

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2006 SPECIAL 301 REPORT

COLOMBIA

EXECUTIVE SUMMARY

Special 301 Recommendation: IIPA recommends that Colombia be elevated from the Watch List to the Priority Watch List in 2006.

IIPA supports the ongoing Free Trade Agreement (FTA) process. The U.S. began FTA negotiations with Colombia and other Andean countries in May 2004, and the negotiations with Colombia continue in early 2006, after Peru has concluded its FTA talks. The FTA negotiations process offers a vital tool for encouraging compliance with 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) and for 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 Colombia take immediate steps to improve its poor enforcement record. Colombia 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).¹

Actions Which the Colombian Government Should Take in 2006:

- 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 accused 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 the copyright law by going after 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;

¹ 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>. During the first 11 months of 2005, \$174.5 million worth of Colombian goods (or 2.2% of Colombia's total exports to the U.S. from January to November) entered the U.S. under the duty-free GSP code, representing a 0.1% decrease over the same period in the previous year. In addition, \$4.1 billion worth of Colombian goods entered the U.S. under the ATPA program for this same 2005 period, accounting for an 18.9% increase from the prior year.

- Encourage adoption of criminal code amendments to increase criminal penalties for copyright infringement;
- 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 which they file with agencies);
- 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;
- Develop and promote legislation which will address the higher standards of copyright protection and enforcement which will be expected as Colombia continues FTA negotiations with the U.S.
- Eliminate trade barriers already existing in Colombian Law, such as: the broadcast TV quota, screen quota and box office tax. Moreover, FTA should not contain any “cultural exception” which could lead to the adoption of restrictive measure in any cultural sector, including filmed entertainment.

COLOMBIA										
Estimated Trade Losses Due to Copyright Piracy										
(in millions of U.S. dollars)										
and Levels of Piracy: 2001-2005 ²										
INDUSTRY	2005		2004		2003		2002		2001	
	Loss	Level								
Records & Music	47.7	71%	51.6	71%	49.4	70%	56.3	65%	73.0	65%
Business Software ³	44.8	55%	46.0	55%	37.0	53%	21.7	51%	19.5	52%
Motion Pictures ⁴	NA	NA	40.0	75%	40.0	75%	40.0	90%	40.0	90%
Entertainment Software ⁵	NA	NA								
Books	6.0	NA	6.0	NA	5.4	NA	5.3	NA	5.3	NA
TOTALS	98.5+		143.6		131.8		123.3		137.8	

² 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.

³ BSA's 2005 statistics are preliminary. They represent the U.S. publishers' share of software piracy losses in Colombia, 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.

⁴ 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>.

⁵ 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 PIRACY IN COLOMBIA

Piracy continues to dominate the Colombian market, adversely affecting legitimate sales. Pirates are increasingly turning to new media—primarily CD-R and DVD-R — as the preferred medium for piracy. Unauthorized photocopying continues to harm the publishing industry, and the business software industries continue to face piracy in businesses as well as retail channels.

Record and music piracy: The recording industry reports that the estimated level of music piracy in Colombia remained constant at the rate of 71% in 2004, with estimated losses due to music piracy placed at \$47.7 million. Piracy of music CDs in Colombia continues is mostly due to local CD-R replication, with pirates primarily copying local repertoire. Most of the blank CD-Rs are brought in to Colombia in containers from the Far East through Panama. Many of them are priced below market for purposes of importation at 3 cents per unit. The industry estimates that over 60 million blank CD-Rs came to Colombia during 2005. Pre-recorded pirate CD-Rs are also being smuggled in from Ecuador. A major problem is the hundreds of stalls in the street markets of San Andrecitos that continue to openly and brazenly sell pirate and counterfeit product. Street vendors sell pirate CDs on the traffic corners in Bogotá, Medellín and Cali. Because these vendors move around so much, it is difficult to locate them and to get the police to conduct raids in a swift and efficient manner. Most of the record companies in Colombia are operating with minimum staff to keep promoting and selling a limited number of products. In view of the market crisis, for example, Warner Music decided to close its operation in 2004. The legitimate music market in Colombia decreased again for the fifth year in a row. The total unit drop since 2000 is close to 68%. The commercial environment in Colombia to sell recorded music products is in jeopardy.

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 because in 2005 the Ministry of Education initiated an anti-piracy campaign against book piracy. Unfortunately, this campaign has not yet resulted in 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. 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. Estimated losses due to business software piracy amounted to \$44.8 million in 2005, with a 55% piracy level. Although Colombia has one of the lower software piracy rates in Latin America, nevertheless, piracy is causing much commercial harm to the business software industry; between

2000 and 2004, the market for legitimate software shrunk by 58% and sales also decreased in early 2005.⁶

Audiovisual piracy: Over the past two years, MPA reports that enforcement activities have improved, although there are few concrete results in terms of deterrent sentences or reductions in piracy rates. Optical disc piracy is a growing problem in Colombia and black markets such as San Andrecitos are the main distribution chain for pirate movies. Importation of blank media from Panama and Ecuador are also a worrisome problem. Video outlets piracy remains an issue in Colombia, especially in smaller cities. Although film piracy remains severe, the Colombian Government is taking the lead to address audiovisual piracy and granted to the Film Development Fund (*Fondo para el Desarrollo Cinematográfico*) a specific budget for anti-piracy activities. Part of this budget was designated to PRACI, a private entity created in August 2005 by local exhibitors and distributors of audiovisual products, which is engaged in four areas: investigation and intelligence, encouraging judges to issue deterrent sentences, training programs, and public relations. PRACI coordinates its anti-piracy program with the National Anti-Piracy Agreement (*Convenio Antipiratería de Colombia*), and has been endorsed by the National Council for Film Arts and Culture (*Consejo Nacional para las Artes y la Cultura en Cinematografía – CNACC*).

