



March 10, 2004

Via electronic mail (FR0411@ustr.gov)

Ms. Gloria Blue
Executive Secretary
Trade Policy Staff Committee (TPSC)
Office of the United States Trade Representative
1724 F Street, N.W.
Washington, D.C. 20508

Re: Notice of Intent to Testify at a Public Hearing
Concerning the Proposed United States-Andean
Free Trade Agreement
(69 Fed. Reg. 7532, Feb. 17, 2004)

To the Trade Policy Staff Committee:

This written notification responds to the TPSC's Request for Comments and Testimony Concerning Proposed United State-Andean Free Trade Agreement. The request requires persons wishing to testify orally at a hearing that will be held in Washington, D.C. on Wednesday, March 17, 2004, to provide written notification of their intention, as well as a copy of their testimony.

Notice of Request to Testify

We hereby notify you that the following person wishes to testify orally at this hearing on behalf of the International Intellectual Property Alliance (IIPA):

Ms. Maria Strong
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International Intellectual Property Alliance
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Summary of Testimony

The following three paragraphs represent a short summary of the IIPA testimony, as required by the Federal Register notice. IIPA's full testimony follows this summary.

The International Intellectual Property Alliance (IIPA) supports the commencement of Free Trade Area negotiations with the Andean nations, commencing first with Colombia and Peru, to be followed by Ecuador and Bolivia. Our testimony is aimed at highlighting relevant trade-related intellectual property issues, specifically copyright and effective enforcement, in these four Andean nations. A U.S.-Andean FTA IPR Chapter that contains high levels of copyright protection and enforcement will benefit both U.S.

and local Andean creative industries. Such an endeavor will continue to set precedents throughout the region, building on the work already done with the FTA IPR chapters with Chile and Central America.

The substantive copyright obligations in the FTA IPR chapter will assist in elevating copyright standards in the digital era. Three of the four nations (Colombia, Peru and Ecuador) already have joined the WIPO internet treaties, thus acknowledging their interest in promoting a digital economy. The FTA would include high levels of substantive copyright obligations. With respect to FTA IPR obligations on copyright enforcement, the scope of criminal penalties and civil remedies are comprehensive. Actions would be taken *ex officio* in both the criminal and customs areas. Presumptions would be added and broadened to speed up copyright infringement proceedings. Enforcement would be strengthened to cope with online infringement, including creating clear standards of secondary liability for online service providers accompanied by certain limitations on infringement remedies that would ensure cooperation between service providers and rightholders. A strong and expeditious notice and takedown system would be a key feature of this system. Finally, criminal and civil remedies would be extended to cover circumvention and rights management information violations.

As we enter the negotiating phase of the U.S.-Andean FTA, IIPA emphasizes that it is critically important that all four of these Andean nations continue to take all appropriate actions under their existing laws to combat copyright piracy in their domestic markets. Widespread copyright piracy, compounded by ineffective and inadequate criminal and civil enforcement mechanisms, already inflict heavy losses on the U.S. copyright industries as well as on their local industry colleagues. 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 levels of copyright protection and effective enforcement.

IIPA and its member association thank the TPSC for permitting us to testify on this important initiative.

Respectfully submitted,



Maria Strong
Vice President and General Counsel
International Intellectual Property Alliance

Attached:

- 1 – IIPA Testimony on the U.S.-Andean FTA IPR Chapter
- 2 – IIPA 2004 Special 301 country reports on
Colombia, Peru, Ecuador and Bolivia

**Testimony of
Maria Strong
Vice President and General Counsel, International Intellectual Property Alliance (IIPA)
for the
Public Hearing on the Proposed U.S.-Andean Free Trade Agreement
To be delivered on March 17, 2004
Before the Trade Policy Staff Committee
In Washington, D.C.**

Introduction

My name is Maria Strong, and I am Vice President and General Counsel of the International Intellectual Property Alliance (IIPA). I am pleased to have this opportunity to share with you the perspectives of the U.S. copyright industries on the promise of the U.S.-Andean Free Trade Agreement.

