered a legal obstacle when trying to procure judicial search measures and/or inspections in Bolivia. Article 326 of the Civil Procedure Code states that the defendant must be notified prior to the execution of any preparatory proceedings (e.g., judicial inspections). Upon receiving notice, the defendant is entitled to object to the search, thus impeding execution of the search order until a judge rules on the objection. Many potential defendants have taken advantage of this process to destroy the evidence that the search was intended to discover. Failure to comply with this notification requirement makes the proceeding null *ab initio*. This prior notification requirement clearly violates TRIPS Article 50.2.

During 2001, BSA conducted 22 civil inspections. In all of these cases, the BSA had the obligation to notify the defendants at least 24 hours prior to the inspection. In many cases the only evidence that the BSA found was the traces of software that was previously installed but deleted a few hours before the inspection. BSA settled seven of these 22 cases. In 2002, BSA conducted eight civil raids and settled three of these cases. The rest are still pending.

Unwarranted Delays in Civil and Criminal Enforcement

The Bolivian Civil Procedure Code fails to impose any time limits for courts to review and approve civil search requests. On average, it takes 45 days to obtain civil search and seizure order, by which time news of the raid may have leaked to the defendant or BSA's evidence may have grown stale or simply disappeared. This unwarranted delay, which is far longer than the average authorization process in other countries in Latin America, violates Article 41 of TRIPS, which requires that remedies for copyright infringement be "expeditious."

Depending on the city in which the civil complaint is filed, it could take up to four to five weeks to obtain a search order. As if the delay itself were not detrimental enough, once the court issues the order, the court must notify the defendant, as per the prior notice requirement discussed above.

In some cases, civil suits in Bolivia can take up to five years of court proceedings just to determine if there was a copyright infringement. Bolivian civil courts use a bifurcated system, meaning that even if the court finds an infringement, there has to be a separate damages trial. This new trial on damages may take up to eight months. All of these factors make it extremely

difficult to settle cases successfully, as defendants would rather wait for five or six years and take their chances than settle a case in which the law is unclear at best. In fact, BSA has only settled nine cases in Bolivia during 2002. To make matters even worse, because Bolivian law only allows the recovery of direct damages (see discussion below), the potential award of damages in a civil suit fails to provide a meaningful deterrent.

Inadequate Civil Copyright Damages

The Bolivian copyright law permits only the recovery of direct economic damages for civil copyright violations and prohibits punitive, consequential, or statutory damages. Without the threat of a damages award significant enough to create a meaningful deterrent to illegal activity, the copyright law fails to meet the requirements of TRIPS Articles 41 and 45.

In contrast, other countries have legislated a system of statutory damages that provide for an effective deterrent mechanism to combat piracy. In Brazil, for instance, the unauthorized reproduction or publication of a protected work may be subject to statutory damages equivalent to up to 3,000 times the retail value of the protected work.⁶ The same solution has been adopted by the United States (up to a maximum of \$30,000 per protected work).⁷ IIPA is encouraged that the overhaul of the intellectual property laws submitted to the Bolivian Congress adds a statutory damages provision of between three to five times the retail value of the protected work⁸, but as indicated above, other provisions of the copyright reform bill fail to meet TRIPS and WCT/WPPT standards.

Inadequate and Ineffective Criminal Enforcement

Enforcing copyrights through the Bolivian criminal system has proven to be totally ineffective.

BSA filed two criminal complaints in 2000 against software resellers for hard disk loading (“HDL”) in the city of Santa Cruz. Although these cases were filed in September 2000, the Judicial Technical Police (*Policía Técnica Judicial*) took over four months to prepare the investigative reports of the cases and request the issuance of a search and seizure order. The order granting the search in one of these cases was finally issued in February 2001. Despite the unwarranted delay, during the raid the prosecutor and the Judicial Technical Police seized extensive evidence of copyright infringement. Among other items, they seized six burned CDs loaded with software from BSA member companies, and a PC loaded with unlicensed software. Two expert witness reports were submitted to the file, one of them from the Judicial Technical Police. Both reports indicated, among other things, that the six burned CDs had been loaded with illegal software, and that the seized PC also had unlicensed software installed in its hard disk.

Because under Bolivian law a party filing a criminal complaint has the right to review the case file, after the raid, local counsel for BSA visited the Prosecutor’s Office and the Court several times to have access to the file and ascertain the case’s status. In both places, local

⁶ Ley de Derechos de Autor, No. 9610, Article 103.

⁷ 17 U.S.C § 504 (c).

⁸ Anteproyecto de Código de Propiedad Intelectual, Article 175 I.

counsel was denied access to the file every single time because the file was under “review.” When he finally had the ability to examine the file a few weeks later, he learned that the Prosecutor’s Office and the Court had both summarily dismissed the case for lack of evidence. To make matters worse, local counsel noticed that the decision was dated several days before, and that the time to appeal the decision had already expired. BSA was never served with a copy of the judge’s decision, although the Court was required to do so under Bolivian law.

TRIPS and the basic principles of due process mandate that “[...]decisions on the merits of a case [...] shall be made available at least to the parties to the proceeding without undue delay. Decisions on the merits of a case shall be based only on evidence in respect of which parties were offered the opportunity to be heard” (TRIPS Articles 41.1 and 2). Needless to say, the Court did not observe any of these due process guarantees in this case.

During 2001, BSA conducted four criminal raids against resellers of illegal software. In three of these cases, it took an average of five months from the time the criminal complaint was submitted with the investigation until the Court issued a search warrant. In one of the cases the delay was long enough to allow the reseller to relocate his business.

In 2002, one of the BSA member companies brought 10 criminal search and seizure raids in the cities of Cochabamba, Santa Cruz and La Paz against resellers who were selling computers with pre-installed unlicensed software. In most of these cases, the BSA member company faced significant problems to enforce its copyrights. Furthermore, in some of these cases, criminal enforcement proved to be totally ineffective and inadequate. In the past eleven months, only one of the ten criminal raids has resulted in criminal prosecution and the public hearing in that case has not even been scheduled yet. In Cochabamba, for instance, the prosecutor handling the case (*fiscal*) let the statute of limitations run out in three of these cases, despite local counsel’s frequent requests for protection. In another case, also in Cochabamba, another prosecutor recommended to local counsel that the action be transformed into a private action because he did not have the time, interest, or resources to spend prosecuting a copyright infringement case. In Santa Cruz, the prosecutor in charge of two cases decided, notwithstanding local counsel’s objections, to return to the defendants the computers that were seized as evidence of the crime. According to the prosecutor, pursuant to Article 189 of the New Code of Criminal Procedure, he may return any seized materials to a defendant provided that the defendant exhibit the seized evidence whenever required by the prosecutor or a judge. With this decision, the prosecutor created a situation where the evidence might be destroyed, putting at risk the rightsholder’s ability to prove copyright infringement. In La Paz, the prosecutor in charge of two cases postponed the issuance of the raid order in one of the cases for more than six months without justification. The BSA member company had to contact the Prosecutor’s General Office (*Fiscal General de la Nación*) to get the prosecutor in charge of the case to act.

Border Measures in Bolivia Must Be Strengthened

Bolivia continued to serve as an alternate route for product controlled by Paraguayan pirates. Santa Cruz de la Sierra in Bolivia is a link between Paraguay’s Ciudad del Este and Chile, Peru, Ecuador and the Far East. Given the growing problem with piratical and counterfeit materials in the Andean Region, it is imperative that Bolivian law satisfy the TRIPS enforcement text on border measures. Bolivian laws and/or regulations should contain provisions under which the competent authorities can act on their own initiative and suspend the release of suspect goods (TRIPS Article 58).

COPYRIGHT LAW REFORM AND RELATED ISSUES

Copyright Law of 1992

Bolivia passed a copyright law on April 29, 1992, which replaced its antiquated 1909 law.⁹ While the 1992 law was a vast improvement in legal protection, it left the implementation of many of its provisions, including enforcement, to subsequent regulations. For example, under the 1992 copyright law, computer programs are protected but not as “literary works,” and are subject to regulations. A first set of draft software regulations was proposed in 1993, and there were several rounds of revisions, as well as numerous delays. Finally, a set of regulations providing the basic foundation for copyright protection of software and including provisions that specifically permit criminal actions to be undertaken against copyright infringers was implemented by presidential decree on April 25, 1997, five years after the original law. With respect to films, the copyright law’s protection is limited to works registered through CONACINE (Cámara Nacional de Empresarios Cinematográficos), a government/industry organization responsible for title registration, or, for works shown on television, through the Ministry of Telecommunications. The CONACINE registry has proven to be highly susceptible to fraudulent registration of titles by parties other than the legitimate rightsholder.

