



June 8, 2005

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

Inv. No: 332-352
Re: Andean Trade Preferences Act: Effect on the U.S.
Economy and on Andean Drug Crop Eradication,
70 Fed. Reg. 13542 (March 21, 2005)

To the Commissioners:

The International Intellectual Property Alliance (IIPA) takes this opportunity to respond to the ITC's request for comments on the effect of the Andean Trade Preference Act (ATPA) on the U.S. economy and on Andean drug crop eradication.

I. About the IIPA

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.¹ IIPA was one of only three commenters in the USITC's prior report in this matter, *Andean Trade Preference Act: Impact on U.S. Industries and Consumers and on Drug Crop Eradication and Crop Substitution, Tenth Report, 2003*. There, the USITC found that the overall effect of ATPA imports on the U.S. economy and consumers to be negligible in 2003. Unfortunately, the only discussion of IPR in that report involved a summary of the ATPA statute and a paragraph highlighting the IIPA's comments.

Our comments this year are again directed at the challenges and difficulties these four ATPA beneficiary countries have encountered in satisfying their ATPA obligations to provide "adequate and effective protection" to U.S. copyright owners, as required under this program's eligibility criteria. Because of the ongoing Andean Free Trade Agreement (FTA) negotiations, we believe it to be prudent for the USITC to expand its independent review of the actual in-country intellectual property issues in this year's exercise.

¹ IIPA is comprised of six trade associations, each representing a significant segment of the U.S. copyright community. These member associations represent over 1,300 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). See www.iipa.com.

II. Actual or Probable Effect of the ATPA on the U.S. Economy

Section 206(c) of the ATPA requires that the ITC report include discussion of the actual effect and/or probable effect that the ATPA will have on the U.S. economy generally and on the domestic industries affected by the Act. As we have noted in our prior filings with the ITC, IIPA cannot point to specific attributes connecting the strength of the U.S. copyright-based industries here in the U.S. to the actual implementation of the ATPA itself.

IIPA concludes that comprehensive copyright laws, combined with effective enforcement of those laws, are the twin pillars necessary for copyright industries – both U.S. and local industries – to continue to grow. Many copyright sectors look to grow their markets overseas. As a result, the IPR standards found in the ATPA as amended can provide a good foundation for these four countries to improve both their copyright laws and enforcement mechanisms to protect both their domestic rightsholders as well as foreign rightsholders.

The U.S. copyright industries are one of the most vibrant sectors of our economy. In October 2004, the IIPA released its tenth economic study entitled Copyright Industries in the U.S. Economy: The 2004 Report, which was completed by Economists Incorporated for the IIPA. This new report also reflects two new methodologies: (1) U.S. government data from the new North American Industrial Classification Systems (NAICS), and (2) recommended economic and statistical standards developed by the World Intellectual Property Organization (WIPO) in 2003 which use the International Standard Industrial Classification system (ISIC). IIPA's 2004 report is the among the first economic studies in the world to fully reflect the new WIPO statistical standards. The latest data show:

- In 2002, the U.S. “core” copyright industries accounted for an estimated 6% of the U.S. gross domestic product (\$626.6 billion).
- In 2002, the U.S. “total” copyright industries accounted for an estimated 12% of the U.S. gross domestic product (\$1.25 trillion).
- The “core” copyright industries employed 4% of U.S. workers in 2002 (5.48 million workers).
- The “total” copyright industries employed 8.41% of U.S. workers in 2002 (11.47 million workers). This level approaches the total employment levels of the entire health care and social assistance sector (15.3 million) and the entire U.S. manufacturing sector (14.5 million workers in 21 manufacturing industries).
- Between 1997-2002, the core copyright industries added workers at an annual rate of 1.33%, exceeding that of the U.S. economy as a whole (1.05%) by 27%. Factoring out the difficult economic year of 2002, between 1997-2001 the core copyright industries' employment grew at an annual growth rate of 3.19% per year, a rate more than double the annual employment rate achieved by the U.S. economy as a whole (1.39%).
- In 2002, the U.S. copyright industries achieved foreign sales and exports estimated at \$89.26 billion, leading other major industry sectors such as: chemicals and related products, food and live animals, motor vehicles, parts, and accessories, and aircraft and associated equipment sectors.