Entertainment software piracy: The Entertainment Software Association (ESA) reports that piracy of entertainment software (across all platforms) is a growing concern, with pirated products being imported from Southeast Asia.

COPYRIGHT ENFORCEMENT

National Anti-Piracy Campaign needs to be revitalized. The Colombian government has not taken significant steps to develop a national anti-piracy campaign and policy. Ten years ago, an interagency group, the National Anti-Piracy Campaign, was established. It involves a large number of governmental and independent agencies in the fight against piracy.⁷ Members of the campaign continue to meet, and efforts continue to improve public awareness, trainings, and similar educational efforts. Such efforts should continue. However, the campaign is not an operational entity that the industries view as having an immediate impact in leading on-the-ground enforcement efforts to deter piracy throughout the country. That kind of high-level political will and coordination is still missing in Colombia.

Criminal raids do occur, 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. 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 (Resolution No. 0-08888 of May 31, 1999). These prosecutors

⁶ BSA and International Data Corporation (IDC) released a new study on December 8, 2005, which illustrates global economic gains from reducing software piracy. This report, [Expanding the Frontiers of Our Digital Future: Reducing Software Piracy to Accelerate Global IT Benefits](#), using 2004 data, found the following: If Colombia reduced its 55-percent software piracy rate by 10 points (to 45%), then \$581 million could be added to the economy, 1,900 new jobs created, and local industry sales increased by almost \$450 million. For Colombia's government, the cumulative effect of all this growth could mean an additional \$38 million in tax revenues. See <http://www.bsa.org/idcstudy/pdfs/Colombia.pdf>.

⁷ The Colombian National Anti-Piracy Campaign is supported by numerous government agencies and private sector groups, including: the President's Office, the Ministry of Culture, the Ministry of Commerce, Industry and Tourism, the Ministry of Communications, DIAN—the Tax and Customs Authority, DAS—the Administrative Department of Security, the National Television Commission, the National Attorney General's Office, the National Police, the National Copyright Office, as well as CERLALC, CECOLDA, SAYCO, FEDESOFTE, ACODEM, CEDER and several others. A 1999 agreement reaffirmed the first anti-piracy agreement, which was signed in December 1995.

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

The recording industry reports that the Colombian enforcement authorities still show interest in fighting piracy but good will alone will never contribute to decreasing the high levels of piracy. The industry's anti-piracy group (APDIF Colombia) has been able to prompt the police to carry out a street-level campaign that contributed to cleaning up some high traffic areas in Bogotá; however, this operation was not carried out consistently and was halted during the first quarter of 2005. Colombian authorities have done little to investigate pirate duplication and distribution facilities, which continue to feed a vast network of street vendors. Paramilitary groups controlling the pirate sale of CDs in some flea markets in Bogotá are a major new concern. In 2004, of 1,885 raids conducted, only 32 were directed at labs where duplication of pirate CDs took place. The result of these actions has been the seizure of approximately 7 million pirated CD-Rs and 794 CD burners. Unfortunately many of these seizures are taking place in Cucuta and Bucaramanga, two cities distant from the major commercial centers of Bogotá and Medellín. The industry reports that the product seized was quickly replaced in most of the thousands of stands offering pirate product around the country due to a lack of frequency of raids.

According to investigations by APDIF and the National Police, narcotraffickers and paramilitary groups have infiltrated the production and distribution of pirate music, increasing by 20% in the past five years.⁸ In March 2005, Colombian authorities assisted by APDIF conducted a major raid in Cucuta, seizing 800,000 recorded CD-Rs and 10 million inlays; what made this action particularly noteworthy was the difficulty in obtaining evidence and executing raids in an area controlled by narco-guerilla insurgents. In January 2006, anti-piracy teams joined with police and prosecutors in the covered market of vendors in San Andrecito de la 20 (near downtown Bogotá), which involved the issuance of 90 search warrants, four arrests, and the seizure of 210,000 music CD-Rs, nearly 100,000 counterfeit DVDs, 1.1 million inlays and over 300,000 jewel boxes. All these efforts to seize product, unfortunately, have a reduced impact on piracy because of a lack of effective deterrent sentences. The industry reports that out of 42 convictions in 2005, no one was incarcerated for piracy. Starting in the second half of 2005, MPA started a joint enforcement program with the local recording industry anti-piracy group; more than 800,000 pirate movies were seized in 2005.

