

Memorandum in response to the decision of the USTR to keep Colombia on the Watch List, 2010 Special Report 301.

Washington DC, February 08, 2011.

In response to USTR's decision that Colombia remains on the Watch List in 2010, this memorandum intends to highlight three areas in which we disagree with the foundations behind USTR's decision. The later, given that the implications of such a decision are particularly acute for Colombia, causing long-term damage to the country's attractiveness as a location for high value-added economic activity. Hence this memo advocates for Colombia to be taken from the Watch List altogether.

The three arguments we contest were taken from the 2010 Special 301 Report which proceeds as follows: 1. lack of deterrent sentences; 2. development of mechanisms to improve enforcement against infringement of intellectual property rights (IPR) on the Internet; and, 3. the establishment of an effective system that addresses patent issues expeditiously in connection with applications to market pharmaceutical products. That said, it is necessary to explain the arguments that refute the later.

Contrary to the reports argument that Colombia *lacks deterrent sentences*, the country's criminal penalties for IPR infringement are too severe, not only when compared to other criminal offence penalties in Colombia, such as sexual offence penalties, but also with IPR infringement and sanctions in other countries. *After Colombia modified its Penal Code¹ in 2006 (Law 1032/06)* pecuniary penalties and jail sentences rose for copyright infringement² (in cases of patrimonial rights, from 4 to 8 years of imprisonment), and industrial property and vegetable variety breeder's rights infringement (from 4 to 8 years of imprisonment). To assess the severity of this penalty compared to child sexual abuse penalties in Colombia; it is appalling to see that the later is also 4 to 8 years imprisonment. In our humble opinion, it is by no means proportional to equate a child sex offender to a copy right infringer; nonetheless, Colombia's criminal system does in the name of IPR. Also, out of the four members of the Andean Community (Bolivia, Ecuador, and Peru), Colombia leads the efforts for adopting the most severe sanctions under criminal law for IPR infringement (8 years of imprisonment)³. Further, when comparing Colombia's penalties for IPR infringement to the United States own copyright statutory penalties, it is seen that for a first time offender the penalty is only five years, three years less than in Colombia.⁴

1See arts: 257,271,272 and 306 Código Penal Colombiano. Centro Colombiano de Derecho de Autor. 2006. Boletín Informativo: Reformas al Código Penal Colombiano, Downloaded 01 February 2011, from:

http://www.cecolda.org.co/index.php?option=com_content&task=view&id=227&Itemid=2

2In cases of moral rights infringements, punishment is from 2 to 4 years of imprisonment.

3Mantilla Galo. 2009. Temas Jurídicos de la Comunidad Andina. Medidas Penales de Observancia de los Derechos de Propiedad Intelectual. Downloaded 01 February 2011, from:

<http://www.eumed.net/libros/2009d/627/MEDIDAS%20PENALES%20DE%20OBSERVANCIA%20DE%20LOS%20DERECHOS%20DE%20PROPIEDAD%20INTELLECTUAL.htm>

41852 Copyright Infringement—Penalties—17 U.S.C. § 506(a) and 18 U.S.C § 2319, downloaded on 04 February 2010, from: http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/crm01852.htm

Given the reports ambiguous language concerning deterrent sentences, one has to read in between the lines in order to understand that USTR's real concern is probably related to the lack of an effective judicial policy against piracy in Colombia. To this argument it is suffice to say that Colombia has and continues adopting a hard-line stance against piracy and counterfeiting. In fact, efforts to reduce statistics are constantly evolving and have taken a variety of forms as one can see from looking at the many efforts Colombia's *Convenio Antipirateria* has achieved since its conception in 1996. This is an alliance whose members are both government and private institutions interested in advocating against counterfeiting and piracy issues. Among the results procured by this alliance it is important to highlight: the creation of a special unit at the district attorney's office aimed at investigating copyright and IPR infringement offences; implementation of 25 seminars and workshops in 1996-2002 to train 1.535 government employees throughout the country (DIAN, DAS, judges, and district attorneys); training of 3.809 police officers on piracy crimes from 2005-2006; and, launching a national media campaign against piracy featuring: "Aventuras del Pirata", "Compromiso de todos", and "Comprar legal te da valor"⁵.

We would also like to take this opportunity to remind the USTR that just in the area of software piracy the worldwide rate "increased from 41% in 2008 to 43% in 2009."⁶ However, in 2007 Colombia's software piracy rate was only 15% higher than the global rate (58%). Although this figure is alarming, it is in fact the lowest rate compared to countries like Venezuela, 87%; Paraguay, 82%; and, Nicaragua, 80%⁷. Also, the 2009 Business Software Alliance (BSA) and IDC Global PC Software Piracy Study show that together with Italy, Serbia and Greece, Colombia's piracy dropped six points from 2005 to 2008 because of tax audits include software license compliance⁸. Finally, in its battle against software counterfeiters Microsoft chose Colombia as headquarters to implement the first forensic lab in South America, as a result of the countries ongoing efforts and positive results against counterfeit and piracy. Microsoft's Forensic lab operates as sophisticated anti-piracy software; the New York Times described as using "a host CSI-like forensic technology tools for finding and convicting criminals"⁹, it is unbelievable to think that all this efforts are not provoking important changes in the judicial prosecution of IP infringements.

