

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2003 SPECIAL 301 REPORT

COLOMBIA

EXECUTIVE SUMMARY

Special 301 recommendation: IIPA recommends that Colombia remain on the Special 301 Watch List in 2003 for its continued difficulties in achieving effective copyright enforcement.

Overview of key issues: Piracy levels in Colombia continue to be high. The home video market is 90% pirate, and the industry is working hard to keep cable piracy from escalating. Pirated sound recordings can be easily found in flea markets and on streets in major cities, and the growth of illegitimate CD-R replication continues to undermine what is left of the legitimate music market. Illegal use of business software in small and medium-sized businesses is widespread, with rates higher in areas outside the major cities. Pirating videogame software on all platforms and illegal photocopying of books are widespread. Estimated losses due to piracy of U.S.- copyrighted materials in Colombia amounted to \$117.8 million in 2002.

Enforcement activity at the raiding level has improved somewhat in the last few years. However, delays in prosecution continue to favor the pirate. The Colombian judicial system fails to actively prosecute cases, much less issue deterrent penalties; hence piracy has not declined. With respect to administrative enforcement of cable piracy and signal theft, CNTV's efforts require improvement. The regulatory agencies and the tax authority must improve efforts to enforce Law No. 603, which requires Colombian corporations to certify compliance with copyright laws in annual reports they file with regulatory agencies. The National Program Against Piracy (*Convenio Nacional*) continues to meet and has achieved some limited success in coordinating the fight against piracy, but it is still far from effective. Colombia must ensure that its criminal, administrative, civil and border procedures meet its bilateral and multilateral copyright enforcement obligations (both in substance and in practice).

Actions which the Colombian government should take in 2003: Actions which the government should undertake include—

- Having 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 against larger, organized distributors of pirated materials;
- Granting civil *ex parte* search orders more swiftly;
- Encouraging more actions by CNTV, both administratively and in coordination with the criminal authorities, to combat television piracy;
- Expediting prosecutions of criminal copyright cases and issuing deterrent sentences, as permitted under the criminal code;
- Improving efforts by the regulatory agencies (*superintendencias*) and the tax authority (DIAN) to 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);

COLOMBIA
ESTIMATED TRADE LOSSES DUE TO PIRACY
(in millions of U.S. dollars)
and LEVELS OF PIRACY: 1998 - 2002¹

INDUSTRY	2002		2001		2000		1999		1998	
	Loss	Level								
Motion Pictures	40.0	90%	40.0	90%	40.0	90%	40.0	55%	38.0	60%
Records & Music	56.3	65%	73.0	65%	60.0	60%	60.0	60%	65.0	60%
Business Software Applications ²	16.2	50%	19.5	52%	33.2	53%	50.5	58%	68.1	60%
Entertainment Software	NA	NA	NA	NA	39.0	85%	7.0	75%	7.7	78%
Books	5.3	NA	5.3	NA	5.0	NA	6.0	NA	6.0	NA
TOTALS	117.8		137.8		177.2		163.5		184.8	

Colombia is a beneficiary country of several U.S. trade programs—the Generalized System of Preferences (GSP), the Andean Trade Preference Act (ATPA) and the recently adopted Andean Trade Promotion and Drug Eradication Act (ATPDEA).³ All three programs have standards of intellectual property rights which must be afforded to U.S. copyright owners. Responding to the U.S. government’s request for comments regarding countries’ eligibility for ATPDEA benefits, IIPA reported that Colombia had failed to provide adequate and effective protection for U.S. copyright owners, especially under the enhanced standards outlined in the ATPDEA.⁴ Given this failure to meet the standards established in the statute, IIPA indicated that it would be appropriate to deny eligibility status to Colombia. Realizing, however, that the U.S. government may choose to serve U.S. interests by extending ATPDEA benefits, IIPA requested that the U.S. government obtain written commitments on Colombia’s actions to meet the IPR

¹ The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA’s 2003 Special 301 submission, and is available on the IIPA website at www.iipa.com/pdf/2003spec301methodology.pdf.

² BSA’s estimated piracy losses and levels for 2002 are preliminary, and will be finalized in mid-2003. In IIPA’s February 2002 Special 301 filing, BSA’s 2001 estimates of \$35.0 million at 53% were identified as preliminary; BSA finalized its 2001 numbers in mid-2002, and those revised figures are reflected above. BSA’s trade loss estimates reported here represent losses due to piracy which affect only U.S. computer software publishers in this country, and differ from BSA’s trade loss numbers released separately in its annual global piracy study which reflects losses to (a) all software publishers in this country (including U.S. publishers) and (b) losses to local distributors and retailers in this country.

