

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2001 SPECIAL 301 REPORT

COLOMBIA

EXECUTIVE SUMMARY

The difference between promise and practice in Colombia is extreme. For example, despite the creation of a well-publicized anti-piracy effort, with resources and new laws, the actual enforcement action has resulted in only insignificant seizures that receive no follow-through and have no practical deterrent effect. As a result, piracy continues to grow unabated. The application of the law is so bad, for at least the audiovisual industry, that the fourth largest potential market in Latin America may be completely lost within three years if the current situation continues.

For the second year in a row, Colombia has completely failed to take concrete action on the three key enforcement issues identified by USTR in the April 1999 Special 301 announcement: the need to improve copyright enforcement; the need to resolve Colombia's failure to license legitimate pay television operators and pursue pirate operators; and the necessity of full TRIPS compliance by January 1, 2000.¹ Most of these required goals were not met. In enforcement, any positive effects of the raiding activity undertaken by Colombian authorities for some industries stops after the seizure of pirated goods because the Colombian judicial system simply fails to actively prosecute cases, much less issue deterrent penalties. The long-standing effort to legitimize the nearly completely pirate television market has failed because the government's activity, primarily that of the CNTV, is full of internal conflicts of interest, deliberate delays and demonstrable untruths. Finally, Colombia still must work to improve its judicial system to ensure that its criminal, administrative, civil and border procedures meet the enforcement obligations of the TRIPS Agreement, as a statutory matter and, more importantly, as applied in practice.

Piracy levels in Colombia continue to be very high for such an important market. For example, the video piracy rate skyrocketed to 90% in 2000, which, coupled with a completely ineffective enforcement environment, forced the U.S. motion picture industry to terminate its video anti-piracy campaign in 2001 and recognize the complete loss of the market to pirates. Piracy levels for the recording and music industry are at 60%; for the entertainment software industry, 85%. In all, estimated losses due to piracy of U.S.- copyrighted materials in Colombia climbed to \$193 million in 2000.

IIPA recommends that Colombia remain on the Special 301 Watch List in 2000.

Last year, Colombia deposited its instruments of ratification to the two WIPO treaties, the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty, in November 2000. This was a major accomplishment and Colombia, and its Copyright Office, merit acknowledgment for this achievement.

¹Press Release 99-41, Office of the U.S. Trade Representative, April 30, 1999.

ESTIMATED TRADE LOSSES DUE TO PIRACY
(in millions of U.S. dollars)
and LEVELS OF PIRACY: 1995 - 2000

INDUSTRY	2000		1999		1998		1997		1996		1995	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Motion Pictures	40.0	90%	40.0	55%	38.0	60%	33.0	60%	27.0	75%	33.0	60%
Sound Recordings / Musical Compositions	60.0	60%	60.0	60%	65.0	60%	54.0	60%	18.0	66%	4.3	15%
Business Software Applications ²	48.0	55%	50.5	58%	68.1	60%	52.4	62%	74.3	67%	82.4	78%
Entertainment Software ³	39.0	85%	7.0	75%	7.7	78%	7.2	73%	6.8	62%	6.8	62%
Books	6.0	NA	6.0	NA	6.0	NA	5.0	NA	5.0	NA	NA	NA
TOTALS	193.0		163.5		184.8		151.6		131.1		126.5	

Colombia currently participates in both the Generalized System of Preferences (GSP) program and the Andean Trade Preferences Act (ATPA), U.S. trade programs that offer preferential trade benefits to eligible beneficiary countries. Part of the discretionary criteria of these programs is that Colombia must provide "adequate and effective protection of intellectual property rights."⁴

COPYRIGHT PIRACY IN COLOMBIA

Although Colombia is one of the most important potential markets in Latin America for the motion picture industry, piracy is so integrated into the economy and enforcement efforts are so ineffective, that the battle for a viable and legal audiovisual market appears close to being lost. The incidence of video piracy is so high that some audiovisual producers have simply given up on the market, despite the country's potential. The Motion Picture Association (MPA) has worked with the very few legal video outlets over the past several years to fight video piracy, but in 2001 the anti-piracy program will withdraw from that effort because of discouraging

² BSA estimates for 2000 are preliminary. In IIPA's February 2000 Special 301 submission, BSA's 1999 loss and level figures of \$50.2 million and 56%, respectively, were also reported as preliminary. These numbers were finalized in mid-2000, and are reflected above.

