

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2004 SPECIAL 301 REPORT

COLOMBIA

EXECUTIVE SUMMARY

Special 301 recommendation: IIPA recommends that Colombia be elevated to the Priority Watch List in 2004.

Overview of key problems: Piracy continues to dominate the Colombian market, greatly affecting legitimate sales, most notably in the music sector. In a very troubling development, pirates are increasingly turning to new media—primarily CD-R and DVD-R, as the medium for piracy, and the government has demonstrated little, if any, determination to address this large and growing problem. If Colombia aspires to be a Free Trade Agreement partner with the U.S., it is essential that it begin immediately to address the deteriorating situation. It is our hope that this filing, and the elevation of Colombia to the Priority Watch List will operate as a call to arms to the Government of Colombia to finally and meaningfully address their failure to provide adequate and effective protection to copyright owners—both their own nationals, and for the purposes of this submission, US creators. Should Colombia fail to act, it will create tremendous uncertainty surrounding their preparedness to take on the obligations of a FTA, and will cast doubt on their reliability as a FTA partner. We hope that this will not be the case.

Colombia must take actions to ensure that its criminal, administrative, civil and border procedures will meet its existing bilateral copyright enforcement obligations (both in substance and in practice). Unfortunately, Colombia's enforcement efforts to combat widespread piracy have been inadequate, ineffective and not deterrent. The growth of illegitimate CD-R replication continues to undermine what is left of the legitimate music market. Despite some raids by the police in Bogota and Medellin, local flea markets like San Andresitos are infested with pirate product. Colombian authorities have done little to investigate pirate duplication and distribution facilities, which continue to feed a vast network of street vendors. Illegal use of business software in small and medium-sized businesses is widespread, with rates higher in areas outside the major cities. While criminal raids continue at a modest level, one breakdown is that few effective prosecutions for copyright infringement are pursued. Lengthy delays in prosecution continue to mean that there is no effective deterrence against piracy. With respect to administrative enforcement of cable piracy and signal theft, CNTV's efforts continue to require improvement. Furthermore, the regulatory agencies and the tax authority must improve efforts to enforce Law No. 603, which requires Colombian corporations to certify compliance with copyright laws in annual reports they file with regulatory agencies. To make matters worse, customs authorities have not taken any action against the inflow of blank CD-Rs that are clearly imported for piracy purposes. Above all, the Colombian government has not taken any real interest in fighting piracy as a priority and developed a policy that would involve all the different agencies that need to take an active part in an effective campaign.

Actions which the Colombian government should take in 2004

- Have the President instruct the Attorney General, Customs and the Finance Ministry to escalate their investigations and actions to enforce the copyright law by going after infringing activities both in the streets and against larger, organized distributors of pirated materials;
- Expedite prosecutions of criminal copyright cases and issuing deterrent sentences, as permitted under the criminal code;
- Engage municipal authorities to clean up flea markets offering pirate product;
- Grant civil *ex parte* search orders more swiftly;
- Encourage more actions by CNTV, both administratively and in coordination with the criminal authorities, to combat television piracy;
- Implement border measures to prevent entry into the country of blank CD-Rs (which are often used for piracy) and halt the flow of pirated products entering Ecuador and Venezuela;
- Improve 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);
- Support the current bill to increase criminal penalties for piracy; and
- Develop and promote legislation which will address the higher standards of copyright protection and enforcement which will be expected as Colombia commences FTA negotiations with the U.S.

COLOMBIA
ESTIMATED TRADE LOSSES DUE TO PIRACY
(in millions of U.S. dollars)
and LEVELS OF PIRACY: 1999 – 2003¹

INDUSTRY	2003		2002		2001		2000		1999	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Motion Pictures	40.0	75%	40.0	90%	40.0	90%	40.0	90%	40.0	55%
Records & Music	49.4	70%	56.3	65%	73.0	65%	60.0	60%	60.0	60%
Business Software Applications ²	NA	NA	21.7	51%	19.5	52%	33.2	53%	50.5	58%
Entertainment Software	NA	NA	NA	NA	NA	NA	39.0	85%	7.0	75%
Books	5.4	NA	5.3	NA	5.3	NA	5.0	NA	6.0	NA
TOTALS ³	NA		123.3		137.8		177.2		163.5	

¹ The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2004 Special 301 submission at <http://www.iipa.com/pdf/2004spec301methodology.pdf>.

