



September 16, 2002

Ms. Carmen Suro-Bredie  
Chairman  
Trade Policy Staff Committee  
Office of the U.S. Trade Representative  
1724 F Street, 5<sup>th</sup> Floor  
Washington, DC 20508

Re: ATPDEA Eligibility: Request for Public  
Comment Regarding the Designation of Eligible  
Countries as Andean Trade Promotion and Drug  
Eradication Act Beneficiary Countries, 67 Fed.  
Reg. 53379 (August 15, 2002)

To the Committee:

The International Intellectual Property Alliance (IIPA) takes this opportunity to respond to the Trade Policy Staff Committee's August 15 request for comments on the Andean Trade Promotion and Drug Eradication Act (ATPDEA). Under the ATPDEA, the criteria related to intellectual property rights protection found in the Andean Trade Preferences Act (ATPA) have been enhanced. Before these four countries are able to receive the ATPDEA benefits, the President must examine their qualifications in order to designate them as ATPDEA beneficiary countries and receive the preferential duties.

In this filing, IIPA highlights the fact that all four countries – Bolivia, Colombia, Ecuador and Peru – fail to provide adequate and effective protection for U.S. copyright owners, especially the standards outlined in the ATPDEA. For years, IIPA and its members have reported on the piracy and enforcement difficulties in all of these Andean countries as well as the ongoing legal reform difficulties in several of them.

Given this failure to meet the standards established in the statute, we believe that it would be appropriate to deny eligibility status to each of these countries. In some cases, Peru for example, the piracy situation is so open and notorious that it seems incongruous for the United States to unilaterally extend trade preferences. Bolivia has one of the highest levels of business software piracy in the entire hemisphere. Nonetheless, we recognize that the Committee may feel that U.S. interests are best served by extending present benefits, but conditioning such benefits on a clear and tangible commitment by beneficiary states to modify their practices so that they conform to the requirements of the statute. Whether the U.S. decides to deny present eligibility, or to extend benefits on an interim basis, we propose that the U.S. government should obtain from putative beneficiary states written commitments on the specific actions they intend to take to meet the IPR standards of the ATPDEA. The U.S. should obtain commitments from each country on how that country is addressing its copyright law and enforcement obligations before designation is officially conferred. It is untenable for the U.S. government to be giving additional trade benefits to countries in which U.S. copyright owners are suffering the ravages of piracy.

## **Description of the IIPA and its Member Associations**

The International Intellectual Property Alliance (IIPA) is a private sector coalition formed in 1984 to represent the U.S. copyright-based industries in bilateral and multilateral efforts to improve international protection of copyrighted materials. IIPA is comprised of six trade associations, each representing a significant segment of the U.S. copyright community. These member associations represent over 1,100 U.S. companies producing and distributing materials protected by copyright laws throughout the world – all types of computer software including business applications software and entertainment software (such as videogame CDs and cartridges, personal computer CD-ROMs and multimedia products); theatrical films, television programs, home videos and digital representations of audiovisual works; music, records, CDs, and audiocassettes; and textbooks, tradebooks, reference and professional publications and journals (in both electronic and print media). The U.S. copyright industries are one of the largest sectors contributing to the U.S. economy.<sup>1</sup> Inadequate laws and ineffective anti-piracy enforcement abroad adversely affects employment, job creation and revenues, both here in the States as well as in foreign countries.

## **The ATPDEA's Criteria on Copyright Protection**

The enhanced trade benefits under the ATPDEA are available only to countries that the President designates as “ATPDEA beneficiary countries.” The criteria that the President must consider in designating countries as ATPDEA beneficiary countries include the criteria already existing under the ATPA, as well as the new criteria added by the ATPDEA.

The ATPA<sup>2</sup> contained provisions for the protection of intellectual property rights similar to those in the Caribbean Basin Initiative<sup>3</sup> and the Generalized System of Preferences.<sup>4</sup> The ATPA had two mandatory IPR criteria and two discretionary IPR criteria. Section 3202(c)(5) states that the President shall not designate a country as an ATPA beneficiary country

if a government-owned entity in such country engages in the broadcast of copyrighted material, including films or television material, belonging to the United States copyright owners without their express consent or such country fails to work toward the provision of adequate and effective protection of intellectual property rights.