³ IDSA estimates for 2000 are preliminary.

⁴ In 1999, \$46.8 million of Colombia's imports to the United States came in under the duty-free GSP code, accounting for .8% of its total imports to the U.S. Another \$797.3 million of Colombia's imports to the United States benefited from the ATPA program in 1999, accounting for over 13.5% of its total imports to the U.S. that year. For the first 11 months of 2000, \$62.4 million of Colombian goods entered the United States under the GSP program, representing a 39.9% increase over the same time period last year. \$767.4 million of Colombian goods entered the U.S. under the ATPA program, accounting for a 4.8% increase over last year. For a full history of Colombia's placement on the Special 301 lists, see Appendices D and E of IIPA's 2001 Special 301 submission.

progress. At least 90% of the video market is pirate – almost doubling from the prior year -- and it may become 100% pirate in the near future.

The MPA will continue to fight signal theft piracy, although there is very little that the Colombian government has done in the past few years to make the effort more viable than the failed video anti-piracy effort. Prior to the long-delayed licensing process, MPA estimated that 80% of the television market was pirate. Many of those formerly pirate stations now have licenses. However, this does not mean that these “legal” operators pay for the programming that they transmit. In an agreement with CNTV, MPA agreed not to bring enforcement actions against the newly licensed operators for a period of time to allow them to legitimize their operations. CNTV agreed to take legal action, in coordination with criminal prosecution, of the nonlicensed operators, concurrently attacking piracy and allowing the newly licensed operators the ability to develop larger subscriber bases and more financial ability to obtain legal contracts for MPA member company product. However, CNTV completely failed to fulfill its promises. As a result, MPA estimates that at least 90% of the potential television market is pirate or systematically involved in unauthorized transmissions of MPA member company product. Annual losses to the U.S. motion picture industry due to audiovisual piracy in Colombia are estimated to be \$40 million in 2000.

In 2000, the estimated level of audio piracy remained constant at 60%, with estimated losses at \$60 million. Piracy of music CDs in Colombia continues to increase. Hundreds of stalls in the street markets of San Andrecitos openly sell and distribute pirate and counterfeit product. Thousands of street vendors sell pirate CDs on the traffic corners in Bogota, 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. Infringing recordings enter Colombia via “ant smuggling” through airports around the country. CD-R piracy (recordable CD) is flourishing in Colombia, as a cottage industry of pirate CD-R products has exploded, pirating primarily Colombian repertoire. The Colombian pirates source much of their business for industrial pirate product out of Florida (Miami), Panama, Belize, Ecuador and Peru. They use a shipping technique in which Miami is both the point of origin and final destination of their pirated goods; they send both counterfeit and legal materials using the same invoices. The Far East, Israel and the U.S. remain important counterfeit production centers.

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 Bogota are believed to be much higher than the average national rate. Significantly, in 2000 BSA for the first time encountered sophisticated, high-volume software counterfeit production facilities outside Bogota. A raid by Colombian law enforcement authorities confirmed that the facilities had manufactured several thousands of counterfeit software licenses and packaging. Some of the licenses were being sold through a major Latin American Internet auction site. BSA also believes that the counterfeiters may have combined the fake materials with counterfeit CD-ROMs imported from Paraguay. Estimated trade losses due to business software piracy are an estimated \$48 million in 2000, with an estimated 55% piracy level. The educational and legal campaign of the Business Software Alliance (BSA), combined with only modest growth in the legitimate market, resulted in a slight reduction in the piracy rate and estimated losses in Colombia in 2000, compared to the prior year.

The publishing industry reports no real improvement in the book piracy situation in Colombia over the past year, despite continued activities of the Colombian Book Chamber, which includes U.S. publishers. Concerns about excess production of commercial books into other Andean countries, primarily Venezuela, remain viable. Illegal photocopying of books and

other printed materials is the predominant book piracy problem in Colombia. There are reports that the drug cartels use piracy to launder money. Estimated trade losses due to book piracy remain at \$6.0 million in 2000.