² BSA's 2003 piracy statistics were not available as of February 13, 2004, and will be made available in the near future and posted on the IIPA website at <http://www.iipa.com>. BSA's statistics for 2003 will then be finalized in mid-2004 and also posted on the IIPA website. In IIPA's February 2003 Special 301 filing, BSA's 2002 estimated losses of \$16.2 million and levels of 50% were identified as preliminary. BSA's revised figures are reflected above. BSA's trade loss estimates reported here represent losses due to piracy which affect only U.S. business software publishers in Colombia, and differ from BSA's trade loss numbers released separately in its annual global piracy study which reflect losses to (a) all software publishers in Colombia (including U.S. publishers) and (b) losses to local distributors and retailers in Colombia.

³ In IIPA's 2003 Special 301 submission, IIPA estimated that total 2002 losses to the U.S. copyright-based industries were \$117.8 million. IIPA's revised loss figures for that year are reflected above.

Upcoming FTA Negotiations

In November 2003, Ambassador Robert Zoellick notified the U.S. Congress that the Bush administration intends to begin Free Trade Agreement (FTA) negotiations with the Andean nations, starting with Colombia and Peru in the second quarter of 2004.⁴ The negotiating objectives specifically include high levels of copyright protection and effective enforcement measures, including criminal, civil/administrative and border enforcement. The FTA negotiations process 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. Presently, 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).⁵ All three programs have standards of intellectual property rights which must be afforded to U.S. copyright owners.⁶

COPYRIGHT PIRACY IN COLOMBIA

The recording industry reports that the estimated level of music piracy in Colombia rose to 70% in 2003, with estimated losses due to music piracy placed at \$49.4 million. Although the value of trade loss estimates decreased slightly in the past year due to devaluation and lower average prices of recorded music, piracy of music CDs in Colombia continues to increase, mostly due to local CD-R replication. 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 CD-Rs are brought in to Colombia in containers from the Far East; pre-recorded pirate CD-Rs are also being smuggled in from Ecuador. A major problem is the hundreds of stalls in the street markets of San Andrecitos that continue to openly and brazenly sell and distribute pirate and counterfeit product. Street vendors sell pirate CDs on the traffic corners in Bogotá, Medellín and Cali, 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

⁴ See Press Release 2003-74, Office of the U.S. Trade Representative, “USTR Notifies Congress of Intent to Initiate Free Trade Talks with Andean Countries,” November 18, 2003, at <http://www.ustr.gov/releases/2003/11/03-74.pdf>; and President Bush’s Letter to Congress, November 18, 2003, at http://www.ustr.gov/new/fta/Andean/2003-11-18-notification_letter.pdf.

⁵ During the first 11 months of 2003, \$148.4 million worth of Colombian goods (or 2.5% of Colombia’s total exports to the U.S. from January to November) entered the U.S. under the duty-free GSP code (representing a 16.2% decrease over the same period in the previous year) and \$2.7 billion worth of Colombian goods entered under the ATPA program (representing a 989% increase from the prior year). For more information on the history of Colombia’s status on Special 301, see Appendix D (<http://www.iipa.com/pdf/2004SPEC301USTRHISTORY.pdf>) and Appendix E (<http://www.iipa.com/pdf/2004SPEC301HISTORICALSUMMARY.pdf>) of this submission.

⁶ IIPA reported to USTR in 2002 that Colombia had failed to provide adequate and effective protection for U.S. copyright owners, especially under the enhanced standards outlined in the ATPDEA. See 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. 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 also requested that the U.S. government obtain written commitments on Colombia’s actions to meet the IPR 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.

conduct raids in a swift and efficient manner. Most of the music companies are shrinking; the local companies continue to close down their operations and their investments. The legitimate music market in Colombia shrunk in 2003.

