

COLOMBIA

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

2018 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that Colombia remain on the Watch List in 2018.

Executive Summary:¹ Under the U.S.-Colombia Trade Promotion Agreement (TPA), which the parties signed in 2012, Colombia enjoys unfettered access to the U.S. market in exchange for, among other things, the implementation of a copyright law and enforcement regime in accordance with global standards. As of now, however, Colombia has not fully implemented numerous intellectual property rights (IPR) obligations under the TPA, although all the transitional deadlines for Colombia's TPA obligations have passed. A Bill that would bring Colombia at least partially in compliance with the TPA has finally been proposed, but it does not yet achieve the relevant level of protection. The government should further engage with rights holders to ensure that proper language with adequate protection is realized. Colombia needs to implement key copyright protection and enforcement obligations under the TPA, and should pass legislation to: extend the term of protection; introduce technical protection measures (TPMs); ensure that rights holders have all the relevant exclusive rights (including exclusive rights for phonogram producers and performers with respect to communication to the public and broadcasting, which is currently missing in the proposed Bill) and that infringing services cannot avoid liability; and confirm that there is no "order of priority" between the rights of authors, artists and sound recording producers. IIPA urges the U.S. Government to prioritize its dialogue with Colombia to encourage this vital trading partner to fulfill its obligations under the TPA and demonstrate its will to protect creative sectors by combating the high levels of piracy persisting throughout the country.

While Colombia ignores its commitments, piracy and unjustified copyright exceptions continue to stifle the protection of rights and deny international rights holders of the benefits of the TPA. For example, legitimate music services have started operating and competing in the Colombian market, but the potential of the online market is fundamentally undermined by the prevalence of pirated copyrighted material. In addition, Colombian law enforcement is not putting forth a serious effort to prosecute administrators and owners of websites, blogs, and hubs involved in the distribution of illegal files. Illegal camcords also continue to occur in Colombian cinemas, both in the Medellin and Bogota areas. Another serious concern is the recent arbitrary and unfair interference by the Colombian Government with the freedom to contract agreements relating to audiovisual works. It is time for Colombia to honor its commitments under the TPA, revise its laws to secure IPR protection but allow for the freedom to contract, and make combatting online piracy a priority.

PRIORITY ACTIONS REQUESTED IN 2018

- Implement Colombia's past due TPA obligations, including:
 - Modernize copyright enforcement avenues to provide a legal basis to require ISPs to take action against copyright-infringing websites (and assist in the removal of infringing material online) and ensure that infringing services cannot avoid liability;
 - Ensure appropriate liability for circumvention of TPMs;
 - Establish exclusive rights for works, performances, and phonograms (including for broadcasting and public performance) to bring Colombia's copyright law up to date in the digital environment; and
 - Extend the term of protection for neighboring rights to at least 70 years for all producers of sound recordings, including producers that are corporate entities.
- Devote law enforcement and prosecutorial resources to combatting online piracy and ensuring respect for existing legal protection such as the right of communication to the public.

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



COPYRIGHT PIRACY IN COLOMBIA

Online piracy in Colombia is an increasing problem that has gone unaddressed by the Colombian Government and threatens to undermine the development of legitimate online distribution of media content. The piracy in Colombia comes in many forms such as significant consumption of pirated recorded music, movies, TV series and paid-TV channels through illegal streaming websites, direct download sites, and peer-to-peer protocols. One of the most popular stream ripping websites in the Latin American region, *Bajaryoutube.com*, is operated by a Colombian company. Numerous pirate websites have “.co” top level domain names and administered by a company appointed by the Colombian Government. The government should require its top level domain registrars to adopt and apply due diligence policies and cooperate with rights holders in tackling IPR violations by their customers.

The situation has now worsened as Illicit Streaming Devices (ISDs) have entered the Colombian market and represent a growing trend. The number of Internet users in Colombia continues to increase, with a population penetration of 58%.² E-commerce in Colombia grew 24% from 2014 to 2016, reaching 76% of all Internet users in Colombia (56% using credit cards), but many creative content industries do not reap proportionate economic benefits of this growth because of the high volume of piracy. In 2017, the top 180 Spanish-language audiovisual piracy websites received 525 million visits from Colombia. Meanwhile, physical piracy continues to plague the *San Andresitos* flea markets, where vendors sell burned CD-Rs and DVD-Rs on the streets, and distribution hubs supply pirate products for the rest of the country.

Legitimate music services have started operating and competing in the Colombian market. While the digital music market is growing (offsetting a sharp decline in physical sales, where revenue has dropped over 50% in 2 years), much of the online market's potential is frustrated by the widespread practice of stream ripping, as well as other sources of pirated music available in Colombia. Internet piracy occupies the vast majority of the total digital music market. Stream ripping of music videos from online platforms such as YouTube is increasingly prevalent, as is the distribution of illegal links to cyberlockers via social networks, forums, blogs, and hosted sites. Although the recording industry has made a significant effort to license and promote more digital services, the Colombian Government has not acted to protect this new legitimate market from unfair competition by pirate operators. One problem is the absence of a national anti-piracy campaign that recognizes the importance of copyright protection in the context of the country's economy and culture.

