



March 5, 2007

[Via email at FR0518@USTR.EOP.GOV](mailto:FR0518@USTR.EOP.GOV)

Gloria Blue  
Executive Secretary  
Trade Policy Staff Committee (TPSC)  
1724 F Street NW  
Washington, DC 20508

Re: Andean Trade Preferences Act: Request for  
Public Comments Regarding Beneficiary Countries  
72 Fed. Reg. 6622 (February 12, 2007)

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 whether beneficiary countries of the Andean Trade Preferences Act (ATPA) are meeting their eligibility criteria.<sup>1</sup>

In brief, copyright law reform, while critical to meeting the ATPA standards, is not sufficient in and of itself. IIPA believes that one of the most immediate problems in this region is the failure of all four Andean countries to adequately and effectively enforce even their current copyright laws. The point is that laws, even good laws, which are not effectively enforced on-the-ground do not satisfy the IPR criteria in the ATPA, the ATPDEA, other U.S. trade programs nor the TRIPS Agreement or the WIPO "Internet" Treaties. We reiterate that IIPA supports both the Colombia Trade Promotion Agreement (TPA) and the Peru TPA. We believe that both these agreement raise the level of copyright law and enforcement obligations to the benefit of Colombian, Peruvian and U.S. creators.

### **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.<sup>2</sup> The U.S. copyright industries are one of the most vibrant sectors of our economy. On January 30, 2007, the IIPA released an economic report entitled *Copyright Industries in the U.S. Economy: The 2006 Report*, which details the economic impact and

<sup>1</sup> Section 203(f) of the ATPA (19 U.S.C. 3202(f)) requires the USTR, not later than April 30, 2007, to submit to Congress a report on the operation of the ATPA. Before submitting such report, USTR is required to request comments on whether beneficiary countries are meeting the criteria set forth in 19 U.S.C. 3203(b)(6)(B) (which incorporates by reference the criteria set forth in sections 3202(c) and (d)).

<sup>2</sup> 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. See [www.iipa.com](http://www.iipa.com).

contributions of U.S. copyright industries to U.S. Gross Domestic Product, employment, and trade. The latest data show that the “core” U.S. copyright industries<sup>1</sup> accounted for an estimated \$819.06 billion or 6.56% of the U.S. gross domestic product (GDP) in 2005. These “core” industries were responsible for 12.96% of the growth achieved in 2005 for the U.S. economy as a whole (this means that the growth contributed by these core industries (12.96%) was almost double their current dollar share of GDP (6.56%)). In addition, the “core” copyright industries employed 5.38 million workers in 2005 (4.03% of U.S. workers) in 2005. And the report, for the first time, provides data on the estimated average annual compensation for a worker in the core copyright industries: \$69,839 in 2005, which represents a 40% premium over the compensation paid the average U.S. worker. Finally, estimated 2005 foreign sales and exports of the core copyright industries increased to at least \$110.8 billion, leading other major industry sectors.

### **IIPA’s Views on Copyright Reform and Enforcement in the Andean Region**

Comprehensive copyright laws, combined with effective enforcement of those laws, are the twin pillars necessary for copyright industries – both U.S. and local industries – to continue to grow. Many copyright sectors look to grow their markets overseas. As a result, the IPR standards found in the ATPA, as amended, can provide a good foundation for these four countries to improve both their copyright laws and enforcement mechanisms to protect both their domestic rightsholders as well as foreign rightsholders.

#### **ESTIMATED TRADE LOSSES DUE TO COPYRIGHT PIRACY (in millions of U.S. dollars) and LEVELS OF PIRACY (2006) in the four ATPDEA BENEFICIARY COUNTRIES**

COUNTRY	Business Software Applications <sup>3</sup>		Music and Recording Industries		Motion Picture Industry <sup>4</sup>		Entertainment Software <sup>5</sup>		Books	2006
	Loss	Piracy Level	Loss	Piracy Level	Loss	Piracy Level	Loss	Piracy Level	Loss	TOTAL LOSSES
<b>Colombia</b>	48.0	44.8	62.5	71%	NA	NA	NA	NA	6.0	<b>116.5</b>
<b>Peru</b>	27.0	70%	53.5	98%	NA	NA	NA	NA	NA	<b>80.5</b>
<b>Ecuador</b>	16.0	68%	33.0	98%	NA	NA	NA	NA	2.0	<b>51.0</b>
<b>Bolivia</b>	NA	NA	NA	NA	NA	NA	NA	NA	NA	<b>--</b>
<b>TOTAL</b>	<b>91.0</b>		<b>149.0</b>		<b>NA</b>		<b>NA</b>		<b>8.0</b>	<b>248.0</b>

NA = Not Available

Attached as appendices (including hyperlinks) are four IIPA reports on each ATPA country, three (Colombia, Peru and Ecuador) of which appear in IIPA’s February 2007 Special 301

<sup>3</sup> BSA’s 2006 statistics are preliminary. They represent the U.S. publishers’ share of software piracy losses in each country, and follow the methodology compiled in the Third Annual BSA/IDC Global Software Piracy Study (May 2006), available at <http://www.bsa.org/globalstudy/>. These figures cover, in addition to business applications software, computer applications such as operating systems, consumer applications such as PC gaming, personal finance, and reference software. BSA’s 2006 piracy statistics will be updated later in 2007 and will be made available on the IIPA website at such time.

<sup>4</sup> MPAA does not have 2006 statistics available at the time the IIPA 301 submission was filed. In 2006, MPAA changed its methodology of analyzing physical (hard goods) and internet piracy, and its 2005 piracy loss

<sup>5</sup> ESA does not have data available for these Andean countries. Note in generally, however, that ESA’s dollar figures reflect the value of pirate product present in the marketplace as distinguished from definitive industry “losses.”

submission, and one (Bolivia) which appeared in IIPA's 2006 301 submission. Each country report contains detailed discussions on piracy, enforcement as well as the status of copyright and related law reform measures. Each report also lists specific actions that each government could take to address the identified issues/problems.

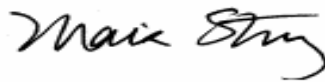
U.S. companies suffered estimated trades losses due to copyright piracy of at least **\$248 million** in 2006 in these four Andean countries (see chart below). The challenges faced by the copyright industries and national governments to enforce copyright laws grow dramatically as the forms of piracy shift from hard goods toward digital media and unauthorized electronic transmissions. Over the last few years, unauthorized "burning" of CDs has grown rapidly in Latin America, adversely affecting the ability of legitimate businesses engaged in the creation and distribution of copyrighted materials – recordings, computer software, videogames, books, and increasingly, DVDs – to compete against these pirated products. Government agencies (especially in Colombia and Peru) have yet to enforce software legalization program. Unauthorized photocopying on university and college campuses also should be halted. Border enforcement remains weak. Inadequate and ineffective copyright enforcement has failed to stem piracy and this continues to cause trade distortions and financial losses in the Andean region. Criminal and civil justice systems must work in a transparent and expeditious manner and apply deterrent penalties and remedies.

IIPA believes that it is critical that all four of these Andean countries continue to take all appropriate actions to improve their respective efforts and results under their existing laws to combat copyright piracy in their domestic markets. In fact, all four of these nations currently have bilateral IPR obligations (under the ATPA and GSP trade programs) as well as international obligations (under the WTO TRIPS Agreement) to provide certain high levels of copyright protection and effective enforcement.

### **Conclusion**

IIPA appreciates the opportunity to convey to the TPSC our views on the current situation, both in terms of substantive copyright legislation and piracy/enforcement, in the four ATPA countries of Colombia, Peru, Ecuador and Bolivia. The IPR criteria of the ATPDEA (and all U.S. trade programs, for that matter) should be applied to ensure that these countries substantially improve both their copyright laws as well as enforcement practices. Finally, IIPA believes that it is critical that these ATPA-eligible countries continue to take all appropriate actions now to improve their respective efforts under their existing laws to combat copyright piracy in their domestic markets.

Respectfully submitted,



Maria Strong  
for the International Intellectual Property Alliance

Attachments (IIPA Special 301 submissions)

- Colombia at <http://www.iipa.com/rbc/2007/2007SPEC301COLOMBIA.pdf> (2007)
- Peru at <http://www.iipa.com/rbc/2007/2007SPEC301PERU.pdf> (2007)
- Ecuador at <http://www.iipa.com/rbc/2007/2007SPEC301ECUADOR.pdf> (2007)
- Bolivia at <http://www.iipa.com/rbc/2006/2006SPEC301BOLIVIA.pdf> (2006)

# INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

## 2007 SPECIAL 301 REPORT

### COLOMBIA

**Special 301 Recommendation:** IIPA recommends that Colombia remain on the Watch List in 2007.

## EXECUTIVE SUMMARY

The copyright industries report that no significant improvement to halt widespread copyright piracy in Colombia occurred in 2006. Legitimate copyright markets remain threatened by widespread piracy. Optical disc piracy is on the rise and street piracy remains uncontained. Piracy at Internet cafés also has grown in the last year, and anti-piracy actions are being taken. Government agencies have yet to enforce software legalization program, or stop illegal photocopying on university campuses. 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. IIPA supports the Free Trade Agreement process and urges U.S. Congressional ratification of the U.S.-Colombia Trade Promotion Agreement.

## PRIORITY ACTIONS IN 2007

### Enforcement

- Require the Attorney General (*Fiscalía General de La Nación*) to adopt measures to expedite the prosecution of criminal copyright infringement (e.g., when a person is caught with pirate goods, that person should be brought immediately before the criminal court);
- Have the President instruct the Attorney General, Customs and the Finance Ministry to escalate their investigations and actions to enforce copyright law by pursuing infringing activities both in the streets and among larger, organized distributors of pirated materials;
- Engage municipal authorities to clean up flea markets offering pirated product;
- Grant civil *ex parte* search orders more swiftly (inspectors generally take at least six months from the time a written request is made before orders are carried out, during which time leaks to the target frequently occur);
- Encourage universities and schools to crack down on illegal photocopying by commercial enterprises in and around campuses, as well as photocopying of entire books by students, and have the Ministry of Education continue and expand its campaign against book piracy;
- Encourage courts' application, in appropriate cases, of higher penalties adopted in the recent criminal code amendments;
- 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 from Ecuador and going to Venezuela. Customs should work with the affected industries on this initiative;
- With the border authorities, establish minimum prices for importation of blank media that at least reflect real manufacturing and patent royalty costs;
- Insist that the regulatory agencies (*superintendencias*) and the tax authority (DIAN) enforce Law No. 603 (a fiscal law which requires Colombian corporations to certify compliance with copyright laws in annual reports);

- Encourage the office of the Attorney General and the *Consejo Superior de la Judicatura* to investigate administrative and judicial authorities for negligence and non-application of the law in piracy-related matters;
- Encourage more actions by CNTV, both administratively and in coordination with the criminal authorities, to combat television piracy;
- Encourage CNTV to restrict the grant of licenses to TV communication associations, since some of these associations are involved in the theft of TV signals;

### **Legislation**

- Develop and promote legislation which will address the higher standards of copyright protection and enforcement which will be expected after the Trade Promotion Agreement is ratified.
- Eliminate trade barriers already existing in Colombian law, such as: the broadcast TV quota, screen quota and box office tax.