Trade losses due to piracy of entertainment software (including videogame CDs and cartridges, personal computer CDs, and multimedia products) skyrocketed over the prior year. The estimated level of piracy of entertainment software jumped from 75% in 1999 to 85% in 2000. The Interactive Digital Software Association (IDSA) reports that its preliminary trade loss estimate due to entertainment software piracy in Colombia rose exponentially to \$39 million in 2000. There are concerns that Colombia is becoming another destination for pirated product out of Southeast Asia. This higher estimate may also be due to an overly conservative underestimate of videogame piracy in Colombia in prior years.

ENFORCEMENT IN COLOMBIA

There is a number of Colombian institutions and interagency groups which take part in anti-piracy activities. Ironically, some enforcement activity has actually improved in the last two 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. Below is an overview of the interagency players:

- In May 1998, the copyright industries signed an interinstitutional agreement with Colombian agencies to strengthen the government commitment to fighting piracy. This agreement, approved by then-President Samper, establishes a collaborative effort between the copyright industries and government agencies.
- On February 25, 1999, President Pastrana confirmed the National Anti-Piracy Campaign, which decrees the involvement of a large number of governmental and independent agencies in the fight against piracy.⁵ This agreement reaffirmed the first anti-piracy agreement (known as CERLALC), signed in December 1995. The governmental entities involved in the 1995 agreement included the Secret Service (DAS), the General Prosecutor's Office (*Fiscalía*), the Investigation Corps of the Prosecutor General (CTI), and the Customs Administration. The 1999 agreement increased the number of involved agencies to include the Ministry of Foreign Affairs, the Ministry of Foreign Trade and the DIAN (Customs).

The purpose of this public/private sector organization is to coordinate anti-piracy activities. Industry reports on the effectiveness of this agreement are mixed. MPA reports that this organization's results have been very disappointing, especially in light of the amount of time spent in strategy meetings, planning meetings, organizational meetings and general monthly meetings. It has been MPA's experience that action and

⁵The 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), Colombian Industrial Software Association and the Sayco Collection Society.

“cooperation” failed to extend beyond the meeting room, except for a few coordinated raids, after which there was no follow-through and no deterrent effect. With respect to business software actions, BSA reports that the campaign has resulted in increased enforcement efforts by Colombian law enforcement agencies.

- The Minister of Industry and Commerce was given control of the government’s policy on IPR, effective January 2000. 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 five special prosecutors, 15 judicial police in Bogotá, and an uncertain number in the provinces. These prosecutors coordinate action with special police forces. In Bogota alone, there are approximately 25 special prosecutors and 25 special judicial police officers.

Recently, one prosecutor was appointed to prosecute signal theft actions. MPA has coordinated with the unit for signal theft action with good raiding results, but advises that the government’s effort basically stops after the raid and does not develop deterrent impact. MPA also notes the surprisingly weak overall results from such a dedication of resources. This organization’s results have been very disappointing, especially in light of the amount of time spent in strategy meetings, planning meetings, organizational meetings and general monthly meetings. It has been MPA’s experience that action and cooperation failed to extend beyond the meeting room, except for a few coordinated raids, after which there was no follow-through and no deterrent effect.

- The National Television Commission (CNTV) indicated for years that it would take the lead in combating signal theft. Unfortunately, this well-funded agency has been completely ineffective in addressing the problem of television piracy. As described below, MPA has lost confidence in this agency and its commitment to resolve the problem of television piracy.

Police And Prosecutors Are Active In Conducting Criminal Actions But Have Not Been Able To Reduce High Piracy Levels.

For the motion picture industry, an effective anti-piracy effort in the home video industry requires three elements: MPA anti-piracy resources, government commitment to deter piracy with the assistance of MPA’s investigative and legal resources, and the industry’s commercial follow-through to encourage legitimate business practices. MPA has taken important anti-piracy action in Colombia’s home video market, seizing over 40,000 pirate videos in 1999 and over 18,000 videos in 2000. However, the violators face absolutely no sanction, other than the loss of their pirate videos, which they quickly replace. Without government follow-through towards sanctions, the replacement of seized stock is so easy that there is virtually no impact on the business. As a result, MPA’s video anti-piracy efforts have not been able to deter continued growth of video piracy and the member companies have been forced to recognize that Latin America’s fourth largest market is virtually past any chance of recuperation.

