

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2002 SPECIAL 301 REPORT

BOLIVIA

EXECUTIVE SUMMARY

IIPA recommends that Bolivia remain on the Special 301 Watch List.

Despite promises and rogue efforts from the Bolivian government, the levels of copyright piracy in Bolivia have remained high across most industry sectors for too many years. Bolivia fails to meet basic TRIPS standards. The lack of civil *ex parte* measures remains the biggest problem in enforcing IPR in Bolivia, as well as the lack of resources and directions to investigate and fight this matter from its sources. Significant improvements are needed to strengthen civil enforcement mechanisms, criminal enforcement and border measures. Copyright legal reform has been considered for years, and a comprehensive intellectual property rights bill was introduced to the Bolivian Congress in early February 2001. The Bolivian Congress has not even started reviewing the bill, despite several requests from the Industry. There are reports that the bill will not be considered during the 2002 legislature either. Interestingly, the Bolivian IPR industries and culture have been the most affected in this process. Multinational companies continue reducing investments down to basic expenses. Bolivia is losing the ability to create new talent and export it in several fields.

Bolivia is long overdue in meeting its bilateral and multilateral obligations regarding copyright protection and enforcement. In October 2000, the U.S. Senate approved the Bilateral Investment Treaty (BIT) with Bolivia, which was signed in April 1998 and ratified by Bolivia. At the time of the BIT negotiation, Bolivia was required to have TRIPS-level protection by the end of April 1999, both in terms of its substantive intellectual property law requirements and the requisite enforcement obligations. Bolivia currently participates in both the Generalized System of Preferences (GSP) program and the Andean Trade Preferences Act (ATPA), U.S. trade programs that offer preferential trade benefits to eligible beneficiary countries. One of the discretionary criteria of these programs is that Bolivia provide "adequate and effective protection of intellectual property rights."¹

¹ In 2000, \$5.8 million of goods from Bolivia entered the U.S. under the duty-free GSP code, accounting for 3.1% of its total imports to the U.S. Another \$61.5 million of Bolivia's imports to the U.S. received benefits under the ATPA program, accounting for 33.4% of its total imports that year. For the first 11 months of 2001, \$6.2 million of Bolivian goods (or 4.1% of Bolivia's total imports to the U.S. from January to November) entered the U.S. under the duty-free GSP code, representing a 26.4% increase over the same time period last year. Another \$52.4 million of Bolivian goods entered the U.S. under the ATPA in the first 11 months of 2001, representing a decrease of 5.8% from the same period last year. For a full history of Bolivia's Special 301 placements, see appendices D and E of IIPA's 2002 Special 301 submission.

BOLIVIA: ESTIMATED TRADE LOSSES DUE TO PIRACY
(in millions of U.S. dollars)
and LEVELS OF PIRACY: 1996 - 2001

INDUSTRY	2001		2000		1999		1998		1997		1996	
	Loss	Level										
Business Software Applications ²	3.0	79%	2.8	81%	4.1	85%	4.0	88%	3.1	88%	3.0	88%
Sound Recordings / Musical Compositions	15.0	85%	15.0	85%	15.0	85%	20.0	85%	18.0	85%	15.0	85%
Motion Pictures	2.0	100%	2.0	100%	2.0	100%	2.0	100%	2.0	100%	2.0	100%
Entertainment Software	NA	NA	1.5	NA	NA	NA	3.9	93%	3.8	94%	3.9	93%
Books	5.5	NA	5.5	NA	5.0	NA	5.0	NA	5.0	NA	5.0	NA
TOTALS	25.5		26.8		26.1		34.9		31.9		28.9	

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Business software piracy by both resellers and end users is widespread in Bolivia. Estimated losses due to piracy of U.S. business application software in Bolivia in 2001 were \$3.0 million. The level of business software piracy in that country remained at a high 79% level. Piracy levels in the government remain extremely high despite efforts by BSA member companies to legalize several agencies. BSA urges the Bolivian government to consider stronger efforts to support government legalization of software in its public ministries and agencies.