2001 Bill to Amend the Copyright Law

Efforts to overhaul the 1992 copyright law have been underway for years. In 1996, the National Secretary of Culture and the National Secretary of Industry and Commerce started to develop a proposal for a special law on intellectual property protection which would complement the existing copyright law. The objective of this project was to increase the level of IP protection, streamline judicial proceedings relating to the enforcement of intellectual property rights, and otherwise improve enforcement efforts to combat piracy and counterfeiting of IPR-protected works in order to encourage the economic development of these industries in Bolivia. Due to funding problems, a final draft of this project was not originally expected until August 1997. At that time, IIPA received mixed reports on whether the project was abandoned in 1998 or whether the Ministry of Justice took over drafting, with a goal of releasing a draft in the March-April 1999 time frame.

On February 1, 2001, the Bolivian Ministry of Justice and Human Rights presented a comprehensive package of proposed legislation on intellectual property rights, including a chapter on copyright, to the President of the Bolivian Congress. The copyright chapter contains over 200 articles which propose to expand the scope of exclusive rights, prescribe statutory damages for copyright violations, establish civil *ex parte* search procedures, add more enforcement powers to the Copyright Office, and create a special police force exclusively for intellectual property enforcement. Unfortunately, this bill has been stalled in Congress since its

⁹ Bolivia’s copyright regime must also comport with decisions made by the Andean Community. In December 1993, the five Andean Pact countries, including Bolivia, approved Decision 351, a common regime on copyright and neighboring rights, including an obligation to provide for injunctive relief, seizure and confiscation of unlawful copies and devices, and damages. Some very preliminary discussion has taken place regarding the modification of Decision 351 to make it TRIPS- and WIPO treaties-compatible, but no resolution has been taken at this point by the Andean Community Copyright Office Directors.

submission. Furthermore, there have been reports that Congress does not intend to pass the bill.

WIPO Treaties

Bolivia is a signatory to the WIPO treaties – the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT). Ratification of these treaties by Bolivia, followed by deposit of instruments of ratification with WIPO, would show the Bolivian government's support for raising the minimum standards of copyright protection, particularly with respect to network-based delivery of copyrighted materials, and fostering the growth of electronic commerce. Bolivia should ensure that any amendments to its copyright law incorporate the substantive obligations of the two WIPO treaties in order to respond to the challenges of the rapidly evolving marketplace for copyrighted materials.

Criminal Procedure Code Reform

The Bolivian government published amendments to its criminal code on March 10, 1997. The amended Article 362 of the Penal Code eliminates the previous requirement that works of intellectual property must be registered in Bolivia in order to be legally protected, and expands the scope of activities deemed as crimes against intellectual property rights. This amended article now matches the 1992 copyright law, which also establishes that registration is not required for the work to be protected by law. Importantly, the amended Article 362 of the penal code now allows the police to take enforcement actions against pirates. Previously, the code had required that copyright infringements be prosecuted and tried under rules for “private” penal actions, without the intervention of the state prosecutors. There are apparently two types of sanctions – “fine days” and “seclusion” (imprisonment) – but no range of fines appears to be specified in the code for copyright infringement. Because the use of these sanctions is not clear, the Supreme Court reportedly issued an administrative resolution in an attempt to provide better guidance.

COPYRIGHT AND REGIONAL TRADE NEGOTIATIONS

The negotiation of bilateral and regional free trade agreements (FTAs) is assuming increasing importance in overall U.S. trade policy. These negotiations offer an important opportunity to persuade our trading partners to modernize their copyright law regimes so they can maximize their participation in the new e-commerce environment, and to improve enforcement procedures. The FTA negotiation process offer a vital tool for encouraging compliance with other evolving international trends in copyright standards (such as fully implementing WIPO treaties obligations and extending copyright terms of protection beyond the minimum levels guaranteed by TRIPS), as well as outlining specific enforcement provisions which will aid countries in achieving effective enforcement measures in their criminal, civil and customs contexts.

IIPA believes that the IPR chapter in the Free Trade Area of the Americas (FTAA) must be a forward-looking, technologically neutral document that sets out modern copyright obligations. It should not be a summary recitation of already existing multilateral obligations such as TRIPS. As the forms of piracy continue to shift from hard goods and more toward

digital media, the challenges faced by the copyright industries and national governments to enforce copyright laws grow exponentially. The Internet has transformed copyright piracy from a local phenomenon to a global wildfire. CD-R burning is fast becoming a pirate's tool of choice throughout this region. Without a modern legal and enforcement infrastructure, including effective criminal and civil justice systems and strong border controls, we will certainly see piracy rates and losses greatly increasing in this region, thus jeopardizing the growth of the copyright sectors both in the U.S. and the local markets.

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

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2003 SPECIAL 301 REPORT

COLOMBIA

EXECUTIVE SUMMARY

Special 301 recommendation: IIPA recommends that Colombia remain on the Special 301 Watch List in 2003 for its continued difficulties in achieving effective copyright enforcement.

Overview of key issues: Piracy levels in Colombia continue to be high. The home video market is 90% pirate, and the industry is working hard to keep cable piracy from escalating. Pirated sound recordings can be easily found in flea markets and on streets in major cities, and the growth of illegitimate CD-R replication continues to undermine what is left of the legitimate music market. Illegal use of business software in small and medium-sized businesses is widespread, with rates higher in areas outside the major cities. Pirating videogame software on all platforms and illegal photocopying of books are widespread. Estimated losses due to piracy of U.S.- copyrighted materials in Colombia amounted to \$117.8 million in 2002.

Enforcement activity at the raiding level has improved somewhat in the last few years. However, delays in prosecution continue to favor the pirate. The Colombian judicial system fails to actively prosecute cases, much less issue deterrent penalties; hence piracy has not declined. With respect to administrative enforcement of cable piracy and signal theft, CNTV's efforts require improvement. 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. The National Program Against Piracy (*Convenio Nacional*) continues to meet and has achieved some limited success in coordinating the fight against piracy, but it is still far from effective. Colombia must ensure that its criminal, administrative, civil and border procedures meet its bilateral and multilateral copyright enforcement obligations (both in substance and in practice).

Actions which the Colombian government should take in 2003: Actions which the government should undertake include—

- Having 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;
- Granting civil *ex parte* search orders more swiftly;
- Encouraging more actions by CNTV, both administratively and in coordination with the criminal authorities, to combat television piracy;
- Expediting prosecutions of criminal copyright cases and issuing deterrent sentences, as permitted under the criminal code;
- Improving efforts by the regulatory agencies (*superintendencias*) and the tax authority (DIAN) to 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);

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

INDUSTRY	2002		2001		2000		1999		1998	
	Loss	Level								
Motion Pictures	40.0	90%	40.0	90%	40.0	90%	40.0	55%	38.0	60%
Records & Music	56.3	65%	73.0	65%	60.0	60%	60.0	60%	65.0	60%
Business Software Applications ²	16.2	50%	19.5	52%	33.2	53%	50.5	58%	68.1	60%
Entertainment Software	NA	NA	NA	NA	39.0	85%	7.0	75%	7.7	78%
Books	5.3	NA	5.3	NA	5.0	NA	6.0	NA	6.0	NA
TOTALS	117.8		137.8		177.2		163.5		184.8	

Colombia is a beneficiary country of several U.S. trade programs—the Generalized System of Preferences (GSP), the Andean Trade Preference Act (ATPA) and the recently adopted Andean Trade Promotion and Drug Eradication Act (ATPDEA).³ All three programs have standards of intellectual property rights which must be afforded to U.S. copyright owners. Responding to the U.S. government’s request for comments regarding countries’ eligibility for ATPDEA benefits, IIPA reported that Colombia had failed to provide adequate and effective protection for U.S. copyright owners, especially under the enhanced standards outlined in the ATPDEA.⁴ Given this failure to meet the standards established in the statute, IIPA indicated that it would be appropriate to deny eligibility status to Colombia. Realizing, however, that the U.S. government may choose to serve U.S. interests by extending ATPDEA benefits, IIPA requested that the U.S. government obtain written commitments on Colombia’s actions to meet the IPR

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

² BSA’s estimated piracy losses and levels for 2002 are preliminary, and will be finalized in mid-2003. In IIPA’s February 2002 Special 301 filing, BSA’s 2001 estimates of \$35.0 million at 53% were identified as preliminary; BSA finalized its 2001 numbers in mid-2002, and those revised figures are reflected above. BSA’s trade loss estimates reported here represent losses due to piracy which affect only U.S. computer software publishers in this country, and differ from BSA’s trade loss numbers released separately in its annual global piracy study which reflects losses to (a) all software publishers in this country (including U.S. publishers) and (b) losses to local distributors and retailers in this country.