The Motion Picture Association of America (MPA) reports there is increasing concern about the recent growth of optical disc piracy in Colombia, as the industry's concerns about systematic television piracy have decreased. Video piracy (VHS format) had been so high that some audiovisual producers had simply abandoned the VHS market, despite the country's potential to support that market. MPA member companies returned to the market as increased purchases of DVD hardware players drove demand for DVDs. However, optical disc piracy (both CD-R and DVD-R) has grown considerably, especially in street markets, and threatens the new legitimate DVD market. The relative success in television actions, however, has reduced the urgency of television piracy, and the concurrent growth of DVD has led to renewed concern for video anti-piracy action. While there is still some television piracy, licensing and inspections by the CNTV (National Television Commission), coupled with MPA legal actions, have greatly reduced the incidence of systematic television piracy. Much of the remaining television piracy is in non-urban areas and in quasi-legal "community associations" where enforcement efforts are only of questionable effectiveness. The television piracy situation has improved due to consistent MPA action (over 60 cases brought in the last five years) and due to the legalization by those cable operators who received licenses in 1999-2000 of their signals. Some of these (now legal) operators have also "bought out" pirate systems to increase their subscriber base. There are still uncounted small unlicensed operators that have built their own pirate distribution systems; however, the prospects for receiving licensing fees by these actors may be slight, given that they are very small systems in remote areas or because they are legally protected under the Colombian law that allows signal distribution on a "community, not-for-profit" basis. These pirate systems often use grey 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 2003.

The piracy rate for business software still reflects an unacceptably high rate of illegal software use in Colombia, particularly within small to medium-sized organizations. Piracy in cities outside Bogotá is particularly high. The Business Software Alliance (BSA) has encountered sophisticated, high-volume software counterfeit production facilities in Bogotá.

The publishing industry continues to suffer from widespread piracy. Efforts by the Colombian Book Chamber (which includes U.S. publishers) and the government to improve both the "Ley del Libro" itself and its enforcement were unsuccessful in 2003. Commercial piracy of Spanish-language trade books has declined somewhat because of enforcement actions, print piracy and photocopying of university textbooks remains. This phenomenon has increased as students from private universities have migrated to public schools, where photocopying is rampant. 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. Estimated trade losses due to book piracy were \$5.4 million in 2003.

The Entertainment Software Association (ESA) 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. 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 number of governmental and independent agencies in the fight against piracy.⁷ The National Anti-Piracy Campaign (*Convenio Nacional*) continues to meet and has achieved some limited success in coordinating the fight against piracy, but it is still far from being an effective anti-piracy force in Colombia.

Several years ago, 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). There are seven special prosecutors, at least 25 judicial police in Bogotá, and an uncertain number in the provinces. These prosecutors coordinate action with special police forces.

Criminal raids do occur, but prosecutions are few. MPA reports that some enforcement activity has actually improved in the last two years in Colombia, although there are few results in terms of sentences or reductions in piracy. For example, of the over 50 pending television piracy cases brought in the last five years, there have been only two sentences (both suspended while on appeal). The Special Unit for Copyright Crime continues to be active, and the MPA has coordinated with the unit for signal theft raids with good results. After the raids, however, prosecution procedures and sentencing prospects have not been a deterrent for pirates.

BSA reports that its business software anti-piracy campaign 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 2003, legal actions were conducted against 10 end-user pirates, and more than 100 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. 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. After re-activation of its anti-piracy unit (APDIF) in 2002, APDIF has been able to carry out a street-level campaign that contributed to cleaning up some high traffic areas in

⁷ 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.

Bogotá, along with some police cooperation. Unfortunately, the authorities do not 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 2,467 raids in 2003, only 309 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 CD-Rs that are used for piracy purposes or stemming the flow of recorded pirate product coming from Ecuador and Venezuela. The current criminal code also presents an obstacle to fighting piracy because for those few cases that are prosecuted the penalties are so low that, for all intents and purposes, it prevents any type of incarceration and leads to suspension of any sentence.