Individuals also utilize social media to promote and sell infringing copies of movies in Colombia. In 2017, nine illegal camcords of MPAA member films (down slightly from eleven in 2016) were traced to Colombian theaters.

COPYRIGHT LAW IN COLOMBIA

TPA Compliance: Colombia's obligations under the U.S.-Colombia TPA, which entered into force on May 15, 2012, are now long past due. Several copyright obligations were due upon the date of entry into force, and civil remedies for TPMs, as provided under Articles 16.7.4 and 16.11.15, were due to be adopted three years after that date (May 15, 2015). Thus, as of May 15, 2015, Colombia is substantially out of compliance with the TPA. While steps were made to meet Colombia's obligations under the TPA, none of the proposed modifications of the copyright law, needed for compliance, have been implemented.

The government previously prepared a package of provisions to address the digital environment. Congress attempted to adopt them in 2012, but the Constitutional Court struck down that law in 2013 for procedural failures during the congressional approval process. In May 2013, the Colombian Government presented a Bill largely incorporating the substantive provisions of the 2012 law, but the Bill was archived due to time constraints during the legislative term. More recently, in August 2016, the Colombian Government published for consultation a draft bill to

²See <http://www.internetworldstats.com/sa/co.htm>.

modify the copyright law to meet at least some obligations under the TPA. The Bill was supposed to be filed after a short consultation process of 30 days (which was then extended to 45 days), but was ultimately stalled.

Parliament is currently debating new amendments to its copyright law in connection with the FTA. This new Bill contains a number of positive proposals. For one, it includes an extension of the term of protection and detailed proposals dealing with the circumvention of TPMs. It also amends the existing law to eliminate any prioritization of the rights of authors and artists—aligning with international treaties, which do not recognize such “hierarchy” of rights. However, the music industry is deeply concerned that the Bill does not provide producers and performers with exclusive communication to the public and broadcasting rights, which might be an omission and should be corrected. The Bill has passed the first of four debates (in the Senate and House of Representatives) and will next be debated on March 16, 2018.

To enable Colombian performers and producers to thrive in the current global digital music market, the Bill must give them the exclusive rights they need to be able to negotiate fair deals with different users. The IIPA urges the government to act to ensure these rights, which are vital to successful operation in the digital environment, are included in any copyright legislation. The Rome Convention 1961 and the WIPO Performances and Phonograms Treaty (WPPT) provide the bare minimum protection for pre-existing broadcast rights. Those minimum standards were agreed to well before today’s digital environment was even conceivable and, as such, are insufficient.

The Copyright Office in Colombia (Nacional del Derecho de Autor (DNDA)) has already received a letter from the recording industry Colombian affiliate, APDIF Colombia, urging Director Carolina Romero to propose an amendment to the Bill in order to update the communication to the public right for performers and producers. The international recording industry stresses that amendments are needed to ensure that international (including U.S.) recordings benefit from protection under Colombian law, even if they are only distributed digitally, which is in line with the WPPT. Colombia should take prompt action to revisit the proposed amendments to its copyright law and bring Colombia in line with international norms for copyright protection.

Other International Treaties: On June 15, 2017, the Colombian Congress voted to ratify the Beijing Treaty (signed by Colombia in 2012), making Colombia the third country in the region to ratify the instrument after El Salvador and Chile. Back in 2000, Colombia ratified the WIPO Copyright Treaty (WCT) and the WPPT, but its full implementation is still pending, as demonstrated by the comments above. It is very important that Colombia properly implement the WPPT and WCT before implementing the Beijing Treaty. In particular, the music producers’ exclusive right to the making available of sound recordings and music videos (and other audiovisual works) should be safeguarded and included in the Colombian copyright legislation. These rights should be in line with the WPPT and WCT treaties, which effectively deal with the protection of authors, music performers, and music producers. Furthermore, the WPPT and WCT obligations regarding TPMs should also be implemented into the Colombian copyright law.

Arbitrary Interference with Freedom to Contract: In June 2017, Congress passed the “Pepe Sanchez” Law (No. 1835-Jun 9-2017). The legislation creates a new remuneration right for directors, screenwriters, composers, and other creators involved in the production of audiovisual works for the communication to the public, the making available of the works, and the rent of audiovisual works. The new remuneration will be collectively managed and apply to all audiovisual productions regardless of any contractual transfer of such rights. The law will apply retroactively. The law also includes a new exception that allows businesses to use audiovisual works in their premises for the entertainment of their employees.