³ For the first 11 months of 2002, \$177.2 million worth of Colombian goods (or 3.6% of Colombia’s total imports to the U.S. from January to November) entered the U.S. under the duty-free GSP code, representing a 228.8% increase over the same time period last year. During this same time period in 2001, \$244.6 million worth of Colombian goods entered under the ATPA program, accounting for a 65.4% decrease from the prior year. For more information on the history of Colombia’s status on Special 301, please see Appendices D and E of this submission.

⁴ IIPA Comments to the Trade Policy Staff Committee regarding the Designation of Eligible Countries as Andean Trade Promotion and Drug Eradication Act Beneficiary Countries, September, 16, 2002, available on the IIPA website at http://www.iipa.com/rbi/2002_Sep16_ATPDEA.pdf.

standards of the ATPDEA before designation was officially conferred. IIPA understands that Colombia indeed made general commitments (a) to reduce piracy and (b) to implement a software legalization decree.

COPYRIGHT PIRACY IN COLOMBIA

Piracy levels in Colombia exceed half the legitimate market in almost all the copyright sectors.

The audiovisual industry faces two serious form of piracy in Colombia: Television signal theft and video piracy. The Motion Picture Association of America (MPA) reports that both are prevalent and so integrated into the economy that the legal market is seriously threatened. In fact, the incidence of video piracy is so high that some audiovisual producers have abandoned the market, despite the country's potential. At least 90% of the video market is pirate. An increasing number of pirate videos are high quality counterfeits, with high quality copies and packaging intended primarily for sale or rental in video stores. The majority of pirate videos, however, are distributed in street markets. MPA has continued to fight television signal theft piracy. The situation has improved somewhat, however, due to consistent MPA action (over 60 cases brought in the last five years), and since cable operators who received licenses in 1999-2000 have now legalized their signals. Some of these 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, although many of these may never pay for their use of signal either because they are very small systems in remote, dangerous areas or because they are legally protected under the Colombian law 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. Annual losses to the U.S. motion picture industry due to audiovisual piracy in Colombia are estimated to be \$40 million in 2002.

The piracy rate for business software still reflects an unacceptably high incidence of illegal software use in Colombia, particularly within small to medium-sized organizations. Piracy levels in cities outside Bogotá are believed to be much higher than the average national rate. During 2002, the Business Software Alliance (BSA) encountered sophisticated, high-volume software counterfeit production facilities in Bogotá. A series of raids by Colombian law enforcement authorities during last year confirmed that the facilities had manufactured several hundreds of counterfeit software licenses and packaging. In one of the raids, the authorities arrested 19 pirates, completely dismantling the pirate operation facilities. Estimated trade losses due to business software piracy are \$16.2 million in 2002, with an estimated 50% piracy level. The educational and legal campaign of the BSA, combined with only modest growth in the legitimate market, resulted in a reduction in the piracy rate and estimated losses in Colombia in 2002, compared to the prior year.

The recording industry reports that in 2002, the estimated level of audio piracy rose to 65%, with estimated losses due to piracy placed at \$56.3 million. This estimated loss is below the 2001 amount mostly due to devaluation. Piracy of music CDs in Colombia continues to increase, mostly due to local CD-R replication. The 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,

Medellin and Cali, and even more vendors sell pirate audiocassettes. 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. CD-R piracy (recordable CD) is flourishing in Colombia, as a cottage industry of pirate CD-R products has exploded, pirating primarily Colombian repertoire. Most of the blank CDRs are brought in to Colombia in containers from the Far East. IFPI also reports that recorded pirate CD-Rs are being smuggled in from Ecuador. Most of the music companies are shrinking; the local companies continue to close down their operations and their investments. U.S. repertoire continues to be very much affected due to this situation. There have been certain isolated efforts and lots of programs and public statements, but to no avail. As a result of poor enforcement efforts, the legitimate market decreased by 22%, or 2.4 million units, in 2002. This declining trend is likely to continue in 2003. Since 1997, the overall market drop in sales in Colombia has been 60.4%, or 12.8 million units. The record companies have taken steps to compensate their losses by streamlining personnel and local artist rosters. Sadly, tax-paying Colombian citizens and artists are paying the price for this piracy problem.

The publishing industry reports the Colombian Book Chamber (which includes U.S. publishers) and the government have been working hard in trying to improve both the “Ley del Libro” itself and its enforcement. In early 2003, the Colombia Book Association reported that one of the most pirated books in Colombia was the first volume of Nobel literature laureate Garcia Marquez’s autobiography, “Vivir para contarla” which was released in October 2002. Anti-piracy efforts in 2002 generated the seizure of over 114,000 illegal published books, the result of some 85 raids.⁵ Commercial piracy has declined somewhat because of enforcement actions, but not photocopying. Currently there is no enforcement against photocopy shops located either outside universities or those operated inside, where individual chapters of textbooks as well as entire books are reproduced without authorization. Local agents of U.S. publishers say that pirated books and photocopies have a 20% to 25% market share (50% in the English language reference books, which is only a small part of the market). There is a campaign on television, on radio and in the newspapers discussing the problem of using illegal IP products. Estimated trade losses due to book piracy remained at \$5.3 million in 2002.

The Interactive Digital Software Association (IDSA) has reported concerns that Colombia is becoming another destination for pirated product (including videogame CDs and cartridges, personal computer CDs, and multimedia products) out of Southeast Asia.

COPYRIGHT ENFORCEMENT IN COLOMBIA

Several Colombian institutions and interagency groups are responsible for anti-piracy activities. Ironically, some enforcement activity has actually improved in the last few years in Colombia, although there are few results in terms of deterrent sentences and judgment issues, or actual reductions in the levels of piracy, to show for these efforts.

For example, in May 1998, the copyright industries joined an inter-institutional agreement with Colombian government agencies to strengthen the government commitment to fighting piracy which was approved by then-President Samper. On February 25, 1999, then-President Pastrana confirmed the National Anti-Piracy Campaign, which involved a large

⁵ EFE News Service, “Garcia Marquez’s books among the most pirated in 2002,” February 6, 2003.

number of governmental and independent agencies in the fight against piracy.⁶ The purpose of this public/private sector organization is to coordinate anti-piracy activities. Under the new administration, the Minister of the Interior has the lead on the national IPR campaign.

In terms of enforcement, 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 crimes involving telecommunications systems (Resolution No. 0-08888 of May 31, 1999). As a result, there are seven special prosecutors, 25 judicial police in Bogotá, and an uncertain number in the provinces. These prosecutors coordinate action with special police forces. In Bogotá alone, there are approximately 25 special prosecutors and 25 special judicial police officers.

Police are active but prosecutions are few.

Given the poor results in actions against home video piracy, MPA has effectively ceased to bring home video piracy cases in Colombia. MPA also is not presently doing any TV cases, although the TV market seems to have fixed itself somewhat. MPA has coordinated with the police unit for signal theft action with good raiding results. After the raids, however, prosecution procedures and sentencing possibilities have not been a deterrent for pirates. Lengthy prosecutions continue to favor the pirate, and MPA is faced with a difficult choice of seeking settlements to quickly end the specific incident of piracy or enduring piracy while cases work their way through the criminal process. In the last three years, MPA took 17 criminal actions against alleged television pirates in 2000, 16 such cases in 2001 and eight in 2002. However, MPA's television anti-piracy strategy depended largely on a complementary effort promised by CNTV, which, as noted below, has done virtually nothing.

For business software piracy, BSA reports that it continues to receive strong support in 2002 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) has diminished its level of support substantially during 2002, explaining that it has other priorities. All these agencies proved critical to BSA's efforts to strengthen anti-piracy enforcement, within and outside Bogotá. In 2002, legal actions were conducted against 12 end-user pirates, and more than 299 actions against 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. Significantly, government agencies conducted several criminal raids in Cali, Bogotá and Medellín.

The recording industry reports that there has been good will between the industry and the Colombian enforcement authorities but the good will never contribute to decreasing the high levels of piracy. The industry reactivated its anti-piracy unit (APDIF) in 2002. With limited support from police authorities APDIF has been able to carry out a street level campaign that contributed to cleaning up some high traffic areas in Bogotá. Unfortunately the authorities to

⁶ 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.

investigate pirate replication facilities and major distributors have done little, which dilutes the effectiveness of street operations since any seized product is quickly replaced. Of 1,100 raids in 2002 only 130 were directed at labs or warehouses. 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 CDRs 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.

There has been some enforcement action in Colombia on commercial book piracy, with some 85 actions taking place in 2002. When informed of suspected problems by the publishers, Colombian authorities will confiscate infringing texts and burn them, but costs of these actions must be borne by the publishers. AAP reports that there is no effective anti-piracy enforcement against copyshops, which operate both in and around universities and copy chapters of, or even entire, books.