<b>COLOMBIA</b> <b>Estimated Trade Losses Due to Copyright Piracy</b> <b>(in millions of U.S. dollars)</b> <b>and Levels of Piracy: 2002-2006 <sup>1</sup></b>										
INDUSTRY	2006		2005		2004		2003		2002	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Sound Recordings & Musical Composition	62.5	71%	47.7	71%	51.6	71%	49.4	70%	56.3	65%
Business Software <sup>2</sup>	48.0	56%	45.0	57%	46.0	55%	37.0	53%	21.7	51%
Motion Pictures <sup>3</sup>	NA	NA	41.0	75%	40.0	75%	40.0	75%	40.0	90%
Entertainment Software <sup>4</sup>	NA	35%	NA	NA	NA	NA	NA	NA	NA	NA
Books	6.0	NA	6.0	NA	6.0	NA	5.4	NA	5.3	NA
<b>TOTALS</b>	<b>116.5</b>		<b>139.7</b>		<b>143.6</b>		<b>131.8</b>		<b>123.3</b>	

Free Trade Agreement negotiations with Colombia and other Andean nations began in May 2004. On February 27, 2006, Colombia and the U.S. concluded negotiations, and on August 24, 2006, President Bush notified the Congress of his intent to enter into a TPA with Colombia. On November 22, 2006, the U.S. and Colombia signed the U.S.-Colombia Trade Promotion Agreement. The TPA offers a vital tool for encouraging compliance with other evolving international

<sup>1</sup> The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2007 Special 301 submission at [www.iipa.com/pdf/2007spec301methodology.pdf](http://www.iipa.com/pdf/2007spec301methodology.pdf). For information on the history of Colombia under Special 301 review, see Appendix D at (<http://www.iipa.com/pdf/2007SPEC301USTRHISTORY.pdf>) and Appendix E at (<http://www.iipa.com/pdf/2007SPEC301HISTORICALSUMMARY.pdf>) of this submission.

<sup>2</sup> BSA's 2006 statistics are preliminary. They represent the U.S. publishers' share of software piracy losses in Colombia, and follow the methodology compiled in the Third Annual BSA/IDC Global Software Piracy Study (May 2006), available at <http://www.bsa.org/globalstudy/>. These figures cover, in addition to business applications software, computer applications such as operating systems, consumer applications such as PC gaming, personal finance, and reference software. BSA's 2005 piracy statistics were preliminary at the time of IIPA's February 13, 2006 Special 301 filing; the 2005 data was revised and posted on the IIPA website in September 2006 (see <http://www.iipa.com/statistics.html>), and the 2005 revisions (if any) are reflected above.

<sup>3</sup> MPAA's trade loss estimates and piracy levels for 2006 are not yet available. However, such numbers will become available later in the year and, as for 2005, will be based on a methodology that analyzes physical or "hard" goods and Internet piracy. For a description of the new methodology, please see Appendix B of this report. As the 2006 loss numbers and piracy levels become available, they will be posted on the IIPA website, <http://www.iipa.com>.

<sup>4</sup> ESA's estimated piracy rates for Hungary in 2006 reflect on the piracy rate for handheld products, which may differ from and often underestimate overall piracy levels in country. ESA's reported dollar figures reflect the value of pirate product present in the marketplace as distinguished from definitive industry "losses." The methodology used by the ESA is further described in Appendix B of this report.

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.<sup>5</sup> Colombia also is a beneficiary country of two U.S. trade programs—the Generalized System of Preferences (GSP) and the Andean Trade Preference Act (ATPA), as amended by the Andean Trade Promotion and Drug Eradication Act (ATPDEA).<sup>6</sup> Once the TPA is in force, these trade benefits for Colombia will end.

## **COPYRIGHT PIRACY IN COLOMBIA**

**Record and music piracy:** The recorded music market in Colombia decreased by 3.6% in local currency year-to-date through November 2006. Other than a slight improvement in 2005, the market has declined four out of the last five years and now represents only 56% of its 2001 local currency level. This decline is taking place despite an expanding economy that has spurred greater consumer spending. With many releases of successful local and international artists, it is clear that only piracy is holding the market back. Estimated losses due to music and recording piracy in Colombia jumped to \$62.5 million in 2006, with 71% piracy levels. It is practically impossible to maintain a viable, legitimate market. The Colombian Congress has taken some steps to facilitate the anti-piracy campaign by passing a law that increases criminal penalties and criminalizes circumvention of technological protection measures, a necessary step to protect the digital market. Unfortunately, the scope and frequency of raids is not sufficient to create a deterrent effect. In addition, more border measures are necessary to curb the high levels of blank media importations. The industry estimates that over 150 million blank CD-Rs came to Colombia mostly from Panama, and this importation exacerbates the piracy situation. Most of the pirate product is still being distributed through hundreds of stalls in open and covered flea markets known as “San Andrecitos.”

**Book piracy:** The publishing industry continues to suffer from widespread piracy, mostly in the form of illegal photocopying of academic textbooks in and around university and school campuses. There is little enforcement against photocopy shops located inside or outside universities, where individual chapters of textbooks as well as entire books are reproduced without authorization. This phenomenon has increased as students from private universities have migrated to public schools, where photocopying is rampant. Reports also indicate that institutions themselves are sometimes “sponsoring” students or student associations in the sale or distribution of photocopied versions. These photocopied versions, which are sold at a fraction of the legitimate price, are even found in some bookstores in major commercial areas. Some publishers report that there was a slight improvement in the market due to a Ministry of Education initiated anti-piracy campaign. Unfortunately, this campaign has not yet resulted in significantly improved sales for original copies. Enforcement against retail establishments dealing in these illegal photocopies is imperative. Publishers also encourage university and school administrations to implement and enforce policies encouraging lecturers, staff, and students to use legitimate materials.

---

<sup>5</sup> The final text of the U.S.-Colombia TPA IPR Chapter is posted on USTR's website at [http://www.ustr.gov/Trade\\_Agreements/Bilateral/Colombia\\_FTA/Final\\_Text/Section\\_Index.html](http://www.ustr.gov/Trade_Agreements/Bilateral/Colombia_FTA/Final_Text/Section_Index.html). Colombia also signed five IPR-related Side Letters, including one on ISP liability and another on retransmission issues.

<sup>6</sup> See IIPA's March 28, 2006 Comments to the U.S. International Trade Commission regarding the Peru Trade Promotion Agreement at [http://www.iipa.com/pdf/IIPA\\_PeruFTA\\_Letter\\_to\\_USITC\\_032806.pdf](http://www.iipa.com/pdf/IIPA_PeruFTA_Letter_to_USITC_032806.pdf). In terms of trade benefits Colombia has received, during the first 11 months of 2006, \$170.1 million worth of Colombian goods (or 2% of Colombia's total exports to the U.S. from January to November) entered the U.S. under the duty-free GSP code, and \$4.5 billion worth of Colombian goods entered the U.S. under the ATPA program for the same period,



Administrations should also ensure that on-campus facilities are used for legitimate copying only. Estimated trade losses due to book piracy were \$6.0 million in 2005.

**Business software piracy:** The Business Software Alliance (BSA) reports that the piracy rates in Colombia remain high, particularly within small to medium-sized organizations, and inflict damage on the legitimate industry. Sophisticated, high-volume software counterfeit production facilities have been discovered in Bogotá. CD-R burning has become the main form of piracy afflicting the business software sector. Piracy - both end-user and retail - in cities outside Bogotá is particularly high. Paramilitary groups appear to be involved in distribution of pirated products. Preliminary 2006 estimated losses due to business software piracy rose slightly to \$48.0 million, while the piracy level dropped one point to 56%. Although Colombia has one of the lower software piracy rates in Latin America, piracy continues to cause commercial harm to the business software industry.

**Audiovisual piracy:** Optical disc piracy of film entertainment product is becoming embedded in the distribution chain. As in all Latin American markets, the Colombian home entertainment market has switched from rental VHS to sell-through DVDs, and black markets such as San Andrecitos, are becoming the main distribution chain for pirate movies. Much of the pirate product is burned in small- and medium-sized facilities, sometimes close to the pirate markets itself. Major cities like Medellin and Cali are infected with pirated products. In addition, the growth of the internet continues and more cyber cafés are involved in piratical activities. Importation of blank media and pirated audiovisual products from Panama, Ecuador and Venezuela.

**Entertainment software piracy:** The Entertainment Software Association (ESA) reports that piracy of entertainment software (across all platforms) continues to be of concern, with counterfeit video game cartridges imported from Southeast Asia remaining prevalent in informal markets.

## **COPYRIGHT ENFORCEMENT IN COLOMBIA**

**National Anti-Piracy Campaign needs reinvigoration and operational authority:** The Colombian government has not taken significant steps to develop a national anti-piracy campaign and policy. In 1995, the National Anti-Piracy Campaign, an interagency group supported by both government agencies and the private sector, was first established. During 2006, members of the campaign continue to meet to improve public awareness, trainings, and similar educational efforts. While IIPA and its members support those efforts, we have noted before that this National Campaign is not an operational entity that the industries view as having an immediate impact on strengthening on-the-ground enforcement efforts to deter piracy throughout the country. That kind of high-level political will and coordination continues to be missing in Colombia.

**Police run raids but prosecutions are few.** The industries report good cooperation with criminal enforcement agencies, but very few actions are taken outside of Bogotá, Medellín and Cucuta. Some good news last year is that actions have been commenced by the authorities, working with the affected industries, on combating piracy at internet cafés.

