

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2005 SPECIAL 301 REPORT

BOLIVIA

EXECUTIVE SUMMARY

Special 301 Recommendation: IIPA recommends that Bolivia be kept on the Special 301 Watch List in 2005.

Overview of Key Problems: Bolivia has shown no progress on copyright reform in almost a decade. By failing to provide a TRIPS-compliant copyright law along with adequate and effective copyright enforcement, Bolivia does not meet its current bilateral and multilateral. For example, the law lacks civil *ex parte* measures, a major problem for the business software community in enforcing copyright in Bolivia. In all of its civil cases, BSA has had to adhere to Bolivian procedures, which include notifying the defendants at least 24 hours prior to the inspection. Border measures are weak. Copyright legal reform has been underway for years without result. A comprehensive intellectual property rights bill was introduced to the Bolivian Congress in early February 2001 but the Bolivian Congress has yet to commence its review, despite several requests from the copyright industry. Bolivia is participating as an observer in the Free Trade Agreement (FTA) negotiations with the United States and other Andean countries (Colombia, Ecuador, and Peru). IIPA and its members expect the IPR chapter in this agreement, to which Bolivia would be required to adhere, to have strong copyright law and enforcement provisions.

Actions that the Government of Bolivia Should Take: To improve the copyright law and enforcement in Bolivia, we recommend the following actions for 2005—

- Halt legislative consideration of the proposed copyright legislation drafted in 2001 because it is severely deficient. TRIPS and WIPO treaties (WIPO Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT)) law reform must be considered and approved;
- Ratify the WCT and WPPT, and fully implement these obligations in any copyright law reform (as referenced above);
- Adopt ISP liability measures including notice and takedown provisions;
- Reform the penal code to provide deterrent level penalties for copyright infringement;
- 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
- Significantly improve anti-piracy enforcement efforts in-practice.

Bilateral Negotiations and Trade Programs

In November 2003, Ambassador Robert Zoellick notified the U.S. Congress that the Bush administration intended to begin Free Trade Agreement (FTA) negotiations with the Andean nations. The negotiating objectives specifically include high levels of copyright protection and effective enforcement measures, including criminal, civil/administrative and

border enforcement. 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 will be looking for an agreement that achieves the same high standards as were achieved in the recently concluded FTA with Central America.

Bolivia currently receives preferential trade benefits under two U.S. trade programs—The Generalized System of Preferences (GSP) and the Andean Trade Preferences Act (ATPA), as amended.¹ These two programs contain standards of intellectual property rights which must be afforded to U.S. copyright owners.² Also, in the 2004 Special 301 review, USTR kept Bolivia on the Watch List, noting that piracy and inadequate laws are significant problems.³ Finally, 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.

COPYRIGHT PIRACY

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 have closed their offices and no local talent has been produced in years. Domestic 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 involves commercial

¹ During the first 11 months of 2004, \$15.2 million worth of Bolivian goods (or 6.4% 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 95.7% increase over the same period in the previous year. Another \$113.1 million worth of Bolivian goods entered the U.S. under the ATPA in the first 11 months of 2004, representing an increase of 133.9% from the same period in 2003. For more information on the history of Ecuador under Special 301 review, see Appendix D (<http://www.iipa.com/pdf/2005SPEC301USTRHISTORY.pdf>) and Appendix E (<http://www.iipa.com/pdf/2005SPEC301HISTORICALSUMMARY.pdf>) of this submission.

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 1, 2004 at http://www.iipa.com/rbi/2004_June1_IIPA_ATPA_trade_filing_for_USTIC.pdf.