The IIPA is a coalition of six trade associations,¹ representing the copyright industries, which contribute well over 5% of the gross domestic product to the total U.S. economy.² IIPA's members produce the nation's books, recorded music, films, videos and TV programming, and computer software for business and entertainment uses. Since 1984, this diverse range of industries has worked together, individually and under the IIPA umbrella, to strengthen the copyright laws and enforcement regimes in over 100 countries around the world. IIPA has also represented the copyright-based industries in the negotiation of key bilateral and multilateral agreements (including the WTO TRIPS Agreement and the WIPO "Internet" Treaties) to raise international minimum standards of copyright protection and, of increasing importance, enforcement. IIPA and its members have been particularly active in working with the U.S. government on the various FTA IPR negotiations already completed (Jordan, Singapore, Chile, Australia, Central America and Morocco) and those in-process or about to commence (Dominican Republic, Bahrain, Thailand, Panama and SACU (Southern African Customs Union)).

IIPA Supports an Andean FTA with High Standards of Copyright Protection and Enforcement, Yet These Nations Must Take Current Action to Enforce Existing Laws Against Piracy

A U.S.-Andean FTA that contains high levels of copyright protection and enforcement will benefit U.S. industries and continue to set precedents throughout the region, following the work already done with the FTA IPR chapters with Chile and Central America.

As we move into the negotiating phase, IIPA believes that it is critical that all four of these FTA-eligible countries continue to take all appropriate actions, to improve their respective efforts 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 levels of copyright protection and effective enforcement. IIPA has provided our views to the U.S. government regarding the

¹ IIPA's members are: the Association of American Publishers (AAP), AFMA (formerly the American Film Marketing Association), the Business Software Alliance (BSA), Entertainment Software Association (ESA), the Motion Picture Association of America (MPAA), and the Recording Industry Association of America (RIAA). IIPA's members represent over 1,350 U.S. companies.

² Economists Inc., Copyright Industries in the U.S. Economy: the 2002 Report (2002); the text of this report is posted on IIPA's website at http://www.iipa.com/pdf/2002_SIWEK_FULLL.pdf.

high levels of copyright protection and enforcement expected of these nations under their existing obligations under the Andean Trade Preferences Act (ATPA), as amended.³

Attached as appendices to our testimony are IIPA's recent reports on these four Andean countries, all of which appear in the IIPA's February 2004 Special 301 submission to USTR.⁴ 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.

The Current State of Copyright Protection and Enforcement in the Andean Nations

Many copyright-based companies increasingly rely on foreign licensing and sales revenues. However, copyright piracy, combined with inadequate enforcement, has significantly limited such revenue and has become the major market access barrier for the copyright industries. For example, U.S. companies suffered estimated trade losses due to copyright piracy in these four Andean countries exceeding \$270 million in 2002 (2003 data expected soon). The challenges faced by the copyright industries and national governments to enforce copyright laws grow exponentially as the forms of piracy shift from hard goods and 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 to a lesser extent, DVDs – to compete against these pirated products. Inadequate and ineffective copyright enforcement has failed to stem this problem and continues to result in significant trade distortions and losses in the Andean region. Criminal and civil justice systems must work in a transparent and expeditious manner and apply deterrent penalties and remedies.

The following summary provides an overview of the kinds of piracy found in the Andean region. (As mentioned above, IIPA already has provided detailed information on copyright piracy, legislation and enforcement issues in all four of the Andean countries in our February 2004 "Special 301" report.)