In 1999, 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. These prosecutors coordinate action with special police forces and perform inspections, bring criminal actions against pirates, and issue expert reports on pirated products.

During 2006, the recording industry and the motion picture industry combined their forces for joint anti-piracy operations, continuing an effort started in mid-2005. Paramilitary groups and narco-traffickers controlling the pirate sale of CDs in some flea markets in Bogotá remain a major concern. Moreover, the results for 2006 are significantly lower than last year - six million units of recorded and blank media seized the past year compared to 10.3 million in 2005 - all of which is contributing to greater market instability. Unfortunately, all these raiding efforts have had no effect on reducing piracy. The industry reports ten convictions in 2006, but no one was incarcerated for piracy.

Last year also reflected a major anti-piracy effort against Internet cafés by the recording industry. In September 2006, anti-piracy groups across Latin America carried out a coordinated campaign to combat illegal music downloading at Internet cafes. The operation, named "Cyber Shutdown," took place in cities in Brazil, Mexico, Costa Rica, El Salvador, Colombia, Chile and Argentina, with the support of more than 2,000 law enforcement officers. IFPI reports that the strategy behind this campaign was based on intelligence developed through local research that indicated internet cafés were becoming a significant factor in the growth of digital and physical music piracy. In Colombia, 22 people were arrested following in-depth investigations by authorities and the recording industry. Also, the raids targeted 417 different locations where over 1,900 computers were inspected containing over 4 million pirate files.

In another initiative, the recording industry reports that in April 2006, the Colombian National Police Cyber crimes units (*Grupo de Delitos Informaticos*) in conjunction with the Attorney General's office concluded a six-month multi-jurisdictional internet investigation involving the so-called "home delivery" market of illicit music, films, games and software in Colombia. This unit had only been in existence for six months at the time of this action. These websites were taking orders online, for mostly music and films "custom" CD's, and using messengers to deliver the products to the buyer's home. The investigation focused on seven websites in the cities of Bogotá, Cali, Medellín and Manizales. Seven search warrants were executed. The investigation resulted in the arrest of seven people, and the seizure of 9 computers, 23 burners, 4,324 music CD-Rs and 3,318 film DVDs. In addition, authorities seized accounting ledgers, customer lists, receipts and banking records and the websites were taken down. Although these websites were acting independently, their volume of activity represented a significant amount of music, game and film pirate products found online in Colombia. This campaign produced eight convictions and set up the stage to continue attacking other centers being used to download and burn illegal files.

**Colombian courts fail to issue deterrent criminal sentences.** Even with all the criminal raids, the Colombian legal system does not result in deterrent penalties or criminal sentences. Even if defendants are found guilty, judges will suspend the sentence or fine, so infringers have no incentive to cooperate and resolve their cases. The recording industry states that it takes Colombian courts an average of 45 months to process most cases, before they end up being either suspended or dismissed. Some cases have taken over seven years in the judicial system, a period which far exceeds the normal statute of limitations of five years; as a result, those cases are also dismissed.

**Border enforcement remains weak but efforts by the authorities are improving.** Enforcement at the Colombian borders still needs to be improved, especially given the growth of optical media piracy in the region. Millions of blank CD-Rs enter Colombia for the purpose of being used in the creation of pirate music CDs. For example, the recording industry has received estimates that over 150 million blank CD-Rs were officially imported during 2006. Many of them are priced below market for purposes of importation at 3 cents per unit. Without taking into consideration a few more million that are probably being smuggled into the country, it is very doubtful that all of these blank CD-Rs are being used for legitimate purposes. Some of the



shipments are undervalued and in all likelihood include blank CD-Rs manufactured in rogue Taiwanese plants that are not licensed by Phillips and do not pay corresponding patent royalties.

There are several solutions to this problem, which IIPA and the industries have suggested in prior filings. It is critical for any effective anti-piracy campaign that custom authorities begin to implement measures to track entry of blank CD-Rs. One important step would be to limit the number of ports of entry to allow closer inspections of blank optical media coming into the country. Second, the importation of optical media contained pirated product (coming from Ecuador) must be halted. Third, minimum prices must be established for importation of blank media that at least reflect real manufacturing and patent royalty costs (no progress was made on this initiative in 2005).

The recording industry (IFPI) reports, on a positive note, that there have been some big seizures at the border. During August 2006, the Customs Police (*Policía Fiscal Aduanera*) seized a total 4.5 million units of blank optical media and 2.9 million jewel boxes from two importers that utilized the Port of Buenaventura as their base of operation. This investigation started based on a Memorandum of Understanding (MOU) signed with Panamanian Customs in 2005 in which IFPI Latin America and Panamanian Customs officials agreed to exchange information on suspect blank optical media shipments transiting through the Panama Canal Zone destined to neighboring countries in Latin America. IFPI provided Colombian customs officials with information that identified these blank media importers as having imported over 125 million units of blank media at an average unit price of \$.01 per unit in 2004-05. Investigation into these importing companies revealed that they utilized a group of "front" principals to form these companies and assume all fiscal and legal responsibilities. The investigation is continuing, and more arrest and seizures are expected. There were at least another three companies involved in the importation of approximately 250 million under-valued blank optical units over a two-year period. The prosecutor will be charging the individuals behind these companies with a host of violations that include tax evasion, illicit enrichment, presentation of false documents and fraud. One of the companies mentioned above will be pursued under the Organized Crime statute and will have their assets seized by the authorities.

Also, in view of the significant volume of blank media coming into Colombia, Customs authorities, with support from the industry's anti-piracy group, began to take some preventive actions mentioned above during 2006. As the major source of blank optical discs coming to Colombia, Panama was negatively impacted by these measures and decided to file a dispute resolution request with the World Trade Organization. Unfortunately, Colombian authorities decided to suspend the program until they reach some type of accommodation with Panama. The recorded music industry would like to encourage Colombian Customs to reinstate a program that would sensibly discourage the importation of blank media that exceeds normal, legitimate uses and are channeled to piracy.

**Civil actions, *ex parte* search orders, delays and high bonds.** BSA also uses civil remedies to pursue those persons and businesses engaged in end-user piracy. Inspections take at least six months to be carried out (from the date of the request). During that time period, leaks frequently occur, severely hampering enforcement efforts. BSA's technical expert has even arrived at a given target on the day of the inspection, only to have the target present a certified list of software licenses. Moreover, it is not unusual for software plaintiffs to face such high bond requirements that copyright holders are forced to withdraw the request for provisional measures, another TRIPS violation. Finally, expert fees tend to be very high. Problems with the Colombian courts are generally 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 has been forced to rely heavily on criminal enforcement.

**Software Regulatory Enforcement of Law No. 603:** In July 2000, Colombia enacted fiscal enforcement legislation (Law No. 603) that requires Colombian corporations to include in their annual reports their compliance with copyright laws. 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. Unfortunately, the law was written in such a way that the tax authority “*may*,” rather than “*must*,” verify compliance with the copyright law. As a result, supervision by the tax authority of compliance with this provision has virtually disappeared. When asked why it has failed to enforce the law and conduct audits, the tax authority insists that it lacks the personnel and resources.

## **COPYRIGHT LAW AND RELATED ISSUES IN COLOMBIA**

**Copyright Law of 1982, as amended:** Colombia’s 1982 copyright law (as amended in 1993 and 1997, and including a 1989 decree on computer programs) is relatively modern. Copyright law amendments 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).

Given the higher standards of copyright obligations and enforcement measures contemplated in the TPA, however, Colombia will have to make additional reforms to its copyright law and enforcement law in order to fully comply (taking note that the TPA does contain transitional periods), with issues such as: refining copyright rights on distribution, making available, rental, and importation; affording statutory damages; clearly protecting temporary copies; and affording ISP liability along with notice and takedown procedures.

**Criminal Code (2001) and 2006 amendments:** Colombia’s criminal code entered into effect in July 2001. It includes copyright infringements as a crime, and with possible sanctions of a jail term of 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, but these violations are only punished by fines. Unfortunately, the 2001 criminal code allows home arrests or bail during the process, and sentences of up to three years can be suspended. In practical terms, that scenario translated into no jail terms for defendants.

In July 2006, amendments to the Criminal Code, supported by the copyright industries, entered into effect and the legal landscape looks much brighter. First, there was an increase in the maximum prison term, from five to eight years, and a corresponding rise in the minimum term, from two to four years. With the new guidelines, judges will be able to keep accused individuals in custody for the duration of their trial and also impose effective jail time as part of their sentences. Second, criminal penalties were developed for the circumvention of technological protection measures in accordance with WIPO Treaties. Previously, these violations were punishable only by fines. Third, the amended code now imposes criminal penalties for those who provide fraudulent information used for distribution of public performance or broadcasting fees to copyright owners.

**Criminal Procedure Code (2005):** Judges need to be encouraged to implement these recent amendments. In January 2005, Law No. 890 took effect and included two positive amendments to the Colombian criminal code in regard to copyright enforcement. First, Article 14 increased the prison sentences for all crimes in the criminal code, although as to copyright

infringements, this appears to have been superseded by the recent amendments, discussed above. Second, Article 5 modified Article 64 of the criminal code, which regulates parole requirements. Under the new amendment, judges may only grant parole if the convict has completed two-thirds of the prison term and shown good behavior. Granting parole will be subject to the full payment of fines imposed and indemnification of the victim. In addition, Law No. 906 (Article 313 of the new Colombian Criminal Procedures Code), effective January 1, 2005, imposes preventive incarceration in piracy cases where the value of the seized merchandise exceeds 150 times a set salary rate (approximately US\$20,000).

## **MARKET ACCESS ISSUES IN COLOMBIA**

The motion picture industry reports that Colombia, through different laws, adopted a series of discriminatory and protectionist measures to defend the national audiovisual sector, such as:

- Colombia has a broadcast TV quota which requires that 70% of prime-time programming during the week be of local content. This quota should be eliminated.
- Colombia has a screen quota, which should be eliminated or transformed into guidelines for exhibitors.
- Colombia created an 8.5% levy on the net box office receipts of foreign films, which should be eliminated.

## **IPR TRAINING AND PUBLIC AWARENESS**

The recording industry reports that its trade group and anti-piracy team participated in over 14 training sessions for personnel from local and federal police, customs, prosecutors and Copyright Office. The sessions reached more than 600 people involved in enforcement or intellectual property affairs.

# INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

## 2007 SPECIAL 301 REPORT

### ECUADOR

**Special 301 Recommendation:** IIPA recommends that Ecuador remain on the Watch List in 2007.

## **EXECUTIVE SUMMARY**

IIPA has recommended for years that it is essential that Ecuador take immediate steps to improve its ineffective record on enforcement and reducing piracy levels. Those copyright sectors who remain in the Ecuador market indicate that 2006 was a difficult year to obtain effective criminal and civil enforcement. In fact, the software industry pursued only administrative remedies last year. The administrative authority, IEPI, rarely focuses actions outside of Quito and its resources are strained. Border controls remain weak. While IIPA supports the Free Trade Agreement process, negotiations between the U.S. and Ecuador were suspended in May 2006.

## **PRIORITY ACTIONS IN 2007**

### **Enforcement**

- Make copyright protection and enforcement a matter of national policy and improve public awareness.
- Encourage police and administrative authorities to use their *ex officio* authority to investigate and take action against copyright infringers.
- Create special police anti-piracy task forces in Quito, Guayaquil and Cuenca to take anti-piracy enforcement actions against pirate street vendors, distributors and manufacturers.
- Improve border enforcement, especially to track importation of optical media.
- Provide IEPI with the necessary budget and national plan to combat piracy effectively.
- Instruct prosecutors to pursue criminal copyright cases.
- Have the National Judiciary Council appoint specialized judges for intellectual property matters, including criminal cases.
- Educate judges on intellectual property issues until the specialized IPR courts (which would have only civil jurisdiction) are created (the creation of such courts was required under the 1998 Intellectual Property Law).
- Implement and execute the tools and remedies provided in the 1998 copyright law and regulations, such that petitions for *ex parte* civil orders are excluded from the random assignment process.

### **Legislation**

- Amend Article 78 of the Education Law of 1999 to clearly eliminate overbroad provisions which suggest a compulsory licensing scheme for software in educational institutions.
- Develop and adopt copyright legislation to establish notice and takedown provisions and create ISP liability (obligations which will be included in any FTA with the U.S.).

**ECUADOR**  
**Estimated Trade Losses Due to Copyright Piracy**  
*(in millions of U.S. dollars)*  
**and Levels of Piracy: 2004-2006 <sup>1</sup>**

INDUSTRY	2006		2005		2004	
	Loss	Level	Loss	Level	Loss	Level
Sound Recordings & Musical Compositions	33.0	98%	26.3	90%	20.0	95%
Business Software <sup>2</sup>	16.0	68%	9.0	69%	7.0	70%
Motion Pictures <sup>3</sup>	NA	NA	NA	NA	NA	NA
Entertainment Software	NA	NA	NA	NA	NA	NA
Books	2.0	NA	2.5	NA	2.5	NA
<b>TOTALS</b>	<b>51.0</b>		<b>37.8</b>		<b>29.5</b>	

Ecuador currently receives preferential trade benefits under two U.S. trade programs—the Generalized System of Preferences (GSP) and the Andean Trade Preferences Act (ATPA)—both of which contain standards of intellectual property rights which must be afforded to U.S. copyright owners.<sup>4</sup> In addition, the FTA negotiation process offers a vital tool for encouraging compliance with other evolving international trends in copyright standards as well as outlining specific enforcement provisions which will aid countries in achieving effective enforcement measures in their criminal, civil, and customs systems.

## COPYRIGHT PIRACY IN ECUADOR

The recording industry reports that in 2006, burned CD-Rs remained the preferred format for most pirate products containing sound recordings and music. Music piracy is so widely spread in the country that burned CDs are manufactured and sold not only on streets and flea markets but also in shopping malls in Quito and Guayaquil. No *ex officio* actions are conducted by the police authorities on a regular basis. Guayaquil, the second largest city in the

<sup>1</sup> The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2007 Special 301 submission at [www.iipa.com/pdf/2007spec301methodology.pdf](http://www.iipa.com/pdf/2007spec301methodology.pdf). For information on the history of Ecuador under Special 301 review, see Appendix D at (<http://www.iipa.com/pdf/2007SPEC301USTRHISTORY.pdf>) and Appendix E at (<http://www.iipa.com/pdf/2007SPEC301HISTORICALSUMMARY.pdf>) of this submission.

<sup>2</sup> BSA's 2006 statistics are preliminary. They represent the U.S. publishers' share of software piracy losses in Ecuador, and follow the methodology compiled in the Third Annual BSA/IDC Global Software Piracy Study (May 2006), available at <http://www.bsa.org/globalstudy/>. These figures cover, in addition to business applications software, computer applications such as operating systems, consumer applications such as PC gaming, personal finance, and reference software. BSA's 2005 piracy statistics were preliminary at the time of IIPA's February 13, 2006 Special 301 filing; the 2005 data was revised and posted on the IIPA website in September 2006 (see <http://www.iipa.com/statistics.html>), and the 2005 revisions (if any) are reflected above.

<sup>3</sup> MPAA's trade loss estimates and piracy levels for 2006 are not yet available. However, such numbers will become available later in the year and, as for 2005, will be based on a methodology that analyzes physical or "hard" goods and Internet piracy. For a description of the new methodology, please see Appendix B of this report. As the 2006 loss numbers and piracy levels become available, they will be posted on the IIPA website, <http://www.iipa.com>.

<sup>4</sup> See IIPA Comments to the U.S. International Trade Commission regarding the Andean Trade Preferences Act: Effect on the U.S. Economy and on Andean Drug Crop, June 8, 2006 at <http://www.iipa.com/pdf/IIPA%20Andean%20USITC%20ATPA%20Investigation%20final%2006082006.pdf>. In terms of trade benefits Ecuador has received, during the first 11 months of 2006, \$65.4 million worth of Ecuadorian goods entered the U.S. under the duty-free GSP code, and \$4.7 billion entered under the ATPA.

country, lost its last standing legitimate music point of sale, becoming a city of almost 100% pirate products. Piracy represents more than 90% of the market in Ecuador, with no signs of improvement. In contrast, the official music market for Ecuador in 2006 was calculated at 400,000 units which represents a decrease of 21% compared to 2005. The government has poor border controls, making it difficult to investigate CD-R importers and their links to pirate organizations. Additionally, there is strong evidence of widespread tax evasion (e.g., undervaluation) and other irregularities associated with CD-R importing. This situation prevents recording companies from investing in local acts and jeopardizes the opportunities that Ecuadorian artists have to develop and promote their talents. The amount of blank CD-Rs and DVD-Rs entering the country every year exceed 80 million units and a similar amount enters as contraband.

The Business Software Alliance (BSA) reports that end-user piracy and some hard-disk loading (the practice of loading unlicensed software onto computer hardware and selling the entire package to an end-user) continued to be the major source of software affecting its industry during 2006. End-user piracy rates remain high among Ecuadorian businesses of all sizes, from small family businesses to large financial institutions.

The major form of piracy afflicting the U.S. book publishing industry in the region continues to be commercial photocopying. Photocopy shops near universities often fill requests for illegal reproductions of entire textbooks. Unauthorized translations are also reported.

The U.S. entertainment software industry suffers from piracy and counterfeiting affects all platforms for playing videogames, including cartridges, personal computer CD-ROMs, and game consoles.

## **COPYRIGHT ENFORCEMENT IN ECUADOR**

**IEPI's anti-piracy enforcement efforts for the software industry:** The IEPI was created by the 1998 copyright law to implement the country's intellectual property laws. IEPI can impose various administrative remedies, including inspections, requests for information, and fines. However, since its creation, IEPI has experienced staff shortages, low salaries and even strikes. IEPI, despite having national jurisdiction, usually performs its enforcement activities in Quito, rarely outside the city. IEPI has only a few well-trained personnel on intellectual property issues.

BSA reports that its relationships with IEPI continued to improve during 2006. BSA representatives maintain regular contact with both IEPI and the district attorney in charge of investigations of IP violations. BSA supported efforts by the IEPI to elevate the protection of intellectual property at the national policy level.

BSA reports that in 2006 it successfully conducted five administrative actions. With respect to *ex officio* actions, BSA reports that IEPI still has not carried out any administrative *ex officio* actions due to its lack of experience and lack of an adequate number of personnel. In order to change this situation, IEPI needs adequate human resources to enforce its responsibilities under the copyright law, to train its officials, and to create a much better salary structure. IEPI has no resources and personnel to conduct raids in high traffic areas in Quito and Guayaquil. Due to the magnitude and complexity of the music piracy problem IEPI has

become ineffective. A coordinated action between police, prosecutors, IEPI and municipalities could make a real difference in the situation but there is a lack of political will to combat piracy.

**Criminal actions:** Efforts developed in 2005, between the recording industry and police authorities, came to a stall in 2006 due to the lack of action from prosecutors and IEPI. The Specialized IPR office conducted only one major raid in Quito against music and audiovisual piracy during the whole year with no significant results and no criminal prosecutions against responsible individuals. Despite the exchange of information between local industry representatives, IEPI and the IPR prosecutor's office on the links between importers or blank media and pirate goods manufacturers/sellers, no investigations were opened in this regard. Finally, no criminal actions were filed in view of the lack of prosecution.

The creation of special anti-piracy task forces in Quito, Guayaquil and Cuenca will improve controls on the streets, distributors, and manufacturers. Music piracy is rampant in the streets of Guayaquil and Quito. The local authorities have made no efforts to prevent the sale of pirated music, nor have they investigated the duplication and distribution sources for these products. Due to the lack of enforcement, especially in Quayaquil, vendors of pirate CDs cover flea markets and public spaces. In fact, some CD-burning labs operate openly. So far, no task forces have yet been created.

**Need for specialized IP courts:** The National Judiciary Council has not yet created specialized courts for intellectual property matters. Delays in the creation of specialized IP courts (which have only civil jurisdiction) continue despite a requirement in the 1998 Intellectual Property Law requiring their creation.

**Poor border controls:** There is a serious need to improve customs control regarding the importation of blank optical discs. Possible solutions include limiting the ports of entry for optical media products (including blank media). More formalized working relationships with industry representatives (for example, the recording industry) would help inform customs officials.