Failure to Impose Deterrent Criminal Sentences

Even with all the criminal raids, the Colombia 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 2001 amendments to the criminal code, is not enough. It is also important to expedite criminal prosecutions.

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. It is well known that in Colombia, it usually 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.

Border Enforcement Measures

Colombia is faced with a major challenge to improve its border measures. Customs is a key element in the effort to control the contraband of legal and illegal product. Last year, DIAN did engage in several major actions, resulting in significant seizures. Enforcement at the Colombian borders still needs to be improved in practice, especially given the growth of optical media piracy in the region.

Millions of blank CDRs are entering Colombia for the sole purpose of burning pirate music CDs. Some of the shipments are being undervalued and in all likelihood include blank CDRs manufactured in rogue Taiwanese plants that are not licensed by Phillips or pay corresponding patent royalties. It is extremely important for any effective anti-piracy campaign that custom authorities begin to implement measures to prevent entry of these blank CDRs.

CRIMINAL COPYRIGHT ENFORCEMENT STATISTICS In COLOMBIA: 2002			
ACTIONS	MOTION PICTURES	BUSINESS APPLICATIONS SOFTWARE	SOUND RECORDINGS
Number of raids conducted	8	311	1,168
By police (including tax authorities)	8	299	1,168
By customs		2	0
By CNTV	0		0
Number of cases commenced	8	11	27
Number of defendants convicted (including guilty pleas)	0	6	9
Acquittals and Dismissals	0	3	
Number of cases pending	64		
Total number of cases resulting in jail time	0		1
Suspended prison terms			
Maximum 6 months			
Over 6 months			
Over 1 year			1
Total suspended prison terms			
Prison terms served (not suspended)			
Maximum 6 months			
Over 6 months			
Over 1 year			
Total prison terms served (not suspended)			
Number of cases resulting in criminal fines	0		9
Up to \$1,000			
\$1,000 to \$5,000			
Over \$5,000			
Total amount of fines levied	0		\$49,000

Administrative Enforcement Against Signal Theft Piracy

Despite several years of promising administrative action to enforce copyright, CNTV has been completely ineffective in addressing the problem of piracy in television. Because of the agency's constant constant excuses and its failure to act against piracy, MPA has lost faith in the agency and has no active cooperation at this time. Without cooperation from the responsible authorities, there is little reason for industry to expend its resources in a one-sided fight against piracy.

Delays in Civil Actions, Including Issuing *Ex Parte* Search Orders

As part of its national enforcement campaign, BSA also uses civil remedies to pursue those persons and businesses engaged in end-user piracy. However, civil enforcement against software pirates continues to be hampered by excessive judicial delays in granting *ex parte* seizure requests. Despite efforts to educate judges on the critical importance of *ex parte* orders to effective anti-piracy enforcement, BSA routinely must wait two to three months to obtain such an order, often much longer in cities outside Bogotá. Problems with the Colombian courts tend to be greatest in cities outside Bogotá, where judges show less understanding of intellectual property rights, despite educational efforts. Because of the judicial delays in obtaining civil ex

parte search authority, BSA was forced to rely heavily on criminal enforcement in 2002, conducting only a handful of civil end user actions.

CIVIL COPYRIGHT ENFORCEMENT STATISTICS In COLOMBIA: 2001-2002		
ACTIONS	BUSINESS APPLICATIONS SOFTWARE 2001	BUSINESS APPLICATIONS SOFTWARE 2002
Number of civil raids conducted	20	06
Post search action		
Cases pending	18	02
Cases dropped	2	
Cases settled or adjudicated		
Value of loss as determined by right holder (\$USD)		\$30,000
Settlement/judgment amount (\$USD)		\$21,000

COPYRIGHT LAW AND RELATED ISSUES

Copyright Law of 1982 and the WIPO Treaties

The 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. In May 1998, the court ruled in favor of the copyright industries, holding that the economic rights of copyright owners are in fact alienable. The interplay between the Colombian law and the Andean Communities Decision 351 on copyright and neighboring rights affords a level of copyright protection close to TRIPS standards.

Colombia has deposited its instruments of ratification for both the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT), making it one of the original 30 countries to place both treaties into force in 2002. These treaties raise the standards of copyright protection worldwide, particularly with respect to network-based delivery of copyrighted materials, and foster the growth of electronic commerce. Amendments to the criminal code actually provide sanctions for the circumvention of technological protection measures.

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 the compliance with copyright laws and 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.

During the second half of 2002, BSA, as part of its awareness campaign in promoting Law 603, conducted a successful seminar addressed to accountants, managers, attorneys and anybody responsible in a corporation for filing an annual report. About 1,000 people participated in this event. BSA is still working closely with the *Superintendencias* and DIAN to have them issue implementing guidelines. To date, neither of the two agencies supervising implementation of this law have not yet taken action to implement it. Both agencies should take public steps towards implementation such as, for example, issuing implementing regulations, making public announcements to companies within their jurisdiction, training audit staff, and conducting audits.

Criminal Code and Criminal Procedure Code Revised

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 from one-to-three up to three-to-five years. The code also contains provisions on violation of technological protection measures and rights managements, both key obligations of the WIPO treaties. Unfortunately, in piracy cases the penal code allows home arrests or bail during the process and suspends any sentences of up to three years. In practical terms, this scenario translates to no incarcerations for pirates.

COPYRIGHT AND REGIONAL TRADE NEGOTIATIONS

The negotiation of bilateral and regional free trade agreements (FTAs) is assuming increasing importance in overall U.S. trade policy. These negotiations offer an important opportunity to persuade our trading partners to modernize their copyright law regimes so they can maximize their participation in the new e-commerce environment, and to improve enforcement procedures. The FTA negotiations process offer a vital tool for encouraging compliance with other evolving international trends in copyright standards (such as fully implementing WIPO treaties obligations and extending copyright terms of protection beyond the minimum levels guaranteed by TRIPS) as well as outlining specific enforcement provisions which will aid countries in achieving effective enforcement measures in their criminal, civil and customs contexts.

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

Therefore, the IPR chapter in the FTAA should contain the highest levels of substantive protection and enforcement provisions possible. At a minimum, the IPR chapter should: (a) be TRIPS- and NAFTA-plus, (b) include—and clarify—on a technologically neutral basis the

obligations in the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty (WCT and WPPT), and (c) include modern and effective enforcement provisions that respond to today's digital and Internet piracy realities. Despite the existence of these international obligations, many countries in the Western Hemisphere region fail to comply with the TRIPS enforcement obligations, both in their legislation and in practice. It is in the area of enforcement that some of the greatest gains for U.S. and local copyright creators can be achieved.

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2003 SPECIAL 301 REPORT

ECUADOR

EXECUTIVE SUMMARY

Special 301 recommendation: IIPA recommends that Ecuador be added to the Special 301 Watch List due to the government's continued inability to achieve effective copyright enforcement (in administrative, criminal and civil cases) along with a dangerous provision in a 1999 education law which purportedly grants unwarranted licenses for software. Ecuador currently does not appear on any 301 lists, but has fluctuated between no-listing, the Watch List and the Priority Watch List since 1992.

Overview of key problems: The copyright industries continue to confront high piracy levels in Ecuador due to insufficient IPR enforcement in the country. Estimated 2002 trade losses due to piracy were approximately \$25.8 million. Some of the problems that the copyright industries face in Ecuador include:

- Dramatic decreases in IPR enforcement since 2001.
- Delays in the creation of specialized IP courts despite the requirement in the 1998 law mandating its creation.
- Reluctance by the courts to issue *ex parte* warrant searches, requiring the aggrieved party to submit direct evidence of intellectual property infringement.
- High judicial bonds or the lack of criteria for posting bonds before granting a seizure order creating disincentives for rightsholders to seek judicial action.
- Courts have recently required copyright owners to file their petitions for civil *ex parte* action through the random assignment process despite the fact that current regulations provide otherwise (in addition, the random assignment process presents problems with leaking of information).
- Regarding administrative copyright enforcement, the National Copyright Authority (IEPI) has little or no presence within the Ecuadorian community, making its enforcement ability very weak.
- The software industry is very concerned about a provision in the 1999 education law which purports to give educational institutions free software licenses. The provision is poorly drafted and generates false expectations among educational institutions.
- The recorded music market is 90 percent pirate.
- The lack of any type of enforcement promotes local piracy and also exports to neighboring Colombia.

Actions which the government of Ecuador should take: To improve IPR enforcement in Ecuador, the government should take the following actions in 2003:

- Request the National Judiciary Council to appoint specialized judges for intellectual property matters as provided by law.