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<sup>1</sup> In April 2002, the IIPA released an economic report entitled Copyright Industries in the U.S. Economy: The 2002 Report, the ninth such study written by Stephen Siwek of Economists Inc. This report details the economic impact and contributions of U.S. copyright industries to U.S. Gross Domestic Product, employment, and trade. The latest data show that in 2001, the U.S. copyright industries accounted for 5.24 percent of U.S. Gross Domestic Product (GDP), or \$535.1 billion – an increase of over \$75 billion from 1999 and exceeding 5 percent of the economy and one-half trillion dollars for the first time. Over the last 24 years (1977-2001), the U.S. copyright industries' share of the GDP grew more than twice as fast as the remainder of the U.S. economy (7 percent vs. 3 percent). Between 1977 and 2001, employment in the U.S. copyright industries more than doubled to 4.7 million workers, which is now 3.5 percent of total U.S. employment, and the U.S. copyright industries' average annual employment grew more than three times as fast as the remainder of the U.S. economy (5 percent vs. 1.5 percent). In 2001, the U.S. copyright industries achieved estimated foreign sales and exports of \$88.97 billion, again leading all major industry sectors, including: chemicals and allied products, motor vehicles, equipment and parts, aircraft and aircraft parts, and the agricultural sector.

<sup>2</sup> Andean Trade Preferences Act of 1990, Pub. L. No. 102-182 (codified at 19 U.S.C. § 3201 et seq.). Bolivia and Colombia became eligible to receive ATPA preferential duty treatment on July 2, 1992, Ecuador on April 13, 1993, and Peru on August 11, 1993.

<sup>3</sup> The Caribbean Basin Economic Recovery Act, Pub. L. No. 98-67, Section 212 (codified at 19 U.S.C. § 2701 et seq.) (CBERA or the Caribbean Basin Initiative or CBI).

<sup>4</sup> See the Generalized System of Preferences Renewal Act of 1984, Pub. L. No. 98-573, as amended (codified at 19 U.S.C. § 2462(c)).

19 U.S.C. § 3202(c)(5) (emphasis added). In addition, in determining whether to designate a country as a beneficiary country, the President shall take into account the following two discretionary IPR criteria in Section 3202(d)<sup>5</sup>:

the extent to which such country provides under its law adequate and effective means for foreign national to secure, exercise, and enforce exclusive rights in intellectual property, including patent, trademark and copyright rights;

the extent to which such country prohibits its nationals from engaging in the broadcast of copyrighted material, including films or television materials, belonging to United States copyright owners without their express consent;...

The ATPDEA IPR-related provisions are found in the revised Section 203(b)(6)(B).<sup>6</sup> The President, in considering his designation of ATPDEA beneficiary countries shall take into account the following provisions in addition to the pre-existing elements, cited above. For ATPDEA purposes, the President shall take into account:

- (i) Whether the beneficiary country has demonstrated a commitment to –  
(I) undertake its obligations under the WTO, including those agreements listed in section 101(d) of the Uruguay Round Agreements Act, on or ahead of schedule, and; (II) participate in negotiations toward the completion of the FTAA or another free trade agreement;
- (ii) The extent to which the country provides protection of intellectual property rights consistent with or greater than the protection afforded under the Agreement on Trade-Related Aspects of Intellectual Property Rights described in section 101(d)(15) of the Uruguay Round Agreements Act.

We make several observations about these standards. First, the WTO TRIPS Agreement is widely recognized as containing the minimum standards of IPR protection. With respect to copyright,<sup>7</sup> the TRIPS Agreement incorporates the level of copyright protection found in the Berne Convention (1971 Paris text), adds explicit protection for computer programs as literary works, adds a rental right, and also affords protection for performers and producers of sound recordings. Very importantly, TRIPS also adds an entire section on enforcement, including measures on civil remedies, administrative measures, border measures and criminal penalties. In addition to obliging WTO members to have these measures in statutory law, TRIPS also requires that these laws be implemented in-practice.