IIPA's report contains almost yearly progressions regarding the contribution of the “core” copyright industries to the U.S. GDP.²

² IIPA's Copyright Industries in the U.S. Economy: The 2004 Report can be accessed in its entirety at the IIPA website at http://www.iipa.com/copyright_us_economy.html. Note: The “core” industries are those copyright-related industries whose primary purpose is to produce and/or distribute copyright materials. The “total” copyright industries contain four sub-sectors called the core, partial, non-dedicated support, and interdependent sectors.

III. Economic Costs Inflicted Due to Copyright Piracy in the Andean Region

U.S. companies suffered estimated trades losses due to copyright piracy of almost **\$300 million** in 2004 in these four Andean countries. The challenges faced by the copyright industries and national governments to enforce copyright laws grow dramatically as the forms of piracy shift from hard goods toward digital media and unauthorized electronic transmissions. Over the last few years, unauthorized “burning” of CDs has grown rapidly in Latin America, adversely affecting the ability of legitimate businesses engaged in the creation and distribution of copyrighted materials – recordings, computer software, videogames, books, and increasingly, DVDs – to compete against these pirated products. Inadequate and ineffective copyright enforcement has failed to stem this problem and continues to result in significant trade distortions and losses in the Andean region. Criminal and civil justice systems must work in a transparent and expeditious manner and apply deterrent penalties and remedies.

ESTIMATED TRADE LOSSES DUE TO COPYRIGHT PIRACY
(in millions of U.S. dollars)
and LEVELS OF PIRACY (2004)
in the four ATPDEA BENEFICIARY COUNTRIES
(Final)

COUNTRY	Motion Pictures		Records & Music		Business Software Applications ³		Videogame Software		Books	2004
	Loss	Piracy Level	Loss	Piracy Level	Loss	Piracy Level	Loss	Piracy Level	Loss	TOTAL LOSSES
Bolivia	2.0	100%	16.0	90%	5.0	80%	NA	NA	NA	23.0
Colombia	40.0	75%	51.6	71%	46.0	55%	NA	NA	6.0	143.6
Ecuador	NA	NA	20.0	95%	7.0	70%	NA	NA	2.5	29.5
Peru	4.0	75%	68.0	98%	22.0	73%	NA	NA	8.5	102.5
TOTAL	46.0		155.6		80.0		NA		17.0	298.6

NA = Not Available

IIPA believes that it is critical that all four of these Andean countries continue to take all appropriate actions to improve their respective efforts and results under their existing laws to combat copyright piracy in their domestic markets. In fact, all four of these nations currently have bilateral IPR obligations (under the ATPA and GSP trade programs) as well as international obligations (under the WTO TRIPS Agreement) to provide certain levels of copyright protection and effective enforcement.

³ BSA's figures follow the methodology found in the BSA/IDC May 2005 and July 2004 Global Software Piracy Studies, and cover, in addition to business software applications software, computer applications such as operating systems, consumer applications such as PC gaming, personal finance and reference software. 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. The 2005 BSA/IDC Global Piracy Study (using 2004 data) is now posted at <http://www.bsa.org/globalstudy/>. BSA's now final, statistics for 2004 – which comport more closely to BSA's traditional methodology for 301 purposes – have been posted to IIPA website and appear above (compare, the attached IIPA 2005 Special 301 country reports contain BSA's preliminary estimates only).

Attached as appendices (including hyperlinks) are four reports on each country, all of which appear in the IIPA's February 2005 Special 301 submission to USTR. Each country report contains detailed discussions on piracy, enforcement as well as the status of copyright and related law reform measures. Each report also lists specific actions that each government could take to address the identified issues/problems. The following summary provides an overview of the kinds of piracy found in the Andean region.