**No civil cases:** BSA reports that in 2006, it did not use the Ecuadorian civil system, preferring instead to use administrative remedies with IEPI. Back in 2003, BSA reported significant difficulty in obtaining effective civil remedies then and as a result, their campaign in recent years has not included civil litigation. Problems involved the regular rejection by judges of BSA requests for precautionary measures (such as search and seizure) and high bonds being required to be posted before such measures could be issued.

## **COPYRIGHT LAW AND RELATED ISSUES IN ECUADOR**

**The Intellectual Property Law of 1998:** Ecuador enacted a comprehensive intellectual property law (IPL) on May 28, 1998, which covers copyright, trademark, patent, as well as semiconductor chip protection, industrial designs, utility models and unfair competition. The law also addresses procedures, including preliminary enforcement measures, border enforcement, statutory damages, and new criminal offenses, including the criminalization of certain acts regarding technological protection measures against infringement and electronic rights management information. The IPL's provisions relating to computer programs and enforcement are basically TRIPS-compliant, and also incorporate some of the obligations of the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms (WPPT). Amendments



to the copyright law will be required to fully implement the IPR obligations in any Free Trade Agreement with the United States.

**The 1999 Education Law:** Ecuador passed an Education Law in 1999 which includes a poorly drafted provision that purports to grant free software licenses to certain educational institutions. The law mandates a broad “educational purposes” license to computer software for universities and technical institutes and requires “distribution” companies (there is no reference to the copyright holder) to donate the corresponding licenses to such educational institutions. This provision, Article 78, conflicts with Ecuador’s constitution as well as its obligations under the Berne Convention, TRIPS, and Decision 351 of the Andean Community. Since the law was issued in 1999, BSA has stated repeatedly that it believes that Article 78 is unconstitutional and should be amended. Because of this provision, BSA member companies have experienced cases in which representatives of educational institutions have argued that they are not obliged to buy software licenses and that the software owner should give its software away free of charge. In light of these experiences, BSA publicly announced its opposition to Article 78 and sent letters to different academic institutions explaining that these institutions are not entitled to free software licenses. In April 2001, BSA petitioned IEPI for a formal opinion regarding the legality of Article 78; it has never received a response.

**Corporations must certify compliance with copyright law in annual reports.** In March 2004, the Superintendency of Companies issued a regulation (No. 04-Q-IJ) requiring companies to certify, in an annual report, that they were complying with copyright law by using only licensed and non-infringing software in their businesses. The BSA has been working in coordination with the Chamber of Commerce in Quito to educate the business community about the compliance requirements of this new regulation. BSA reports that this resolution has had a positive effect, persuading an important group of medium-sized and large corporations to improve their management of IP and information technology matters.

## **IPR TRAINING AND PUBLIC AWARENESS**

The lack of public awareness about the importance of copyright protection and enforcement in the general public carries over to many law enforcement officials, many of whom view piracy as a social problem, not as an economic crime. BSA provides workshops, seminars, and training programs to different audiences, such as businessmen, universities, and others.

# INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

## 2007 SPECIAL 301 REPORT

### PERU

**Special 301 Recommendation:** IIPA recommends that Peru remain on the Watch List in 2007.

## **EXECUTIVE SUMMARY**

Despite macroeconomic numbers that point to an improved economy in Peru, the copyright industries continue to have difficulties in commercializing their products due to piracy. These industries report that 2006 was a difficult year to obtain effective criminal and administrative copyright enforcement in Peru. Optical disc piracy is on the rise and street piracy remains uncontained. More police actions and administrative investigations are needed, prosecutors must pursue piracy cases, and judges should impose the deterrent-level sentences afforded in the criminal code. The government has yet to enforce its software legalization program within government agencies and illegal photocopying on university campuses continues. Border control remains weak. IIPA supports the Free Trade Agreement process and urges U.S. Congressional ratification of the U.S.-Peru Trade Promotion Agreement.

## **PRIORITY ACTIONS IN 2007**

### **Enforcement**

- Conduct regular and concerted anti-piracy actions at the black markets in Lima (specifically, Mesa Redonda, Avenida Wilson, Galerías Garcilaso de la Vega, el Hueco, Polvos Azules and Polvos Rosados) with enhanced support of the National Police (which should provide more policemen when requested by the Prosecutor) as well as on the streets of high-traffic areas, with particular attention given to Miraflores, San Isidro, and other middle class neighborhoods as well as other targeted cities in the rest of the country.
- Better coordinate efforts between the Copyright Office and local municipalities to revoke licenses granted to vendors selling pirate product and close black-market businesses.
- Perform in-depth investigations directed at closing down illegal replication facilities and warehouses of hard-good piracy.
- Support more administrative enforcement efforts by INDECOPI against piracy of business software, motion pictures (DVD and cable), books, entertainment software and music.
- Enforce the 2004 software legalization regulation (the December 31, 2006 deadline has been unacceptably extended to July 31, 2008) against those public agencies that did not comply with the business software inventory requirements and the licensing of such software.
- Involve INDECOPI, local and regional governments, the National Library and the Ministry of Education to take actions to halt unauthorized photocopying at universities.
- Dedicate significantly more resources to criminal IPR enforcement (e.g., budget reallocation, adding at least one additional special prosecutor, supporting the special IPR unit of the Fiscal Police -- *Division de Investigacion de Delitos contra los Derechos Intelectuales*, in particular with National Police support when large raids are conducted) as well as enhancing financial resources for INDECOPI.
- Pursue prosecutions and impose expeditious and deterrent sentences in piracy cases.

- Train the judges in the new four specialized IPR courts and new appeal court in Lima.
- Improve border enforcement to seize suspicious copyrighted products as well as raw materials (e.g., blank optical media) used in making those products.
- Increase the involvement of the tax authorities (SUNAT) in all anti-piracy actions, including end-user and retailer actions and coordinating with INDECOPI on border measures.
- Implement the Importation Register for importers of blank media and recording devices and equipment.

### **Legislation**

- Work with the U.S. Government and copyright industries to properly and fully implement the FTA IPR obligations and the WIPO Treaties.
- Adopt a content protection system to protect digital audiovisual content to be broadcast and delivered by Digital Terrestrial Television effective measures from unauthorized re-distribution.

<b>PERU</b> <b>Estimated Trade Losses Due to Copyright Piracy</b> <b>(in millions of U.S. dollars)</b> <b>and Levels of Piracy: 2002-2006 <sup>1</sup></b>										
INDUSTRY	2006		2005		2004		2003		2002	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
<b>Sound Recordings &amp; Musical Compositions <sup>2</sup></b>	<b>53.5</b>	<b>98%</b>	66.0	98%	68.0	98%	87.0	98%	70.2	98%
<b>Business Software <sup>3</sup></b>	<b>27.0</b>	<b>70%</b>	22.0	73%	22.0	73%	19.0	68%	14.7	60%
<b>Motion Pictures <sup>4</sup></b>	<b>NA</b>	<b>NA</b>	12.0	63%	4.0	75%	4.0	45%	4.0	50%
<b>Entertainment Software</b>	<b>NA</b>	<b>NA</b>	NA	NA	NA	NA	NA	NA	NA	NA
<b>Books</b>	<b>NA</b>	<b>NA</b>	9.0	NA	8.5	NA	8.5	NA	8.5	NA
<b>TOTALS</b>	<b>80.5</b>		<b>109.0</b>		<b>102.5</b>		<b>118.5</b>		<b>97.4</b>	

The U.S. and Peru began FTA negotiations in May 2004, and negotiations concluded in December 2005. On January 6, 2006, President Bush notified the U.S. Congress of his intent to

<sup>1</sup> The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2007 Special 301 submission at [www.iipa.com/pdf/2007spec301methodology.pdf](http://www.iipa.com/pdf/2007spec301methodology.pdf). For information on the history of Peru under Special 301 review, see Appendix D at (<http://www.iipa.com/pdf/2007SPEC301USTRHISTORY.pdf>) and Appendix E at (<http://www.iipa.com/pdf/2007SPEC301HISTORICALSUMMARY.pdf>) of this submission. IIPA's prior country reports on Peru are posted on the IIPA website at <http://www.iipa.com/countryreports.html>.

<sup>2</sup> The lower recording industry loss estimate in 2004 was due to the fact that the average sale price per legitimate CD was lower; the number of pirate units remained unchanged between 2003 and 2004.

<sup>3</sup> BSA's 2006 statistics are preliminary. They represent the U.S. publishers' share of software piracy losses in Peru, and follow the methodology compiled in the Third Annual BSA/IDC Global Software Piracy Study (May 2006), available at <http://www.bsa.org/globalstudy/>. These figures cover, in addition to business applications software, computer applications such as operating systems, consumer applications such as PC gaming, personal finance, and reference software. BSA's 2005 piracy statistics were preliminary at the time of IIPA's February 13, 2006 Special 301 filing; the 2005 data was revised and posted on the IIPA website in September 2006 (see <http://www.iipa.com/statistics.html>), and the 2005 revisions (if any) are reflected above.

<sup>4</sup> MPAA's trade loss estimates and piracy levels for 2006 are not yet available. However, such numbers will become available later in the year and, as for 2005, will be based on a methodology that analyzes physical or "hard" goods and Internet piracy. For a description of the new methodology, please see Appendix B of this report. As the 2006 loss numbers and piracy levels become available, they will be posted on the IIPA website, <http://www.iipa.com>.

enter into this Trade Promotion Agreement with Peru.<sup>5</sup> In June 2006, Peru ratified the TPA, leaving the U.S. to complete its ratification vote. The TPA 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.<sup>6</sup> Peru currently is a beneficiary country of several U.S. trade programs which contain IPR standards, including the Generalized System of Preferences (GSP) and the Andean Trade Preference Act (ATPA), as amended by the Andean Trade Promotion and Drug Eradication Act (ATPDEA) and December 2006 ATPA Extension Act.<sup>7</sup> Once the FTA is in force, these trade benefits for Peru will end.

## **COPYRIGHT PIRACY IN PERU**

**Street piracy and optical disc piracy:** Optical disc piracy is a major problem in Peru, harming the markets of almost all the copyright industries. There are entrenched black markets such as Polvos Azules, Polvos Rosados, Hueco and Mesa Redonda (which is located one block away from the police and Public Ministry's headquarters) where pirates operate during daylight with little risks of suffering raids. Indeed, during the last semester of 2006, the Specialized Fiscal Police and Prosecutor have not received support in the form of policemen from the National Police, who were requested with the purpose of organizing large raids against these black markets. Most of the pirate product is burned and copied in small-medium size replication facilities hidden in neighboring areas of these markets. Thousands of blank tapes and CD-Rs are smuggled into the country each week and then distributed for illegal duplication around the country.