³ For the first 11 months of 2002, \$177.2 million worth of Colombian goods (or 3.6% of Colombia’s total imports to the U.S. from January to November) entered the U.S. under the duty-free GSP code, representing a 228.8% increase over the same time period last year. During this same time period in 2001, \$244.6 million worth of Colombian goods entered under the ATPA program, accounting for a 65.4% decrease from the prior year. For more information on the history of Colombia’s status on Special 301, please see Appendices D and E of this submission.

⁴ IIPA Comments to the Trade Policy Staff Committee regarding the Designation of Eligible Countries as Andean Trade Promotion and Drug Eradication Act Beneficiary Countries, September, 16, 2002, available on the IIPA website at http://www.iipa.com/rbi/2002_Sep16_ATPDEA.pdf.

standards of the ATPDEA before designation was officially conferred. IIPA understands that Colombia indeed made general commitments (a) to reduce piracy and (b) to implement a software legalization decree.

COPYRIGHT PIRACY IN COLOMBIA

Piracy levels in Colombia exceed half the legitimate market in almost all the copyright sectors.

The audiovisual industry faces two serious form of piracy in Colombia: Television signal theft and video piracy. The Motion Picture Association of America (MPA) reports that both are prevalent and so integrated into the economy that the legal market is seriously threatened. In fact, the incidence of video piracy is so high that some audiovisual producers have abandoned the market, despite the country's potential. At least 90% of the video market is pirate. An increasing number of pirate videos are high quality counterfeits, with high quality copies and packaging intended primarily for sale or rental in video stores. The majority of pirate videos, however, are distributed in street markets. MPA has continued to fight television signal theft piracy. The situation has improved somewhat, however, due to consistent MPA action (over 60 cases brought in the last five years), and since cable operators who received licenses in 1999-2000 have now legalized their signals. Some of these legal operators have also "bought out" pirate systems to increase their subscriber base. There are still uncounted, small unlicensed operators that have built their own pirate distribution systems, although many of these may never pay for their use of signal either because they are very small systems in remote, dangerous areas or because they are legally protected under the Colombian law that allows signal distribution on a "community, not-for-profit" basis. These pirate systems often use gray market decoders (legal decoders used outside of the territory for which they are licensed) to descramble U.S. signals and then distribute them to their own pirate customer base. Annual losses to the U.S. motion picture industry due to audiovisual piracy in Colombia are estimated to be \$40 million in 2002.

The piracy rate for business software still reflects an unacceptably high incidence of illegal software use in Colombia, particularly within small to medium-sized organizations. Piracy levels in cities outside Bogotá are believed to be much higher than the average national rate. During 2002, the Business Software Alliance (BSA) encountered sophisticated, high-volume software counterfeit production facilities in Bogotá. A series of raids by Colombian law enforcement authorities during last year confirmed that the facilities had manufactured several hundreds of counterfeit software licenses and packaging. In one of the raids, the authorities arrested 19 pirates, completely dismantling the pirate operation facilities. Estimated trade losses due to business software piracy are \$16.2 million in 2002, with an estimated 50% piracy level. The educational and legal campaign of the BSA, combined with only modest growth in the legitimate market, resulted in a reduction in the piracy rate and estimated losses in Colombia in 2002, compared to the prior year.

The recording industry reports that in 2002, the estimated level of audio piracy rose to 65%, with estimated losses due to piracy placed at \$56.3 million. This estimated loss is below the 2001 amount mostly due to devaluation. Piracy of music CDs in Colombia continues to increase, mostly due to local CD-R replication. The major problem is the hundreds of stalls in the street markets of San Andrecitos that continue to openly and brazenly sell and distribute pirate and counterfeit product. Street vendors sell pirate CDs on the traffic corners in Bogotá,

Medellin and Cali, and even more vendors sell pirate audiocassettes. Because these vendors move around so much, it is difficult to locate them and get the police to conduct raids in a swift and efficient manner. CD-R piracy (recordable CD) is flourishing in Colombia, as a cottage industry of pirate CD-R products has exploded, pirating primarily Colombian repertoire. Most of the blank CDRs are brought in to Colombia in containers from the Far East. IFPI also reports that recorded pirate CD-Rs are being smuggled in from Ecuador. Most of the music companies are shrinking; the local companies continue to close down their operations and their investments. U.S. repertoire continues to be very much affected due to this situation. There have been certain isolated efforts and lots of programs and public statements, but to no avail. As a result of poor enforcement efforts, the legitimate market decreased by 22%, or 2.4 million units, in 2002. This declining trend is likely to continue in 2003. Since 1997, the overall market drop in sales in Colombia has been 60.4%, or 12.8 million units. The record companies have taken steps to compensate their losses by streamlining personnel and local artist rosters. Sadly, tax-paying Colombian citizens and artists are paying the price for this piracy problem.

