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Elizabeth Kendall
Acting Assistant U.S. Trade Representative
for Innovation and Intellectual Property
Office of the U.S. Trade Representative
600 17th Street, NW
Washington, DC 20508

Re: **IIPA Written Submission Re: 2017 Special 301 Out-of-Cycle Review of Colombia:
Request for Public Comments 82 Fed. Reg. 44695 (Sept. 25, 2017)**

Dear Ms. Kendall:

The International Intellectual Property Alliance (IIPA)¹ provides these comments in response to the above-captioned Federal Register Notice inviting “written comments concerning any act, policy, or practice that is relevant to the decision regarding whether USTR should identify Colombia under Section 182 of the Trade Act” of 1974 (19 U.S.C. 2242) as part of an “out-of-cycle” (OCR) review of Colombia. On February 9, 2017, IIPA filed a “Written Submission” regarding the 2017 Special 301 review, which included, *inter alia*, a country report on specific copyright reforms and enforcement activities in Colombia. The February 2017 Colombia Special 301 country filing is appended to this letter.

¹IIPA is a private sector coalition, formed in 1984, of trade associations representing U.S. copyright-based industries working to improve international protection and enforcement of copyrighted materials and to open foreign markets closed by piracy and other market access barriers. Members of the IIPA include Association of American Publishers (www.publishers.org), Entertainment Software Association (www.theesa.com), Independent Film & Television Alliance (www.ifta-online.org), Motion Picture Association of America (www.mpa.org), and Recording Industry Association of America (www.riaa.com). Collectively, IIPA’s five member associations represent over 3,200 U.S. companies producing and distributing materials protected by copyright laws throughout the world. These include entertainment software (including interactive video games for consoles, handheld devices, personal computers and the Internet) and educational software; motion pictures, television programming, DVDs and home video and digital representations of audiovisual works; music, records, CDs and audiocassettes; and fiction and non-fiction books, education instructional and assessment materials, and professional and scholarly journals, databases and software in all formats.



Updates in Colombia (Since the IIPA 2017 Special 301 Submission in February)

The IIPA February 2017 Special 301 country review noted several legal and enforcement deficiencies in Colombia. To update that filing, IIPA members report that Colombia still has not fully implemented numerous intellectual property rights (IPR) obligations under the U.S.-Colombia Trade Promotion Agreement (TPA). A proposed bill to bring Colombia at least partially in compliance with the TPA was introduced twice, and has stalled in each instance.

The most recent version of the bill contains several provisions that are of significant concern. For example, the current draft of the bill deprives phonogram producers of exclusive broadcasting and public performance rights. Under the current draft, phonogram producers will be the only sector with a nonexclusive right of communication to the public (i.e., broadcasting and public performance). This asymmetrical and unfair treatment between performers, producers, and authors will undermine producers' remuneration right and contravenes international copyright law (e.g., the WIPO Performance and Phonograms Treaty) and practice. Adoption of the draft bill would introduce considerable uncertainty and depart from long-standing, non-hierarchical treatment between right holders in the copyright sector.

Symmetrical treatment and interaction between all right holders in the copyright sector is a critical component of a well-functioning copyright system. Such systems should avoid the creation of "hierarchy" or "supremacy" of one right holder over the others. These hierarchical distinctions are outdated and may create profound obstacles to the freedom of contract and the free transfer of intellectual property rights.

In addition, Colombia must focus on implementing other key copyright protection and enforcement obligations under the TPA, including obligations for Internet Service Providers (ISPs) to assist in removing infringing material online and ensuring that infringing services cannot avoid liability.

Colombia also needs to enforce the numerous rulings of the Colombia Copyright Office to sanction the Board of the Colombian Copyright Society (SAYCO) and its administrators. Failure to enforce these rulings has permitted the Board to continue its abusive practices with respect to administering performance rights in violation of Colombian law. Additionally, it has negatively affected the functioning of the joint licensing organization OSA, which represents copyright and neighboring right holders for the collection of public performance rights from businesses in Colombia. OSA is one of the most efficient collective management organizations in the Latin American region.