Second, the ATPDEA-eligible countries must provide protection “consistent with or greater” than the levels found in the WTO TRIPS Agreement.<sup>8</sup> One of the copyright industries’ challenges in substantive laws is to elevate the levels of protection to account for changes in the digital environment. The Internet fundamentally transforms copyright piracy from a mostly local phenomenon to a global plague. Modern copyright laws must respond to this fundamental change by providing that creators have the basic property right to control distribution of copies of their creations. Copyright owners must be able to control delivery of their works, regardless of the specific technological means employed. Many of these legal changes are contemplated by the two “internet” treaties of the World Intellectual Property Organization (WIPO). The WIPO Copyright Treaty (WCT) entered into force on March 6, 2002, and the

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<sup>5</sup> See 19 U.S.C. §§ 3202(d)(9) and 3202(d)(10).

<sup>6</sup> Andean Trade Promotion and Drug Eradication Act, Title XXXI of the Trade Act of 2002, Pub. L. No. 107-210 (2002).

<sup>7</sup> All references to “copyright” herein are meant to include subject matter protected under neighboring rights’ regime, which is often the case in many, but not all, countries in Latin America.

<sup>8</sup> This new standard in the ATPDEA track s that found in the CBTPA.

WIPO Performances and Phonograms Treaty (WPPT) entered into force on May 20, 2002. In fact, the U.S. government is working at all levels to encourage countries to sign, ratify and implement both WIPO Treaties.<sup>9</sup> Of these Andean countries, Colombia, Ecuador and Peru are members of the WCT and the WPPT; Bolivia is not. We strongly suggest that the U.S. government request Bolivia to make a specific commitment regarding its best efforts to ratify the Treaties and implement their obligations as part of its process to become an ATPDEA beneficiary country.

Furthermore, the U.S. government, supported by the U.S. copyright industry, is seeking specific obligations (both substantive and enforcement-related) in the IPR chapter of the Free Trade Area of the Americas. IIPA and its members are on-the-record with respect to these measures we believe should be included in the FTAA IPR Chapter.<sup>10</sup> All four of the Andean countries are participating in the FTAA negotiations.

Third, copyright law reform, while critical to meeting the ATPA and ATPDEA standards, is not sufficient in and of itself. IIPA believes that one of the most immediate problems in this region is the failure of all four Andean countries to adequately and effectively enforce their current copyright laws. The point is that laws, even good laws, which are not effectively enforced on-the-ground do not satisfy the IPR criteria in U.S. trade programs nor the TRIPS Agreement. In Peru, for example, the legitimate record industry has almost entirely vanished, with piracy levels now at 97%; sales dropped over 40% in 2001, and have continued to slide in 2002. In Bolivia, the business software piracy level is 77%, one of the highest in the entire western hemisphere.

### **Copyright Piracy and Legal Reform in the ATPDEA-Eligible Countries**

Strong and comprehensive copyright protection and enforcement are the key ingredients to robust economic growth and development. Copyright gives creators the basic property rights that enable them to authorize and control the copying, distribution, performance and display of the works they create. Exercising these exclusive rights themselves, or licensing someone else to exercise them, is the main way that creators earn a living and generate revenue. That revenue is needed to underwrite the skyrocketing costs of producing and distributing motion pictures; developing, testing and maintaining computer software; scouting, recording, and promoting musical talent; and all the other activities that are indispensable to bringing creative products to the public.

Copyright Laws: Many of the Andean countries have conducted copyright law reform efforts in recent years. The basic copyright laws in Colombia, Ecuador and Peru, provide an adequate basis to permit enforcement. This is not to say that these laws are perfect; in fact, further revision will be needed to fully incorporate the WIPO Treaties as well as provisions likely to be included in the FTAA IPR Chapter. The copyright law in Bolivia, however, falls far short of its current obligations (both bilaterally and multilaterally) in numerous respects. Bolivia is long overdue to satisfy its substantive copyright obligations of TRIPS and continues to fail to meet the performance standards regarding enforcement.

Enforcement: Inadequate and ineffective copyright enforcement continues to inflict significant trade distortions in the Andean region. U.S. companies suffered estimated trades losses due to piracy in these four ATPDEA-eligible countries which exceeded **\$274 million** in 2001 alone. Over the last year or two, CD-burning has grown rapidly in Latin America, thus challenging the ability of legitimate businesses engaged in the creation and distribution of copyright materials – recordings, software, videogames, books, and to a lesser extent, DVDs – to compete against pirated products. With many of

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<sup>9</sup> Press Release 02-48, Office of the U.S. Trade Representative, “USTR Releases Annual ‘Special 301’ Report on Global Intellectual Property Protection,” April 30, 2002.