The publishing industry reports the Colombian Book Chamber (which includes U.S. publishers) and the government have been working hard in trying to improve both the “Ley del Libro” itself and its enforcement. In early 2003, the Colombia Book Association reported that one of the most pirated books in Colombia was the first volume of Nobel literature laureate Garcia Marquez’s autobiography, “Vivir para contarla” which was released in October 2002. Anti-piracy efforts in 2002 generated the seizure of over 114,000 illegal published books, the result of some 85 raids.⁵ Commercial piracy has declined somewhat because of enforcement actions, but not photocopying. Currently there is no enforcement against photocopy shops located either outside universities or those operated inside, where individual chapters of textbooks as well as entire books are reproduced without authorization. Local agents of U.S. publishers say that pirated books and photocopies have a 20% to 25% market share (50% in the English language reference books, which is only a small part of the market). There is a campaign on television, on radio and in the newspapers discussing the problem of using illegal IP products. Estimated trade losses due to book piracy remained at \$5.3 million in 2002.

The Interactive Digital Software Association (IDSA) has reported concerns that Colombia is becoming another destination for pirated product (including videogame CDs and cartridges, personal computer CDs, and multimedia products) out of Southeast Asia.

COPYRIGHT ENFORCEMENT IN COLOMBIA

Several Colombian institutions and interagency groups are responsible for anti-piracy activities. Ironically, some enforcement activity has actually improved in the last few years in Colombia, although there are few results in terms of deterrent sentences and judgment issues, or actual reductions in the levels of piracy, to show for these efforts.

For example, in May 1998, the copyright industries joined an inter-institutional agreement with Colombian government agencies to strengthen the government commitment to fighting piracy which was approved by then-President Samper. On February 25, 1999, then-President Pastrana confirmed the National Anti-Piracy Campaign, which involved a large

⁵ EFE News Service, “Garcia Marquez’s books among the most pirated in 2002,” February 6, 2003.

number of governmental and independent agencies in the fight against piracy.⁶ The purpose of this public/private sector organization is to coordinate anti-piracy activities. Under the new administration, the Minister of the Interior has the lead on the national IPR campaign.

In terms of enforcement, 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). As a result, there are seven special prosecutors, 25 judicial police in Bogotá, and an uncertain number in the provinces. These prosecutors coordinate action with special police forces. In Bogotá alone, there are approximately 25 special prosecutors and 25 special judicial police officers.

Police are active but prosecutions are few.

Given the poor results in actions against home video piracy, MPA has effectively ceased to bring home video piracy cases in Colombia. MPA also is not presently doing any TV cases, although the TV market seems to have fixed itself somewhat. MPA has coordinated with the police unit for signal theft action with good raiding results. After the raids, however, prosecution procedures and sentencing possibilities have not been a deterrent for pirates. Lengthy prosecutions continue to favor the pirate, and MPA is faced with a difficult choice of seeking settlements to quickly end the specific incident of piracy or enduring piracy while cases work their way through the criminal process. In the last three years, MPA took 17 criminal actions against alleged television pirates in 2000, 16 such cases in 2001 and eight in 2002. However, MPA's television anti-piracy strategy depended largely on a complementary effort promised by CNTV, which, as noted below, has done virtually nothing.

For business software piracy, BSA reports that it continues to receive strong support in 2002 from the Fiscalia and SIJIN (Judicial Department of intelligence of the National Police), but 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) has diminished its level of support substantially during 2002, explaining that it has other priorities. All these agencies proved critical to BSA's efforts to strengthen anti-piracy enforcement, within and outside Bogotá. In 2002, legal actions were conducted against 12 end-user pirates, and more than 299 actions against 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. Significantly, government agencies conducted several criminal raids in Cali, Bogotá and Medellín.