- Implement and execute the tools and remedies provided in the Copyright Law of 1998 and regulations in which the petitions for *ex parte* civil orders are excluded from the random assignment process.
- Educate judges on intellectual property issues until the specialized IPR courts are created.
- Urge IEPI to have and maintain adequate human resources to enforce its responsibilities under the copyright law, to train its officials, and to create a better salary structure.
- Amend the provision of the Education Law of 1999.
- Create special police anti-piracy task forces in Quito and Guayaquil that will address the problems of pirate street vendors, distributors and manufacturers.

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

INDUSTRY	2002		2001		2000		1999		1998	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Business Software Applications ²	5.5	59%	6.9	62%	8.2	65%	20.5	71%	12.7	73%
Records & Music	18.0	90%	18.0	90%	N/A	N/A	N/A	N/A	N/A	N/A
Motion Pictures	N/A	95%	N/A	95%	N/A	95%	N/A	95%	N/A	95%
Entertainment Software	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
Books	2.3	N/A	2.3	N/A	N/A	N/A	N/A	N/A	N/A	N/A
TOTALS	25.8		27.2		N/A		N/A		N/A	

Although Ecuador currently does not appear on any of the Special 301 lists, it does receive preferential trade benefits under two U.S. trade programs, both of which contain IPR

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

² BSA's estimated piracy losses and levels for 2002 are preliminary, and will be finalized in mid-2003. In IIPA's February 2002 Special 301 filing, BSA's 2001 estimates of \$9.5 million at 68% were identified as preliminary; BSA finalized its 2001 numbers in mid-2002, and those revised figures are reflected above. BSA's trade loss estimates reported here represent losses due to piracy which affect only U.S. computer software publishers in this country, and differ from BSA's trade loss numbers released separately in its annual global piracy study which reflects losses to (a) all software publishers in this country (including U.S. publishers) and (b) losses to local distributors and retailers in this country.

standards.³ Responding to the U.S. government's request for comments regarding countries' eligibility for ATPDEA benefits, IIPA reported that Ecuador had failed to provide adequate and effective protection for U.S. copyright owners, especially under the enhanced standards outlined in the ATPDEA.⁴ Given this failure to meet the standards established in the statute, IIPA indicated that it would be appropriate to deny eligibility status to Ecuador. Realizing, however, that the U.S. government may choose to serve U.S. interests by extending ATPDEA benefits, IIPA requested that the U.S. government obtain written commitments on Bolivia's actions to meet the IPR standards of the ATPDEA *before* designation was officially conferred. One of the key discretionary criteria of these programs is that Ecuador provide "adequate and effective" protection of intellectual property rights to U.S. rightsholders.

COPYRIGHT PIRACY IN ECUADOR

Computer software piracy in Ecuador consists primarily of end-user piracy and some hard-disk loading. With hard-disk loading, Ecuadorian resellers load unlicensed software onto computer hardware and sell the package to an end user. End users' piracy rates remain high among Ecuadorian businesses of all sizes, from small family businesses to large financial institutions. Estimated trade losses due to business software piracy in Ecuador were \$5.5 million in 2002, with an estimated piracy level of 59%.

The music industry contacted police authorities in Quito and Guayaquil to organize a campaign against piracy. Unfortunately, nothing was done during the course of the year and piracy continues to strangle the local market, with estimated trade losses due to music recording amounting to \$18 million. In addition, Ecuador also serves as a base to replicate and export pirate product to Colombia. Local customs authorities have shown no interest in developing border measures to prevent exports of illegal product.

COPYRIGHT LAW IN ECUADOR AND RELATED ISSUES

The Intellectual Property Law of 1998

On May 28, 1998, Ecuador enacted an intellectual property law (IPL), which covers all aspects of intellectual property, from copyrights to trademarks to patents, as well as semiconductor chip protection, industrial designs, utility models and unfair competition. It also provides for a complete set of procedures, including preliminary enforcement measures, border enforcement, statutory damages, and new criminal offenses, including the criminalization of

³ For the first 11 months of 2002, \$69.6 million worth of Ecuadorian goods (or 3.7% of Ecuador's total imports to the U.S. from January to November) entered the U.S. under the duty-free GSP code, representing a 181.7% increase over the same time period in 2001. In the first 11 months of 2002, \$69.3 million entered under the ATPA, representing a 67.6% decrease from the same period in 2001.

⁴ IIPA's September 16, 2002 Comments to the Trade Policy Staff Committee regarding the Designation of Eligible Countries as Andean Trade Promotion and Drug Eradication Act Beneficiary Countries are available on the IIPA website at http://www.iipa.com/rbi/2002_Sep16_ATPDEA.pdf.

certain acts regarding technological protection measures against infringement and electronic rights management information. The IPL's provisions relating to computer programs and enforcement are TRIPS-compliant. The IPL also generally incorporates obligations of the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT), and creates a set of enforcement mechanisms.

Finally, the IPL declares that the protection and enforcement of IP rights is in the public interest, and creates the Ecuadorian Intellectual Property Institute (IEPI) to administer all IP registration processes and administrative enforcement measures, including border enforcement.

The IPL also provides for specialized IP courts; however, due to operative, political and financial reasons, these courts have not been created yet by the National Judiciary Council.

Even though Ecuador's current substantive copyright legislation meets its bilateral (the IPR agreement with the U.S.), multilateral (TRIPS) and regional (Andean Pact Decision 351) obligations, the performance of Ecuador's judiciary remains deficient, in that the courts continue to interpret the law in such a way as to not enforce it. This, in turn, creates an environment of uncertainty for rightsholders.

The 1999 Education Law

Ecuador passed its Education Law in 1999 which includes a poorly drafted provision that purports to grant free software licenses to high educational institutions. The law mandates a broad "educational purposes" license to computer software for universities and technical institutes and requires "distribution" companies (there is no reference to the copyright holder) to donate the corresponding licenses to such educational institutions. This provision, known as Article 78, clearly conflicts with Ecuador's constitution as well as its obligations under the Berne Convention, TRIPS, and Decision 351 of the Andean Community regarding copyright compulsory licenses.

Since the law was issued in 1999, BSA has stated repeatedly that it believes that Article 78 is unconstitutional and should be amended. Due to this provision, BSA member companies have experienced cases in which representatives of educational institutions have argued that they are not obliged to buy software licenses and that the software owner should give its software away free of charge. In light of these experiences, BSA publicly announced its opposition to Article 78 and sent letters to different academic institutions explaining that these institutions are not entitled to free software licenses. In April 2001, BSA petitioned IEPI for a formal opinion regarding the legality of Article 78. However, to date, no opinion has been issued.

COPYRIGHT ENFORCEMENT IN ECUADOR

IEPI's anti-piracy enforcement efforts are weak and must improve.

The IEPI was created by the 1998 copyright law to implement the country's intellectual property laws. The 1998 copyright law provides IEPI with its own budget and with autonomy in financial, economic, administrative and operational matters. Since its creation, IEPI has been functioning with a small staff whose average income is lower than comparable entities. IEPI's

administrative structure to raise salaries is deficient and during the last two years, IEPI employees have not received salary increases. During 2002, IEPI employees decided to go on strike in order to put pressure on the government. The government has not yet resolved IEPI employees' petitions. Even though IEPI employees resumed work after two months, it is still possible that another strike could take place in the near future.

Since IEPI started its operation, it has performed some enforcement activities in Quito, but rarely outside the city. Furthermore, not everyone in Ecuador acknowledges IEPI as the National Copyright Office, and there is no clear understanding of what IEPI's role is with respect to the protection of intellectual property.

With regard to *ex officio* actions, IEPI has not carried out any administrative *ex officio* actions due to its lack of experience and lack of an adequate number of personnel. In order to change this situation, IEPI needs adequate human resources to enforce its responsibilities under the copyright law, to train its officials, and to create a much better salary structure.

Due to IEPI's lack of knowledge about software piracy issues, BSA has worked with IEPI, mainly in the area of education. BSA organized a two-day seminar which addressed software piracy and ways to identify counterfeit software products; during the second half of 2002 BSA organized an International Seminar on Intellectual Property issues with the sponsorship of USPTO. On the enforcement side, BSA has provided leads to IEPI for inspections. IEPI has conducted only a couple of inspections during 2002. A few others were not conducted due to its employees' strike. BSA expects IEPI to conduct more inspections during the first quarter of 2003. BSA believes that IEPI will only be successful if the Ecuadorian government supports IEPI as an autonomous institution with the power to increase the salaries of its staff and provide training.

Judicial action is still a barrier in effective enforcement.

The IPL provides for specialized courts for intellectual property matters; however, to date, due to operative, political and financial reasons, the National Judiciary Council has not yet created them. Thus the petitions for civil *ex parte* actions are brought before civil courts which have neither the knowledge nor the expertise necessary to attend these types of petitions. Due to this situation, seizure orders are either not granted, or are delayed.