<sup>10</sup> See IIPA Public Comments on the Preliminary Draft Consolidated Texts of the Free Trade Area of the Americas (FTAA) Agreement, August 22, 2001, available at [http://www.iipa.com/rbi/2001\\_Aug22\\_FTAA.pdf](http://www.iipa.com/rbi/2001_Aug22_FTAA.pdf).

our industries increasingly relying on foreign distribution revenues, piracy combined with inadequate enforcement by the foreign governments are the major market access barriers for our industries.

**ESTIMATED TRADE LOSSES DUE TO COPYRIGHT PIRACY (in millions of U.S. dollars)  
and LEVELS OF PIRACY (2001)  
in ATPDEA-ELIGIBLE COUNTRIES**

COUNTRY	Motion Pictures		Records & Music		Business Software Applications <sup>11</sup>		Videogame Software		Books	TOTAL LOSSES
	Loss	Video Piracy Level	Loss	Piracy Level	Loss	Piracy Level	Loss	Piracy Level	Loss	
Bolivia	2.0	100%	15.0	85%	4.9	77%	NA	NA	5.5	27.4
Colombia	40.0	90%	73.0	65%	19.5	52%	NA	NA	5.3	137.8
Ecuador	NA	95%	18.0	90%	6.9	62%	NA	NA	2.3	27.2
Peru	4.0	50%	57.8	97%	11.2	60%	NA	NA	9.0	82.0
<b>TOTAL</b>	<b>46.0</b>		<b>163.8</b>		<b>42.5</b>		<b>NA</b>		<b>22.1</b>	<b>274.4</b>

IIPA cannot emphasize strongly enough that as the forms of piracy shift from hard-goods and more toward digital media, the challenges faced by the copyright industries and national governments to enforce copyright laws grow exponentially. The Internet transforms copyright piracy from a mostly local phenomenon to a global plague. Criminal and civil justice systems must work in a transparent and expeditious manner and result in deterrent penalties and remedies.

Attached as appendices are the reports on all four of these ATPA countries which appeared in the IIPA's February 2002 Special 301 submission to USTR. Each country report contains detailed discussions on piracy, the weaknesses (and improvements made) regarding enforcement over the last year, as well as the status of copyright and related law reform measures. The following summary provides an overview of the kinds of piracy found in the Andean region, with specific recent examples provided.

- Piracy of sound recordings and music remains very high in the Andean region. While audiocassette piracy has been the preferred business of pirates for years, the levels of music CD piracy have been rising rapidly. A June 2002 report on music piracy by the International Federation of Phonographic Industries (IFPI) noted increases in commercial CD-R piracy (production and/or distribution) in Latin America during 2001.<sup>12</sup> These four Andean countries have piracy levels well over 60% (see above chart), meaning most of the copies of recorded music in these markets is unauthorized and piratical.
  - In Peru, the legitimate record industry has almost entirely vanished, with piracy levels now at 97%. Music piracy has devastated the legitimate industry which was once in Peru.
  - In Ecuador, the local recording industry estimated that piracy of sound recording amounted to \$102 million in 2001, of which half amounted to lost tax revenues to the Ecuadorian government. The legitimate industry cannot compete with pirates who sell pirated recordings at US\$1. A local distribution company has had to close eight of their ten stores

<sup>11</sup> BSA's preliminary 2001 estimates which were reported in IIPA's 2002 Special 301 submission (country excerpts attached to this submission) have been finalized, and are reflected above. BSA's trade loss estimates represent losses to U.S. publishers only, and differ from the BSA trade loss numbers generally released in their global piracy surveys.

<sup>12</sup> IFPI Music Piracy Report 2002, available at <http://www.ifpi.org/site-content/library/piracy2002.pdf>.