The recording industry reports that there has been good will between the industry and the Colombian enforcement authorities but the good will never contribute to decreasing the high levels of piracy. The industry reactivated its anti-piracy unit (APDIF) in 2002. With limited support from police authorities APDIF has been able to carry out a street level campaign that contributed to cleaning up some high traffic areas in Bogotá. Unfortunately the authorities to

⁶ The Colombian National Anti-Piracy Campaign is supported by the following agencies which coordinate anti-piracy efforts: The President's Office, the Ministry of Foreign Commerce, the Ministry of Communications, the Ministry of Culture, the National Attorney General's Office, the National Police Force, the National Author Rights Association, the National Television Commission, DIAN—the Tax and Customs Authority, the Colombian Record Producers Association, the Colombian Book Chamber, the Colombian Video Chamber (COLVIDEO), the Colombian Industrial Software Association and the Sayco Collection Society. This 1999 agreement reaffirmed the first anti-piracy agreement (known as CERLALC) which was signed in December 1995.

investigate pirate replication facilities and major distributors have done little, which dilutes the effectiveness of street operations since any seized product is quickly replaced. Of 1,100 raids in 2002 only 130 were directed at labs or warehouses. It is imperative that the police intensify investigations and raids against pirate production and distribution centers to have any hope of reducing piracy levels in Colombia. In addition, the Colombian government has not cooperated in implementing adequate border measures to prevent entry into the country of blank CDRs that are used for piracy purposes or stemming the flow of recorded pirate product coming from Ecuador and Venezuela. The current criminal code also presents an obstacle to fighting piracy because for those few cases that are prosecuted the penalties are so low that, for all intents and purposes, it prevents any type of incarceration and leads to suspension of any sentence.

There has been some enforcement action in Colombia on commercial book piracy, with some 85 actions taking place in 2002. When informed of suspected problems by the publishers, Colombian authorities will confiscate infringing texts and burn them, but costs of these actions must be borne by the publishers. AAP reports that there is no effective anti-piracy enforcement against copyshops, which operate both in and around universities and copy chapters of, or even entire, books.

Failure to Impose Deterrent Criminal Sentences

Even with all the criminal raids, the Colombia system does not result in deterrent penalties or criminal sentences. The Colombian judicial system remains a serious obstacle to effective enforcement. Increasing penalties, as was done in the 2001 amendments to the criminal code, is not enough. It is also important to expedite criminal prosecutions.

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 would not be required to serve any jail time. It is well known that in Colombia, it usually takes more than six years between the commencement of the criminal investigation and the final decision of the court; therefore pirates currently do not feel pressure when an action is filed against them.

Border Enforcement Measures

Colombia is faced with a major challenge to improve its border measures. Customs is a key element in the effort to control the contraband of legal and illegal product. Last year, DIAN did engage in several major actions, resulting in significant seizures. Enforcement at the Colombian borders still needs to be improved in practice, especially given the growth of optical media piracy in the region.

Millions of blank CDRs are entering Colombia for the sole purpose of burning pirate music CDs. Some of the shipments are being undervalued and in all likelihood include blank CDRs manufactured in rogue Taiwanese plants that are not licensed by Phillips or pay corresponding patent royalties. It is extremely important for any effective anti-piracy campaign that custom authorities begin to implement measures to prevent entry of these blank CDRs.

CRIMINAL COPYRIGHT ENFORCEMENT STATISTICS In COLOMBIA: 2002			
ACTIONS	MOTION PICTURES	BUSINESS APPLICATIONS SOFTWARE	SOUND RECORDINGS
Number of raids conducted	8	311	1,168
By police (including tax authorities)	8	299	1,168
By customs		2	0
By CNTV	0		0
Number of cases commenced	8	11	27
Number of defendants convicted (including guilty pleas)	0	6	9
Acquittals and Dismissals	0	3	
Number of cases pending	64		
Total number of cases resulting in jail time	0		1
Suspended prison terms			
Maximum 6 months			
Over 6 months			
Over 1 year			1
Total suspended prison terms			
Prison terms served (not suspended)			
Maximum 6 months			
Over 6 months			
Over 1 year			
Total prison terms served (not suspended)			
Number of cases resulting in criminal fines	0		9
Up to \$1,000			
\$1,000 to \$5,000			
Over \$5,000			
Total amount of fines levied	0		\$49,000

Administrative Enforcement Against Signal Theft Piracy

Despite several years of promising administrative action to enforce copyright, CNTV has been completely ineffective in addressing the problem of piracy in television. Because of the agency's constant constant excuses and its failure to act against piracy, MPA has lost faith in the agency and has no active cooperation at this time. Without cooperation from the responsible authorities, there is little reason for industry to expend its resources in a one-sided fight against piracy.

Delays in Civil Actions, Including Issuing *Ex Parte* Search Orders

As part of its national enforcement campaign, BSA also uses civil remedies to pursue those persons and businesses engaged in end-user piracy. However, civil enforcement against software pirates continues to be hampered by excessive judicial delays in granting *ex parte* seizure requests. Despite efforts to educate judges on the critical importance of *ex parte* orders to effective anti-piracy enforcement, BSA routinely must wait two to three months to obtain such an order, often much longer in cities outside Bogotá. Problems with the Colombian courts tend to be 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 was forced to rely heavily on criminal enforcement in 2002, conducting only a handful of civil end user actions.