Colombian courts fail to issue deterrent criminal sentences. Even with all the criminal raids, the Colombian system does not result in deterrent penalties or criminal sentences. The Colombian judicial system remains a serious obstacle to effective enforcement. Increasing penalties, as was done in the 2001 amendments to the criminal code, is not enough. It is also important to expedite criminal prosecutions. It takes more than six years between the commencement of the criminal investigation and the final decision of the court; therefore pirates currently do not feel pressure when an action is filed against them.⁸

The recording industry states that it takes Colombian courts an average of 45 months to process most cases, all before they end up being either suspended or dismissed. Some cases have taken over 7 years in the judicial system, a period which far exceeds the normal statute of limitations of 5 years; as a result, those cases are also dismissed.

Border enforcement is weak. Millions of blank CD-Rs 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 CD-Rs 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 CD-Rs. 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. Enforcement at the Colombian borders still needs to be improved in practice, especially given the growth of optical media piracy in the region.

⁸ 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.

CRIMINAL COPYRIGHT ENFORCEMENT STATISTICS In COLOMBIA: 2003			
ACTIONS	MOTION PICTURES	BUSINESS APPLICATIONS SOFTWARE	SOUND RECORDINGS
Number of raids conducted		10	2,467
By police (including tax authorities)		8	2,466
By customs			1
By CNTV			0
Number of cases commenced		11	5
Number of defendants convicted (including guilty pleas)		0	17
Acquittals and Dismissals		0	0
Number of cases pending		8	44
Total number of cases resulting in jail time		0	17
Suspended prison terms		0	16
Maximum 6 months		--	
Over 6 months		--	
Over 1 year		--	
Total suspended prison terms			16
Prison terms served (not suspended)			1
Maximum 6 months			
Over 6 months			
Over 1 year			1
Total prison terms served (not suspended)			1
Number of cases resulting in criminal fines		--	17
Up to \$1,000		--	
\$1,000 to \$5,000		--	
Over \$5,000			
Total amount of fines levied			

Administrative enforcement against signal theft piracy remains ineffective.

Licensing and inspections by the CNTV, the national television commission, have contributed to a significant reduction in systematic television piracy in Colombia.

Civil actions and issuance of civil *ex parte* search orders is slow. As part of its national enforcement campaign, BSA also uses civil remedies to pursue those persons and businesses engaged in end-user piracy. 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 both 2002 and 2003, conducting only a handful of civil end-user actions.

CIVIL COPYRIGHT ENFORCEMENT STATISTICS In COLOMBIA: 2002-2003		
ACTIONS	BUSINESS APPLICATIONS SOFTWARE 2002	BUSINESS APPLICATIONS SOFTWARE 2003
Number of civil raids conducted	6	2
Post search action		
Cases pending	2	2
Cases dropped		-
Cases settled or adjudicated		1
Value of loss as determined by right holder (\$USD)	US\$30,000	US\$40,000
Settlement / judgment amount (\$USD)	US\$21,000	US\$13,500

COPYRIGHT LAW AND RELATED ISSUES

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

Fiscal Enforcement Legislation—Law No. 603: In July 2000, Colombia enacted fiscal enforcement legislation (Law No. 603) that requires Colombian corporations to include in their annual reports 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. BSA, through a Colombian software publisher, has been working with some representatives of the Superintendency during 2003 in order to offer seminars to its officials regarding the compliance of Law 603. BSA expects to hold some seminars during the first half of 2004.

Criminal code and criminal procedure code: Colombia's criminal code entered into effect in July 2001. It includes copyright infringements as a crime, and increases possible sanctions from a jail term from one-to-three years up to two-to-five years. The code also contains provisions on the violation of technological protection measures and rights managements, both key obligations of the WIPO treaties. Unfortunately, in piracy cases the penal code allows home arrests or bail during the process, and sentences of up to three years can be suspended. In practical terms, this scenario translates to no incarcerations for pirates. Congress is in the process of reforming the criminal procedure and, maybe, the criminal code. Any reform should take in consideration an increase in criminal penalties for copyright infringement that would allow the courts to hand down deterrent level sentences that involve prison time for offenders mainly involved in duplication and distribution of pirate product.