Estimated trade losses due to the piracy of sound recordings and music in Bolivia has remained at \$15 million in 2001. In comparison, the legitimate industry decreased significantly. Current figures are difficult to come by, as most of the formal companies had to close down operations due to piracy. The estimated level of audio piracy in the Bolivian market is 85% because every hit is pirated after two to three weeks of initial release. In fact, the legitimate recording and music industries have accounted for no more than 15% of the total market for the last six years. To compound matters, the market is being threatened by digital piracy, and has – as predicted – shifted into a pirate CD-R (recordable CD) market. These high losses are due primarily to the total lack of action from the Bolivian government; the high levels of corruption of the police; the lack of commitment of the SENAPI (the National Intellectual Property Service); and the lack of commitment of the Bolivian judiciary. In addition, Bolivia continues to serve as an alternate route for product controlled by Paraguayan pirates. For example, Santa Cruz de la Sierra in Bolivia is a link between Paraguay's Ciudad del Este and other markets in Chile, Peru, Ecuador, and the Far East. Yacuiba is also known as a center for illegal traffic of raw materials for piracy. Street vendors of pirate product in La Paz, Cochabamba, Sucre and Potosi are common. Bolivian authorities do not assist in conducting investigations; actions only happen after the local industry presses the bureaucracy and the local industry is close to disappearing completely.

²BSA estimates for 2001 are preliminary. In IIPA's February 2001 Special 301 filing, BSA's 2000 estimates of \$4.1 million at 84% were identified as preliminary. BSA finalized its 2000 numbers in mid-2001, and the revised estimates are reflected above.

The level of book piracy in Bolivia has seen no improvement. It appears that Bolivian pirates are now printing their own books, and there are reports that they exchange these copied books with pirate publishers/printers in Peru. As a result, there are fewer book imports from Peru than before. Estimated losses due to book piracy amounted to \$5.5 million in 2001.

The Interactive Digital Software Association (IDSA) reports Bolivia continues to have pirated interactive entertainment CD-ROMs and cartridges that are shipped from Paraguay by Chinese manufacturers, many of whom have Taiwanese connections. Estimated 2001 trade losses and videogame piracy levels are not available.

COPYRIGHT ENFORCEMENT IN BOLIVIA

Lack of Commitment from the Bolivian Government to Protect IPR

During 2001, the Bolivian government showed its lack of commitment to protect IPR within its borders on numerous occasions.

In March 2001, the BSA launched a massive legalization campaign in Bolivia. Throughout the campaign, which was originally sponsored by the Ministry of Foreign Trade, several TV, radio and printed press commercials communicated to the Bolivian companies the legal consequences of using illegal software. During the campaign, some companies and a trade association complained to the Bolivian government that they should not be obligated to license the illegal software they were using because of the economic situation the country was going through. Mr. Ronald McLean, then Minister of Sustainable Development, without consulting with BSA decided to take a stance on the matter. He called a press conference and stated that the BSA did not have the right to operate in Bolivia. In addition, he indicated that any software publisher needed to have its copyrights registered in Bolivia to enforce them. Both statements were in clear contradiction with Bolivian and international law. After several meetings, document productions and negotiations with Mr. McLean, the minister indicated that he was satisfied with the evidence submitted to demonstrate BSA's legal status and the member companies' ability to enforce their intellectual property rights in Bolivia. The Ministry of Sustainable Development then issued a press release correcting the minister's previous statements. The minister's public comments, however, caused the BSA and its member companies extensive damage to their image and credibility in Bolivia and other neighboring countries in Latin America. His remarks sent a dangerous message to the Bolivian business community and the public in general that computer software piracy will be tolerated by the Government.

In addition, during the period of the legalization campaign, the Minister of Justice ordered the suspension of any investigations submitted to the Prosecutor's Office by the BSA. Several criminal complaints that were filed against resellers of illegal software were put unduly on hold for over four months. No written decision explaining the reasons for the order was ever issued.

Software piracy in government agencies and ministries remains both blatant and rampant. On March 2001, President Banzer issued a *Decreto Supremo* creating a committee to supervise the legalization of all government agencies and ministries. Up to date, the Committee has only issued a directive mandating all ministries and agencies to stop purchasing legal software until the government prepares a legalization strategy. The effect of this order was to paralyze the few

legalization processes that were taking place at the time. Despite its rhetoric, the Bolivian government has not shown any sign that it will start its legalization process any time soon.

The music industry continuously requested the assistance of the government at all levels. The National Recording Industry Association (ASBOPROFON) has basically disappeared. There are just a few reminders of what it used to be — a mature and vibrant industry. All the multinational companies have left the country with the exception of one, and the one that has remained left a small representative office. The local industry is starving and the legitimate trade has been reduced to the minimum. The damage will be irreversible, yet the Bolivian government contemplates the situation with passivity.