CIVIL COPYRIGHT ENFORCEMENT STATISTICS In COLOMBIA: 2001-2002		
ACTIONS	BUSINESS APPLICATIONS SOFTWARE 2001	BUSINESS APPLICATIONS SOFTWARE 2002
Number of civil raids conducted	20	06
Post search action		
Cases pending	18	02
Cases dropped	2	
Cases settled or adjudicated		
Value of loss as determined by right holder (\$USD)		\$30,000
Settlement/judgment amount (\$USD)		\$21,000

COPYRIGHT LAW AND RELATED ISSUES

Copyright Law of 1982 and the WIPO Treaties

The 1982 copyright law, as amended in 1993 and 1997, and including a 1989 decree on computer programs, is reasonably comprehensive. Amendments to the Colombian law made in 1993 increased the level of criminal penalties for piracy, and expanded police authority to seizing infringing product. In May 1998, the court ruled in favor of the copyright industries, holding that the economic rights of copyright owners are in fact alienable. The interplay between the Colombian law and the Andean Communities Decision 351 on copyright and neighboring rights affords a level of copyright protection close to TRIPS standards.

Colombia has deposited its instruments of ratification for both the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT), making it one of the original 30 countries to place both treaties into force in 2002. These treaties raise the standards of copyright protection worldwide, particularly with respect to network-based delivery of copyrighted materials, and foster the growth of electronic commerce. Amendments to the criminal code actually provide sanctions for the circumvention of technological protection measures.

Fiscal Enforcement Legislation: Law No. 603

In July 2000, Colombia enacted fiscal enforcement legislation (Law No. 603) that requires Colombian corporations to include in their annual reports the compliance with copyright laws and 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.

During the second half of 2002, BSA, as part of its awareness campaign in promoting Law 603, conducted a successful seminar addressed to accountants, managers, attorneys and anybody responsible in a corporation for filing an annual report. About 1,000 people participated in this event. BSA is still working closely with the *Superintendencias* and DIAN to have them issue implementing guidelines. To date, neither of the two agencies supervising implementation of this law have not yet taken action to implement it. Both agencies should take public steps towards implementation such as, for example, issuing implementing regulations, making public announcements to companies within their jurisdiction, training audit staff, and conducting audits.

Criminal Code and Criminal Procedure Code Revised

Colombia's criminal code entered into effect in July 2001. It includes copyright infringements as a crime, and increases possible sanctions from a jail term from one-to-three up to three-to-five years. The code also contains provisions on violation of technological protection measures and rights managements, both key obligations of the WIPO treaties. Unfortunately, in piracy cases the penal code allows home arrests or bail during the process and suspends any sentences of up to three years. In practical terms, this scenario translates to no incarcerations for pirates.

COPYRIGHT AND REGIONAL TRADE NEGOTIATIONS

The negotiation of bilateral and regional free trade agreements (FTAs) is assuming increasing importance in overall U.S. trade policy. These negotiations offer an important opportunity to persuade our trading partners to modernize their copyright law regimes so they can maximize their participation in the new e-commerce environment, and to improve enforcement procedures. The FTA negotiations process offer 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 believes that the IPR chapter in the Free Trade Area of the Americas (FTAA) must be forward-looking, technologically neutral documents that set out modern copyright obligations. They should not be summary recitations of already existing multilateral obligations (like TRIPS). As the forms of piracy continue to 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 has transformed copyright piracy from a local phenomenon to a global wildfire. CD-R burning is fast becoming a pirate's tool of choice throughout this region. Without a modern legal and enforcement infrastructure, including effective criminal and civil justice systems and strong border controls, we will certainly see piracy rates and losses greatly increasing in this region, thus jeopardizing more American jobs and slowing the growth of the copyright sectors both in the U.S. and the local markets.

Therefore, the IPR chapter in the FTAA should contain the highest levels of substantive protection and enforcement provisions possible. At a minimum, the IPR chapter should: (a) be TRIPS- and NAFTA-plus, (b) include—and clarify—on a technologically neutral basis the

obligations in the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty (WCT and WPPT), and (c) include modern and effective enforcement provisions that respond to today's digital and Internet piracy realities. Despite the existence of these international obligations, many countries in the Western Hemisphere region fail to comply with the TRIPS enforcement obligations, both in their legislation and in practice. It is in the area of enforcement that some of the greatest gains for U.S. and local copyright creators can be achieved.