Finally, while levels of piracy in Colombia continue to grow, particularly online, Colombian law enforcement remains unwilling to prosecute administrators and owners of websites, blogs, and "hubs" involved in the distribution of illegal files. Likewise, illegal camcording in Colombia remains a critical and growing problem.

In conclusion, IIPA appreciates the opportunity to comment in this Out-of-Cycle Review of Colombia. We look forward to continuing to work with the U.S. and Colombian



Governments to improve the IPR protection and enforcement regime in Colombia for the benefit of American and Colombian creators and producers.

Respectfully submitted,

Kevin M. Rosenbaum, Counsel
International Intellectual Property Alliance

COLOMBIA

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2017 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that Colombia remain on the Watch List in 2017.

Executive Summary:¹ Many of Colombia's intellectual property rights (IPR) obligations under the U.S.-Colombia Trade Promotion Agreement (TPA) (signed in 2012) have been overdue for implementation since at least May 2015. The agreement contains a comprehensive chapter on IPR that would raise the level of copyright law and enforcement obligations in Colombia to the benefit of both Colombian and U.S. creators. A proposed bill to bring Colombia at least partially in compliance with the TPA was floated twice, most recently in August 2016, but has stalled with no prospect of revival. Colombia needs to focus on implementing key copyright protection and enforcement obligations under the TPA, such as addressing obligations for Internet Service Providers (ISPs) to assist in removal of infringing material online and ensuring that infringing services cannot avoid liability. Now that all of the transitional deadlines for Colombia's TPA obligations have passed, it is time for enforcement of those obligations, which Colombia took on in return for the unfettered access to the U.S. market that it has enjoyed ever since the TPA came into force in 2012. IIPA urges the U.S. Government to prioritize its dialogue with Colombia and encourage this vital trading partner to fulfill its obligations under the TPA and to demonstrate the will to protect creative sectors by combating the high levels of piracy that persist throughout the country. While Colombia's commitments go ignored, levels of piracy there continue to grow, increasingly online. There is no serious effort on the part of Colombian law enforcement to prosecute administrators and owners of websites, blogs, and "hubs" involved in the distribution of illegal files, and 2016 has seen a large increase in the number of illegal camcords traced to Colombian cinemas. It is time for Colombia to honor its commitments under the TPA and to make combatting online piracy a priority.

PRIORITY ACTIONS REQUESTED IN 2017

- Implement Colombia's past due TPA obligations, including:
 - Addressing the scope of liability for ISPs in cases of copyright infringement;
 - Ensuring appropriate liability for circumvention of technological protection measures (TPMs);
 - Establishing exclusive rights for works and for performances and phonograms to bring Colombia's Copyright Law up to date in the digital environment; and
 - Extending the term of protection for neighboring rights to at least 70 years for all producers of sound recordings, including corporate entities.
- Devote law enforcement and prosecutorial resources to combatting online piracy and ensuring due respect for existing legal protection such as the right of communication to the public.

COPYRIGHT PIRACY IN COLOMBIA

Online piracy in Colombia is an increasing problem that has gone unaddressed by the Colombian Government and threatens to undermine the development of legitimate online distribution of media content. Internet broadband reaches more than 28% of households and 41% of the population, according to the Colombia Ministry of Information Technology and Communications, and more than 13.7 million internet connections are active in Colombia (1.5% growth year-over-year).² E-commerce in Colombia grew 24% from 2014 to 2016, reaching 76% of Internet users in Colombia (56% using credit cards), but the creative content industries are not part of this growth—the entertainment sector represents only 2% of transactions, given the high volume of piracy. In 2016, there were an

¹For more details on Colombia's Special 301 history, see previous years' reports at <http://www.iipawebsite.com/countryreports.html>. For the history of Colombia's Special 301 placement, see <http://www.iipawebsite.com/pdf/2017SPEC301HISTORICALCHART.PDF>.

²See <http://www.ccce.org.co/>.



estimated 500 million visits from Colombia to the top 108 Spanish-language audiovisual piracy websites. Meanwhile, physical piracy continues to plague the “*San Andresitos*” flea markets, where vendors sell burned CD-Rs and DVD-Rs on the streets, and distribution hubs supply pirate products for the rest of the country.

