

# INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE



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Office of the Secretary  
International Trade Commission  
500 E Street, SW  
Washington, DC 20436

Re: Request for Comments on the Andean Trade Preference Act: Effect on the U.S. Economy and on Andean Drug Corp Eradication, Investigation No. 332-352, 67 Fed. Reg. 40337 (June 12, 2002)

To the International Trade Commission:

The International Intellectual Property Alliance (IIPA) takes this opportunity to respond to the International Trade Commission's request for comments on the Andean Trade Preferences Act (ATPA). The ITC is preparing a report under section 332(g) of the Tariff Act of 1930, following receipt of a May 22, 2002 request from the House Committee on Ways and Means. The ITC's report on ATPA will be similar to its previous reports and will analyze the economic impact of ATPA on U.S. industries and consumers and the effectiveness of ATPA in promoting drug-related crop eradication and crop substitution efforts of the beneficiary countries.

The IIPA, its member associations and their member companies represent the creative content community in the United States. 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 ATPA requires that each beneficiary country (Bolivia, Colombia, Ecuador and Peru) must provide "adequate and effective" copyright protection and enforcement in order to qualify for, and to remain eligible to receive, preferential duty treatment under ATPA.

Here is one measure of the economic impact of piracy in the Andean region: U.S. companies suffered estimated trades losses due to piracy in these four ATPA 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. For example, the legitimate record industry in Peru has almost entirely collapsed, vanished, disappeared; piracy levels are now at 97%. With many of 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. ATPA is a critical tool which can provide the leverage to keep the intellectual property rights' playing field even and fair.

## **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).

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.

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

The June 12, 2002 Federal Register notice invites comments on three issues, two of which are relevant to IIPA's issues: "(1) The actual effect of ATPA on the U.S. economy generally as well as on specific domestic industries which produce articles that are like, or directly competitive with, articles being imported under the Act; (2) The probable future effect that ATPA will have on the U.S. economy generally and on domestic industries affected by the Act." Simply put, inadequate copyright laws and enforcement in the Andean region have an adverse impact on American companies which create, produce and distribute copyright-protected materials.

The ATPA<sup>1</sup> contains provisions for the protection of intellectual property rights similar to those in the Caribbean Basin Initiative<sup>2</sup> and the Generalized System of Preferences.<sup>3</sup> 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. 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

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<sup>1</sup> Andean Trade Preferences Act of 1990, Pub. L. No. 102-182 (codified at 19 U.S.C. § 3201 et seq.).

<sup>2</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>3</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)).

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 works to the public. Copyright also makes possible the paychecks for the millions of jobs the creative industries generate worldwide.

It is important to remember that the ATPA contains two mandatory criteria embedded in Section 3202(c)(5) which state 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.

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:

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;...

19 U.S.C. §§ 3202(d)(9) and 3202(d)(10). The leverage provided by the prospect of the U.S. halting or limiting ATPA privileges to those beneficiary countries which refuse to stop illegal piracy or provide equitable and reasonable market access to U.S. copyrighted products and services should be viewed as an important means to achieve the goals of this program. Under the ATPA, the President has the authority to

(A) withdraw or suspend the designation of any country as a beneficiary country, or  
(B) withdraw, suspend, or limit the application of duty-free treatment under this chapter to any article of any country,  
if, after such designation, the President determines that as a result of changed circumstances such a country should be barred from designation as a beneficiary country.

19 U.S.C. §3202(e). To date, such ATPA leverage has not yet been used directly with respect to intellectual property rights.<sup>4</sup>

### **Impact on U.S. Copyright Industries due to Piracy in ATPA Countries**

Inadequate and ineffective copyright enforcement continues to inflict significant trade distortions in the Andean region. High levels of piracy of music, audiocassettes and compact discs, business, entertainment and multimedia software on all platforms, films, television programs, videocassettes, textbooks, tradebooks, reference and professional publications and journals, all hurt U.S. creators. Local

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<sup>4</sup> IIPA notes that the ATPA, like the CBERA program (but unlike the GSP program), does not by statute provide for any specific, formal, review procedures for the Executive Branch to receive and act upon petitions from the public to withdraw or suspend ATPA beneficiary status or product eligibility. IIPA has recommended to Congress that this lack of petition authority be remedied.

businesses in these countries are also harmed by piracy, as are the governments themselves. The following summary provides an overview of the kinds of piracy found in the Andean region. Also, attached to this letter as Appendix 1 are the reports on all four of these ATPA countries which appeared in the IIPA's February 2002 Special 301 submission to the U.S. Trade Representative. Here is an overview:

- Piracy of sound recordings (*fonogramas*) 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>5</sup> These four Andean countries have piracy levels well over 60%, meaning most of the copies of recorded music in these markets is unauthorized and piratical. For example, the legitimate record industry in Peru has almost entirely vanished, with piracy levels now at 97%, as mentioned earlier.
- Business software piracy appears in various formats, including counterfeiting, resellers, mail order houses, bulletin boards, other internet-based distributions and end-user piracy. The greatest threat comes from end-user piracy, where typically a corporate or institutional use copies software onto the hard disks of many more computers than the number authorized. 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), a member of IIPA, reports that software piracy is on the rise around the globe – growing from 37 percent in 2000 to 40 percent in 2001.<sup>6</sup> For the third consecutive year, Latin America continues to experience a decline in its piracy rate, which is now placed at 57%. For example, the countries with the highest piracy rates were Nicaragua (78%), Bolivia (77%), El Salvador and Guatemala (both at 73%) – all of which far exceed the 25% piracy level in the United States, which is one of the lowest in the world.
- Video piracy remains a consistent problem in the Andean region, ranging from 50% in Peru to over 90% in Ecuador and Colombia. Ineffective enforcement does not improve matters. For example, in Peru, the administrative fine issued when pirate tapes 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. In addition, the unauthorized reception and retransmission of U.S. domestic satellite signals is a key concern to the U.S. motion picture industry. This problem is particularly acute in Colombia, which 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.
- 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.

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<sup>5</sup> IFPI Music Piracy Report 2002, available at <http://www.ifpi.org/site-content/library/piracy2002.pdf>.

<sup>6</sup> Business Software Alliance, Seventh Annual BSA Global Software Piracy Study, 2002, available at <http://www.bsa.org/resources/2002-06-10.130.pdf>

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

COUNTRY	Motion Pictures		Records & Music		Business Software Applications <sup>7</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>0.0</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. Fundamentally, the Internet transforms copyright piracy from a mostly local phenomenon to a global plague. It makes it cheaper and easier than ever for thieves to distribute unauthorized copies of copyrighted materials around the globe. 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. Criminal and civil justice systems must work in a transparent and expeditious manner and result in deterrent penalties and remedies.

**Proposals to Amend ATPA**

IIPA and its members support the renewal of the ATPA program, which expired on December 4, 2001. Over the years, IIPA has identified some issues in the ATPA program which require some technical adjustments in order to make the program more effective for copyright owners. To this end, IIPA has worked toward inserting these technical amendments in pending legislation which would renew the ATPA program. For example, our main ATPA-related issues have addressed the following issues:

- To conform the IPR criteria for determining eligibility for entry of certain goods into this country duty-free under the GSP, ATPA and CBERA/CPTPA programs to the criteria already established by the Congress when it amended the Special 301 provisions of U.S. law upon the U.S. accession to the World Trade Organization. IIPA's proposal would conform the definition of "adequate and effective" protection in the other trade law programs (GSP, ATPA and CBI) dealing with intellectual property to the definition given to that term in Special 301, a definition already adopted by Congress in 1995;
- To create a conforming petition process in the ATPA and CBERA/CBTPA programs, similar to the petition process now in place for the GSP program, under which interested parties could challenge the eligibility of a country for such benefits where it fails to adequately protect U.S. copyrights and other intellectual property. Such amendment would not change any of the

<sup>7</sup> As reported in the IIPA's 2002 Special 301 submission to USTR, BSA's estimated losses and piracy levels for 2001 are preliminary, and finalized figures will be made public in the near future.

eligibility criteria for a country getting these benefits; it would establish the same general right to petition that now exists in the GSP program. In fact, H.R. 3009 as passed by the Senate (and presenting awaiting its Senate-House conference) does contain a provision which would have the President promulgate regulations regarding the review of eligibility of articles and countries under ATPA;

- To empower the President to deny GSP, ATPA and CBERA/CPTPA benefits to a beneficiary country that violates the IPR provisions of any bilateral trade agreement between the U.S. and that country. This amendment would require USTR, if it found that a country was violating a trade agreement, including violating the IP provisions in such trade agreement, to withdraw benefits under GSP, ATPA and CBERA/CBTPA. Congress has already established that violating a trade agreement is an automatic unfair trade practice; this amendment would merely adopt that same principle to apply to countries' receipt of these unilateral trade benefits;
- To clarify the President's authority to withdraw or suspend ATPA (and CBERA/CBPTA) benefits for failure to meet the IPR eligibility criteria, thus conforming these programs with the authority that already exists in the GSP program. Our amendment would merely corrects an ambiguity in the existing ATPA and CBERA/CBTPA laws to make certain that a country, once designated a beneficiary country, can later have its benefits suspended or removed if it ceases to protect U.S. intellectual property under the "adequate and effective" standard.

## CONCLUSION

IIPA appreciates the opportunity to remind the ITC and Congress about the important copyright criteria found in the Andean Trade Preferences Act. The ATPA is not solely an anti-narcotics program. It is a trade program that is aimed at promoting investment. The IPR criteria of the ATPA should be used to provide incentives to generate substantial improvements in the copyright laws and enforcement practices throughout the Andean region.

Sincerely,

Maria Strong  
Vice President and General Counsel  
International Intellectual Property Alliance

Attached:

Country excerpts from IIPA's 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>