³ Press Release, Office of the U.S. Trade Representative, "Special 301 Report Finds Continued Progress but Significant Improvements Needed," May 3, 2004, available at http://www.ustr.gov/Document_Library/Press_Releases/2004/May/Special_301_Report_Finds_Continued_Progress_But_Significant_Improvements_Needed.html. See also USTR, 2004 Special 301 Report, available at http://www.ustr.gov/assets/Document_Library/Reports_Publications/2004/2004_Special_301/asset_upload_file16_59_95.pdf. ("Bolivia's existing legislation for IPR protection is deficient. Bolivia has failed to provide for *ex parte* civil search orders. In addition, damages are inadequate, enforcement efforts have been sporadic and largely ineffective, and border enforcement remains weak. While the 1992 Copyright Law recognizes copyright infringement as a public offense and the new Bolivian Criminal Procedures Code began to provide for the criminal prosecution of IPR violations, enforcement by Bolivian Courts has been disappointing. Unfortunately, no progress has been made on amending the copyright law to bring it up to international standards. Furthermore, it appears that the Bolivian government agencies use unlicensed software. Piracy rates for videos, sound recordings, and software remain among the highest in Latin America, according to industry sources. Despite these serious deficiencies in enforcement, the Mesa Administration has publicly committed itself to transparency and has demonstrated at multiple levels a desire to work with the United States on institutionalization, combating corruption, and increasing the efficiency of the Bolivian Government. We welcome this commitment and urge the Bolivian Government to continue in its efforts to improve enforcement.").

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. 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.

BOLIVIA				
Estimated Trade Losses Due to Copyright Piracy				
(in millions of U.S. dollars)				
and Levels of Piracy: 2000-2004⁴				
INDUSTRY	2004		2003	
	Loss	Level	Loss	Level
Records & Music	16.0	90%	16.0	90%
Business Software ⁵	7.0	78%	7.0	78%
Motion Pictures	2.0	NA	2.0	100%
Entertainment Software	NA	NA	NA	NA
Books	NA	NA	NA	NA
TOTALS	25.0		25.0	

COPYRIGHT ENFORCEMENT

Failure to Provide TRIPS-compatible Civil *Ex Parte* Search Measures

As for civil actions, 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 clearly violates TRIPS Article 50.2.

During 2004, the BSA conducted seven civil inspections. In all of these cases, the BSA was required 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 were previously installed but deleted a few hours before the inspection. Of the seven civil inspections conducted in 2004, only two were settled.

⁴ The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2005 Special 301 submission at www.iipa.com/pdf/2005spec301methodology.pdf.

⁵ BSA's final 2003 figures represent the U.S. software publisher's share of software piracy losses in Bolivia, as compiled in October 2004 (based on a BSA/IDC July 2004 worldwide study, found at <http://www.bsa.org/globalstudy/>). In prior years, the "global" figures did not include certain computer applications such as operating systems, or consumer applications such as PC gaming, personal finance, and reference software. The preliminary 2003 losses which had appeared in previously released IIPA charts level (\$11 million) were based on the older methodology, which is why they differ from the 2003 numbers in this report.

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. This unwarranted delay, which is far longer than the average authorization process in other countries in Latin America, violates Article 41 of TRIPS, which requires that remedies for copyright infringement be "expeditious."

Depending on the city in which the civil complaint is filed, it could take up to four to five weeks to obtain a 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 Civil Copyright Damages

The Bolivian copyright law permits only the recovery of direct economic damages for civil copyright violations and prohibits punitive, consequential, or statutory damages. Without the threat of 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. In contrast, other countries have legislated a system of statutory damages that provide for an effective deterrent mechanism to combat piracy. In Brazil, for example, the unauthorized reproduction or publication of a protected work may be subject to statutory damages equivalent to up to 3,000 times the retail value of the protected work.⁶ The same solution has been adopted by the United States (up to a maximum of \$30,000 per protected work).⁷ The overhaul of the intellectual property laws submitted to the Bolivian congress in 2001 added a statutory damages provision of between three to five times the retail value of the protected work.⁸ It is unclear whether the new, bifurcated, version of the bill, recently introduced by SENAPI (see discussion below), preserves this provision. As indicated above, other provisions of the 2001 copyright reform bill fail to meet TRIPS and WCT/WPPT standards. To the extent the recent 2004 bill is identical to its predecessor, the new bill likewise has these deficiencies.