Internet piracy of recorded music occupies the vast majority of the total digital music market. Stream-ripping of music videos from online platforms such as YouTube is currently the most prevalent form of piracy harming the recording industry in Colombia. Stream-ripping mostly occurs on foreign sites such as *youtube-mp3.org*, but is also available on the local site *bajaryoutbe.com*, which receives more than eight million monthly visits. Also prevalent is the distribution of illegal links to cyberlockers via social networks, forums, and mp3 search engine sites such as *mp3clan* and *mimp3*. Cyberlocker sites continue to harm the industry—among the most popular cyberlocker platforms are *4shared* and *hulkshare*. Finally, BitTorrent is also an important source for pirated music.

Individuals also utilize social media to promote and sell infringing copies of movies in Colombia. In addition, eight full motion picture camcords and three audio caps were sourced from Colombian theaters in the first eleven months of 2016, a dramatic increase from the two camcords traced to Colombia in 2015.

In 2016, Colombia ranked among the top 25 countries in the world in the number of peers discovered in peer-to-peer (P2P) swarms in which illegal copies of console games were being distributed. Colombia is also listed as one of the top 15 countries in the world when it comes to mobile piracy of games.

The recording industry reports that there are eleven legitimate online music services competing in the Colombian market. While the digital music market is growing, much of its potential is frustrated by the widespread practice of stream-ripping, as well as other sources of pirated music. Although the recording industry has made a significant effort to license and promote more digital services, many of them offering millions of tracks for free to consumers, the Colombian Government has not acted to protect this new legitimate market from unfair competition by pirate operators. One problem is the absence of a national anti-piracy campaign that recognizes the importance of copyright protection in the context of the country's economy and culture, including Colombia's internationally successful music exports.

COPYRIGHT LAW IN COLOMBIA

Colombia's obligations under the U.S.-Colombia TPA, which entered into force May 15, 2012, are now long past due. Several copyright obligations were due upon the date of entry into force, and civil remedies for TPMs, as provided under Articles 16.7.4 and 16.11.15, were due to be adopted three years after that date (May 15, 2015). As of May 15, 2015, Colombia is thus substantially out of compliance with the TPA. While some movement has been made toward implementing Colombia's obligations under the TPA, none of the proposed modifications of the Copyright Law needed for compliance have been implemented.

In August 2016 the Colombian Government published for consultation a draft bill to modify the Copyright Law in order to implement at least some obligations under the TPA. Among other provisions, the draft bill includes:

- Civil remedies to protect against the circumvention of TPMs. (While criminal remedies are available under Colombia's penal code, civil remedies are also required, under TPA Articles 16.7.4 and 16.11.15.)
- Extension of the term of copyright for works for hire to 70 years (required under TPA Articles 16.5.5(b) (with respect to works) and 16.6.7(b) (with respect to performances or phonograms)). This does not completely resolve the outstanding problem that Colombia's Copyright Law only provides for a 50 year term for sound recordings produced by corporate entities, which is out of pace with regional standards and the term in the U.S. and Europe.
- Protection of Rights Management Information (RMIs) (required under TPA Article 16.7.5).
- A series of new exceptions and limitations (caching, lending of copyrighted materials by public libraries, and free making available of copyrighted materials legally acquired by public libraries).

The bill was supposed to be filed after a short consultation process of 30 days (which was then extended to 45 days). However, the bill has not been filed in Congress and the outlook for passage is unclear.

The government previously prepared a package of provisions addressing the digital environment and bringing Colombia in line with international norms for copyright protection. The Congress attempted to adopt these in Law 1520 of 2012. However, the Constitutional Court struck down that law in 2013 for procedural failures during the congressional approval process. In May 2013, the Colombian Government presented Bill 306 of 2013 to the House of Representatives, largely incorporating the substantive provisions of Law 1520 of 2012. Subsequently, Senate Bill 306 of 2013 was archived due to time constraints during the legislative term.

Colombia should take prompt action to revisit proposed amendments to its Copyright Law and bring Colombia in line with international norms for copyright protection. To this end and consistent with its TPA obligations, Colombia should bring its law into compliance with the WIPO Internet Treaties, to which it acceded in 2002.