- Piracy of **sound recordings and music** has reached unacceptable levels in the Andean region. These four Andean countries each have music piracy levels of 70% or higher (in fact, piracy in Peru, Ecuador and Bolivia exceeds 90 percent of the total market), meaning that most of the copies of recorded music in these markets are piratical. Music CD piracy – often involving local burning -- is the preferred piracy format, although cassette piracy still exists. Specifically:
 - In Peru, the once-thriving legitimate record industry has almost entirely vanished, with piracy levels now at 98%, devastating the legitimate market. Pirate music in CD and audiotape format are sold throughout the country, including in the Mesa Redonda area located one block away from police headquarters.
 - The recorded music market in Colombia has also suffered from lack of an effective national anti-piracy campaign. The local industry has created an anti-piracy task unit to work with local authorities in performing investigations and bringing charges against identified pirates, but these efforts have been diluted by a lack of political will to perform in-depth investigations into large distributors and an aversion by judges to apply deterrent-level sanctions.
 - Bolivia and Ecuador have shown a total lack of concern for music piracy. Neither country's enforcement authorities perform anti-piracy investigations or raids for the recording industry, and as a result, multinational companies have limited their presence in these markets.

- **Business software** piracy takes various forms, including counterfeiting, illegal reproduction and/or distribution by resellers, mail order houses, bulletin boards, other internet-based distribution and corporate end-user piracy. The greatest threat is when 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, academia, 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.
 - Bolivia: The Business Software Alliance (BSA) has reported that Bolivia has one of the highest piracy rates for business software anywhere in Latin America (an estimated 78% in 2004). The lack of civil *ex parte* search measures remains a serious problem to effective software enforcement. 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. In many cases the only evidence found by the BSA were traces of software that was previously installed but deleted a few hours before the inspection.
 - Ecuador: Ecuador's 1999 Education Law contains a poorly drafted provision that would appear to grant free software licenses 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.
 - Peru: Although Peru is to be commended for enacting a government software legalization decree in early 2003 and approving a governmental software management guide in March, 2004, a deadline has slipped far backward. The original March 31, 2005 deadline for all government agencies to legalize their software platforms (Compliance Decree 013-2003-PCM) has been extended 19 months, until December 31, 2006 (Decree 037-2005 PCM). In addition, industry indicates that Peruvian government entities (both criminal and

administrative) across all copyright sectors have a mixed record on conducting effective enforcement, and the judiciary fails to issue deterrent criminal penalties.

- **Audiovisual piracy** remains a consistent problem in the Andean region, and the growth of optical disc piracy (DVD, DVD-R, CD-R) has inflicted more harm on these market. In addition, MPA reports that ineffective enforcement remains a principal problem. For example:
 - Peru: In Peru, the administrative fine issued when pirate videotapes are seized is approximately US\$2 per tape, which is the street price for a pirate videotape. This inadequate fine is simply not a deterrent to piratical activity. While MPA notes that administrative actions have improved in the last year, criminal prosecutions remain challenging.
 - Colombia: The growth in OD piracy in this market had caused film companies to renew their concerns about high levels of home video piracy. Progress has been reported in combating television piracy (the unauthorized reception and retransmission of U.S. domestic satellite signals) in recent years.
- The major forms of piracy afflicting the U.S. **book publishing industry** in the region involve commercial photocopying piracy. Photocopying shops near universities often fill requests for illegal reproductions of entire textbooks. Unauthorized translations are also reported in the region.
- The U.S. **entertainment software industry** suffers from inadequate enforcement by governmental and judicial authorities in the Andean region. Piracy and counterfeiting affects all platforms for playing videogames, including cartridges, personal computer CD-ROMs, and game consoles.

IV. Copyright Law Reform in the Four ATPA Countries

Colombia, Peru and Ecuador all engaged in copyright law reform efforts during the 1990s. In fact, these three countries have already deposited their instruments of accession to both the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT). However, some further revisions to the copyright laws (and related laws such as criminal and civil codes) will be needed to fully incorporate the WIPO Treaties as well as provisions included in the expected FTA IPR Chapter.