An effective judicial system is necessary for adequate and effective copyright protection in Ecuador. During 2001 a few judges consistently applied the IPL in enforcement procedures with good results; however, during 2002 the situation worsened dramatically and enforcement remains a serious problem. Due to generalized court corruption, lack of knowledge of intellectual property matters by the Civil Courts and, in part, the perception among judges that intellectual property enforcement usually helps multinational companies to the disadvantage of poor Ecuadorians, judges have become reluctant to grant precautionary measures. Thus, before granting a seizure order, judges have required that copyright owners submit direct evidence of intellectual property infringement, pay high judicial bonds, and file civil *ex parte* actions through a random assignment process despite the fact that the regulation states otherwise. Few copyright infringement cases made it through the Ecuadorian judicial system last year and therefore no judicial decisions have been issued recently.

In 2001, BSA filed five civil complaints against end users. Since then, some of the experiences that BSA's local counsel has had with the judiciary while filing these petitions include the following:

- Even though the current regulation provides that precautionary measures can be filed directly before a specific judge without going through a random case assignment process, the majority of judges are rejecting the precautionary measures submitted directly to them, stating that such measures should be submitted to the random assignment process.
- Some judges are imposing bonds before granting a seizure order. The problem here is that there are no provisions in the IPL that establish how to determine the bond amount; therefore, it is left to the judge's discretion. In general, judges determine the bond amount as the same amount requested as damages by rightsholders, which discourages rightsholders to pursue the actions.
- According to the IPL, a judge shall grant a precautionary measure (such as a search and seizure raid) when a rightholder considers that a violation of his/her rights may have occurred and the violation is evidenced by an affidavit signed by a private investigator. Despite the clear wording of the law, in one case a judge stated that an affidavit is insufficient evidence and refused to grant a precautionary measure.

During 2002, based on the experience of the previous year, BSA brought some cases before IEPI and a couple before the civil courts. One civil court denied the precautionary measure requested on the grounds that copyright owners need to show direct evidence of a copyright infringement before a seizure order could be granted. Currently, the case is under appeal. The other court still has not made any decision. In August 2002, BSA filed a second petition for civil *ex parte action*; to date the civil court has not granted the precautionary measure.

After the enactment of the new intellectual property law in 1998, BSA organized a series of judicial seminars both in Quito and Guayaquil to introduce judges to the provisions of the new law. Due to the current situation, it is a high priority for BSA to keep working on the education of the civil judges on intellectual property issues until the specialized courts are created.

The BSA is very concerned about these trends in the Ecuadorian courts that amount to the arbitrary application and enforcement of the Ecuadorian copyright law.

COPYRIGHT AND REGIONAL TRADE NEGOTIATIONS

The negotiation of bilateral and regional free trade agreements (FTAs) is assuming increasing importance in overall U.S. trade policy. These negotiations offer an important opportunity to persuade our trading partners to modernize their copyright law regimes so they can maximize their participation in the new e-commerce environment, and to improve enforcement procedures. The FTA negotiations process offers a vital tool for encouraging compliance with other evolving international trends in copyright standards (such as fully implementing WIPO treaties obligations and extending copyright terms of protection beyond the minimum levels guaranteed by TRIPS) as well as outlining specific enforcement provisions

which will aid countries in achieving effective enforcement measures in their criminal, civil and customs contexts.

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

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

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2003 SPECIAL 301 REPORT

PERU

EXECUTIVE SUMMARY

Special 301 recommendation: IIPA recommends that Peru stay on the Special 301 Watch List in 2002 due to high piracy levels harming the legitimate copyright sectors. We request that the U.S. government continue high-level bilateral engagement contacts with Peru on copyright issues.

Overview of key problems: Effective enforcement—on both the administrative and the criminal levels—remains the copyright industries' primary concern in Peru. Estimated trade losses due to piracy of U.S. copyrighted materials in Peru were \$93 million in 2002. For the recording industry, piracy has devastated the market such that, in effect, no legitimate record businesses are operating in Peru. More police actions are needed, prosecutors must actively pursue piracy cases, and judges must impose deterrent sentences for Peru to meet its multilateral and bilateral copyright obligations. Administrative end-user actions should be INDECOPI's primary focus and such actions need to be improved so that deterrent fines are issued and collected. Peru also needs to improve its border controls. Progress is being made on the government's legalization of computer software; the Government Software Legalization Decree was published on February 13, 2003, and requires all public government entities to use legal software and establish effective controls to ensure such legal use between now and March 31, 2005.

Actions which the Peruvian government should take in 2003: To better enforce copyrights, the Peruvian government should:

- Make anti-piracy an issue of national priority;
- Improve border enforcement to seize suspicious copyrighted products as well as raw materials used in making those products;
- Pursue prosecutions and issue expeditious and deterrent sentences in piracy cases (almost all criminal sentences are suspended);
- Dedicate significantly more resources to criminal IPR enforcement (e.g., budget reallocation, adding at least one additional special prosecutor, making the appropriate arrangements with the responsible judicial bodies to create a judicial court which focuses on IPR issues);
- Conduct regular and concerted anti-piracy actions on the streets of high-traffic areas for piracy in Lima, specifically Mesa Redonda, Avenida Wilson, Galerías Garcilaso de la Vega, el Hueco, Polvos Azules and Polvos Rosados;
- Increase the involvement of the tax authorities (SUNAT) in all anti-piracy actions, including retailer actions;
- Have SUNAT work jointly with other government entities to fight piracy in corporate settings (e.g., SUNAT could request companies to provide information about licensing and software when it conducts its own inspections, and send such information to INDECOPI if it believes that a copyright violation has been committed);
- Improve the prosecution of software end-user actions by INDECOPI.

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

INDUSTRY	2002		2001		2000		1999		1998	
	Loss	Level								
Records & Music	70.2	98%	57.8	97%	55.0	96%	50.0	85%	50.0	85%
Business Software Applications ²	10.3	58%	11.2	60%	12.6	61%	22.2	63%	30.5	64%
Motion Pictures	4.0	50%	4.0	50%	4.0	75%	4.0	65%	4.0	50%
Entertainment Software	NA	NA	NA	NA	3.8	70%	NA	NA	NA	NA
Books	8.5	NA	9.0	NA	9.5	NA	10.0	NA	10.0	NA
TOTALS	93.0		82.0		84.9		86.2		94.5	

Peru is a beneficiary country of several U.S. trade programs—the Generalized System of Preferences (GSP) and the Andean Trade Preferences Act (ATPA), and the recently adopted Andean Trade Promotion and Drug Eradication Act (ATPDEA).³ These programs have standards of intellectual property rights which must be afforded to U.S. copyright owners. Responding to the U.S. government’s request for comments regarding countries’ eligibility for ATPDEA benefits, IIPA reported that Peru had failed to provide adequate and effective protection for U.S. copyright owners, especially under the enhanced standards outlined in the ATPDEA.⁴ Given this failure to meet the standards established in the statute, IIPA indicated that it would be appropriate to deny eligibility status to Peru. Realizing, however, that the U.S. government may choose to serve U.S. interests by extending ATPDEA benefits, IIPA requested that the U.S. government obtain written commitments on Peru’s actions to meet the IPR standards of the ATPDEA before designation was officially conferred. IIPA understands that Peru indeed made general commitments (a) to reduce piracy and (b) implement a software legalization decree by February 28, 2003.

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

² BSA’s estimated piracy losses and levels for 2002 are preliminary, and will be finalized in mid-2003. In IIPA’s February 2002 Special 301 filing, BSA’s 2001 estimates of \$13.5 million at 59% were identified as preliminary; BSA finalized its 2001 numbers in mid-2002, and those revised figures are reflected above. BSA’s trade loss estimates reported here represent losses due to piracy which affect only U.S. computer software publishers in this country, and differ from BSA’s trade loss numbers released separately in its annual global piracy study which reflects losses to (a) all software publishers in this country (including U.S. publishers) and (b) losses to local distributors and retailers in this country.

³ For the first 11 months of 2002, \$157 million worth of Peruvian goods (or 9% of Peru’s total imports) entered the U.S. under the duty-free GSP code, representing an increase of 154.3% over the same period in 2001. During this same 2002 time period, an additional \$309.1 million worth of Peruvian goods entered the U.S. under ATPA, representing a 54.4% decrease from the same time period in 2001. For more information on the history of Peru’s status on Special 301, please see Appendices D and E of this submission.