- Piracy of **sound recordings and music** has reached unacceptable levels in the Andean region. These four Andean countries each have music piracy levels of 70% or higher (in fact, piracy in Peru, Ecuador and Bolivia exceeds 90 percent of the total market), meaning that most of the copies of recorded music in these markets are piratical. While audiocassette piracy had been the preferred business of pirates for years, music CD piracy is the format of preference now. In addition, none of the countries provide effective legislation to combat internet piracy, and also lack other basic enforcement provisions such as statutory damages. Specifically:
 - In Peru, the once-thriving legitimate record industry has almost entirely vanished, with piracy levels now at 98%, devastating the legitimate market. Pirate music in CD and audiotape format are sold throughout the country, including in the Mesa Redonda area located one block away from police headquarters.
 - The recorded music market in Colombia has also suffered from lack of an effective national anti-piracy campaign. The local industry has created an anti-piracy task unit to work with

³ See IIPA Comments to the U.S. International Trade Commission on the Andean Trade Preferences Act, May 21, 2003, posted at http://www.iipa.com/rbi/2003_May21_ATPA_ITC.pdf.

⁴ Visit IIPA's homepage at www.iipa.com. Specifically, IIPA's reports on the Andean nations are found at the following links:

(1) Colombia at <http://www.iipa.com/rbc/2004/2004SPEC301COLOMBIA.pdf> ;

(2) Peru at <http://www.iipa.com/rbc/2004/2004SPEC301PERU.pdf>;

(3) Ecuador at <http://www.iipa.com/rbc/2004/2004SPEC301ECUADOR.pdf> ; and

(4) Bolivia at <http://www.iipa.com/rbc/2004/2004SPEC301BOLIVIA.pdf>

- local authorities in performing investigations and bringing charges against identified pirates, but these efforts have been diluted by a lack of political will to perform in-depth investigations into large distributors and an aversion by judges to apply deterrent-level sanctions. In fact, a major recording label, Warner Music, announced just a week ago that it is closing its Colombia operations; distributions for its Peru and Venezuela operations will also be affected.
- Bolivia and Ecuador have shown a total lack of concern for music piracy. Neither country's enforcement authorities perform anti-piracy investigations or raids for the recording industry, and as a result, multinational companies have limited their presence in these markets.
- **Business software** piracy takes various forms, including counterfeiting, illegal reproduction and/or distribution by resellers, mail order houses, bulletin boards, other internet-based distribution and corporate end-user piracy. The greatest threat is when a corporate or institutional entity copies software onto the hard disks of many more computers than the number authorized. Such end-user piracy occurs in government, academia, and business enterprises throughout the Andean region. To address this problem, governments must lead the way in promoting legal software use within their ministries and offices. In a 2003 study commissioned by BSA, an estimated 10-point drop in the level of business software piracy throughout Latin American could result in 25,000 new jobs, US\$6.4 billion in additional economic growth, and more than US\$600 million in new tax revenues in the region.⁵
 - Bolivia: The Business Software Alliance (BSA) has reported that Bolivia has one of the highest piracy rates for business software anywhere in Latin America (74% in 2002). The lack of civil *ex parte* search measures remains a serious problem to effective software enforcement. In all of its civil cases, BSA has had to adhere to Bolivian procedures, which include notifying the defendants at least 24 hours prior to the inspection. In many cases the only evidence found by the BSA were traces of software that was previously installed but deleted a few hours before the inspection.
 - Ecuador: Ecuador's 1999 Education Law contains a poorly drafted provision that would appear to grant free software licenses to educational institutions. The industry has objected to this provision (Article 78 in that Law) for years as it violates Ecuador's obligations under the Berne Convention as well as TRIPS.
 - Peru: Although Peru is to be commended for enacting a government software legalization decree in early 2003, Peruvian government entities (both criminal and administrative) across all copyright sectors have a mixed enforcement record, and the judiciary fails to issue deterrent criminal penalties.
 - **Video piracy** remains a consistent problem in the Andean region, ranging from 45% in Peru to over 90% in Ecuador and Bolivia. Ineffective enforcement remains a principal factor. For example:
 - Peru: In Peru, the administrative fine issued when pirate videotapes are seized is approximately US\$2 per tape, which is the street price for a pirate videotape. This inadequate fine is simply not a deterrent to piratical activity. While MPA notes that administrative actions have improved in the last year, criminal prosecutor remains challenging.
 - Colombia: The motion picture industry is increasingly concerned about the recent growth of optical disc piracy (both CD-R and DVD-R) in Colombia. This growth in OD piracy means that the film companies have renewed their immediate concern with high levels of home video piracy in this market. Progress has been reported in combating television piracy (the unauthorized reception and retransmission of U.S. domestic satellite signals) in recent years.