Despite these reform efforts, it should be made clear that these copyright laws are not without problems; in fact, further revisions will be needed to fully incorporate the WIPO Treaties as well as provisions likely to be included in the Andean FTA IPR Chapter. In particular, the copyright law in Bolivia falls far short of these eligibility criteria and of that country's current bilateral and multilateral copyright obligations in numerous respects. Bolivia is long overdue to remedy its inadequate copyright law and fix serious deficiencies in its enforcement regime. Ecuador passed an Education Law in 1999, which includes a poorly drafted, TRIPS-incompatible provision that purports to grant free software licenses to high educational institutions. In Peru, recent legislation known as the "Law of the Artist, Interpreter and Performer" (2003) imposes new and burdensome employment/labor obligations on record producers and performers, creates an objectionable private copying levy. It also makes a derogation against all provisions of copyright law which it may conflict, thus creating legal uncertainties. These countries do not contain statutory damages provisions, a very useful tool in creating deterrence.

V. Recent USTR Actions in the "Special 301" Process

IIPA's summary above (along with the four country reports) is supported by concerns outlined by USTR. On April 29, 2005, USTR decided to continue placement of all four of these Andean nations on

the annual Special 301 “Watch List” for concerns over their respective intellectual property regimes.⁴ The text of USTR’s 2005 Special 301 decisions on these four countries appears below:

BOLIVIA: Bolivia remains on the Watch List in 2005 due to lack of improvements to its IPR regime. Under its bilateral and multilateral commitments, Bolivia should have increased its level of IPR protection years ago. Bolivia’s IPR system continues to be deficient with respect to inadequate copyright laws, significant copyright piracy and trademark counterfeiting, and weak IPR enforcement efforts overall. The United States looks to Bolivia to strengthen its copyright law, improve its IPR enforcement mechanisms, and ratify and implement the WIPO Internet Treaties. In addition to these legal reforms, we urge Bolivia to increase its enforcement efforts. Specifically, we recommend that Bolivia provide for civil ex parte searches, prevent unwarranted delays in civil enforcement, provide adequate civil and criminal damages in copyright cases, and strengthen border measures. The U.S. copyright industry reports that Bolivia conducted no raids last year in response to music piracy, which has become so rampant that all international recording companies have closed their offices in Bolivia. Other copyright problems include commercial photocopying of books, unauthorized translations of books, video piracy, and Bolivia remains on the Watch List in 2005 due to lack of improvements to its IPR regime. Under its bilateral and multilateral commitments, Bolivia should have increased its level of IPR protection years ago. Bolivia’s IPR system continues to be deficient with respect to inadequate copyright laws, significant copyright piracy and trademark counterfeiting, and weak IPR enforcement efforts overall. The United States looks to Bolivia to strengthen its copyright law, improve its IPR enforcement mechanisms, and ratify and implement the WIPO Internet Treaties. In addition to these legal reforms, we urge Bolivia to increase its enforcement efforts. Specifically, we recommend that Bolivia provide for civil ex parte searches, prevent unwarranted delays in civil enforcement, provide adequate civil and criminal damages in copyright cases, and strengthen border measures. The U.S. copyright industry reports that Bolivia conducted no raids last year in response to music piracy, which has become so rampant that all international recording companies have closed their offices in Bolivia. Other copyright problems include commercial photocopying of books, unauthorized translations of books, video piracy, and business and entertainment software piracy. The United States encourages Bolivia to increase its anti-piracy and anti-counterfeiting activities and to institute IPR legislative reforms during 2005.