⁴ IIPA Comments to the Trade Policy Staff Committee regarding the Designation of Eligible Countries as Andean Trade Promotion and Drug Eradication Act Beneficiary Countries, September 16, 2002; available on the IIPA website at http://www.iipa.com/rbi/2002_Sep16_ATPDEA.pdf.

COPYRIGHT PIRACY IN PERU

The legitimate record industry in Peru has almost entirely vanished in the last two years. The estimated piracy level is now at 98%, one of the highest music piracy rates in the world. Pirate audio product in Peru appears in all formats—cassettes, CDs and now mostly CD-Rs (recordable CDs). Estimated trade losses due to record piracy in Peru rose to \$70.2 million in 2002. In recent years, many recording companies have closed because they could not compete with the overwhelming levels of piracy. Customs figures have indicate that there were more than 10 blank CD-Rs legally imported into the country for every single CD sold in the country. Record industry investigations show that every week thousands of blank tapes and CD-Rs are smuggled into the country through Tacna in Chile (Iquique-Arica) and then are distributed for illegal duplication around the country. Replication of the music is produced locally. APDIF PERU also works with COPERF, the Peruvian Recording Industry Association, and continues to run an anti-piracy campaign which results in police raids and the seizures of pirate product.

For the business software industry, the major challenge remains illegal duplication of business software within larger Peruvian private sector companies. The Business Software Alliance (BSA) reports that this problem of corporate copying has declined over the past five years, but it continues to be a serious problem, particularly within small and medium-sized organizations. Unfortunately, during the last seven months, INDECOPI's priority has shifted towards channel actions. INDECOPI should refocus its administrative enforcement priorities on end user piracy. To be sure, reseller piracy remains a very significant problem as well. Despite an impressive number of raids by the criminal justice authorities, pirate business software and other copyrighted products are openly available in commercial centers such as Galerías Garcilazo and Wilson, in Lima. Pirates frequently move their production facilities around Galerías Garcilazo and Wilson to evade police raids. The level of illegal use of business software in Peru was 58% in 2002, with losses due to the piracy of U.S. business software estimated to be \$10.3 million. These stable levels are due to the industry's effective anti-piracy program, despite only modest growth in the market for legitimate software.

Video and optical disk piracy is the most significant audiovisual piracy problem in Peru and is rampant in both video stores and street vendors, according to the Motion Picture Association of America (MPAA). The piracy situation in street markets is so pervasive that thousands of pirate videos and optical disks are sold in the street market one block away from the police headquarters. In addition to street sales, 80% of all video stores, estimated at 800, rent pirate videos. The piracy level continues at a high 50% level. Pirate videos and optical disks sell for approximately US\$2.00. Small-scale pirate duplication laboratories supply both video stores and street markets, and there is also a high incidence of back-to-back copying in video stores. Sales of optical disc pirated materials over the Internet has significantly increased. It has become usual to receive e-mails offering home deliveries of pirated material with increasingly high quality. DVD parallel imports have been also detected. Cable operators in the provinces generally use satellite TV decoders to steal signals and distribute protected audiovisual copyrighted programming via cable. Finally, pirate exhibitors use videos and optical disks for unauthorized exhibitions, damaging the theatrical distribution. Cease and desist letters have been sent, even to the public universities, with limited success. Losses to the U.S. motion picture industry due to audiovisual piracy in Peru are estimated to be \$4 million in 2002.

Book publishers report little change in the piracy problem over the last year. The more damaging forms of piracy—commercial book piracy and photocopying—still remain at high levels.

Trade books of U.S. origin now appear as pirated translations. There continue to be pirated translations of college texts, which have resulted in cheaper pirated editions. The economic crisis in Peru adversely affected sales of legitimate books over the past two years. Estimated trade losses due to book piracy in Peru dropped slightly to \$8.5 million in 2002 due to the difficult economy, not because of a decline in book piracy.

The Interactive Digital Software Association (IDSA) reports that piracy of entertainment software (including videogame CDs and cartridges, personal computer CDs, and multimedia products) is widespread in Peru.

COPYRIGHT ENFORCEMENT IN PERU

Peru's 1996 copyright law covers a broad range of economic rights in favor of the author/producer, as well as some of the highest levels of criminal penalties in Latin America. Criminal and administrative actions can be filed at the same time. Some of the copyright industries, primarily the recording and motion picture industries, prefer to use criminal procedures through the Public Ministry. Unfortunately, the criminal and administrative enforcement systems simply fail to deter piracy.

Criminal Enforcement

Deterrent criminal penalties and effective enforcement action by the police, prosecutors, and the administrative and judicial system remain essential, and much improvement in these areas is needed.

Police actions: Unfortunately, the special police unit trained in IPR enforcement matters is ineffective in handling street piracy, and only of limited effectiveness in fighting piracy in video clubs. For example, the Mesa Redonda neighborhood of Peru is full of all kinds of pirate product. The IPR industries agree that there is a strong need to allocate public resources to support the special IPR unit of the Fiscal Police (*Division de Investigacion de Delitos contra los Derechos Intelectuales*) in order to conduct effective anti-piracy investigations.

The piracy problem for the recording industry is severe. For example, thousands of pirated audiocassettes and illegal music CDs are sold in the neighborhood of Mesa Redonda, located one block away from the police and Public Ministry's headquarters. The Peruvian police continue to protect the pirates of Mesa Redonda (an area similar in its level of lawlessness to the Mexican district of Tepito and the Paraguayan city of Ciudad del Este).

Prosecutions: Prosecutors have been unable to move copyright cases along and judges have issued only few, non-deterrent sentences. In January 2003, a new special intellectual property rights prosecutor was appointed (Dr. Fredy Santiago Irigoyen) to replace the previous prosecutor. The new prosecutor's jurisdiction is still limited to metropolitan Lima and the northern suburbs, but it excludes the Province of Del Callao, which comprises the port and six other areas, and north Lima, which includes several of the most populated areas of Lima. The prosecutor handles matters of intellectual property rights exclusively; he seems willing to pursue copyright infringement cases, but is overwhelmed by a large caseload and budget cuts.

On November 28, 2001, the Public Ministry and INDECOPI created a Special IP Prosecutor's Office, and appointed two special prosecutors. Nevertheless, this office lacks effective

public budget support and will face severe problems in improving criminal enforcement.

The courts: Few criminal cases reach the Peruvian judiciary. When they do, judges do not impose deterrent sentences. Most cases result in suspended sentences. No copyright pirate has received deterrent sentences for criminal copyright infringements in Peru, despite the fact that the law contains adequate penalties.⁵ Under Article 57 of the Peruvian Criminal Procedures Code, sentences of four years or less are suspendable; the amendments made to the Criminal Code in 2002 did not change this. As a result, the courts usually suspend the defendant's sentence. The only deterrent factor is that the defendant is prohibited from leaving the country and from committing the same crime again (and even this deterrent is suspended if the defendant files an appeal).

During 2002, MPA conducted two raids in Peru. One of them was a criminal action filed in August 2002. The raid has been conducted by the special prosecutor's office in the street market of Las Malvinas, seizing over 7,000 illegal videos. MPA obtained 19 sentences of 1-2 years of imprisonment from older cases during this year. All of them were suspended. As such, the industry has no confidence in the judicial system.

In 2002, BSA commenced nine criminal actions through the public prosecutor against resellers suspected of software piracy. In addition, the police self-initiated more than 30 raids to reduce piracy in pirate bazaars such as Galerías Garcilazo and Wilson, Lima. Regarding the 2001 pending criminal cases, the court issued three decisions, two of which included prison sentences of two years and the third one included a prison term of one year. However, the prison terms were suspended because, under Peruvian law, only prison terms of four years or more are actually imposed.

SUNAT (National Tax Authority)

For the first time ever, SUNAT participated in several criminal copyright infringement cases in 2002. On April 29, SUNAT and INDECOPI raided 178 stands at Galerías Wilson, a shopping center known for the sale of counterfeit products. 700 policemen and 12 prosecutors conducted the raid, seizing 25 tons of software and computer equipment. Since no invoices were produced to justify the software found at the various stands, SUNAT ruled that the crime of tax evasion had occurred. This was the largest series of computer software piracy raids in Peruvian history. Despite this breakthrough, SUNAT has since been reluctant to take further action.

INDECOPI

Over the last three years (2000-2002), the BSA and INDECOPI have participated in successful, jointly branded software legalization campaigns in Peru, including joint publicity bearing the INDECOPI and BSA logos. The business software industry also continues to work with INDECOPI on many of its end-user actions. Despite being an effective entity, INDECOPI charges a discriminatory case fee to carry out inspections in software piracy cases, alleging that it needs to charge in order to pay the fees of the experts that accompany such case. The case fee is 60%

⁵ Article 217 of the 1996 copyright law provides for a penalty of not less than two years or more than six years in jail, and a fine of 30 to 90 times the average daily income for most infringements. Other articles provide even higher penalties. For acts involving commercial purposes, Article 218(d) specifies that the sanction is not fewer than two years or more than eight years in jail and fines of 60 to 100 average daily income wages. While these on-the-books provisions are strict, they are not actually imposed as a matter of practice by Peruvian judges.

higher than the one imposed on other copyright industries. Additionally, INDECOPi fails to compel collection of the fines it assesses.

