

# ARGENTINA

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

### 2018 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that Argentina be maintained on the Priority Watch List in 2018.<sup>1</sup>

**Executive Summary:** Argentina assumed the G20 Presidency for 2018, announcing a commitment to international cooperation, and in December 2017, the United States ended Argentina's suspension from the GSP, which had been in place since 2012. In order to make good on these commitments, the Government of Argentina must make copyright protection and enforcement a priority. Long-standing deficiencies in IPR protection continue, in particular as to online piracy. The figures are startling. According to the last available data, the overall content piracy rate in Argentina was 33%, and 1 in 6 Argentine Internet users visited music stream ripping sites. The Government of Argentina did crack down on hard goods piracy in 2017, with high-profile arrests of two alleged leaders and many associates of the notorious open-air market *La Salada* in June and October, followed by largescale enforcement operations in December 2017. However, digital piracy remains a serious concern, and there were no online investigations promoted or supported by federal or local authorities, and no website removals in coordination with Internet Service Providers (ISPs). This inaction regarding online piracy, due to a failure of inter-agency cooperation to address the issue, has resulted in numerous pirate sites that are growing, adapting, and developing resiliency. Fighting piracy must be prioritized to promote a positive shift in the market and the growing economy. Moreover, the Government of Argentina should promote cross-agency law enforcement cooperation in both the offline and online arenas, tackling some of the most relevant and known markets.

#### PRIORITY ACTIONS REQUESTED IN 2018

- Devote increased resources to fighting online piracy, and develop a coordinated antipiracy campaign at the federal and local level to address online piracy.
- Undertake routine inspections and raids of physical markets, and *ex officio* actions to stop physical and online piracy.
- Continue to uphold the liability of online service providers for infringing content stored on their services, pursuant to the new Civil Code.
- Improve market access by removing quotas for motion pictures and computers and electronic devices.
- Instruct collective rights organizations in the audiovisual sector that the U.S. provides reciprocal protection, and that royalties collected for U.S. motion pictures should be remitted to U.S. directors and performers.

#### THE NATURE OF PIRACY IN ARGENTINA

Piracy in Argentina is pervasive and takes many forms.

**Online Piracy.** Digital piracy is endemic and continues to increase. Both online and on mobile phones, digital piracy in Argentina takes many forms, including torrent sites, downloading, streaming, cyberlockers, and linking sites. The prevalence of piracy fundamentally undermines the emerging digital economy in the country.

The U.S. Government has said that Internet piracy rates approach 100% in several content areas, citing the example of the Argentine-run notorious market *Cuevana*, which offers pirated movies and TV shows and has

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<sup>1</sup>For more details on Argentina's Special 301 history, see previous years' reports, at <https://iipa.org/reports/reports-by-country/>. For the history of Argentina's Special 301 placement, see <https://iipa.org/files/uploads/2018/02/2018SPEC301HISTORICALCHART.pdf>.



expanded to include a mobile streaming application. Enforcement against *Cuevana* gained momentum in December 2017, with the indictment of a key figure in the case, but this has taken years to accomplish. The lack of a level playing field in the digital content market stymies the growth of legitimate services, which struggle to compete when vast quantities of copyright material are available from a multitude of sources. Argentina has the highest Internet penetration rate in the region, but its prospects for a robust legitimate online content market will remain bleak until the government makes concerted efforts to address rampant piracy issues.

Argentina is a heavy consumer of BitTorrent and pirate streaming websites. Following a regional trend, Argentina has seen an increase in usage of Illicit Streaming Devices (ISDs), in particular, dedicated Android boxes such as the HTV box and Kodi boxes, which are used to stream illicit copies of films and television.

The video game industry has seen the emergence of online marketplaces offering illegal video games and entertainment software, from video game titles to consoles and other devices. For some U.S. video game companies, Argentina is among the top ten countries globally for listings of game copiers and modified consoles via online marketplaces such as *Mercado Libre*. Argentine users are estimated to represent over 20% of the global audience for the most popular Spanish-language illegal online marketplaces for video games.

There are currently 13 legal digital music services in Argentina, including Spotify, Apple Music, Tidal, Personal Música, Claro Musica, and Deezer, but the online music market in Argentina is still performing below the regional average. While Argentina has a relatively large physical and public performance rights market, demonstrating the country's appetite for music consumption, digital sales are currently well below potential. For example, in 2016, digital music accounted for only 24% of sales revenue by trade value, compared with a regional average of 49% and global average of 50%. Despite promising growth in streaming revenue (for example) in recent years, it is plain that the digital market cannot flourish while widespread piracy undermines it.

**Physical Piracy.** According to local reports, there are more than 650 illegal open-air markets in the country, and hard copy piracy is still rampant in major public markets and by street vendors. By some estimates, hard copy piracy accounts for 60% of the illegal market. While some industries are not concerned about hard copy piracy, for many, it remains a significant concern.

