

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)¹

¹ 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)² — 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.³

BOLIVIA						
Estimated Trade Losses Due to Copyright Piracy						
(in millions of U.S. dollars)						
and Levels of Piracy: 2003-2005⁴						
INDUSTRY	2005		2004		2003	
	Loss	Level	Loss	Level	Loss	Level
Records & Music	15.8	90%	16.0	90%	16.0	90%
Business Software ⁵	6.0	80%	5.0	80%	7.0	78%
Motion Pictures ⁶	NA	NA	2.0	NA	2.0	100%
Entertainment Software ⁷	NA	NA	NA	NA	NA	NA
Books	NA	NA	NA	NA	NA	NA
TOTALS	21.8+		23.0		25.0	

\$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.

² 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>.

³ 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.

⁴ 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.

⁵ 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.

⁶ 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>.

⁷ 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.⁸ 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.⁹ 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.

⁸ 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.

⁹ 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.

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