COPYRIGHT ENFORCEMENT IN COLOMBIA

Colombia lacks a national anti-piracy campaign to address online piracy, which is now the predominant form of piracy in the country. In 2016, the top 146 Spanish-language online video piracy websites received an estimated 500 million visits from terminals in Colombia. Within the Attorney General's office, there is a National Unit Specialized in Prosecuting Crimes against Intellectual Property Rights and Telecommunications, responsible for investigating and prosecuting Internet piracy and crimes against intellectual property rights. However, coordination among police officers, prosecutors, and judges to combat online piracy is still lacking, and many authorities believe online piracy is not a problem, or is one that only affects foreign interests. Greater resources should be dedicated to permit proactive investigations by the National Police, and the Attorney General's specialized unit for IP crimes should increase its focus on a broader range of antipiracy cases. The competent authority in the Executive on Copyright is the *Nacional del Derecho de Autor* (DNDA). However, the DNDA is not legally empowered to conduct enforcement actions. The DNDA operates under the Ministry of the Interior, which makes its role in government less relevant, and many proposals to move the DNDA to the Ministry of Commerce, Industry and Tourism (where it is located in other countries in the region) have failed, mainly because of the lack of political will to prioritize the copyright sector.

Even before the rise in online piracy, the prosecution of piracy was a weak point in Colombia's enforcement regime. It is considered a minor offense by Colombian criminal judges and appellate courts. For example, in 2015, a national group of right holders (APDIF Colombia) went before a civil judge in Bogota to seek injunctive relief against the *Pirate Bay*. However, the action was never considered by the judge. Despite the good efforts of the National Police in recent years conducting investigations and raids, there have been no significant efforts to take *ex officio* action against widespread piracy. No criminal convictions on music piracy cases were issued in 2016.

A significant issue for the recording industry arose in April 2016, when the Minister of Transportation made a public statement on national media declaring her opposition to performance rights payments for music played on buses and other public transportation systems, stating that "payments for music on buses won't be allowed" and "the matter will have to be solved in Congress by legislation." In fact, existing Colombian law recognizes a public performance right in Article 173 of Law No. 23 of 1982, and a large part of music companies', performers' and authors' income in Colombia comes from the licensing of recorded music that is played on board buses and coaches—a form of public transportation that is extensively used in the country.

Music producers, performers and authors (composers) created an entity called *Organizacion SAYCO-ACINPRO*³ (OSA) for the purpose of simplifying the public performance licensing process. OSA has licensed more than 100,000 businesses in Colombia for public performance of sound recordings. In recent years, OSA signed

³OSA is a joint venture between the collective management organization of authors (Authors' and Composers' Society (SAYCO)) and the collective management organization of producers and performers (the Record Producers' and Artists' Society (ACINPRO)).

agreements with two important trade organizations within the transportation sector to license the performance right on buses and similar private sector transportation systems, pursuant to which around 300,000 buses currently offer music to passengers on routes around the country. OSA estimates that it expected to collect from these “bus” agreements in 2016 approximately 7 billion Colombian pesos (US\$2.5 million).

The statement from Minister Abello was immediately echoed by all transportation companies in the country, payments to OSA were suspended, and now collections of licensing fees for public performances are being questioned by transportation companies, taxi drivers and the general public. The Minister’s public statements and encouragement for bus companies to avoid or suspend payments for performance rights licenses go directly against existing law, inflict material harm on musical performers, producers, and composers, and should be officially reversed. As a result of the damaging statements from Minister of Transportation, OSA filed an action to the Andean Court of Justice seeking a judicial order that the Government of Colombia must comply with copyright legislation and Colombia’s obligations under the Andean Community treaties. The process is at an early stage of consideration. Meanwhile, although the DNDA has issued a Circular confirming the existence of legal obligations under domestic law, the Circular has been largely ignored by other parts of the government and consumers.

MARKET ACCESS

Pending on the books is an Actors Bill, which if passed, would have the effect of increasing production costs for film and television made in Colombia. The bill would impose excessive burdens on producers of audiovisual works in terms of costs and production schedules, limitations on talent engagement, and a set of compensations and encumbrances that curtail the legitimate ability to commercially exploit audiovisual works. In sum, this bill would significantly raise costs for producers, would render local production unviable, and would make Colombia less competitive as a location for audiovisual production.