MPA’s signal theft campaign will continue in 2001, despite some tough choices to make regarding avenues by which to pursue effective enforcement. MPA does recognize the government’s efforts to follow up MPA investigations with raids and recognizes that the raids are well done. Following raids of signal theft pirates conducted in conjunction with the police, MPA

had initially sought private settlements with signal theft pirates that provided compensation for past piracy and commitments to legalize future content. MPA has done so, in part in the hopes that this would be a useful transition measure leading toward legalization of the market and because the prosecution procedures and sentencing possibilities had not been a deterrent for pirates. In June 2000, the MPA stopped seeking such settlements, advising the criminal authorities that it preferred to seek deterrent sentences. However, the lengthy prosecutions continue to favor the pirate, and the MPA is faced with the difficult choice of again seeking settlements to quickly end the specific incident of piracy or enduring piracy while cases work their way through the criminal process. MPA took seventeen criminal actions against alleged television pirates in 2000. However, MPA's 2000 television anti-piracy strategy depended largely on a complementary effort promised by CNTV. CNTV failed to fulfill its promises and thus MPA's overall effort did not have nearly the result expected.

Because of the high levels of audio piracy in Colombia, the international and national recording industries decided to form a united group (APDIF), with presence in Bogota, Cali and Medellin. This unit is fully staffed and trained to identify sources of piracy. Unless the Colombian government acts in certain markets (Bogota and Medellin would represent good starting points), the piracy rates will only increase and legitimate companies will suffer even more losses. There has been good cooperation between the industry and the Colombian enforcement authorities.

During 2000, the Customs Office (DIAN) conducted several large raids, seizing impressive quantities of infringing product. Unfortunately, this had no impact in the Colombian market. Customs has been key in the plan to control the import of pirate goods, but the pirates are changing their strategies by bringing in smaller shipments to avoid Customs control. The police had been very active in conducting raids, both efficiently and constantly, but this is no longer the case. The recording industry continues to conduct an anti-piracy campaign which results in seizures and other actions. While cooperation between industry and the authorities is good, more active involvement by Customs and the Finance Ministry (*Ministerio de Hacienda*), under the clear direction and specific instruction of the President, is needed to conduct investigations and order constant street raids. While fighting street vendors has been a big challenge, the Colombian government should go the next step, and identify and investigate larger producers and distributors of pirate product. To this end, the involvement of the Colombian tax authorities would be instrumental.

In the area of business software piracy, BSA reports strong cooperation from DAS and the *Fiscalía*. These agencies have proven critical to BSA's efforts to strengthen anti-piracy enforcement, within and outside Bogota. In 2000, 25 legal actions were conducted against end user pirates, and more than 40 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, the *Fiscalía* and DAS conducted several criminal raids in Cali, Cartagena and Barranquilla, where the rate of piracy tends to be much higher than the national average. Criminal enforcement efforts briefly halted in early 2000 due to threats against BSA from a FARC-related group. DAS worked with BSA to investigate the threats and renewed enforcement activities after the threats ended.

There has been some enforcement action in Colombia on book piracy matters. In April 1999, Colombian police took action against a bookshop and seized 1,500 books (280 different titles, 250 of which are reportedly published by U.S. publishers like Harcourt, WB Saunders, McGraw-Hill, Mosby and Prentice Hall). The Colombian Book Chamber was coordinating this case.

Colombian Judiciary Fails To Impose Deterrent Criminal Sentences.

Despite the active level of criminal raids, these actions simply do not result in deterrent penalties or criminal sentences. The Colombian judicial system remains a serious obstacle to effective enforcement. Amendments to the criminal code have been approved, and will enter into effect on January 1, 2001. This is one measure of improving enforcement in the judicial system.⁶

Administrative Enforcement Against Signal Theft Piracy Needs To Be Significantly Restructured In 2001.

Given the arrest of three of its five commissioners in mid-2000, repeated failure to redeem its pledges of effective enforcement, and the delays in a now-questionable licensing process, CNTV has been completely ineffective in addressing the problem of piracy in television. CNTV's only effort in 2000 was a public relations campaign which served to distract attention from CNTV's decision to delay enforcement of licensing requirements and its failure to act against piracy. Without cooperation from the responsible authorities, there is little reason for industry to expend its resources in a one-sided fight against piracy.

Colombia Needs To Strengthen Its 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.

Civil Enforcement Efforts Suffer From Unwarranted Delays, Including Delays in 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 longer in cities outside Bogota. Problems with the Colombian courts tend to be greatest in cities outside Bogota, 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 2000, conducting only a handful of civil end-user actions.