BSA reports that their 2005 actions resulted in more seized products than in 2004, but this had little effect on the legitimate market. BSA's anti-piracy campaign continues to receive strong support from the *Fiscalia* and SIJIN (Judicial Department of Intelligence of the National Police), and also from other government authorities such as CTI (Investigation Department of the Prosecutor Office), DIJIN (Direction of Intelligence of the National Police) and National Police. However, DAS (Security Department of the Ministry of Justice) suspended its support during 2004, explaining that its role is limited to the area of national security. All of these agencies proved critical to BSA's efforts to strengthen anti-piracy enforcement, within and outside Bogotá. In 2004, legal actions were conducted against more than 100 reseller pirates. BSA relied on Colombian law enforcement agencies to conduct most of these actions, in part because of the continuing difficulties in obtaining civil search authority in a timely manner. Government agencies conducted several criminal raids in Bogotá, Medellín, and Cali. Unfortunately, prosecutions are few and slow.

The book industry reports that in 2005 the Ministry of Education initiated an anti-piracy campaign against book piracy. In the first half of 2005, the police seized over 161,000 copies of pirated books and 8,300 books-on-CD. The problem is that these seizures do not yet seem to have a visible effect on improving the local book marketplace.

⁸ "Colombia: narcotraffic and paramilitary groups reach phonographic market," [La Republica](#), November 24, 2005.

Colombian courts fail to issue deterrent criminal sentences. Even with all the criminal raids, the Colombian system does not result in deterrent penalties or criminal sentences. All industries report that the Colombian courts do not impose deterrent penalties, and cases can take five years or more to be resolved. Even if defendants are found guilty, judges will suspend the sentence or fine, so infringers have no incentive to cooperate and resolve their cases. Increasing authorized penalties, as was done in the 2004 amendments to the criminal code (see below), is not enough; it is also important to expedite criminal prosecutions. When it takes more than six years or more between the commencement of the criminal investigation and the final decision of the court; pirates do not feel pressure when an action is filed against them.⁹

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 and must be improved. 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 60 million blank CD-Rs were officially imported during 2005. 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.

Therefore, it is critical for any effective anti-piracy campaign that custom authorities begin to implement measures to track entry of blank CD-Rs. An 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).

Administrative enforcement against signal theft piracy remains ineffective. However, licensing and inspections by the CNTV, the national television commission, have contributed to a significant reduction in systematic television piracy in Colombia.

Civil actions and issuance of civil *ex parte* search orders is slow. 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.

⁹ The statute of limitations on criminal penalties benefits pirates who are able to remain out of prison on bail during the trial and appellate procedures. In essence, if the jail term to which the defendant is sentenced in first instance is shorter than the time between the commencement of the criminal investigation and the final conviction (after exhausting all appeals), then the statute of limitations expires and the defendant is not required to serve any jail time.

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 is drafted 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.

Industry Trainings: BSA reports that in 2005, it conducted about 20 training courses which were attended by 2,000 police officers and prosecutors. In addition, the World Intellectual Property Organization (WIPO) has pledged its support to help Colombia modernize its intellectual property infrastructure,¹⁰ and IIPA hopes that this includes some copyright- and enforcement-related components. .

COPYRIGHT LAW AND RELATED ISSUES IN COLOMBIA

Copyright Law of 1982: Colombia’s 1982 copyright law, as amended in 1993 and 1997, and including a 1989 decree on computer programs, is comprehensive. 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). Amendments to the criminal code actually provide sanctions in the form of fines for the circumvention of technological protection measures. However, additional amendments to the copyright law and related laws (criminal codes, etc.) will be necessary to implement the high standards contemplated in an FTA IPR Chapter with the U.S. Among other things, revisions to the copyright law should include: exclusive distribution, making available, rental, and importation rights; statutory damages; protection of temporary copies; ISP liability along with notice and takedown procedures; and civil sanctions against circumvention of technological measures and electronic rights management information.

Criminal Code: 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; however, violations are only punished by fines. Unfortunately, in piracy cases, the penal code allows home arrests or bail during the process, and sentences of up to three years can be suspended. In practical terms, this scenario translates to no incarcerations for pirates. In early 2004, the recording industry supported the introduction of a bill to amend Article 271 of the Criminal Code to increase penalties for copyright infringement up to a four-to-eight years’ term. Reports indicate that Congress recently did pass an amendment to the Criminal Code which increases the level of criminal penalties from a minimum of 2 years and 8 months to 4 years and from a maximum of 7 years and six months to 8 years for copyright infringement. (IIPA does not have the text of the law.)

¹⁰ WIPO Update, “Director General Pledges WIPO Support to Colombia,” November 11, 2005, at http://www.wipo.int/edocs/prdocs/en/2005/wipo_upd_2005_262.html.

Criminal Procedure Code: 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 as of 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

Colombia, through different laws, adopted a series of discriminatory and protectionist measures to defend the national audiovisual sector. These should be dismantled in any FTA:

- 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.

Moreover, the FTA should not contain any “cultural exception” provision which could allow Colombia to introduce any new, restrictive measure in any cultural sector, including filmed entertainment.