The Copyright Office of INDECOPI reported that blank OD imports have decreased from 140 million copies in 2005 to an estimated 52 million during 2006. This does not necessarily mean that there is less blank media entering Peru. The reports do not indicate any increase or decrease in the imports of media with an uncertain destiny. Rather the data suggests that certain border measures have created incentives to smuggle the blank media into Peru as contraband, no longer being declared as imports. According to official 2005 customs statistics, the major blank media importer has moved to Iquique, a free port in the north of Chile, from which it is publicly known that significant amounts of contraband come to Peru.

**Business software piracy:** The business software industry reports that its most critical problem in Peru during 2006 was the illegal duplication of business software within small- and medium-sized private sector companies. OD piracy poses another challenge for this industry. Reseller piracy remains a significant problem too; illegal bazaars operate openly in high traffic areas in the center of Lima (Galerías Garcilaso de la Vega) with virtual impunity. Enforcement actions slowed in 2006 (see enforcement section, below). Preliminary estimated trade losses due

---

<sup>5</sup> The President's letter gave Congress at least 90 days' notice before Bush signs the agreement. See Notice of Intention to Enter into a Free Trade Agreement with Peru, 71 Fed. Reg. 1679 (Jan. 10, 2006), at <http://a257.g.akamaitech.net/7/257/2422/01jan20061800/edocket.access.gpo.gov/2006/06-261.htm>.

<sup>6</sup> The final text of the U.S.-Peru FTA IPR Chapter is posted on USTR's website at [http://www.ustr.gov/Trade\\_Agreements/Bilateral/Peru\\_TPA/Final\\_Texts/Section\\_Index.html](http://www.ustr.gov/Trade_Agreements/Bilateral/Peru_TPA/Final_Texts/Section_Index.html). Peru also signed four IPR-related Side Letters, including one on ISP liability and another on retransmission issues.

<sup>7</sup> See IIPA's March 28, 2006 Comments to the U.S. International Trade Commission regarding the Peru Trade Promotion Agreement at [http://www.iipa.com/pdf/IIPA\\_PeruFTA\\_Letter\\_to\\_USITC\\_032806.pdf](http://www.iipa.com/pdf/IIPA_PeruFTA_Letter_to_USITC_032806.pdf). In terms of trade benefits Peru has received, during the first 11 months of 2006, \$160.8 million worth of Peruvian goods entered the U.S. under the duty-free GSP code, and an additional \$1.5 billion worth of Peruvian goods entered the U.S. under ATPA.

to business software piracy in Peru rose slightly in 2006 to \$27.0 million, and the estimated piracy level dropped slightly to 70%.

**Record and music piracy:** Over the last few years, the legitimate recording industry in Peru has nearly disappeared because of the high levels of piracy. Piracy of music and sound recordings still remains at one of the highest levels in the world. The only market left in the country is made up of a few retail stores in Lima. No major recordings have been produced in Peru over the last few years. Due to dwindling company resources, local artists have had very limited access to organized marketing and sale campaigns to offer their products. The end result is a poor market that does not support either local or international productions. With international support, the remaining companies in Peru still run an anti-piracy operation aimed at preserving what is left of the market. Estimated trade losses due to music and recording piracy in Peru were \$53.5 million in 2006, and the level of piracy continue to be 98%.

**Book piracy:** The book publishing industries report little change in the piracy situation in Peru for 2006. Large-scale photocopying (the most damaging form of piracy) remains at high levels. Furthermore, trade books of U.S. origin appear in pirated translations. Book fairs (*campos feriales*), including two large ones in Lima, often permit the sale of pirated books; some estimates place 90% of the books as being piratical. Such widespread piracy over the last decade has devastated the local book industry, causing bookstores to close and interfering with the ability of legitimate publishers to continue doing business; such embedded piracy also sends the wrong signal about the importance of cultural development. Some professional pirates have the ability to offer approximately 3,000 titles for sale. This commercial devastation contradicts the government's declaration about the importance of publishing, as found in the Law of the Book (Law 28086 of 2003) which recognizes the important public need to create and protect books and editorial products.

**Audiovisual piracy:** MPA reports that optical disc piracy of audiovisual programming continued to grow tremendously over the last year. Pirate optical discs are available even prior to theatrical release in Peru and are distributed in street markets, home delivery, newspaper stands and black market distribution centers. The industry's main concerns are the large black markets such as Polvos Azules Polvos Rosados y Hueco, which are especially difficult to address because of their political protection and their tendency to resort to violence in raids. Internet is becoming a bigger concern, although there are no statistics to show the exact extent of possible internet-based movie piracy in Peru. Interestingly, the theatrical market in Peru has increased despite the piracy problem. The home entertainment market, however, has been decreasing dramatically, due to both piracy and the closing of several stores of a major rental chain. Some supermarket chains are trying to get into the DVD sell-through market, and there may be some positive prospects there to help fill the gap in the legitimate video rental market.

**Entertainment software piracy:** The Entertainment Software Association (ESA) reports that pirated entertainment software products (videogame CDs and cartridges, and personal computer CDs) remain widely available in Peru's informal markets.

## **COPYRIGHT ENFORCEMENT IN PERU**

Last year (2006) was an election year in Peru (Presidential and Congressional elections in May and June, and local and regional Governments elections in November), and some industries feel that that raised challenges for generating political and enforcement-related support needed to

engage in concerted, effective anti-piracy enforcement actions. Industry sectors report generally good cooperation with many (not all) Peruvian IPR agencies, but the main problem remains that results (lower piracy and effective deterrence) did not happen in 2006.

Peru has a number of agencies involved in anti-piracy activities. The appointment of the High-level Multi-Sectorial Commission against Contraband and Piracy, formed in 2004, and headed by the Ministry of Production and including 22 members from both the public and private sector, was extended for one additional year (through 2007); this does represent a political gesture supporting IPR enforcement activities. During 2006, this commission was a positive form in obtaining the appointment of the four special courts and one special appeal court with national jurisdiction on IPR crimes. However, it has to-date not been able to get SUNAT (the tax and customs authority) actively involved in anti-piracy operations.

BSA reports a good relationship with officials in the INDECOPI Copyright Office and with the IPR prosecutors. Even so, BSA notes that 2006 was a difficult year for enforcement against software piracy. MPA reports that its work with the *Cruzada Antipirateria* (a private association created by the audiovisual sector, including distributors, exhibitors, and video rental stores) continues to have good relationships with SUNAT, Policia Nacional (Cyber Crime Division and IP Special Unit), and the Ministerio Publico. Unfortunately, the *Cruzada* feels that the municipal authorities such as those in Lima Municipalidad have no commitment to fight audiovisual piracy. There is also little support from the Ministry of Interior, through the Policia Nacional (7<sup>th</sup> Region), for permanent enforcement activities to conduct raids in the major black markets such as Polvos Azules, Polvos Rosados, Hueco and Mesa Redonda. IFPI reports some improvement in general enforcement but with the added requirement of filing formal complaints.

**Police actions:** The copyright industries believe that members of the Peruvian police forces still protect the pirates of Mesa Redonda. Unfortunately, the special police unit trained in IPR enforcement matters is ineffective in handling street piracy. The copyright industries agree that there is a strong need to allocate public resources to support the special IPR unit of the Fiscal Police (*Division de Investigacion de Delitos contra los Derechos Intelectuales*) in order to conduct effective anti-piracy investigations and to compromise the effective support of the National Police (7<sup>th</sup> Region) providing troops when large raids are to be conducted in the above referred black markets. Three industries report their experiences in 2006, below.

BSA reports that 2006 was not a good year for its enforcement activities. *Ex officio* enforcement actions, in particular large raids against black markets such as Polvos Azules, Polvos Rosados, Hueco and Mesa Redonda by both the police and INDECOPI, significantly decreased during 2006. The Fiscal Police Special IP Unit basically stopped running large raids since May 2006, likely due to the lack of government support of the uniform police forces; it was likely also due to election year politics which halted anti-piracy momentum. Large *ex officio* or *ex parte* raids, regardless of the copyright sector, have not resumed after the elections.

MPA has an active campaign in Peru, working through the *Cruzada Antipirateria*, with both INDECOPI and the Federal Police. MPA reports that for the first nine months of 2006, its campaign undertook 63 actions against stores, arresting 2 people, seizing 462,000 blank optical discs and 182,000 pirate burned DVDs and jewel boxes.

The music industry reports an increased level of anti-piracy operations in 2006 mainly coming from the special IPR prosecutor in Lima, Pablo Seminario. Mr. Seminario's office has been willing to conduct weekly street raids in selected parts of Lima to limit the availability of pirate product around viable commercial centers. The local industry welcomes these actions despite the

drawback that it doesn't generate arrests or convictions. In addition, the anti-piracy group has been able to promote actions against major pirate centers such as "El Hueco" and "Las Malvinas". The anti-piracy campaign seems to be taking a turn for the better compared to 2005 but it still lacks the greater frequency in actions and sentences with effective jail time needed to generate a real impact in the market. The industry hopes that the number of actions increase in 2007 and target major pirate markets. They also see favorably the changes in criminal code procedures currently taking place as it may facilitate and expedite sentencing and jailing major pirates. Over the last year, authorities with support from the local anti-piracy team have been able to seize 5.7 million units of recorded optical discs and 2.6 million of blank units. In addition, 30 persons were sentenced for piracy that did not carry effective jail terms.

**INDECOPI's administrative efforts:** INDECOPI continues to experience problems due to limited resources; it is supposed to be self-funding from the income it gets from patent and trademark registrations and from the fines that its administrative bodies are permitted to impose. However, significant fiscal restrictions have adversely affected *ex officio* enforcement activities. Additional resources should be allocated to support INDECOPI's enforcement efforts.

