

PERU

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

2018 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

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

Executive Summary:¹ Trade with Peru has almost doubled as a result of the U.S.-Peru Trade Promotion Agreement (TPA), which entered into force on February 1, 2009. Peru initially made promising steps to implement the comprehensive Intellectual Property Rights (IPR) chapter of the TPA, which contains high standards for copyright protection and enforcement in some areas. However, Peru has yet to complete implementation. For example, Peru's law lacks a provision that provides statutory damages for civil copyright infringement. Peru must also ensure that infringing services cannot avoid liability. Most importantly, however, Peru needs to invest more effort into enforcement based on the legal tools already at the authorities' disposal.

While there has been some improvement in enforcement, piracy continues to be a serious problem in Peru, both online and on the streets. There has been a long-standing digital piracy problem in Peru, which has become a safe haven for pirate sites distributing content throughout Latin America. Online piracy has continued to grow strong, undermining the market for legitimate content in Peru and across the region. Individuals based in Peru operate many websites offering vast music catalogs from national and international artists to stream and/or download. These sites are highly popular in places such as Argentina, Mexico, and Chile. Pirate businesses, which generate profits by selling advertising and user data, flourish as a result of the lack of coherent action by the government. For example, *SetBeat* has more than 900 million monthly visitors from across the region in the last six months. Urgent action is required from the government to tackle this music piracy problem that is severely damaging Peruvian creative industries and the rights of composers, artists, performers, publishers, and producers. Notably, Peru lacks a specific law dealing with camcording and remains one of the main sources of camcorded materials in the region. To facilitate enforcement against this form of piracy, criminal penalties without a need to prove a profit intent should be enacted. The Internet piracy market managed within Peru is steadily increasing, and its impact is affecting not only Peru, but also other countries in the region. The websites attract hundreds of thousands, and for some countries, millions of visitors.

PRIORITY ACTIONS REQUESTED TO BE TAKEN IN 2018

- Pass legislation to address secondary liability principles for online copyright infringement, implement provisions allowing judges to disable access to infringing sites, establish obligations for ISPs to apply preventive technical measures to combat digital piracy, and provide for statutory damages for copyright infringement, in part, to satisfy TPA obligations.
- Devote significantly more resources and political support to combat digital piracy.
- *El Instituto Nacional de Defensa de la Competencia y de la Protección de la Propiedad Intelectual* (INDECOPI), the agency charged with promoting and defending intellectual property rights, should work to consistently build upon the recent positive examples of IPR enforcement against administrators of piracy websites, who continue to find Peru to be a safe haven.
- Pass legislation criminalizing unauthorized camcording of films without the need to prove an intent to profit.
- Improve the efficiency and effectiveness of the judicial system.

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



COPYRIGHT PIRACY IN PERU

Internet Piracy: Internet-based piracy is widespread in Peru. While Peru is not a leading country in broadband penetration, the number of Internet users is steadily increasing. At present, there are approximately 18 million Internet users in Peru, representing about 56% of the population.² Mobile broadband penetration is growing rapidly. In 2016 there were 62.0 active mobile broadband subscriptions per 100 inhabitants, up from 55.0 the previous year.³ Fixed broadband is not nearly as prevalent, with only 6.7 fixed broadband subscriptions per 100 inhabitants (up from 6.4 in 2015).⁴

Streaming of pirated audiovisual content is prevalent in Peru. In 2017, the top 180 Spanish-language, audiovisual piracy websites received 260 million visits from Peru. *Repelis.tv*, a website MPAA identified as a notorious market in its 2017 out-of-cycle review filing, has been active since 2013 and receives a high volume of traffic from Peru. This site is a stream-linking site that offers more than 150,000 links to more than 10,000 illegally reproduced titles including movies and television series. Following the regional trend, Peru has also seen the introduction of Android and Kodi boxes as a means of piracy. Piracy websites, like *Repelis.tv*, and devices that facilitate infringement, like preloaded Kodi boxes, affect the legitimate market in the entire region and must be addressed with urgency. Although Peru has seen an influx in modes of infringement with Illicit Streaming Devices (ISDs) entering the market, the prosecution office is currently expanding the time and effort it dedicates to digital piracy. This helps prevent the piracy situation from worsening, even in light of the increased possibilities and methods for users to infringe.