COLOMBIA: Despite Colombia’s progress in certain areas toward strengthening its IPR regime, Colombia still needs to make further improvements and therefore will remain on the Watch List for 2005. Colombia is the only Andean country to provide a full five years of data protection for pharmaceuticals. In the copyright context, Colombia has increased criminal penalties for copyright infringement and has established a specialized IPR unit in the Prosecutor General’s office. Notwithstanding these improvements, however, high levels of piracy continue to dominate the Colombian market. The U.S. copyright industry estimates its losses in 2004 due to music piracy alone at \$51 million in Colombia, and reports that 71 percent of the music sold in Colombia is pirated product; the U.S. copyright industry estimates losses across all copyright sectors at \$131 million last year. Other areas of copyright piracy are on the rise, including optical disc piracy (both CD-Rs and DVD-Rs), illegal photocopying of academic textbooks, business software piracy, and entertainment software piracy. These high piracy levels plus a lack of successful prosecutions for IPR infringement remain problematic. Efforts to combat piracy through raids and other enforcement measures are hindered by a judicial system that fails to actively prosecute cases or issue deterrent criminal sentences. Border enforcement is weak, administrative enforcement against signal theft piracy needs improvement, and it can take as long as six months to carry out inspections after requesting civil ex parte search orders. The United States urges Colombia to ensure that its criminal,

⁴ Press Release, Office of the U.S. Trade Representative, “Special 301 Report Finds Progress and Need for Significant Improvements,” April 29, 2005, at http://www.ustr.gov/Document_Library/Press_Releases/2005/April/Special_301_Report_Finds_Progress_Need_for_Significant_Improvements.html. Text of full USTR 2005 Special 301 Report posted at http://www.ustr.gov/assets/Document_Library/Reports_Publications/2005/2005_Special_301/asset_upload_file1957636.pdf.

administrative, civil and border enforcement procedures meet its longstanding bilateral and multilateral intellectual property enforcement obligations and are implemented effectively in the near future.

ECUADOR: Ecuador has made minimal progress in improving its IPR regime over the last year, and it will remain on the Watch List in 2005. Although Ecuador generally has an adequate IPR law, enforcement of the law remains a central problem. Enforcement of copyrights is a significant problem, especially with respect to sound recordings, computer software, and illegal commercial photocopying of books. The U.S. copyright industry reports high piracy levels due to insufficient IPR enforcement by Ecuador, including poor border controls, infrequent ex officio raids, and limited government resources dedicated to anti-piracy and anti-counterfeiting activities. Music piracy has become so severe that the majority of international record companies have closed their offices in Ecuador. Even though Ecuador's current substantive copyright legislation has been modernized in line with its international obligations, Ecuador's judicial system remains deficient because the courts appear unwilling to enforce the law. The Ecuadorian Government has not yet established the specialized intellectual property courts required by its IPR law. Petitions for civil ex parte actions are brought before civil courts, delaying or preventing seizure orders for pirated or counterfeit products. Concerns also remain over Ecuador's current lack of effective protection for undisclosed test data submitted for marketing approval of pharmaceutical and agricultural chemical products. The United States urges Ecuador to strengthen enforcement of IPR and will closely monitor Ecuador's efforts to address IPR-related concerns.

PERU: Peru will be kept on the Watch List in 2005. Both the United States Government and U.S. industry remain concerned with Peru's current lack of protection for undisclosed test data submitted for marketing approval of pharmaceutical and agricultural chemical products. Peru also does not provide second use patents, and no coordination mechanism exists between its health authorities and patent office to prevent registrations of unauthorized patent-infringing products. Regarding copyright protection, the Peruvian Government took some steps toward improving enforcement through its "Anti-Piracy Crusade" initiated in 2002; however, piracy remains high for sound recordings, business and entertainment software, books, and motion pictures. According to the U.S. copyright industry, piracy of sound recordings has been on the increase in the last several years and is so severe now (98% of the market was estimated to be pirated goods in 2004) that it has virtually eliminated any legitimate market and caused the remaining legitimate sound recording businesses to shut down. Optical media piracy is on the rise in all sectors, particularly with respect to the audiovisual industry due to a tremendous growth in pirate optical discs. The Government of Peru, in coordination with the private sector, has conducted numerous raids over the last few years on large-scale distributors and users of pirated goods and has increased enforcement activities. However, piracy and weak IPR border enforcement measures continue to be significant problems for copyright owners. The United States urges Peru to strengthen IPR protection and enforcement and will continue to monitor Peru's efforts in addressing these concerns.