⁵ IDC, Expanding Global Economies: The Benefits of Reducing Software Piracy, commissioned by the Business Software Alliance (April 2003), available at http://www.bsa.org/idcstudy/pdfs/Latin_America.pdf.

- The major forms of piracy afflicting the U.S. **book publishing industry** in the region involve commercial photocopying piracy. Photocopying shops near universities often fill requests for illegal reproductions of entire textbooks. Unauthorized translations are also reported in the region.
- The U.S. **entertainment software industry** suffers from inadequate enforcement by governmental and judicial authorities in the Andean region. Piracy and counterfeiting affects all platforms for playing videogames, including cartridges, personal computer CD-ROMs, and game consoles.

Colombia, Peru and Ecuador all engaged in copyright law reform efforts during the 1990s. In fact, these three countries have already deposited their instruments of accession to both the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT). However, some further revisions to the copyright laws (and related laws such as criminal and civil codes) will be needed to fully incorporate the WIPO Treaties as well as provisions included in the expected FTA IPR Chapter. However, IIPA must point out that the copyright law in Bolivia falls far short of satisfying its TRIPS requirements, let alone its current bilateral copyright obligations under the ATPA and the GSP trade programs. Bolivia is long overdue to reform its inadequate copyright law and fix serious deficiencies in its enforcement regime.

Key Elements of a Strong Copyright and Enforcement Text in a Free Trade Agreement

IIPA has gone on record, in numerous fora, elaborating the key copyright substantive law obligations as well as the critical enforcement-related measures which must be included in any FTA. Fortunately, to date, most of our recommendations have been integrated into the FTAs already concluded. We would expect that the same high level of standards would be included in the U.S.-Andean FTA.

SUBSTANTIVE COPYRIGHT OBLIGATIONS: It is critical that with respect to copyright, the U.S.-Andean IPR Chapter include, on a technologically neutral basis, the obligations in both WIPO Internet Treaties, other substantive improvements such as copyright duration, as well as modern and effective enforcement provisions that respond to today's digital and Internet piracy realities. Below, we highlight those key improvements.

- **Right of reproduction and protection for temporary copies:** The right of reproduction, for all works, including performances and sound recordings, must include a specific and express reference to the right including both permanent and temporary copies in line with the Berne Convention, TRIPS and both WIPO Internet Treaties. It is important that clear language indicating that that temporary and transient copies (such as those made in the Random Access Memory (RAM) of a computer) are "copies" and are fully subject to the reproduction right.
- **Right of communication to the public and the "making available" right:** Copyright rightholders must have the exclusive right to authorize or prohibit the communication to the public of their works, including performances and phonograms, by wire or wireless means with respect to all forms of transmissions, including their "making available" to the public in such a way that members of the public may access them from a place and at a time individually chosen by them. An "interactive" exclusive right is critical.
- **Right of distribution:** Copyright rightholders must have the exclusive right to authorize the distribution to the public of the original and copies of their works, including performances and phonograms, through sale or other transfer of ownership, as provided in the WIPO Internet Treaties, WCT Article 6 and WPPT Article 8.