The business software industry has relied significantly on administrative actions by INDECOPI against end users, since civil and criminal actions can last for years without having any deterrent impact on the market for pirate copyrighted products. BSA reports that, on a positive note, INDECOPI and Municipalities have used its new powers in two opportunities to temporarily close the premises of bazaars caught in illegal business software reproduction and marketing. More examples like these would contribute to increase the perception of effective enforcement in the country. BSA reports that in 2006, INDECOPI organized several trainings in software compliance and licensing for Governmental Agencies. This contributed to generating a climate of compliance among these agencies' public servants and a comprehensive knowledge of the government guide for software management approved in 2004. However, INDECOPI still, in 2006, has no authority to force an inspection when the defendant denies access to INDECOPI. As an administrative entity, INDECOPI needs express authorization from a court to enter in the face of such a denial. This lack of authority has encouraged some defendants to deny access to INDECOPI, with the expectation that the amount of the fine to be imposed by INDECOPI for such denial would be smaller than the compensation and fines faced had the inspection occurred. INDECOPI should seek for a solution using its current faculties, for example imposing deterrent sanctions to avoid this conduct in the future and seizing all means used to infringe software companies rights. INDECOPI has been effective in imposing fines on end-users that first reach a settlement with BSA but later choose not to comply with the settlement terms.

The book publishing industry believes it is critical that, in addition to criminal efforts, the administrative agencies of INDECOPI and the Copyright Office initiate investigations and punish those individuals and businesses involved in book piracy. INDECOPI should also work jointly with local and regional governments, as well as with the National Library and the Ministry of Education.

**Criminal prosecutions remain few:** Prosecutors have been unable to move copyright cases. Peru still has two IPR prosecutors who work with INDECOPI when requested to do so. Unfortunately, these IPR prosecutors have restrictions on their jurisdiction, in that after they file the complaint (which happens with an excessive delay of 4 to 6 months after the raid), the case goes to a general prosecutor's office instead of staying under the responsibility of the specialized IPR office. This situation, along with the fact that there have not been any specialized IPR courts for copyright cases, have historically lead to suspended sentences and non-deterrent penalties (see discussion below on courts).



**Non-deterrent results in the criminal courts:** Few criminal cases reach the Peruvian judiciary, and if they do, judges do not impose deterrent sentences. What happens in practice is that the Peruvian Criminal Procedure Code permits sentences of four years or less to be suspended. As a result, the courts usually suspend the defendant's sentence in copyright cases. This sad practice continued even after the 2004 amendments to the criminal code, which provided an increase of minimum sentencing to four or more years for copyright infringements.<sup>8</sup>

Industry hopes that the appointment of four special courts and one special appeal court with national jurisdiction on IPR crimes in November 2006 will improve the enforcement environment in Peru this year. In addition, industry hopes that amendments made in November 2006 to the criminal code to penalize recidivist offenders with stronger sanctions and establish additional penalties for more crimes will also give both prosecutors and judges more legal groundwork to pursue and impose deterrent sentences.

**Border enforcement weakened in 2006:** Border measures in Peru are simply inadequate to stop the flow of pirated material into the country. Interventions by customs authorities to seize suspect shipments are few. Border interventions during 2006 conducted by INDECOPI's representative at Customs have decreased in quantity and quality. INDECOPI has convened to a working committee to try to identify the cause of this phenomenon. Several steps could be taken to improve this situation:

- Peruvian customs, by an internal directive or some regulatory means, should impose strict controls to check the legitimacy of IP goods entering and leaving Peru (e.g., music CDs, videos, business software, videogame software on all platforms, including CD-ROMs, personal computer CD-ROMs and multimedia entertainment products). Customs can consult with industry associations and local representatives about suspect shipments. Many of the copyright industries have participated in training aimed at Peruvian customs officials.
- Customs should pay special attention to the value of the goods that are used as raw materials for the production of copyrighted products, such as recordable CDs, blank tapes, blank videos, etc., that enter Peru with what appear to be under-declared values. By a November 2005 resolution, the Customs Authority included blank media in a special regime (withholding of VAT) by which every importer shall pay in advance the VAT of the reseller of such merchandise, in addition to its own VAT.
- SUNAT should implement its obligation under the 2004 criminal code amendment to create an Importation Registry where persons or companies importing, producing, or distributing duplicating equipment or blank optical media discs must register.
- INDECOPI and SUNAT signed an agreement of mutual cooperation and support on August 18, 2004. Both agencies agreed to coordinate actions to enable customs authorities to identify infringing products more efficiently and to prepare joint anti-piracy media campaigns. MPA reports that that customs does report to INDECOPI all import operations related to optical discs and other goods that could be used in piracy. INDECOPI has an inspector working with Customs, who is in charge of checking the importation of blank media. That inspector reports to INDECOPI's director any irregular operations, and as necessary, INDECOPI takes administrative action or denounces the irregular activity to the IPR prosecutors.

---

<sup>8</sup> An ESA member company reports that several of its cases remain stagnant within the court system, with some dating back to 2000.

## **COPYRIGHT LAW AND RELATED ISSUES IN PERU**

**1996 Copyright Law and TPA implementation:** Peru's copyright law (Legislative Decree No. 822) entered into force on May 24, 1996. This comprehensive legislation raised the level of protection toward the standards of both TRIPS and the Andean Community Decision 351 (1993). The Peruvian law contains a broad scope of economic rights, as well as some of the highest levels of criminal penalties in Latin America. Peru already has deposited its instruments of accession to both the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT).

Given the higher standards of copyright obligations and enforcement measures contemplated in the TPA, Peru will have to make additional reforms to its copyright law in order to fully comply (the TPA does contain transitional periods). Additional reforms to the copyright law will have to include: comprehensive protection against the circumvention of technological protection measures and rights management information, statutory damages, presumption of ownership, ISP liability and notice and takedown provisions, *ex officio* border measures, and *ex parte* seizure of infringing products.

**2004 criminal code amendments increased sanctions:** Peru's criminal code was amended in 2004 by Law No. 28,289 which increased criminal sanctions to a minimum of four years of prison and a maximum of eight years of prison for those who commit copyright infringement. The law also restricts judges' powers to suspend criminal sentences.

**2006 criminal code amendments (Law No. 28,726 and No. 28,730):** These amendments to the Criminal Code penalize recidivist offenders with stronger sanctions and established additional penalties for more crimes.

**Customs and the 2004 criminal code:** The 2004 criminal code amendments also included several provisions to address customs crimes and piracy. The law created a permanent commission to fight customs crimes and piracy, designating SUNAT as the secretary of this commission. The law requires Customs officials to give INDECOPI all necessary support to help it fulfill its mission. It also created an Importation Registry where persons or companies importing, producing, or distributing duplicating equipment or blank optical media discs must register. The registry is supposed to be administered by SUNAT, however SUNAT did not activate such registry during 2006.

**New IPR courts in Lima:** New Federal Ordinance No. 122/2006 gave federal jurisdiction to some courts to analyze customs and tax crimes against intellectual property. This law also created the four new courts.

**Levy on imported blank media:** SUNAT Ordinance No. 224/2005 created a levy ranging from US\$ 0.03 to 0.06 per unit of blank optical media imported. The industries have attempted to collect this levy but with major difficulties. Equipment and blank media Importers are unwilling to pay. The industries see an apparent increase in contraband to avoid this levy as well as importation related VAT's. The copyright office seems to show some concern over this issue and has begun to take some *ex-officio* actions against delinquent importers. We encourage additional enforcement in this area.

**Digital terrestrial television:** In 2006, Peru announced that will adopt and implement a digital terrestrial TV system. Peru has not yet announced which standard it will adopt. MPA calls attention to the need to select a method of protection against unauthorized re-distribution of digital broadcast signals over the Internet, as critical to guaranteeing the future viability of this sector.

**Law of the Book 2003:** The Law of Democratization of the Book and the Development of Reading (Law No. 28086) was enacted in October 2003, with the goals of protecting the creation and distribution of books and similar editorial products. The law also has goals of improving access to books, promoting the national library system, and promoting the conditions necessary for the legal production of the books, among others. The law created an entity known as PROMOLIBRO (*el Consejo Nacional de Democratización del Libro y de Fomento de la Lectura*), within the Ministry of Education

**Government software asset management deadline of December 2006:** BSA urges the Government to implement the software guide and the decree as swiftly as possible. The Government should enforce this regulation by punishing public servants that did not comply with the business software inventory requirements and the licensing of such software used in the respective public entity. To review, on February 13, 2003, the Peruvian Government published the Government Software Legalization Decree, Decreto Supremo No. 013-2003-PCM. The decree states that all public entities should use legal software and, to that end, these entities must establish effective controls to ensure legal use of software. The decree specifies that government agencies must budget sufficient funds for the procurement of legal software, and set a deadline of March 31, 2005 for government agencies to provide an inventory of their software and to erase all illegal software. The decree also delineates clear lines of responsibility and mechanisms for ensuring compliance with its provisions: the chief technology officer or other designated official must certify compliance. The decree also provides for education campaigns aimed at public employees to inform them about licensing provisions and the content of the Legalization Decree, and further requires INDECOPI to publish a guide to ensure efficient software administration in the public sector. INDECOPI published the government guide for software management in 2004. The Government issued Supreme Decree 037-2005-PCM in May 2005, postponing the enforceability of the agencies' obligations to provide an inventory of their software and to erase all illegal software until December 2006. Once again, on January 11, 2007, the Government issued Supreme Decree 002-2007-PCM, postponing the enforceability of the Decree 013-2003-PCM until July 2007. This three-year delay in enforcing this decree is unjustified.

## **IPR TRAINING AND PUBLIC AWARENESS**

During 2006, BSA organized and sponsored several training seminars, and expects to continue this training effort in 2007, directed at the newly appointed four IPR courts. Many of these seminars are conducted with INDECOPI, to train chief technology officers of several Government Agencies in their software management obligations. BSA sponsored and organized, along with the pharmaceutical industry and the U.S. and Swiss Embassies, the XI International conference on IPR, which was the most important IP conference organized by the private sector in 2006. Finally, BSA organized and sponsored an IPR seminar for criminal judges; judges and prosecutors attended this event.

# INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

## 2006 SPECIAL 301 REPORT

### BOLIVIA

#### **EXECUTIVE SUMMARY**

**Special 301 Recommendation:** IIPA recommends that Bolivia stay on the Special 301 Watch List in 2006.

#### **Actions That the Government of Bolivia Should Take in 2006:**

- Revise Bolivia's copyright law up to the international standards of the TRIPS Agreement and the WIPO Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT).
  - Any new copyright bill that is drafted should be considered separately from any industrial property legislation.
  - Any consideration of the proposed copyright legislation drafted in 2001 should be discontinued because that bill is severely deficient.
  - Extend the term of protection for sound recordings to at least 70 years;
  - Include statutory damages provisions for copyright infringement in the civil code; and
  - Adopt ISP liability measures, including notice and takedown provisions;
- Ratify the WCT and WPPT, and fully implement these obligations in any copyright law reform (as referenced above);
- Adopt and implement a national anti-piracy effort to combat copyright infringements;
- Significantly improve on-the-ground anti-piracy enforcement efforts;
- Elevate the level of penalties for copyright infringement to more deterrent levels (in both the criminal code and in any copyright law reform).