VI. Copyright Law and Enforcement Standards in the ATPA, as Amended

A. IIPA's longstanding concerns about the U.S. government's not holding these countries up to their ATPA obligations:

IIPA has filed comments with the Office of the U.S. Trade Representative on our views regarding the ATPA-eligible countries' compliance (or lack thereof) with the intellectual property rights (IPR) obligations under the ATPA, as amended.⁵ In fact, before the ATPDEA benefits were ever extended to these four countries, IIPA submitted its comments to the Trade Policy Staff Committee (TPSC), highlighting its view that Bolivia, Colombia, Ecuador and Peru all failed to provide the level of adequate and effective protection for U.S. copyright owners that are required under the eligibility standards in the

⁵ See e.g., International Intellectual Property Alliance (IIPA), Public Comments to USTR Regarding the Andean Trade Promotion and Drug Eradication Act Beneficiary Countries, March 26, 2003, available at http://www.iipa.com/rbi/2003_Mar26_ATPDEA.pdf.

ATPDEA.⁶ In those comments, IIPA indicated that it would be appropriate to deny eligibility status to each of these countries. Nonetheless, IIPA recognized at that time that the TPSC might feel that U.S. interests were best served by extending present benefits, and we recommended that such benefits be conditioned on a clear and tangible commitment by beneficiary states to modify their practices so that they conform to the requirements of the statute. IIPA proposed that the U.S. government should obtain from these potential beneficiary countries written commitments on the specific actions they intend to take to meet the IPR standards of the ATPDEA, on how that country is addressing its copyright law and enforcement obligations before designation is officially conferred. IIPA understands that these countries did address these brief commitments on copyright-related issues which they made in bilateral discussions and exchanges. We remain, however, very concerned that these non-statutory commitments also have not been fully met in-practice.

B. Summary of the copyright provisions in the ATPA as amended:

The ATPDEA provides clear and definitive criteria relating to the protection for intellectual property. To summarize, the enhanced trade benefits under the ATPDEA are available to countries that the President designates as “ATPDEA beneficiary countries.” The criteria that the President had to consider in designating countries as ATPDEA beneficiary countries included the criteria already existing under the ATPA, as well as the new criteria added by the ATPDEA.

In this section, we restate what we have provided to the ITC in prior ATPA proceedings.⁷ The ATPA⁸ contains provisions for the protection of intellectual property rights similar to those in the Caribbean Basin Initiative⁹ and the Generalized System of Preferences.¹⁰ The ATPA has 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.

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)¹¹:

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;

⁶ See International Intellectual Property Alliance (IIPA), Public Comments to the Trade Policy Staff Committee (TPSC) Regarding the Designation of Eligible Countries as Andean Trade Promotion and Drug Eradication Act Beneficiary Countries, September 16, 2002, available at http://www.iipa.com/rbi/2002_Sep16_ATPDEA.pdf.

⁷ See IIPA Comments to the U.S. International Trade Commission on the Andean Trade Preferences Act, May 21, 2003, posted at http://www.iipa.com/rbi/2003_May21_ATPA_ITC.pdf.

⁸ 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.

⁹ 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).

¹⁰ 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)).

¹¹ See 19 U.S.C. §§ 3202(d)(9) and 3202(d)(10).

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).¹² The President, in considering his designation of ATPDEA beneficiary countries shall take into account the following provisions in addition to the criteria in the pre-existing ATPA (cited above). For ATPDEA eligibility 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.

