



July 29, 2008

Secretary
International Trade Commission
500 E Street SW
Washington, DC 20436

Inv. No: 332-352
Re: Andean Trade Preferences Act: Effect on the U.S.
Economy and on Andean Drug Crop Eradication, 73
Fed. Reg. 30627 (May 28, 2008)

To the Commissioners:

The International Intellectual Property Alliance (IIPA) takes this opportunity to respond to the ITC's request for comments on the effect of the Andean Trade Preference Act (ATPA) on the U.S. economy and on Andean drug crop eradication.

IIPA reiterates our longstanding support for both the recently concluded Peru Trade Promotion Agreement (TPA) as well as the pending Colombia TPA. We believe that both these agreements raise the level of copyright law and enforcement obligations to the benefit of Colombian, Peruvian and U.S. creators.

IIPA's comments here focus on the need for the ATPA beneficiaries to meet their eligibility criteria regarding intellectual property rights protection and enforcement. In brief, copyright law reform, while critical to meeting the ATPA 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 ATPA, the ATPDEA, other U.S. trade programs nor the TRIPS Agreement.

About the IIPA

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 seven trade associations, each representing a significant segment of the U.S. copyright community. These member associations represent over 1,900 U.S. companies producing and distributing materials protected by copyright laws throughout the world.¹

Actual or Probable Effect of the ATPA on the U.S. Economy

Section 206(c) of the ATPA requires that the ITC report include discussion of the actual effect and/or probable effect that the ATPA will have on the U.S. economy generally and on the domestic industries affected by the Act.

¹ See www.iipa.com.

The U.S. copyright industries are one of the most vibrant sectors of our economy. On January 30, 2007, the IIPA released an economic report entitled *Copyright Industries in the U.S. Economy: The 2006 Report*, which details the economic impact and contributions of U.S. copyright industries to U.S. Gross Domestic Product, employment, and trade.² The latest data show that the “core” U.S. copyright industries accounted for an estimated \$819.06 billion or 6.56% of the U.S. gross domestic product (GDP) in 2005. These “core” industries were responsible for 12.96% of the growth achieved in 2005 for the U.S. economy as a whole (this means that the growth contributed by these core industries (12.96%) was almost double their current dollar share of GDP (6.56%)). In addition, the “core” copyright industries employed 5.38 million workers in 2005 (4.03% of U.S. workers) in 2005. And the report, for the first time, provides data on the estimated average annual compensation for a worker in the core copyright industries: \$69,839 in 2005, which represents a 40% premium over the compensation paid the average U.S. worker. Finally, estimated 2005 foreign sales and exports of the core copyright industries increased to at least \$110.8 billion, leading other major industry sectors.

As IIPA has noted in our prior filings with the USITC, we cannot directly connect the strength of the U.S. copyright-based industries here in the U.S. to the actual implementation of the ATPA itself. However, U.S. companies do suffer losses due to copyright piracy in these four Andean countries, though we are not able to provide a comprehensive estimate to evaluate the depth of such losses. The challenges faced by the copyright industries and national governments to enforce copyright laws grow dramatically as the forms of piracy shift from hard goods toward digital media and unauthorized electronic transmissions. Over the last few years, unauthorized “burning” of CDs has grown rapidly in Latin America, adversely affecting the ability of legitimate businesses engaged in the creation and distribution of copyrighted materials – recordings, computer software, videogames, books, and increasingly, DVDs – to compete against these pirated products. Government agencies (especially in Colombia and Peru) have yet to enforce software legalization program. Unauthorized photocopying on university and college campuses also should be halted. Border enforcement remains weak. Inadequate and ineffective copyright enforcement has failed to stem piracy and this continues to cause trade distortions and financial losses in the Andean region. Criminal and civil justice systems must work in a transparent and expeditious manner and apply deterrent penalties and remedies.

IIPA believes it necessary and prudent for the ITC to review the actual in-country intellectual property issues in this year’s exercise; we advocated this same review in our comments to the USITC two years ago in this same docket, where we also discussed, in detail, over view of both the ATPA and the ATPDEA’s IPR standards.³ To this end, our brief comments this year are again directed at the major challenges these four ATPA beneficiary countries have encountered in satisfying their current ATPA obligations to provide “adequate and effective protection” to U.S. copyright owners, as required under this program’s eligibility criteria.

IIPA believes that it is critical that all four of these Andean countries continue to take all appropriate actions to improve their respective efforts and results under their existing laws to combat copyright piracy, both in hard goods and the online environment, in their domestic markets.