IIPA supports the Free Trade Agreement process. The U.S. began FTA negotiations with Colombia, Peru and Ecuador, with Bolivia participating as an observer, in May 2004. Negotiations with Colombia and Ecuador continue in early 2006, after Peru concluded its FTA negotiations with the U.S. It is not yet known how the new Bolivian government will approach the FTA negotiations. IIPA believes that 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. IIPA has recommended for years that it is essential that Bolivia take immediate steps to improve its poor enforcement record. Bolivia currently receives preferential trade benefits under two U.S. trade programs — the Generalized System of Preferences (GSP)<sup>1</sup>

---

<sup>1</sup> For more information on Bolivia under Special 301 review, see Appendix D (<http://www.iipa.com/pdf/2006SPEC301USTRHISTORY.pdf>) and Appendix E (<http://www.iipa.com/pdf/2006SPEC301HISTORICALSUMMARY.pdf>) of this submission. During the first 11 months of 2005, \$25.1 million worth of Bolivian goods (or 9.1% of Bolivia's total exports to the U.S. from January to November) entered the U.S. under the duty-free GSP code, representing a 64.8% increase over the same period in the previous year. Another

and the Andean Trade Preferences Act (ATPA)<sup>2</sup> — both of which contain standards of intellectual property rights which must be afforded to U.S. copyright owners. Bolivia is long overdue in meeting its bilateral and multilateral obligations regarding copyright protection and enforcement. In June 2001, the Bilateral Investment Treaty (BIT) between Bolivia and the U.S. entered into force. At the time of the BIT signature in April 1998, 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; that commitment has not been met, almost seven years later.

Furthermore, at the multilateral level, the WTO conducted a Trade Policy Review (TPR) of Bolivia on November 1 and 3, 2005. Both the Report by the Secretariat and the Minutes of this TPR Meeting reflect concerns raised by several WTO member nations regarding the adequacy of Bolivia's copyright legislation as well as the effectiveness of its enforcement system.<sup>3</sup>

<b>BOLIVIA</b>						
<b>Estimated Trade Losses Due to Copyright Piracy</b>						
<b>(in millions of U.S. dollars)</b>						
<b>and Levels of Piracy: 2003-2005<sup>4</sup></b>						
INDUSTRY	2005		2004		2003	
	Loss	Level	Loss	Level	Loss	Level
Records & Music	15.8	90%	16.0	90%	16.0	90%
Business Software <sup>5</sup>	6.0	80%	5.0	80%	7.0	78%
Motion Pictures <sup>6</sup>	NA	NA	2.0	NA	2.0	100%
Entertainment Software <sup>7</sup>	NA	NA	NA	NA	NA	NA
Books	NA	NA	NA	NA	NA	NA
<b>TOTALS</b>	<b>21.8+</b>		<b>23.0</b>		<b>25.0</b>	

\$149.2 million worth of Bolivian goods entered the U.S. under the ATPA in the first 11 months of 2005, representing an increase of 33.8% from the same period in 2004.

<sup>2</sup> See IIPA Comments to the U.S. International Trade Commission regarding the Andean Trade Preferences Act: Effect on the U.S. Economy and on Andean Drug Crop, June 8, 2005 at <http://www.iipa.com/pdf/IIPA%20Andean%20USITC%20ATPA%20Investigation%20Final%2006082005.pdf>.

<sup>3</sup> See WTO Trade Policy Review of Bolivia, Minutes of the Meeting, WT/IPR/M/154 (issued 16 January 2006), and Trade Policy Review on Bolivia, Report by the Secretariat WT/TRP/S/154 (issued 16 January 2006). Both documents are available on the WTO website, [www.wto.org](http://www.wto.org).

<sup>4</sup> The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2006 Special 301 submission at [www.iipa.com/pdf/2006spec301methodology.pdf](http://www.iipa.com/pdf/2006spec301methodology.pdf).

<sup>5</sup> BSA's 2005 statistics are preliminary. They represent the U.S. publishers' share of software piracy losses in Bolivia, and follow the methodology compiled in the Second Annual BSA/IDC Global Software Piracy Study (May 2005), available at <http://www.bsa.org/globalstudy/>. These figures cover, in addition to business applications software, computer applications such as operating systems, consumer applications such as PC gaming, personal finance, and reference software. BSA's 2004 piracy statistics were preliminary at the time of IIPA's February 11, 2005 Special 301 filing; the 2004 data has been revised and is reflected above.

<sup>6</sup> MPAA's trade losses and piracy levels for 2005 are available for a limited number of countries and are based on a methodology that analyzes physical or "hard" goods and Internet piracy. For a description of the new methodology, please see Appendix B of this report. As loss numbers and piracy levels become available for additional countries at a later time, they will be posted on the IIPA website, <http://www.iipa.com>.

<sup>7</sup> ESA's reported dollar figures reflect the value of pirate product present in the marketplace as distinguished from definitive industry "losses." The methodology used by the ESA is further described in Appendix B of this report.

## **COPYRIGHT LAW AND RELATED ISSUES**

**Copyright Law of 1992:** Bolivia passed a copyright law on April 29, 1992, which replaced its antiquated 1909 law.<sup>8</sup> Although the 1992 law represented an improvement in legal protection in Bolivia, it unfortunately left the implementation of many of its provisions, including enforcement, to subsequent regulations.<sup>9</sup> The 1992 law predated many of the substantive copyright and enforcement measures adopted in the WTO TRIPS Agreement.

**Efforts to amend the Copyright Law:** Efforts to overhaul the 1992 Bolivian copyright law have been underway for almost a decade. 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. 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 contained 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. While a good start, that draft would have required additional amendments to bring its copyright provisions up to acceptable standards.

Industry was under the impression that this 2001 bill was abandoned by the government a few years ago. However, Bolivian officials informed the WTO that this 2001 bill remains pending review. Industry had heard that SENAPI presented a new IP proposal in May 2004, which split the bill into two parts: one for trademark and patent (industrial property), and another for copyright. IIPA does not know whether this 2004 version contains identical proposals to the 2001 version or not. We do support its severance from industrial property legislation.

**WIPO Treaties:** Bolivia is a signatory to the WIPO treaties—the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT)—but has not yet completed ratification with WIPO. Importantly, 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. IIPA encourages the government of Bolivia to add ratification of the WIPO treaties to the 2006 legislative agenda.

---

<sup>8</sup> Bolivia's copyright regime must also comport with decisions made by the five members of the Andean Community, especially Decision 351 (of December 1993), which outlines a common regime for copyright and neighboring rights, including remedies like injunctive relief, seizure and confiscation of unlawful copies and devices, and damages.

<sup>9</sup> As IIPA has reported previously, 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, 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 rightholder.

**Criminal Codes:** In May 2001, a new Code of Criminal Procedure, providing for criminal proceedings for IPR infringements, was adopted. In August 2003, the Bolivian Criminal Code was amended. Article 362 provides criminal sanctions for copyright infringement of three months to two years in jail and a fine of 70 days. The one glaring problem with this provision is that it requires a commercial purpose intent (“*con animo de lucro*”), an intent which cannot always be satisfied, especially in Internet-related cases.

## **COPYRIGHT PIRACY AND ENFORCEMENT**

Business software piracy by both resellers and end-users is widespread in Bolivia. In addition, music piracy is so rampant in Bolivia that all international recording companies closed their offices several years ago. Domestic music repertoire is suffering enormously as a result of the absence of local and international producers. The major form of piracy afflicting the U.S. book publishing industry in the region in 2005 continues to be commercial photocopying piracy. Photocopying shops near universities often fill requests for illegal reproductions of entire textbooks. Unauthorized translations are also reported in the region. Video piracy remains a consistent problem throughout the Andean region; however, the motion picture industry does not have an anti-piracy presence in Bolivia. The U.S. entertainment software industry suffers from inadequate enforcement in the Andean region; piracy and counterfeiting affects all platforms for playing videogames, including cartridges, personal computer CD-ROMs, and game consoles. SENAPI, the National Intellectual Property Service, was created by decree in 1998 and is in charge of administrating IP rights in Bolivia.

**Failure to Provide TRIPS-Compatible Civil *Ex Parte* Search Measures:** BSA reports no improvement in 2005 in the longstanding problems they have encountered with obtaining civil *ex parte* searches. BSA's enforcement efforts were almost completely unsuccessful in Bolivia during 2005. In the only civil case attempted, the judge rejected the presentation of evidence. The reason given by the judge was that more time was required for the other side to respond to the presented evidence. This was despite the fact that the time was identical to times provided for response in previous years. Over the years, 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 violates the *ex parte* standards in TRIPS Article 50.2.

**Unwarranted Delays in Civil 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 a 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. 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 mandated by 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. 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 and Ineffective Criminal Enforcement:** Enforcing copyrights through the Bolivian criminal system has proven to be completely ineffective. The business software reports no criminal cases were brought in 2005.

**Border measures in Bolivia must be strengthened:** In January 2004, SENAPI signed an agreement with the National Customs Authority and the Taxation Service aimed at preventing the entry of pirated products into Bolivia. During 2005, 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 laws and/or regulations should contain provisions under which the competent authorities can act on their own initiative (*ex officio*) and suspend the release of suspect goods. According to WTO's review of Bolivia, SENAPI can order Customs to suspend the clearance of goods which are suspected of IPR infringement; once the IP infringement is proven, Customs may seize the goods and order their disposal.

**Inadequate Civil Copyright Damages:** The Bolivian 1992 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. The IP legislation drafted in 2001 included a positive concept by proposing to add a statutory damages provision of between three to five times the retail value of the protected work. It is unclear whether the new, bifurcated version of the bill as introduced by SENAPI in 2004 preserves this provision. As indicated above, other provisions of the 2001 version of the copyright reform bill fail to meet TRIPS and WCT/WPPT standards.

**THIS PAGE LEFT BLANK INTENTIONALLY.**