



May 12, 2010

Submitted via regulations.gov

Ms. Carmen Suro-Bredie
Chairman, Trade Policy Staff Committee
Office of the U. S. Trade Representative
1724 F Street NW
Washington, DC 20508

Re: USTR Report on Operation of the Andean Trade
Preferences Act (ATPA) -- Request for Public
Comments Regarding Beneficiary Countries,
75 Fed. Reg. 19669 (April 15, 2010)

To the Trade Policy Staff Committee:

The International Intellectual Property Alliance (IIPA) takes this opportunity to respond to the TPSC's request for comments on countries' participation in the Andean Trade Preferences Act (ATPA), as amended. The TPSC will be preparing a report for the U.S. Trade Representative to submit to the U.S. Congress later this year.

Overview on Copyright Concerns in the Andean Region

IIPA's comments here focus on the continuing difficulties the ATPA beneficiary countries experience with providing adequate and effective copyright protection and enforcement. Copyright law reform, while critical to meeting the ATPA standards, is not sufficient in and of itself: the statute requires both high standards of substantive copyright law as well as effective enforcement of those laws in-country.

IIPA reiterates our longstanding support for the recent entry into force of the 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. Finally, IIPA also supports the commencement in March 2010 of negotiations intended to result in a Trans-Pacific Partnership FTA (TPP), of which Peru is also a participating member.

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.

On July 20, 2009, the IIPA released an economic report entitled *Copyright Industries in the U.S. Economy: The 2003 - 2007 Report*, the twelfth study written by Stephen Siwek of Economists Inc. for the IIPA. This report details the economic impact and contributions of U.S. copyright industries to U.S. Gross Domestic Product, employment, economic growth and trade. This is the third IIPA report which follows the statistical methodology outlined by WIPO in its 2003 *Guide on Surveying the Economic Contribution of the Copyright-Based Industries*.

The latest data from our report show that the “core” U.S. copyright industries accounted for an estimated \$889.1 billion or 6.44% of the U.S. gross domestic product (GDP) in 2007. These “core” industries were responsible for 22.74% of the real economic growth achieved by the U.S. economy in 2006-2007. In addition, the “core” copyright industries employed 5.6 million workers in 2007 (4.05% of U.S. workers) in 2007. Our report also provides data on the estimated average annual compensation for a worker in the core copyright industries: \$73,554, which represents a 30% premium over the compensation paid the average U.S. worker. Finally, estimated 2007 foreign sales and exports of the core copyright industries increased to at least \$126 billion, leading other major industry sectors. Those sectors include: chemicals and related products (not including medicinal and pharmaceutical products); motor vehicles, parts and accessories; aircraft and associated equipment; food and live animals; and medicinal and pharmaceutical products.

Difficulties Facing the Copyright Industries in this Region

IIPA’s comments this year are directed at summarizing the difficulties these Andean countries have encountered in providing “adequate and effective protection” to U.S. copyright owners. IIPA believes that it is critical that these four Andean countries (three of which are current ATPA beneficiary countries) continue to take all appropriate actions to improve their respective efforts and results under their existing laws to combat copyright piracy in their domestic markets. All four of these nations currently have bilateral IPR obligations as well as international obligations to provide certain high levels of copyright protection and effective enforcement. Importantly, the recent Trade Promotion Agreements (in force with Peru, pending U.S. approval for Colombia) also contain high copyright and enforcement standards as part of that framework.

Comprehensive copyright laws combined with effective and consistent enforcement of those laws, are the twin pillars necessary for copyright industries – both U.S. and local industries – to continue to grow. Many of the U.S. copyright sectors look to grow their markets overseas, and indeed rely on the worldwide distribution of their valuable content.

In recent 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 DVDs – to compete against these pirated products. Government agencies (especially in Peru and Colombia) have yet to enforce software legalization programs. Unauthorized photocopying on and near university and college campuses should be halted. Border enforcement in the region is generally weak. However, more recently the problems of Internet piracy have infiltrated many of the Latin American countries, including those in the Andean region. The hurdles 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. For example, there is basically no legitimate market for physical copies of sound recordings left in Peru, the only viable market opportunity there involves electronic distribution of recorded music. Criminal and civil justice

systems must work in transparent and expeditious manners and apply deterrent penalties and remedies. To date, inadequate and ineffective copyright enforcement has failed to stem piracy and this continues to cause trade distortions and financial losses in the Andean region.