With respect to the argument about the lack of mechanisms against IPR infringement on the Internet, it looks like Colombia's recent efforts to criminalize information-technology offenses were not up to USTR's standards. Since law 1273 was just implemented in 2009, it is still too early to assess its success or failure. However, it seems that USTR has already made up its mind on the impact the law will have, or perhaps is

5 Convenio antipiratería para Colombia. Avances, downloaded 05 February 2011, from:

http://www.convenioantipirateria.org.co/index.php?option=com_content&view=category&layout=blog&id=35&Itemid=98

6 Business Software Alliance. 2009. Seventh Annual BSA and IDC Global Software Piracy Study, downloaded 05 February 2010, from: <http://portal.bsa.org/globalpiracy2009/index.html>

7 Convenio antipiratería para Colombia. Estadísticas, downloaded 05 February 2011, from:

http://www.convenioantipirateria.org.co/index.php?option=com_content&view=section&layout=blog&id=13&Itemid=97

8 Business Software Alliance. 2009. Seventh Annual BSA and IDC Global Software Piracy Study, downloaded 05 February 2010, from: <http://www.tarkvaraliit.ee/UserFiles/files/IDC%20Piracy%20Study%202009%20final%20report.pdf>

9 Vance Ashlee, 2010. Chasing Pirates: Inside Microsoft's War Room. The New York Times, downloaded 07 February 2010, from: <http://www.nytimes.com/2010/11/07/technology/07piracy.html?pagewanted=all>

not aware of its adoption. Notwithstanding, USTR has to take into consideration that together with Law 1273 of 2009, another mechanism that must be considered is that Colombia's Penal Code is based on an open modal offence system. Hence any offence in the Penal Code can be considered IPR infringement on the Internet, because an open modal structure allows the offences to be committed through a digital medium.¹⁰

In relation to the adoption of a domestic law that resembles the Online Copyright Infringement Liability Limitation Act, which under section 512 allows "copyright holders to ask that an online service provider (OSP, including ISPs) remove access to copyright infringing material if the copyrighted material is made available through the OSP."¹¹ The USTR must know that one of Colombia's obligations after signing the Free Trade Agreement was precisely implementing a domestic law on ISP responsibility, even when the impact (whether successful or not) of such a law in reducing IPR infringement online has not yet been assessed fully in the United States. Nonetheless and although there are still outstanding issues surrounding the Colombia FTA that has not come into force, it is a known fact that an ISP responsibility bill is already under assessment in Colombia.

Finally, and on the same line with the previous argument, Colombia's compliance with the FTA also means that it had to establish an effective system that addresses patent issues expeditiously in connection with applications to market pharmaceutical products. So much so, that compliance with such measures goes in detriment of the right to health in the country. As noted on the concluding observations of the U.N., Committee on Economic, Social and Cultural Rights in May 2010 "*the Free Trade Agreement (FTA) (...) contains provisions on intellectual property that may result in increase of prices of medicines and negatively impact on the enjoyment of the right to health, in particular of those with low income (arts. 1, 12). ...In this regard, the Committee recommends that the State party consider revising the intellectual property provisions of the Free Trade Agreement signed with the United States, in order to ensure protection against the increase of the price of medicines, in particular for those with low income.(para. 10).*"¹²

In sum, USTR's decision that Colombia remains on the Watch List in 2010 has no substantial grounds. As shown in this report, Colombia has and continues adopting a hard-line stance on intellectual property. Now, to most critics Colombia's overzealous efforts to enforce IPR are becoming unduly and unjustly intrusive on the liberty of citizens, as both domestic laws and judicial policy bypass the minimum international standards. Therefore, we appeal to the USTR to consider revising the arguments set forth in 2010 Special Report, in the light of the evidence set forth in this memorandum and we are positive that Colombia will be withdrawn from the Watch List in this year's report.

10Maya Posada R.2006. Aproximación a la criminalidad informática en Colombia. Universidad de los Andes, Facultad de Derecho. Grupo de Estudios Hecti. From Revista No.2 de Derecho Comunicaciones y Nuevas Tecnologías.

http://derechoytics.uniandes.edu.co/pdfs/R2_A1.pdf

11The Anti -Abuse Project, Online Copyright Infringement Liability Limitation Act, downloaded 07 February 2010, from:

<http://www.anti-abuse.org/online-copyright-infringement-liability-limitation-act-ocilla/>.

12CIEL, Columbian IP Agreement continues to Raise Human Rights Concerns. Posted by Baskut Tuncak on the 27 May 2010.

Downloaded on 04 February 2011, from: <http://ipsd.typepad.com/ipsd/access-to-medicines/>.