- and fire employees, all because of the rising piracy problems. Even the head of Ecuador's Intellectual Property Institute (IEPI), a government agency, blamed the authorities for failing to control recording piracy.<sup>13</sup>
- Business software piracy appears in various formats, including counterfeiting, resellers, mail order houses, bulletin boards, other internet-based distributions and corporate end-user piracy. The greatest threat comes from situations where 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, education, 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. The Business Software Alliance (BSA) reports that software piracy is on the rise around the globe – growing from 37 percent in 2000 to 40 percent in 2001.<sup>14</sup>
    - The 77% business software piracy rate in Bolivia is one of the highest piracy rates for business software anywhere in Latin America; it far exceeds the 25% piracy level in the United States (which has one of the lowest levels in the world). Also in Bolivia, the lack of civil *ex parte* search measures remains a serious problem to effective software enforcement. During 2001, BSA conducted 22 civil inspections; in all of these cases, 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. Piracy levels in the government remain extremely high despite efforts by BSA member companies to legalize several agencies.
    - Ecuador's 1999 Education Law contains a poorly drafted provision that would appear to grant free software license 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. To date, the IEPI (the Ecuadorian Institute for Intellectual Property, a government agency) has not issued its opinion on the legality of this article, despite the many requests of BSA.
  - Video piracy remains a consistent problem in the Andean region, ranging from 50% in Peru to over 90% in Ecuador, Colombia and Bolivia. Ineffective enforcement does not improve matters.
    - In Peru, the administrative fine issued when pirate videotapes are seized is approximately US\$2/tape, which is the street price for a pirate videotape. This inadequate fine is simply not a deterrent to piratical activity. The criminal code in Peru was recently amended with respect to sanctions for copyright piracy, but it is too early to tell whether in fact this amendment will result in an improvement in criminal enforcement there. Merely having laws on the books but not enforcing those laws is not an effective deterrent.
    - Unauthorized reception and retransmission of U.S. domestic satellite signals is a key concern to the U.S. motion picture industry, one which is particularly acute in Colombia because it falls within the footprint of U.S. satellites. Without authorization from copyright owners, cable system operators, hotels, resorts, bars and homeowners have erected satellite dishes to intercept programming intended for reception with the U.S. This signal theft harms the theatrical exhibition of motion pictures in these markets and slows the development of a legitimate home video market as well.

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<sup>13</sup> "Pirated music cost Ecuador more than \$100 million last year," EFE News Service, September 2, 2002.

<sup>14</sup> Business Software Alliance, Seventh Annual BSA Global Software Piracy Study, 2002, available at <http://www.bsa.org/resources/2002-06-10.130.pdf>

- The major forms of piracy afflicting the U.S. book publishing industry in the region are commercial and photocopying piracy. Photocopying shops near universities often fill requests for illegal reproductions of entire textbooks.
- The U.S. videogame industry suffers from inadequate enforcement by governmental and judicial authorities in the Andean region. Pirated and counterfeit videogame products are found on all platforms, including cartridges, personal computer CD-ROMs and multimedia products.

## CONCLUSION

IIPA appreciates the opportunity to convey to the TPSC and its interagency colleagues our views on the important copyright criteria found in the ATPDEA. We believe that the IPR criteria of this trade program should be used to provide generate substantial improvements in the copyright laws and enforcement practices throughout the Andean region.

All four ATPA countries – Bolivia, Colombia, Ecuador and Peru – fail to provide adequate and effective protection for U.S. copyright owners. IIPA's recommends that all four countries do not receive designation as ATPDEA-eligible countries due to their respective failures to provide adequate and effective intellectual property rights protection required under the ATPDEA. In the case that such designation does move forward, however, IIPA then requests that the U.S. government obtain specific written commitments from each country on how it will address its copyright obligations and resolve current deficiencies in their enforcement and/or legal copyright regimes before designation is officially conferred.

Thank you for your consideration.

Sincerely,



Maria Strong  
Vice President and General Counsel  
International Intellectual Property Alliance

Attached:

Country excerpts from IIPA's February 2002 Special 301 submission to USTR:

- Bolivia at <http://www.iipa.com/rbc/2002/2002SPEC301BOLIVIA.pdf>
- Colombia at <http://www.iipa.com/rbc/2002/2002SPEC301COLOMBIA.pdf>
- Ecuador at <http://www.iipa.com/rbc/2002/2002SPEC301ECUADOR.pdf>
- Peru at <http://www.iipa.com/rbc/2002/2002SPEC301PERU.pdf>