- Right of importation: Copyright rightholders must have the right to authorize or prohibit the importation of both piratical and legal copies imported without the consent of the rightholder.
- “Anti-bootlegging” provisions -- unfixed performances: Performers must have the right to authorize or prohibit (a) the broadcasting and communication to the public of their unfixed performances except where the performance is already a broadcast performance, and (b) the fixation of their unfixed performances.
- “Simultaneous” publication with respect to performers and producers of phonograms: A performance or phonogram should be considered first published when it is published within 30 days of its original publication.
- No formalities for all works, including for performers and producers of phonograms: The enjoyment and exercise of all rights provided for in the Free Trade Agreement should not be subject to any formality.
- Term of protection: Given developments in communications media that are effectively making cross-border transmissions the norm, it is essential that all countries further harmonize the term of protection on a global basis. Where the term of protection of a work is calculated on the basis of the life of a natural person, the term shall be not less than the life of the author and 70 years after the author's death. Where the term is calculated on a basis other than the life of a natural person, (such as with performances and phonograms), the term should be not less than 95 years from the end of the calendar year of the first authorized publication of the work, performance or phonogram.
- Technological protection measures (TPMs): This is one of the key obligations in the WIPO treaties. Provisions must be included which implement these obligations on making illegal the act of circumvention of technological protection measures that effectively control access to copyrighted materials or materials, and the circumvention of TPMs that effectively control the exercise of exclusive rights. Furthermore, devices, services, and components that facilitate and defeat the measures that rightholders use to protect their works must be covered. Any exceptions to these requirements must be carefully and narrowly crafted to preserve the adequacy and effectiveness of the anti-circumvention prohibitions as the treaties require. Violations must be independent of infringement and subject to both civil and criminal remedies.
- Protection of rights management information: Adequate and effective legal remedies must be afforded to protect rights management information from unauthorized alteration and removal, consistent with the WIPO Internet Treaties. Such provisions on rights management information (RMI) systems are critical to providing opportunities for licensed access and use of protected materials.
- Protection for encrypted program-carrying satellite signals: Criminal and civil liability must be afforded for encrypted program-carrying satellite signals which have been decoded without the authorization of the lawful distributor of the signal.
- National treatment: The principle of full national treatment, without exception or derogation, must be the norm in this FTA with respect to all works and sound recordings.
- Contractual rights: Any person acquiring or holding any economic rights must be able to freely and separately transfer such rights by contract. Any person or entity acquiring or holding any such

economic rights by virtue of a contract, including contracts of employment underlying the creation of works and phonograms, must be able to exercise those rights in its own name and enjoy fully the benefits derived from those rights. All rights, including rights of communication, must not be subject to mandatory collective administration.

- Narrow exceptions to protection: Limitations or exceptions to exclusive rights must be expressly limited to certain special cases which do not conflict with a normal exploitation of the work, performance or phonogram, and do not unreasonably prejudice the legitimate interests of the rightholder, as provided in Berne, TRIPS and the WIPO treaties.
- Retroactivity provisions: The provisions of Article 18 of the Berne Convention (and Articles 9.1 and 14.6 of the TRIPS Agreement) should be applied strictly to the subject matter, rights and obligations provided for in the FTA.
- Government legalization of software (and more), plus protection against use of public computers and networks for copyright infringement: The FTA must contain an obligation for these countries to issue appropriate administrative or executive decrees, laws, orders or regulations mandating that all government agencies use and procure only properly licensed computer software; such instruments must actively regulate the acquisition and management of software for such government use. Furthermore, this obligation should be extended to other works as well such as textbooks. Finally, these order and decrees must obligate these nations to adopt provisions ensuring that their government agencies and other institutions containing publicly-controlled computers, computer systems or networks are not used in ways that infringe, or facilitate the infringement of, all copyrighted materials.

COPYRIGHT ENFORCEMENT: Effective copyright enforcement must remain a high priority and be a key element of the FTA. These FTA proposals illustrate the kind of measures which will, once implemented at the national level, simplify and expedite anti-piracy legal actions, reduce the costs of enforcement, and provide more effective and deterrent remedies.