Copyright Law Reform in the Four ATPA Countries

Comprehensive copyright laws, combined with effective enforcement of those laws, are the twin pillars necessary for copyright industries – both U.S. and local industries – to continue to grow. Many copyright sectors look to grow their markets overseas. As a result, the IPR standards found in the ATPA as

² See full report posted on the IIPA website at http://www.iipa.com/pdf/2006_siwek_full.pdf; a summary of this report is also available at <http://www.iipa.com/pdf/2006SiwekSummary.pdf>.

³ See IIPA letter to the USITC regarding its ATPA review, June 6, 2006, posted on the IIPA website at <http://www.iipa.com/pdf/IIPA%20Andean%20USITC%20ATPA%20Investigation%20final%2006082006.pdf>.

amended can provide a good foundation for these four countries to improve both their copyright laws and enforcement mechanisms to protect both their domestic rightsholders as well as foreign ones.

Colombia, Peru and Ecuador engaged in copyright law reform efforts during the 1990s. In fact, these three countries have already deposited their instruments of accession to both the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT). However, further revisions to the copyright laws (and related laws such as criminal and civil codes) in Peru (and Colombia) will be needed to fully incorporate the WIPO Treaties as well as the provisions in the IPR Chapter of the Trade Promotion Agreements.

On April 25, 2008, USTR decided to continue placement of all four of these Andean nations on the annual Special 301 "Watch List" for concerns over their respective intellectual property regimes.⁴ The text of USTR's 2008 Special 301 decisions on these four countries appears below, along with IIPA's additional summary observations about the copyright situation locally.

PERU

IIPA had hoped that in 2007, the Peruvian IP enforcement agencies would be taking strong actions to enforce its current copyright laws to combat widespread piracy. Unfortunately, there remain to this day numerous disturbing enforcement-related developments that weaken the likelihood of any effective criminal, administrative and even civil copyright enforcement in Peru. Piracy in the Peruvian marketplace continues to be a significant business obstacle. Optical disc piracy and street piracy remain basically uncontained. The government has chosen to issue a fourth postponement in the implement of its program to legalize software within government agencies. Illegal photocopying on university campuses continues. Border control remains weak. More police actions are needed, prosecutors should pursue piracy cases, and judges should impose the deterrent-level sentences permitted in the criminal code. Furthermore, administrative enforcement by INDECOPI (El Instituto Nacional de Defensa de la Competencia y de la Protección de la Propiedad Intelectual) has deteriorated, and both its court and a constitutional court have issued alarming interpretations that will threaten the viability of effective enforcement, especially for the business software sector that relies on *ex parte* inspections.

IIPA filed a detailed report with USTR in the course of the 2008 Special 301 process.⁵ The estimated trade losses due to copyright piracy in Peru in 2007 amounted to \$99.5 million.⁶ We understand the legislative drafting is well underway regarding the domestic implementation of certain IPR and border measures found in the PTPA.

USTR 2008: Peru will remain on the Watch List in 2008. The United States remains concerned with the IPR situation in Peru. The U.S. copyright industries report that piracy levels remain high. The United States encourages the Government of Peru to continue its efforts to combat IPR piracy by: conducting more raids and seizures; ensuring that arrests of IPR infringers result in convictions and the imposition of deterrent-level sentences that include imprisonment; applying effective civil remedies; and giving increasing attention to IPR enforcement measures at its borders. Additional IPR areas of concern include inadequate protection against unfair commercial use of undisclosed test or other data generated to obtain marketing approval for pharmaceutical products, and inadequate protection for patents, copyrights, and trademarks. The United States will work closely with Peru to

⁴ USTR's 2008 Special 301 decisions, posted at http://www.ustr.gov/assets/Document_Library/Reports_Publications/2008/2008_Special_301_Report/asset_upload_file193_14872.pdf.

⁵ IIPA 2008 Special 301 report on Peru, filed February 13, 2008, at <http://www.iipa.com/rbc/2008/2008SPEC301PERU.pdf>.

⁶ IIPA Regional Chart of 2007 estimated trade losses and piracy levels, issued June 17, 2008, posted at <http://www.iipa.com/pdf/2008USTRdecisionsSpecial301AmericasFinal2007LossLevel061708.pdf>.

ensure implementation of Peru's IPR commitments under the United States – Peru Trade Promotion Agreement (PTPA), in which Peru has committed to implement high standards of IPR protection through its legal structures and enforcement practices. The United States urges Peru to strengthen IPR protection and enforcement to ensure that it will meet its international and PTPA commitments.