A few years ago, the film industry began to work with INDECOPi to conduct raids against operators of illegal cable television systems. However, INDECOPi has proven generally ineffective in enforcement against video piracy as well as other cases involving the production, distribution and sale of pirate materials. In some cases, fines issued against pirates amounted to \$2 per infringing tape; the cost of a pirate tape is \$2, so this administrative fine can hardly be seen as a compelling deterrence to video piracy. In September 2002, MPA filed an administrative complaint with INDECOPi to support the new head of the Copyright Office (Dr. Martin Moscoso) in its efforts to conduct a joint industries raid in Arequipa, the second biggest city in Peru. The Copyright Office seized over 3,000 videos, among other illegal products.

The recording industry does not bring administrative enforcement cases in Peru.

The entertainment software industry had some success working with INDECOPi in 2001, with respect to the seizure of counterfeit goods being shipped into the country. In November 2001, INDECOPi along with customs officials, seized 12 containers full of counterfeit *Nintendo* and *Pokemon* products. Although INDECOPi conducted a hearing into the seized items in February 2002, none of the importers showed up. The seized products are being held for destruction pending INDECOPi's investigation.

Overlapping jurisdiction with police in 2002: During the last six months of 2002, the jurisdiction of INDECOPi's Copyright Office overlapped with the IP prosecutor (Fiscalía) in filing cases against resellers. This new issue has caused some delays in conducting software end-user cases. End-user piracy continues to be the greatest problem and BSA's main focus because entities frequently load copies of software onto more PCs than authorized by license. End-user piracy is present in both academic and commercial environments throughout the country.

Case resolutions in software actions and fine collections: The business software industry, unlike the audiovisual and the recording industries, has relied significantly on administrative actions by INDECOPi against end-users, and the level of success achieved over the years has been improving, although there are still some problems, mainly with the Copyright Office.

BSA prefers INDECOPi enforcement because its administrative proceedings continue to be faster than criminal proceedings, which seldom reach indictment and trial.⁶ In 2002, INDECOPi's Tribunal finally decided all BSA cases still pending before the Tribunal, some of them pending since 1998. In 2002, BSA commenced 28 end-user administrative actions through INDECOPi. Presently, INDECOPi has six cases awaiting decision.

In 2002, INDECOPi started imposing deterrent fines against end-users that first reached a settlement with BSA but later chose not to comply with the settlement terms. The fine imposed is 50% of the amount due under the settlement, with the possibility of higher fines for non-compliance. Despite this improvement, the Copyright Office continues to fail to collect the fines once imposed, so the end-user has little incentive to comply with the decision. This is precisely what happened in the Municipalidad del Callao, Cepeban and Transamerica cases. The Copyright Office also fails to

⁶ This also reflects the fact that the defendants in the business software cases are generally otherwise legitimate businesses or establishments that are using unauthorized software, and such cases are substantially distinct from the problems encountered by the audio and audio visual industries—i.e., the commercial manufacture, distribution and sale of piratical materials.

assess and collect the fines when the end-user refuses the inspection, such as with Mensajería El Rayo and Redesin. A further example of INDECOPI's surprising lack of recent cooperation is the CESCA case, where the defendant, CESCA, entered into a settlement agreement with BSA, under the auspices of INDECOPI. When CESCA's check failed to clear, BSA asked that CESCA pay by wire transfer. CESCA refused to do so, and INDECOPI refused to require the company to meet the payment stipulated in the settlement agreement, or indeed even to hold another meeting, claiming the matter had been resolved. BSA will now have to seek payment through the slow and inefficient civil court system.

Customs

Border measures in Peru are inadequate to stop the flow of pirated material into the country. Interventions by customs authorities SUNAT (formerly known as SUNAD) to seize suspect shipments are few. SUNAT has been working jointly with INDECOPI to take action on the ground to interdict and hold suspect merchandise.

First, Peruvian customs, by an internal directive or some regulatory means, should impose strict controls to check the legitimacy of IP goods entering and leaving Peru (e.g., music CDs, videos, business software, videogame software on all platforms, including CD-ROMs, personal computer CD-ROMs and multimedia entertainment products). Customs can consult with industry associations and local representatives about suspect shipments. Many of the copyright industries have participated in training aimed at Peruvian customs officials. Second, customs should also pay special attention to the value of the goods that are used as raw materials for the production of copyrighted products, such as recordable CDs, blank tapes, blank videos, etc., that enter Peru with what appear to be under-declared values.

On a slightly positive note, an IDSA member company, in cooperation with the Peruvian Customs Office, was able to seize a huge shipping container of counterfeit videogame products belonging to a Lima importer. The confiscated merchandise included a variety of products including educational computers, keyboards, joysticks and video games. A total of 5,500 video game systems with built-in Nintendo video games were seized. The products were all exported from China.

COPYRIGHT LAW AND RELATED ISSUES

1996 Copyright Law

Peru's copyright law (Legislative Decree No. 822) entered into force on May 24, 1996. This comprehensive legislation raised the level of protection toward the standards of both TRIPS and the Andean Community Decision 351.⁷ The law contains a broad scope of economic rights, as well as some of the highest levels of criminal penalties in Latin America. Some preliminary discussion has

⁷ On December 17, 1993, the Andean Community countries (Bolivia, Colombia, Ecuador, Peru and Venezuela) adopted Decision 351, which established a common regime on copyright and neighboring rights. This decision set up rudimentary enforcement mechanisms, including injunctive relief, seizure and confiscation of unlawful copies and devices, and damages, many of which need to be implemented into national legislation. There are several drawbacks to Decision 351, including its failure to provide protection against parallel imports, and to meet the civil and criminal enforcement standards found in NAFTA and TRIPS.

taken place regarding the modification of Decision 351 to make it TRIPS and WIPO treaties-compatible. At last report, no specific action on this matter has been taken by the Andean Community Copyright Office directors.

WIPO Treaties

Peru separately deposited its instruments of accession to both the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT). Both WIPO treaties provide the basic framework for the transmission of content in e-commerce. Peru needs to review its laws to ensure the effective implementation of the WIPO treaties' obligations. One of the copyright industries' challenges in substantive laws is to elevate the levels of protection to account for changes in the digital environment. The Internet fundamentally transforms copyright piracy from a mostly local phenomenon to a global problem. Modern copyright laws must respond to this fundamental change by providing that creators have the basic property right to control distribution of copies of their creations. Copyright owners must be able to control delivery of their works, regardless of the specific technological means employed. While the Peruvian law is quite good, several refinements would strengthen its protections, especially in the area of technological protection measures and rights management information, both key elements of the WIPO treaties.

Government Software Asset Management

On February 13, 2003, the Peruvian government published the Government Software Legalization Decree, Decreto Supremo No. 013-2003-PCM. The Decree states that all public entities should use legal software and, to that end, these entities must establish effective controls to ensure legal use of software. The Decree specifies that government agencies must budget sufficient funds for the procurement of legal software. The Decree also sets a deadline of March 31, 2005, for government agencies to provide an inventory of their software and to erase all illegal software. The Decree also delineates clear lines of responsibility and mechanisms for ensuring compliance with its provisions: the chief technology officer or other designated official must certify compliance. The Decree also provides for education campaigns aimed at public employees to inform them about licensing provisions and the content of the Legalization Decree, and further requires INDECOPI to publish a guide to ensure efficient software administration in the public sector. This is a major step forward that demonstrates the government's increased awareness of the value of managing its software assets in a systematic and thorough manner.

COPYRIGHT AND REGIONAL TRADE NEGOTIATIONS

The negotiation of bilateral and regional free trade agreements (FTAs) is assuming increasing importance in overall U.S. trade policy. These negotiations offer an important opportunity to persuade our trading partners to modernize their copyright law regimes so they can maximize their participation in the new e-commerce environment, and to improve enforcement procedures. The FTA negotiations process offers a vital tool for encouraging compliance with other evolving international trends in copyright standards (such as fully implementing WIPO treaties obligations and extending copyright terms of protection beyond the minimum levels guaranteed by TRIPS) as well as outlining specific enforcement provisions which will aid countries in achieving effective enforcement measures in their criminal, civil and customs contexts.

IIPA believes that the IPR chapter in the Free Trade Area of the Americas (FTAA) must be

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

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