A bright spot in enforcement has been an increased enforcement against piracy in several open-air markets in Buenos Aires, including *La Salada*, one of the largest black markets for pirated goods. As reported by USTR, in January 2017, Buenos Aires city authorities, with the support of Argentina's national government, evicted 2,000 illegal street vendors from the Once neighborhood.<sup>2</sup> These street vendors were relocated to nearby commercial facilities and provided with a stipend and a two-month business-training course organized by the Argentine Confederation of Small and Medium-Sized Enterprises. Nearly one-half of the evicted street vendors are now operating legally from two new locations in Buenos Aires. The high profile arrests of two alleged leaders and many associates of notorious market *La Salada* in June and October 2017, followed by largescale enforcement operations in December 2017, show a renewed governmental interest in cracking down on marketplaces known for counterfeit and pirated goods.

**Camcording.** While no illicit recordings of MPAA member films were sourced from Argentine cinemas in the period of January—November 2017, and only two camcords have been sourced to Argentina since January 2015, Argentina is home to a number of release groups which source camcorded material from all over the region and resell it online.

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<sup>2</sup>USTR, 2017 Out-of-Cycle Review of Notorious Markets (January 2018), available at <https://ustr.gov/sites/default/files/files/Press/Reports/2017%20Notorious%20Markets%20List%201.11.18.pdf>.

## COPYRIGHT ENFORCEMENT

The creative industries report that, as in previous years, there were no significant enforcement actions in 2017. In its April 2017 Special 301 Report, the U.S. Government noted long-standing deficiencies in Argentina's IPR protection, and especially the lack of effective enforcement by the national government. The report noted that Argentine police do not take *ex officio* actions, prosecutions can stall, and cases may languish. In addition, it observed that "even when a criminal investigation reaches final judgment, infringers do not receive deterrent sentences." In sum, the U.S. Government said that "[c]riminal enforcement is nearly nonexistent." The U.S. Government cited weak laws, leaving rights holders dependent on trying to persuade cooperative Argentine online providers to agree to take down specific infringing works as well as seeking injunctions in civil cases. These problems persist.

Some of the weakness in Argentina's copyright enforcement regime is attributable to a lack of resources, but much rests on failings in procedures and laws. *Ex officio* action by enforcement agencies remains non-existent; the police fail to comply with search warrants in a timely manner; and prosecutors fail to take criminal cases forward. All of this makes enforcement very difficult.

The general perception is that while enforcement actions remained at the same, very low level as in previous years, there is improved government initiative to (1) tackle organized crime; and (2) promote a legitimate digital market in Argentina that could be used to improve IPR protections generally. However, law enforcement agencies lack human and technical resources, and without adequate resources, agencies have a difficult time investigating and enforcing against IPR crimes.

**Online Piracy.** Particularly as to online piracy, there is a noticeable lack of action by either federal or local law enforcement. There is also a jurisdictional issue between local and federal police forces when it comes to online piracy cases. Both local and federal authorities suffer from a lack of technical support and human resources able to tackle the problem on a large-scale level.

To address digital piracy, the government should: (i) encourage the development of processes that enhance cooperation between rights holders and online intermediaries; (ii) establish voluntary best practices or codes of conduct to deal with copyright piracy over Internet services; (iii) ensure that the law establishes sufficient liability for known infringements and permits courts' access to incriminating data regarding online piracy; and (iv) create and train special working groups on federal and local levels for police and prosecutors. Overall, the government should, at the highest levels, commit to developing and implementing a coordinated antipiracy campaign that addresses hard goods and online infringements as a matter of national priority. Currently, there is no official initiative with respect to Argentina's huge Internet piracy problem.

While there are agreements related to U.S.-based companies with DMCA-style requirements for content removal, ISPs typically ignore takedown notices submitted by rights holders. Moreover, these agreements should be updated to counter rising piracy levels, especially for repeat infringers.

**Physical Piracy.** As for piracy of hard goods, there are simple measures that the Government of Argentina can take to reduce piracy. Market organizers should be required to restrict licenses to vendors selling legitimate products. Routine inspections followed by raids are needed for markets in Buenos Aires that offer counterfeit goods, including illegal copies of video games, film and television DVDs, and pirated sound recordings. The enforcement of the existing laws on IP protection by local and federal authorities, including active participation by prosecutors on such actions, would create a positive impact in the short term on the local market and also allow for more long term cases. Active involvement by the AFIP, the Argentinian Customs Office, is needed to reduce hard goods piracy, including the broad and open importation of illegal video game devices and consoles.

**Civil and Criminal Prosecution.** Criminal and civil prosecution of pirates present significant procedural hurdles in the criminal and civil courts. Reform is needed to help cases move through the system. For example, criminal cases can take up to six years to reach a final verdict. In the *Cuevana* case, filed in August, 2013, it took over four years to obtain an indictment of the operator of the website. This renders criminal prosecution of cases relatively non-threatening. Providing authorities with information on digital piracy could potentially improve the duration and success of criminal prosecution. The Criminal Code needs reform, including legislation to clearly criminalize camcording activities.