In September 1997, Bolivia created a new agency responsible for copyright, trademark and patent issues. The Law of Organization of the Executive Power No. 1788, dated September 16, 1997, created the National Intellectual Property Service (SENAPI). This public entity was formed with the objective of managing issues regarding industrial property and intellectual property in an integrated manner. SENAPI operates in accordance with the provisions established under the Supreme Decree No. 25159, dated September 4, 1998. This Supreme Decree sets forth the objectives, institutional framework, and powers attributed to SENAPI. SENAPI, however, is seriously under-funded, lacks a cadre of trained personnel, and lacks any mechanism by which to enforce intellectual property rights.

Bolivia Fails to Provide TRIPS-Compatible Civil *Ex Parte* Search Measures

Concerning civil actions, the BSA has encountered a legal obstacle when trying to procure judicial searches and/or inspections in Bolivia. Article 326 of the Civil Procedure Code states that all preparatory proceedings (e.g., judicial inspections) must be carried out with the prior notification of the defendant. This prior notification violates TRIPS Article 50.2. In Bolivia, the failure to notify the defendant will make the proceeding *null ab initio*. This requirement has caused problems for BSA by depriving its actions of the necessary element of "surprise" in inspections involving software programs. In addition, once the target has been notified of a pending search order, it is entitled to object to the search. This effectively stops the search and seizure even before it occurs, given that a judge must rule on the objection. Various targets have deleted their illegally installed software just prior to the raid.

In 2000, BSA filed 12 civil complaints against end users, but the courts granted search orders in only six of them. At least four of these cases had to be dropped by BSA due to leaks from the Bolivian judiciary. A few of the more salient examples follow. On May 5, 2000, BSA filed a civil complaint requesting a search order against a waste management company. Before the target had been notified of the search order, legal counsel for that company contacted BSA's local counsel to discuss the complaint. A few days later, that company placed a purchase order to legalize the software it had been illegally using.

During 2001, BSA conducted 22 civil inspections. In all of these cases, the BSA had the obligation to notify the defendants at least 24 hours prior to the inspection. In many cases the only evidence that the BSA found was the traces of software that was previously installed but deleted a few hours before the inspection. BSA settled seven of these 22 cases. The rest are pending.

Unwarranted Delays in Civil and Criminal Enforcement

The Bolivian Civil Procedure Code fails to impose any time limits for courts to review and approve civil search requests. On average, it takes 45 days to obtain civil search and seizure order, by which time news of the raid may have leaked to the defendant or BSA's evidence may have grown stale or simply disappeared. This unwarranted delay, which is far longer than the average authorization process in other countries in Latin America, violates Article 41 of TRIPS, which requires that remedies for copyright infringement be "expeditious."

Depending on the city in which the civil complaint is filed, it could take up to four to five weeks to obtain a warrant search order. As if the delay itself were not detrimental enough, once the court issues the order, the court must notify the defendant, as per the prior notice requirement discussed above.

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 that the software was infringing a copyright, there has to be a damages trial. This new trial on damages may take up to eight months. In addition, there has never been a final civil judgment for copyright infringement in Bolivia. All these factors make it extremely difficult to settle cases successfully, as defendants would rather wait for five or six years and take their chances than settle a case in which the law is unclear at best. In fact, BSA has only settled two cases in Bolivia during 2000. 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 is too limited to provide a meaningful deterrent.

BSA filed a criminal complaint against a software reseller for hard disk loading ("HDL") in September 2000. The Judicial Technical Police (*Policía Técnica Judicial*) took over four months to prepare the reports of the cases and request the issuance of a search and seizure order. It took the Prosecutor's Office and the Court an additional two months until the warrant search was finally issued.

Inadequate Civil Copyright Damages

The Bolivian copyright law permits only the recovery of direct economic damages for civil copyright violations and prohibits punitive, consequential, or statutory damages. Without the threat of significant damages large enough to create a meaningful deterrent to illegal activity, the copyright law fails to meet the requirements of TRIPS Articles 41 and 45.

In contrast, other countries have legislated a system of statutory damages that provide for an effective deterrent mechanism to combat piracy. In Brazil, for instance, the unauthorized reproduction or publication of a protected work may be subject to statutory damages equivalent to up to 3,000 times the retail value of the protected work.³ The same solution has been adopted by the United States (up to a maximum of \$30,000 per protected work).⁴ BSA is encouraged that the

³ Ley de Derechos de Autor, No. 9610, Article 103.

