

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.