Civil action is often the only available recourse, particularly for obtaining preliminary injunctions. Procedural hurdles persist here as well, such as the high cost of conducting civil cases, high cost for obtaining a bond, and very long processes. In 2014, the *Pirate Bay* case seemed to set a positive precedent for site blocking, but no website blocking injunctions have issued recently. Authorities should take *ex officio* initiative.

A new Civil Code, entered into force 2015, provides for general principles of secondary liability and due care. Applied effectively to online infringement cases, this Code has the potential to activate cooperation by various intermediaries whose services are used by pirate operators who otherwise risk liability.

**Working Group.** Finally, IIPA welcomes and encourages continued dialog between the U.S. Government and the Government of Argentina under the Creativity and Innovation Working Group, including on how best to address digital piracy issues in Argentina.

## **COPYRIGHT ACT AND RELATED LAWS IN ARGENTINA**

In April 2017, the Government of Argentina launched a public input process to gather views on how, if at all, Argentina should update its copyright law. After receiving submissions from various stakeholders, it does not appear that any legislative changes will be proposed. Should the Government of Argentina proceed with any reform of the copyright law, the Government of Argentina should ensure adequate opportunities for relevant stakeholders to contribute to the process, and insist on adherence to international agreements. IIPA urges the U.S. Government to closely monitor this process.

There have also been recent legislative proposals that, if enacted, would be a step backwards for Argentina's protection of creative content. A troubling bill would have established an expansive safe harbor protecting a wide range of online intermediaries from content-related liability. While ostensibly intended to secure ISP liability, in fact the bill defined "ISP" broadly enough to include nearly any company with an online or cloud presence, and would have severely compromised the ability of rights holders to quickly remove infringing content from websites by requiring them to initiate judicial proceedings and obtain a court order before a service provider was required to remove illegal content. The Bill, if adopted, would make online copyright enforcement unworkable in Argentina. While developments in Argentina suggest a diminution of activity in the Congress on this bill, IIPA urges the U.S. Government to be vigilant to ensure that the troubling provisions of this draft legislation do not resurface. If such a bill were approved, there would be serious consequences to the local digital market and Argentina would risk becoming a safe harbor for even greater numbers of infringing sites and platforms.

## **MARKET ACCESS**

An official decree in February 2017 (Official Decree 117/17) reduced to zero tariffs on imported information technology hardware, including computers, tablets, and electronic devices, in an attempt to stimulate the local market and spur foreign investment. IIPA commends the Government of Argentina for taking this action in increasing market access and equalizing the market landscape.

In November 2017, the Board of Directors of the National Entity for Communications (ENACOM), under significant pressure from a coalition of local representatives of the audiovisual industry, passed resolution 4773

E/2017, mandating certification of compliance with the screen quota provisions set forth in Section 67 of the Media Law and accompanying regulation (Decree 1225/10), effective January 1, 2018. The quota regime requires free television licensees to show eight Argentine feature films per calendar year, or, for certain licensees, to pay 0.50% of the previous year's annual turnover to acquire, prior to filming, the broadcast rights to new independent Argentine film and TV movies. Likewise, non-national (retransmitted) subscription television services that show primarily fiction programs are required to allocate 0.50% of the previous year's annual turnover to acquire the broadcast rights to independent Argentine film and TV movies.

The article and regulations are retroactive, meaning that the motion picture industry could be held accountable for screen quota compliance, including investment and screening, for the entire year 2017. The quota mandate was incorporated in the 2009 Media Law but has not been previously enforced. As of this writing, U.S. stakeholders are engaging ENACOM to explore ways in which this resolution may be mitigated, or postponed pending further consultation. IIPA recommends that the quota provision be eliminated and a new Media Law be developed to replace the 2009 framework.

## **COLLECTIVE RIGHTS AND COLLECTIVE MANAGEMENT ORGANIZATION ISSUES**

DAC, an Argentine collective management organization representing directors of audiovisual works, has been collecting significant amounts of royalties from theatrical and television exhibitors on behalf of directors, including for U.S. audiovisual works. However, DAC has refused to accept claims to those royalties asserted by U.S. directors, represented by the Directors Guild of America (DGA), arguing that reciprocity is required and does not exist. DAC's denial of payment to U.S. directors is contrary to Berne and WIPO Copyright Treaty obligations binding on Argentina. Those treaties require national treatment of U.S. authors, and as a result, prohibit reciprocity requirements that would limit protection of U.S. author rights holders. In addition, U.S. law does provide reciprocal protection of Argentine directors' rights in their works under the retransmission compulsory licenses arising in sections 111 and 119 of the U.S. Copyright Law.