This legislation covers music videos as audiovisual works, making it problematic for the music industry. Music videos account for a significant share of online, on-demand music consumption; according to an IFPI IPSOS study, over 50% of all on-demand streams are music videos. Music producers invest in the production of music videos, acquire the necessary rights from the contributing authors and performers, pay the agreed upon fees and/or royalties, and then exercise those exclusive rights to carry out music video licensing activities. The new Colombian

legislation, insofar as it applies to music videos, ignores the established industry practices in the music sector, unfairly disrupts the contractual balance between the parties, and unnecessarily adds complexity to the licensing process. Moreover, the law's application to the public performance of audiovisual works runs afoul to the three-step test enshrined in the international copyright conventions. It risks negatively impacting the public performance activities of music rights holders because the public performance of music videos is commonly licensed in various types of workplaces. The law amounts to an unfair intervention in the parties' freedom of contract and creates an obstacle to the development of the digital content market in Colombia. At minimum, the Government of Colombia should amend the legislation to clarify that music videos are not covered by its scope.

This legislation is equally problematic for the audiovisual sector where remuneration rights for creative participants in U.S. works are highly regulated and satisfied by contract. Mandatory remuneration rights unnecessarily interfere with negotiated agreements that already generate remuneration to creative participants—including authors, directors, and performers—driven by proceeds from the exploitation of U.S. works in every medium and in every world market. Imposition of a collectively licensed additional royalty chills the market for consumers (by increasing exploitation costs) and results in potential double payments for creative participants in U.S. works.

COPYRIGHT ENFORCEMENT IN COLOMBIA

Colombia lacks a national anti-piracy campaign to address online piracy, which is now the predominant form of piracy in the country. In 2017, the top 180 Spanish-language audiovisual piracy websites received 525 million visits from Colombia. The Attorney General's Office established the National Unit Specialized in Prosecuting Crimes against Intellectual Property Rights and Telecommunications, responsible for investigating and prosecuting Internet piracy and crimes against intellectual property rights. However, coordination among police officers, prosecutors, and judges to combat online piracy is still lacking, and many authorities believe that online piracy is not a problem or is one that only affects foreign interests. Greater resources should be dedicated to permit proactive investigations by the National Police. Further, the Attorney General's specialized unit for IP crimes should increase its focus on a broader range of antipiracy cases. Unfortunately, the DNDA, the department that is most competent in copyright-related issues, is not legally empowered to conduct enforcement actions. The DNDA operates under the jurisdiction of the Ministry of the Interior, which makes its role in the government less relevant. Many proposals to move the DNDA's functions under the jurisdiction of the Ministry of Commerce, Industry, and Tourism (as is the case in other countries in the region) have failed, mainly because of the lack of political will to prioritize the copyright sector.

Even before the rise of online piracy, the prosecution of piracy was a weak point in Colombia's enforcement regime. It is considered a minor offense by Colombian criminal judges and the appellate courts. For example, in 2015, a national group of rights holders (APDIF Colombia) went before a civil judge in Bogota to seek injunctive relief against *The Pirate Bay*. However, the action was never considered by the judge. Despite the good efforts of the National Police in recent years conducting investigations and raids, there have been no significant efforts to take *ex officio* action against widespread piracy.

ISP Cooperation: While many ISPs are willing to cooperate with rights holders to combat online piracy, such cooperation is limited due to flaws in the underlying law. For example, Colombian law does not provide for any anti-camcording legislation. Another possible negative influence on ISPs is the Colombian President's failure to sign the national anti-piracy agreement. Colombia used to have a national anti-piracy agreement signed by every new president and all civil organizations representing rights holders. The agreement served as a clear indication to all official authorities about the existence of a policy towards the piracy problem. Also, the anti-piracy agreement granted some priority to actions destined to combat the problem. Unfortunately, President Santos never signed the agreement, which made the issue less important in the eyes of public servants in the country. Colombia must follow through with legal reform to incentivize cooperation by all intermediaries to end online piracy. To do so, it must modernize copyright enforcement avenues to provide for a legal basis that requires ISPs to take action against copyright-infringing websites. Such remedies exist in many countries around the world, including EU Member States, Mexico, Argentina, Australia, Singapore, South Korea, India, and Indonesia.

MARKET ACCESS

In 2016 and 2017, an Actors Bill was proposed in Colombia's Congress. If passed, the Bill would have the effect of increasing production costs for film and television made in Colombia by imposing (i) excessive burdens on producers of audiovisual works in terms of costs and production schedules, (ii) limitations on talent engagement, and (iii) a set of compensations and encumbrances that curtail the legitimate ability to commercially exploit audiovisual works. In sum, this Bill would significantly raise costs for producers, render local production unviable, and make Colombia less competitive as a location for audiovisual production. Time ran out for this Bill in the 2017 legislative session, but it could be reintroduced as a new bill as early as July 2018.