- Provide deterrent levels of criminal penalties and remedies (including copyright infringements as “serious” offenses and as predicate offenses under organized crime provisions): The FTA must include provisions requiring imprisonment and monetary fines for copyright piracy “on a commercial scale” and that include infringements causing commercial harm even if not done for profit, as is the case with many infringements on the Internet. To be “deterrent,” copyright offenses should be treated as serious offenses, and penalties should be consistent with those accorded to other serious crimes. Furthermore, the FTA text must encourage these nations to treat copyright offenses as predicate offenses under organized crime provisions of penal codes.
- Provide deterrent levels of civil damages for copyright infringement, including pre-established (statutory) damages: The FTA chapter should provide that damages actually imposed act as a deterrent and remove any gain to the infringer. To ensure deterrent civil damages, a system of pre-established damages (also known as statutory damages) must be adopted.
- Ensure *ex officio* actions in criminal cases: National enforcement authorities must be able to initiate criminal actions *ex officio*, without the need for a complaint by a private party or rightholder. This would allow authorities (such as police, inspectors, administrative officials, and prosecutors) to initiate actions on their own initiative – an essential component of an anti-piracy campaign aimed to “retake” the streets and remove infringing product.

- Ensure *ex officio* authority for customs officials: Customs authorities must be primarily responsible for preventing infringing products from entering or exiting each nation's territory. They must be able to initiate border measures *ex officio*, without the need for a formal complaint by a private party or association or the rightholder. Border measures must be applicable to goods in transit and to goods destined for export.
- Civil *ex parte* search orders must be granted in an expeditious manner and without unnecessary costs: Each country must strictly implement its TRIPS Article 50 obligations. In civil cases, searches and seizures conducted *inaudita altera parte* must be statutorily implemented and requests should be acted upon and executed within a short period of time. Any security or bonding obligations must not result in unreasonably deterring recourse to these procedures.
- Extend civil and criminal remedies to cover violations of the technological protection measures and rights management information obligations: All available remedies and enforcement procedures applicable to copyright infringement must apply to the obligations dealing with the circumvention of technological protection measures (TPMs) and with rights management information (RMI). Further negotiations are needed to clarify the relationship between the TPM and RMI obligations and their corresponding enforcement provisions.
- Award fees/costs and require information: Awarding legal fees and costs to the injured party is also critical to the deterrence that is a TRIPS requirement. Each nation must be able to order the infringer to provide any information regarding other persons involved in the infringement and about suspected distribution channels.
- Provide presumptions of ownership and subsistence: To speed up the civil justice system by making it easier for rightholders and judges to bring cases to conclusion, the physical person or legal entity whose name is indicated as the author, producer, performer or publisher of the work (including a performance or phonogram) in the usual manner must, in the absence of proof to the contrary, be presumed to be such designated rightholder as such. It must also be presumed that the copyright subsists in such subject matter, in the absence of proof to the contrary. Such presumptions should also pertain in criminal cases.
- Provide domain name registrant contact data: Unrestricted public access to current and accurate contact information about domain name registrations is a key ingredient for effective action against copyright piracy in the online environment. The FTA must require each Andean nation to take steps to ensure that the country code domain registries under its control provide this public access, such as by bringing its registration policies into compliance with the WIPO ccTLD Best Practices for the Prevention and Resolution of Intellectual Property Disputes.
- Provide that secondary infringers face appropriate liability generally (especially Internet service providers): It is critical that Internet service providers, other intermediaries, and anyone who aids and abets infringements face appropriate liability. This is particularly important in the case of infringements being carried out over the electronic networks of service providers. Limitations on remedies available against service providers who promptly take down infringing material must be narrowly crafted and ensure that cooperation between service providers and rightholders is preserved. Notice and takedown procedures must be spelled out, be simple and expeditious and exist without the need for judicial intervention.

In conclusion, IIPA appreciates the opportunity to appear before the TPSC to testify on the IPR Chapter in the U.S.-Andean FTA, in order to ensure adequate protection of the U.S. copyright industries.