On October 31, 2002, President Bush issued Presidential Proclamation 7616 designating Bolivia, Colombia, Ecuador and Peru as ATPDEA beneficiary countries.¹³

C. IIPA Observations on the IPR criteria in the ATPA, as Amended:

IIPA again takes this opportunity to make several observations about these ATPA IPR standards. First, the WTO TRIPS Agreement is widely recognized as containing the minimum standards of IPR protection. With respect to copyright,¹⁴ 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. Perhaps most important, TRIPS also adds an entire new set of obligatory standards of enforcement, including measures on civil remedies, administrative measures, border measures and criminal penalties. In addition to obliging WTO members to have these enforcement measures in statutory law, TRIPS also requires that they be implemented in-practice in such a manner as to actually deter further infringements.

Second, the ATPDEA-eligible countries must provide protection “consistent with or greater” than the levels found in the WTO TRIPS Agreement.¹⁵ One of the copyright industries’ most critical substantive challenges is to ensure that levels of protection available in any country accounts for the important changes made by digital, networked environment. The Internet fundamentally transforms copyright piracy from a mostly local phenomenon to a potential global plague. In order for protection to be “adequate and effective,” modern copyright laws must respond to this fundamental change by providing that creators have the basic property right to control the reproduction, distribution and transmission of their creations, whether those works are in analog or digital form and whether they are distributed as permanent copies or via transmission over electronic networks like the Internet.

¹² Andean Trade Promotion and Drug Eradication Act, Title XXXI of the Trade Act of 2002, Pub. L. No. 107-210 (2002).

¹³ The text of the Presidential Proclamation is posted on the White House website at <http://www.whitehouse.gov/news/releases/2002/10/20021031-9.html>.

¹⁴ 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.

¹⁵ This new standard in the ATPDEA tracks that found in the CBTPA.

It is no longer sufficient, therefore, in the Internet and digital world, that countries merely meet their obligations under TRIPS. The new means by which protected works can be reproduced digitally and globally transmitted electronically without authorization has given rise to the negotiation of the two new "Internet" treaties under the auspices of the World Intellectual Property Organization (WIPO). The WIPO Copyright Treaty (WCT) entered into force on March 6, 2002, and the WIPO Performances and Phonograms Treaty (WPPT) entered into force on May 20, 2002 and together they provide the legal infrastructure for this new digital and Internet environment. Because the standards of protection to be afforded by ATPDEA beneficiaries must incorporate these modern standards of protection and enforcement, including those contained in the WCT and WPPT, the U.S. government has been working at all levels to encourage countries to sign, ratify and implement both WIPO Treaties. Of the ATPDEA beneficiary countries, Colombia, Ecuador and Peru are members of the WCT and the WPPT; Bolivia is not. All countries must implement these new obligations, and IIPA again strongly recommends that the U.S. government request Bolivia to make a specific commitment to ratify these two WIPO treaties and implement their obligations.

Finally, 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 even 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 the ATPDEA, the ATPA, other U.S. trade programs nor the TRIPS Agreement or the WIPO "Internet" Treaties.

VII. CONCLUSION

IIPA appreciates the opportunity to convey to the ITC our views on the current situation, both in terms of substantive copyright legislation and piracy/enforcement, in the four ATPA countries of Bolivia, Colombia, Ecuador and Peru. The IPR criteria of the ATPDEA (and all U.S. trade programs, for that matter) should be applied to ensure that these countries substantially improve both their copyright laws as well as enforcement practices. Finally, IIPA believes that it is critical that these FTA-eligible countries continue to take all appropriate actions now to improve their respective efforts under their existing laws to combat copyright piracy in their domestic markets.

Respectfully submitted,



Maria Strong
Vice President and General Counsel
International Intellectual Property Alliance

Attached/Links: Country reports from IIPA's February 2005 Special 301 submission to USTR:

- Bolivia at <http://www.iipa.com/rbc/2005/2005SPEC301BOLIVIA.pdf>
- Colombia at <http://www.iipa.com/rbc/2005/2005SPEC301COLOMBIA.pdf>
- Ecuador at <http://www.iipa.com/rbc/2005/2005SPEC301ECUADOR.pdf>
- Peru at <http://www.iipa.com/rbc/2005/2005SPEC301PERU.pdf>