⁶ IIPA does not have the text of this new code, and will consult with its members to evaluate progress made under this new code during 2001.

LICENSING FOR PAY TELEVISION/CABLE OPERATORS

The Colombian government finally accomplished concrete results in the longstanding problem regarding the licensing of pay TV. After years of delays, the government issued 114 new cable television operator licenses in November 1999. At that time, MPA urged caution and continued monitoring of the issue, because the history of obtaining cable television operator licenses in Colombia is one of delays and broken promises that have resulted in serious economic damage to the industry.⁷

In IIPA's 2000 Special 301 submission, the need for continued monitoring of the licensing process as well as the enforcement process in 2000 was identified to be of paramount importance. In particular, MPA encouraged the active participation of the CNTV in inspecting the new licensee to assure compliance with copyright law obligations and acceptable business practices. CNTV has failed completely to fulfill its promises to enforce license requirements and to enforce copyright law by inspections and cooperation with MPA. Its delays have only continued to damage MPA member company legitimate market interests and to allow piracy to continue to integrate itself in cable operators' business practices.

COPYRIGHT LAW AND RELATED ISSUES

Copyright Law of 1982

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.

During the summer of 1999, the Colombian Copyright Office (ONDA) was dissolved by the President via executive decree (No. 1164 of June 29, 1999). After a four-month period of

⁷The licensing problem took four years to resolve. In 1995, the Colombian Television Broadcast Law 182/95 created a commission to oversee the regulation of the growing pay television market in Colombia. The CNTV pledged to establish a regulatory environment which would be conducive to the growth of a legitimate pay television market, including tough anti-piracy measures and a simple application process to obtain an operating license. From 1995 to late 1999, no operating licenses were issued, and hundreds of illegal, pirate cable operators continue to flourish throughout Colombia. The government prohibited MPA member companies from selling to unlicensed operators, while it did not license new operators. As a result, only 300,000 of the estimated 3.5 million subscribers received authorized programming; the rest received pirated signals. Some 55 new cable operator licenses were expected to be issued in mid-October 1998, but the process was suspended in November. In December 1998, a large delegation of U.S. pay television executives visited Colombia to seek a solution to this problem and press for the acceleration of the licensing process. During the visit, CNTV and Minister of Communications pledged that the licenses would be issued in July 1999. All bids were received by CNTV, and the bidding process closed on August 27, only two weeks behind the original date. The winners of the bids were notified in early October, and 114 licenses were issued in November 1999.

dissolution, ONDA was to be integrated into the Industrial Property Office within the Ministry of Industry and Commerce. This dissolution was later overturned by the Supreme Court (which overturned all Presidential emergency decrees). The President sought approval for a bill that would accomplish this transfer of the Copyright Office, which was to happen before July 2000. IIPA was reassured by the Minister of Industry and Commerce that the national and regional leadership of the former Colombian Copyright Office would continue.

WIPO Treaties

With the strong support of the Colombian Copyright Office, legislation to ratify both the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT) passed the Congress in November and December 1999. After some delay in completing the *pro forma* constitutional review, official deposit with WIPO in Geneva took place on November 29, 2000. IIPA applauds the Colombian government for taking this important step, which will contribute to raising the minimum standards of copyright protection worldwide, particularly with respect to network-based delivery of copyrighted materials, and foster the growth of electronic commerce.

Criminal Code and Criminal Procedure Code Revised

Legislation to reform the criminal and criminal procedure codes of Colombia was approved at the end of 1999, and will enter into effect on January 1, 2001.⁸ Given past history, it seems prudent to reserve judgment on the effectiveness of these changes until the industries see how the authorities will use the new tools provided under law.

Fiscal Enforcement Legislation

In July 2000, Colombia enacted fiscal enforcement legislation (Law 603) that requires Colombian corporations to certify compliance with copyright laws in annual reports filed with regulatory agencies (the *Superintendencias*). Any corporation that falsely certifies copyright compliance is subject to inspection by the *Superintendencia* and 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. BSA is currently working with the *Superintendencias* and DIAN to issue implementing guidelines and promote awareness of the new law.

Government Legalization of Software

President Pastrana issued a directive in February 1999 to all government and educational institutions to use only legitimate software. Although the directive represents an important policy statement, there is no evidence that its requirements are being actively implemented by government agencies and institutions.

⁸ IIPA does not have the text of this legislation.