⁴ 17 U.S.C § 504 (c)

overhaul of the intellectual property laws submitted to the Bolivian Congress adds a statutory damages provision of between three to five times the retail value of the protected work⁵.

Inadequate and Ineffective Criminal Enforcement

Enforcing copyrights through the Bolivian criminal system has proven to be totally ineffective.

BSA filed two criminal complaints in 2000 against software resellers for hard disk loading ("HDL") in the city of Santa Cruz. Although these cases were filed in September 2000, the Judicial Technical Police (*Policía Técnica Judicial*) took over four months to prepare the investigative reports of the cases and request the issuance of a search and seizure order. The order granting the search in one of these cases was finally issued in February 2001. During the raid, the prosecutor and the Judicial Technical Police seized extensive evidence of copyright infringement. Among other items, they seized six burned CDs loaded with software from BSA member companies, and a PC loaded with unlicensed software. Two expert witness reports were submitted to the file, one of them from the Judicial Technical Police. Both reports indicated, among other things, that the six burned CDs had been loaded with illegal software, and that the seized PC also had unlicensed software installed in its hard disk.

After the raid, local counsel for BSA visited the Prosecutor's Office and the Court several times to have access to the file. Under Bolivian law, a party who files a criminal complaint has the right to review the file and status of a case. In both places, he was denied access to the file every single time because the file was under "review." When local counsel finally examined the file a few weeks later, he learned that the Prosecutor's Office and the Court had both summarily dismissed the case for lack of evidence. To make matters worse, local counsel noticed that the decision was dated several days before, and that the time to appeal the decision had already expired. BSA was never served with a copy of the judge's decision, although the Court was required to do so under Bolivian law.

TRIPS and the basic principles of due process mandate that "...[d]ecisions on the merits of a case [...] shall be made available at least to the parties to the proceeding without undue delay. Decisions on the merits of a case shall be based only on evidence in respect of which parties were offered the opportunity to be heard" (TRIPS Articles 41.1 and 2). Needless to say, the Court did not observe any of these formalities in the above-mentioned case.

During 2001, BSA conducted four criminal raids against resellers of illegal software. In three of these cases, it took an average of five months from the time the criminal complaint was submitted with the investigation until the Court issued a search warrant. One of the cases was totally frustrated because the reseller relocated his business before the raid.

The recording industry reports that a few small raids were conducted in Bolivia in 2000 and 2001. Only 3,500 pirate cassettes were seized representing less than 1% of the problem. Reports indicate that some raids are ruined due to leaks within the police, prior to the raid itself. In other cases, street vendors have attacked the police as anti-piracy actions were taking place.

⁵ Anteproyecto de Código de Propiedad Intelectual, Article 175 I.

Border Measures in Bolivia Must Be Strengthened

A new national customs service was created to control contraband and other infringing materials at Bolivia's borders and ports of entry. Bolivia continued to serve as an alternate route for product controlled by Paraguayan pirates. Santa Cruz de la Sierra in Bolivia is a link between Paraguay's Ciudad del Este and Chile, Peru, Ecuador and the Far East. Given the growing problem with piratical and counterfeit materials in the Andean Region, it is imperative that Bolivian law satisfy the TRIPS enforcement text on border measures. Bolivian laws and/or regulations should contain provisions in which the competent authorities can act on their own initiative and suspend the release of suspect goods (TRIPS Article 58).

COPYRIGHT LAW AND RELATED ISSUES

Copyright Law of 1992

Bolivia passed a copyright law on April 29, 1992, which replaced its antiquated 1909 law.⁶ While the 1992 law was a vast improvement in legal protection, it left the implementation of many of its provisions, including enforcement, to subsequent regulations. For example, under the 1992 copyright law, computer programs are protected but not as "literary works," and are subject to regulations. A first set of draft software regulations was proposed in 1993, and there were several rounds of revisions, as well as numerous delays. Finally, a set of regulations providing the basic foundation for copyright protection of software and include provisions that specifically permit criminal actions to be undertaken against copyright infringers was implemented by presidential decree five years after the original law, on April 25, 1997. 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 rights holder.