Inadequate and Ineffective Criminal Enforcement

Enforcing copyrights through the Bolivian criminal system has proven to be totally ineffective. In June 2003, the Court of Criminal Instruction in Cochabamba issued a criminal sentence—regarded as the first in the history of country—for violation of intellectual property rights. The court determined that material evidence and expert testimony demonstrated that the

⁶ *Ley de Derechos de Author*, No. 9610, Article 103.

⁷ 17 U.S.C. § 504 (c)(1). In cases of "willful" infringement, statutory damages can be elevated to as much as US\$150,000 per work infringed. 17 U.S.C. § 504(c)(2).

⁸ *Anteproyecto de Código de Propiedad Intelectual*, Article 175 I.

owner of a computer equipment store had violated Bolivia's Criminal Code provisions on intellectual property rights by profiting from the reproduction, plagiarizing, and distribution of Microsoft software without license or rights. The court sentenced the owner to one year in prison which was suspended in accordance with provisions in the law for first time offenders.

The music industry confirmed that no raids were conducted by the authorities to pursue music piracy. Unfortunately, no new resources have been allocated to SENAPI or any other agency for the purposes of combating IPR violations. We urge the Bolivian government to adopt and implement a national anti-piracy effort to combat IPR violations.

Border measures in Bolivia must be strengthened

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

COPYRIGHT LAW REFORM AND RELATED ISSUES

Copyright Law of 1992

Bolivia passed a copyright law on April 29, 1992, which replaced its antiquated 1909 law.⁹ While the 1992 law was a vast improvement in legal protection, it left the implementation of many of its provisions, including enforcement, to subsequent regulations. For example, under the 1992 copyright law, computer programs are protected but not as "literary works," and are subject to regulations. A first set of draft software regulations was proposed in 1993, and there were several rounds of revisions, as well as numerous delays. Finally, a set of regulations providing the basic foundation for copyright protection of software, 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.

2001 Bill to Amend the Copyright Law

Efforts to overhaul the 1992 Bolivian copyright law have been underway for years. In 1996, the National Secretary of Culture and the National Secretary of Industry and Commerce started to develop a proposal for a special law on intellectual property protection which would

⁹ Bolivia's copyright regime must also comport with decisions made by the Andean Community. In December 1993, the five Andean Pact countries, including Bolivia, approved Decision 351, a common regime on copyright and neighboring rights, including an obligation to provide for injunctive relief, seizure and confiscation of unlawful copies and devices, and damages. Some very preliminary discussion has taken place regarding the modification of Decision 351 to make it TRIPS and WIPO Treaties compatible, but no resolution has been taken at this point by the Andean Community Copyright Office Directors.

complement the existing copyright law. The objective of this project was to increase the level of IP protection, streamline judicial proceedings relating to the enforcement of intellectual property rights, and otherwise improve enforcement efforts to combat piracy and counterfeiting of IPR-protected works in order to encourage the economic development of these industries in Bolivia.

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 contains over 200 articles which propose to expand the scope of exclusive rights, prescribe statutory damages for copyright violations, establish civil *ex parte* search procedures, add more enforcement powers to the Copyright Office, and create a special police force exclusively for intellectual property enforcement. The 2001 bill was subsequently abandoned due to its complex structure and content. However, reports indicate that SENAPI presented a new 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 this 2004 copyright bill contains identical proposals in the 2001 version or not. .

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. Ratification of these treaties by Bolivia, followed by deposit of instruments of ratification with WIPO, would show the Bolivian government’s support for raising the minimum standards of copyright protection, particularly with respect to network-based delivery of copyrighted materials, and fostering the growth of electronic commerce. Bolivia should ensure that any amendments to its copyright law incorporate the substantive obligations of the two WIPO treaties in order to respond to the challenges of the rapidly evolving marketplace for copyrighted materials. According to reports produced by SENAPI, the treaties have not been presented to Congress, pending amendments to the copyright law. IIPA encourages the government of Bolivia to add ratification of the WIPO treaties to the 2005 legislative agenda.

Criminal Procedure Code Reform

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