Observations on the IPR provisions in the ATPA

For the purposes of preparing your report to Congress, three aspects of the international copyright and enforcement obligations under the ATPA IPR framework bear emphasizing (see Appendix A for the key statutory language).

First, the WTO TRIPS Agreement is widely recognized as containing the minimum standards of IPR protection. With respect to copyright,¹ 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 importantly, 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.

Second, the ATPDEA-eligible countries must provide protection “consistent with or greater” than the levels found in the WTO TRIPS Agreement.² 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 primarily 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 World Intellectual Property Organization (WIPO) developed two new treaties that created distinct obligations in the digital realm. 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. Currently 88 countries have ratified the WCT and 86 countries have ratified the WPPT. Of the ATPDEA beneficiary countries, Colombia, Ecuador and Peru are members of the WCT and the WPPT; Bolivia is not.

Finally, we reiterate that copyright law reform, while critical to meeting the ATPA and ATPDEA standards, is not sufficient in and of itself. To repeat, IIPA believes that one of the most immediate problems

¹ 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.

² This new TRIPS-plus standard in the ATPDEA tracks that found in the CBTPA (Caribbean Basin Trade Partnership Act).

in this region is the difficult these Andean countries have with adequately and effectively enforcing their current copyright laws.

Copyright Issues in these Four Andean Countries

On April 30, 2010, USTR decided to continue placement of all four of these Andean nations on its annual Special 301 “Watch List” for concerns over their respective intellectual property regimes.³

PERU

In February 2010, IIPA filed a comprehensive report on recent copyright and enforcement developments in Peru.⁴ USTR’s recent Special 301 report also notes similar concerns:

“USTR 2010 Special 301: Peru will remain on the Watch List in 2010. Peru has enhanced its IPR legal framework by enacting legislation designed to implement its obligations under the United States-Peru Trade Promotion Agreement (PTPA). Additionally, Peru has strengthened its Intellectual Property Office (INDECOPI) and created a National Strategic Plan to combat counterfeiting and piracy. However, several concerns remain, including continued overall weak enforcement resulting in the widespread availability of pirated and counterfeit goods. A further concern is that courts fail to impose deterrent penalties in criminal IPR cases and against businesses found to have engaged in infringing activity. There is a continuing need for measures to prevent government use of unlicensed software. In connection with its obligations under the PTPA, Peru should clarify its system for protecting undisclosed test or other data submitted to obtain approval of agricultural chemical products, particularly in light of recent measures that appear to provide for automatic approval of generic products. The United States will work closely with Peru on these and other issues through the framework provided by the PTPA.”

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, and some anti-piracy actions have been taken. 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 to stop illegal photocopying on university campuses. USTR also has identified several challenging IPR enforcement issues in this country:

USTR 2010 Special 301: Colombia will remain on the Watch List in 2010. Colombia continues to improve its efforts to combat IPR infringement through enforcement actions. Coordination of the many agencies responsible for enforcing IPR improved in 2009; however, these agencies need additional training and resources. There are also concerns over the lack of deterrent sentences. Another area of improvement has been the reduction in patent approval times from more than six to less than five years, in keeping with commitments Colombia made during the U.S.-Colombia Trade Promotion Agreement negotiations. The United States encourages Colombia to develop an effective system to address patent issues expeditiously in connection with applications to market pharmaceutical products. The United States also encourages Colombia to develop a mechanism to improve enforcement against IPR infringement on the Internet, and notes that optical disc piracy

³ USTR’s 2010 Special 301 Report is posted at <http://www.ustr.gov/about-us/press-office/reports-and-publications/2010-3>.

⁴ IIPA’s 2010 Special 301 Submission on Peru, February 18, 2010, is posted at <http://www.iipa.com/rbc/2010/2010SPEC301PERU.pdf>.

remains a concern. The United States looks forward to working with Colombia to address these issues in the coming year.

ECUADOR

Ecuador needs to take steps to improve its ineffective record on enforcement and reducing piracy levels. Those few copyright sectors that remain in the Ecuador market indicate that it remains difficult to obtain effective criminal and civil enforcement. Given the generally 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. USTR similarly noted the following IPR problems in Ecuador:

USTR 2010 Special 301: Ecuador will remain on the Watch List in 2010. Ecuador's Intellectual Property Institute continued to make progress in 2009 by continuing to reduce the processing time of patent applications, and by working to implement an electronic system for patent and trademark applications. The government is also undertaking public awareness and training efforts. However, serious concerns remain about overall IPR enforcement efforts, which decreased in 2009. Industry reported increases in piracy of music, movies, books, and business and entertainment software. Dedicated IPR units created in 2008 appear to lack the level of specialization required to be effective, and Ecuador has not yet established the specialized IPR courts required under its 1998 IPR law. The United States encourages Ecuador to provide effective protection against unfair commercial use, as well as unauthorized disclosure, of undisclosed test or other data generated to obtain marketing approval for pharmaceutical products, as well as to provide an effective system to address patent issues expeditiously in connection with applications to market pharmaceutical products. The United States will continue to monitor recent developments concerning compulsory licensing of pharmaceutical and agricultural chemical products in Ecuador, bearing in mind the discussion of the Doha Declaration on TRIPS and Public Health in Section I of this report. The United States urges Ecuador to continue public awareness campaigns, and to strengthen its IPR protection and enforcement efforts.

BOLIVIA

Effective June 30, 2009, Bolivia was no longer an ATPA eligible beneficiary country. Nevertheless, we take this opportunity to point out a few salient issues related to copyright matters in this country. The copyright law in Bolivia falls far short of its current bilateral and multilateral copyright obligations in numerous respects. 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. USTR's 2010 Special 301 decision also identified these same problems:

USTR 2010 Special 301: Bolivia will remain on the Watch List in 2010. Piracy and counterfeiting, including counterfeiting of medicines, continue to be widespread in Bolivia. There continues to be a need for significant improvements to the Bolivian IPR regime. The Bolivian copyright law should be amended to conform to international standards. Despite a notable enforcement action resulting in the seizure of more than 30 tons of counterfeit pharmaceutical products and corresponding prosecutions, substantial additional resources and a commitment by enforcement and judicial authorities are needed to improve enforcement actions against piracy and counterfeiting. The United States continues to urge Bolivia to improve its IPR protection and enforcement regimes, and to further its IPR enforcement efforts.

Conclusion

IIPA appreciates this chance to share with the TPSC our views on the current situation regarding substantive copyright legislation, piracy and enforcement in Peru, Colombia, Ecuador and Bolivia. The IPR criteria of the ATPA, as amended (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. It is important 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 and strengthen legitimate distribution opportunities in their domestic markets.

Respectfully submitted,

A handwritten signature in black ink that reads "Maria Strong". The signature is written in a cursive, flowing style.

Maria Strong
for the International Intellectual Property Alliance

APPENDIX A
SUMMARY OF ATPA AND ATPDEA PROVISIONS
ON
INTELLECTUAL PROPERTY PROTECTION

Andean Trade Preferences Act (ATPA): The ATPA⁵ contains provisions for the protection of intellectual property rights similar to those in the Caribbean Basin Initiative⁶ and the Generalized System of Preferences.⁷ The ATPA has 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 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)⁸:

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; ...

Andean Trade Promotion and Drug Eradication Act (ATPDEA): 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.

⁵ 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.

⁶ 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).

⁷ 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)).

⁸ See 19 U.S.C. §§ 3202(d)(9) and 3202(d)(10).

The ATPDEA IPR-related provisions are found in the revised Section 203(b)(6)(B).⁹ 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.

On October 31, 2002, President Bush issued Presidential Proclamation 7616 designating Bolivia, Colombia, Ecuador and Peru as ATPDEA beneficiary countries. Later, the December 2006 Trade Bill granted a six-month extension for these four countries, and Congress later agreed to extend the ATPA program until February 29, 2008, followed by another extension through December 30, 2008. On October 16, 2008, President Bush signed legislation extending ATPA benefits by waiving duties on imports from Bolivia, Colombia, Ecuador and Peru in return for strengthened anti-drug cooperation; that law limited the extension for Ecuador and Bolivia to six months (through June 30, 2009), but allowed an additional six-month extension if the two countries cooperate with U.S. anti-drug efforts.

However, in Proclamation 8323 of November 25, 2008, President Bush determined that Bolivia no longer satisfies the eligibility criteria related to counternarcotics and suspended Bolivia's status as a beneficiary country for purposes of the ATPA and ATPDEA. In a June 30, 2009 report to Congress, President Obama did not determine that Bolivia satisfies the requirements set forth in section 203(c) of the ATPA (19 U.S.C. 3202(c)) for being designated as a beneficiary country. Recently, Congress and the Obama Administration extended ATPA benefits to Colombia, Ecuador and Peru (but not Bolivia) through December 31, 2010.

⁹ Andean Trade Promotion and Drug Eradication Act, Title XXXI of the Trade Act of 2002, Pub. L. No. 107-210 (2002).