COLOMBIA

The copyright industries report that the legitimate copyright markets remain threatened by widespread piracy. Optical disc piracy is on the rise and street piracy remains uncontained. Piracy at Internet cafés also has grown in the last year, and some anti-piracy actions are being taken. The recording industry reports piracy levels of approximately 13 million physical units and 200 million illegal downloads. More police actions and administrative investigations are needed, prosecutors must pursue piracy cases, and judges should impose the deterrent-level sentences afforded in the amended criminal code. Border control remains weak. Government agencies have yet to enforce software legalization program, or stop illegal photocopying on university campuses. In our 2007 Special 301 filing, IIPA suggested a long list of recommended actions that the Colombian government could take to improve the on-the-ground situation and strengthen the legitimate market for copyrighted materials.⁷

USTR 2008: Colombia will remain on the Watch List in 2008. The United States commends Colombia for its continued actions to combat IPR violations through launching public awareness campaigns, conducting raids, prosecuting IP infringers, and designating special IP judges. The United States remains concerned, however, that further IPR improvements are needed, including efficient prosecutions of IP infringers, issuance of deterrent-level criminal sentences by courts, and stronger IPR border enforcement. The United States will continue to monitor Colombia's compliance with its bilateral and multilateral obligations to protect against unfair commercial use of undisclosed test or other data generated to obtain marketing approval for pharmaceutical products, and encourages Colombia to develop procedures and remedies to prevent the issuance of marketing approvals for patent-infringing pharmaceutical products. The United States will work with Colombia to achieve progress on these pressing IPR issues through the implementation of its IPR commitments under the United States – Colombia Trade Promotion Agreement (CTPA), in which Colombia has committed to implement high standards of IPR protection through its legal structures and enforcement practices.

ECUADOR

IIPA has recommended for years that it is essential that Ecuador take immediate steps to improve its ineffective record on enforcement and reducing piracy levels. Those copyright sectors who remain in the Ecuador market indicate that 2006 was a difficult year to obtain effective criminal and civil enforcement. In fact, the software industry pursued only administrative remedies last year. The administrative authority, IEPI, rarely focuses actions outside of Quito and its resources are strained. Border controls remain weak. Given the poor enforcement situation in Ecuador, very few U.S. copyright-based industries have active anti-piracy operations in this market, let alone active commercial distribution channels. Estimated trade losses due to copyright piracy in Ecuador are not presently available.

USTR 2008: Ecuador will remain on the Watch List in 2008. Ecuador made some progress in 2007 towards eliminating its backlog of pending patent applications. Overall IPR enforcement in Ecuador remains problematic, however, and Ecuador has not yet established the specialized IPR courts required by its 1998 IPR law. Concerns also remain over Ecuador's lack of effective protection against unfair commercial use of undisclosed test or other data generated to obtain marketing approval for pharmaceutical products, as well as Ecuador's lack of an effective coordination system between its health and patent authorities to prevent the issuance of marketing approvals for unauthorized copies of patented pharmaceutical products. The United States urges Ecuador to strengthen its IPR regime and to enhance its IPR enforcement efforts, and will monitor Ecuador's efforts to address these IPR concerns.

⁷ IIPA's 2007 Special 301 filing on Colombia, available at <http://www.iipa.com/rbc/2007/2007SPEC301COLOMBIA.pdf>.

BOLIVIA

IIPA has long noted that 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 up to its obligations under the WTO TRIPS Agreement, let alone its ATPA IPR obligations and the high standards set out by the WIPO Treaties. In addition, the Bolivian government should adopt and implement a national anti-piracy effort to combat copyright infringement, significantly improve on-the-ground anti-piracy enforcement efforts, and increase the level of penalties for copyright infringement to more deterrent levels (in both the criminal code and in any copyright law reform). Given the weak law and poor enforcement, very few U.S. copyright-based industries have active anti-piracy operations in this market, let alone active commercial distribution channels. Estimated trade losses due to copyright piracy are not presently available.

USTR 2008: Bolivia will remain on the Watch List in 2008. Piracy and counterfeiting persist in Bolivia, and there were no notable improvements to Bolivia's IPR regime during 2007. As a WTO member, Bolivia committed to increase its levels of IPR protection substantially. The United States encourages Bolivia to accede to and implement the WIPO Internet Treaties. In addition to rampant piracy and counterfeiting in Bolivia, concerns remain about the erosion of IP protection for pharmaceutical products in Bolivia. The United States encourages Bolivia to improve its IPR protection regime in 2008, as well as increase its IPR enforcement efforts to combat piracy and counterfeiting.

Conclusion

IIPA appreciates the opportunity to convey to the ITC our views on the current situation, both in terms of substantive copyright legislation and piracy/enforcement, in the four ATPA countries of Peru, Colombia, Ecuador and Bolivia. The IPR criteria of the ATPA (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. Finally, IIPA believes that it is critical that these ATPA-eligible countries continue to take all appropriate actions now to improve their respective efforts under their existing laws to combat copyright piracy in their domestic markets.

Respectfully submitted,



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