Copyright Law Amendments of 2001

Efforts to overhaul the 1992 copyright law have been underway for years. In 1996, the National Secretary of Culture and the National Secretary of Industry and Commerce started to develop a proposal for a special law on intellectual property protection which would complement the existing copyright law. The objective of this project was to increase the level of IP protection, streamline judicial proceedings relating to the enforcement of intellectual property rights, and otherwise improve enforcement efforts to combat piracy and counterfeiting of IPR-protected works

⁶ Bolivia's copyright regime must also comport with decisions made by the Andean Community. In December 1993, the five Andean Pact countries, including Bolivia, approved Decision 351, a common regime on copyright and neighboring rights, including an obligation to provide for injunctive relief, seizure and confiscation of unlawful copies and devices, and damages. Some very preliminary discussion has taken place regarding the modification of Decision 351 to make it TRIPS- and WIPO Treaties-compatible, but no resolution has been taken at this point by the Andean Community Copyright Office Directors.

in order to encourage the economic development of these industries in Bolivia. Due to funding problems, a final draft of this project was not originally expected until August 1997. At that time, IIPA received mixed reports on whether the project was abandoned in 1998 or whether Ministry of Justice took over drafting, with a goal of releasing a draft in the March-April 1999 time frame.

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 on February 1, 2001. The copyright chapter reportedly contains over 200 articles which propose to expand the scope of exclusive rights, prescribe statutory damages for copyright violations, establish civil *ex parte* search procedures, add more enforcement powers to the Copyright Office, and create a special police force exclusively for intellectual property enforcement. IIPA members look forward to reviewing the chapters on copyright, as well as any separate enforcement-related chapters, in order to ensure that the proposals satisfy Bolivia's bilateral and multilateral obligations.

WIPO Treaties

Bolivia is a signatory to the WIPO treaties – the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT). Ratification of these treaties by Bolivia, followed by deposit of instruments of ratification with WIPO, would show the Bolivian government's support for raising the minimum standards of copyright protection, particularly with respect to network-based delivery of copyrighted materials, and fostering the growth of electronic commerce. Bolivia should ensure that any amendments to its copyright law incorporate the substantive obligations of the two WIPO treaties in order to respond to the challenges of the rapidly evolving marketplace for copyrighted materials.

Criminal Procedure Code Reform

The Bolivian government published amendments to its penal code on March 10, 1997. The amended Article 362 of the Penal Code eliminates the previous requirement that works of intellectual property must be registered in Bolivia in order to be legally protected, and expands the scope of activities deemed as crimes against intellectual property rights. This amended article now matches the 1992 copyright law, which also establishes that registration is not required for the work to be protected by law. Importantly, the amended Article 362 of the penal code now allows the police to take enforcement actions against pirates. Previously, the code had required that copyright infringements be prosecuted and tried under rules for "private" penal actions, without the intervention of the state prosecutors. There are apparently two types of sanctions – "fine days" and "seclusion" (imprisonment) – but no range of fines appears to be specified in the code for copyright infringement. Because the use of these sanctions is not clear, the Supreme Court reportedly issued an administrative resolution in an attempt to provide better guidance. Perhaps this omission is addressed and corrected in the proposed IPR legislation presented to Congress on February 1, 2001.

BOLIVIA ENFORCEMENT CHARTS: 2000 and 2001

CRIMINAL COPYRIGHT ENFORCEMENT STATISTICS 2001		
ACTIONS	BUSINESS APPLICATIONS SOFTWARE	SOUND RECORDINGS
Number of Raids conducted	4	N/A
Number of cases commenced	4	N/A
Number of defendants convicted (including guilty pleas)		N/A
Acquittals and Dismissals		N/A
Number of Cases Pending	4	N/A
Total number of cases resulting in jail time		N/A
Suspended Prison Terms		N/A
Maximum 6 months		-
Over 6 months		-
Over 1 year		-
Total Suspended Prison Terms		-
Prison Terms Served (not suspended)		NONE
Maximum 6 months		-
Over 6 months		-
Over 1 year		-
Total Prison Terms Served (not suspended)		NONE
Number of cases resulting in criminal fines		-
Up to \$1,000		-
\$1,000 to \$5,000		-
Over \$5,000		-
Total amount of fines levied		NONE

CIVIL COPYRIGHT ENFORCEMENT STATISTICS		
ACTIONS	2001 BUSINESS APPLICATIONS SOFTWARE	2000 BUSINESS APPLICATIONS SOFTWARE
Number of civil raids conducted	22	8
Post Search Action		0
Cases Pending		0
Cases Dropped	2	5
Cases Settled or Adjudicated	7 (settled)	1(settled)
Value of loss as determined by Rightholder (\$USD)	243,782	135,558
Settlement/Judgment Amount (\$USD)	73,387.81	10,000