Peru saw a significant increase in digital sales of recorded music in the last year, with almost all growth coming from streaming platforms. That increase is offsetting the very steep decline in physical sales (physical sales revenue has gone down from \$0.8m to \$0.1m in just two years). However, there is no possibility for the market to reach its potential because of the unfair competition created by pirate websites, who are operating openly in Peru and offering millions of illegal music tracks to consumers, mainly via mobile devices. If the legitimate music market is to develop, urgent action is required to tackle endemic piracy problems. There has been a long-standing digital piracy problem in Peru, which has been a safe haven for pirate sites distributing content all across Latin America. Hundreds of websites offering vast music catalogs from national and international artists have numerous domain names registered abroad, but were created, and are administered by, individuals operating within Peru. Digital piracy businesses have flourished with different functionalities spanning from streaming and stream ripping websites, download websites, and linking websites. These websites allow users to access and/or copy thousands of music tracks without authorization from rights holders and compete with legitimate services in the music market. Peruvian pirate websites profit by selling advertising placements and user data. Because the Peruvian Government does not take any substantive action towards the problem, these illegal business succeed. Beyond Peru, these websites are highly popular in places such as Argentina, Mexico, and Chile. Examples of the websites are *Foxmusica* (now subject to an INDECOPI order, see below), *FullTono*, *Enladisco*, *BuenTema* and *SetBeat*. All of these websites have a strong regional audience. *SetBeat* has more than half a million monthly visitors. The Peruvian Government needs to take the music piracy problem seriously because it damages the intellectual rights of Peruvian and international composers, artists, performers, publishers, and producers. It should also shift the focus and training at INDECOPI to better address the problem of digital piracy.

Hard Goods Piracy: Some industries, such as the motion picture and software industries, have found that hard goods piracy is still relevant in the Peruvian market. In the notorious black markets such as *Polvos Azules*, *Polvos Rosados*, *Hueco*, and *Mesa Redonda* (which is located one block away from the police and Public Ministry headquarters), pirates operate during daylight hours. There are also some popular shopping galleries and arcades that sell pirate products. The sale of pirate discs through street vendors, small stores, and stands located in informal

²See www.Internetworldstats.com.

³Data from International Telecommunication Union, *Measuring the Information Society Report 2017*, p. 144, https://www.itu.int/en/ITU-D/Statistics/Documents/publications/misr2017/MISR2017_Volume1.pdf.

⁴Id.

discount retail centers continues to be the main channel of pirate commerce, and the one that most affects the audiovisual industry. Lima, Arequipa, Trujillo, Chiclayo, and Tacna have the most wide-spread hard goods piracy problem. The purchase of pirate and counterfeit hard goods through websites and online marketplaces is becoming more popular as Peruvians embrace e-commerce. For example, *mercadolibre.com.pe* hosts listings of hacked video game consoles that come installed with infringing video games, as well as listings of circumvention devices bundled with infringing video games. In addition to advertising listings on *Mercado Libre*, many top sellers also run their own proprietary e-commerce sites where they traffic in video game circumvention devices and services. Optical disc piracy is a major problem in Peru, where large numbers of blank media (e.g., CDs, DVDs) are imported and then used for burning copyrighted content. These discs are then sold in street markets and over the Internet. There are thousands of street vendors selling burned DVD-Rs containing the latest Hollywood releases, available for US\$1.00 each. It is no longer possible to evaluate the dimension of piracy based simply on the volume of optical disc imports. The decline in reported imports of blank media in recent years does not necessarily mean that the amount of blank CDs and DVDs used by pirates has decreased in recent years (down to 16.2 million units in 2007, more recent data is not available).

Camcording: Camcording piracy has grown exponentially over the last few years in Latin America. With the developments in camcorder technology, the camcorded copies are nearly perfect and make detection extremely difficult. Peru remains one of the leading sources of unauthorized camcords in the region and does not have a specific law regulating this issue. Twenty-five illicit audio and/or video recordings of MPAA member films were sourced from Peruvian theaters between January and November 2017. While this is a slight improvement compared to the same period in 2016, Peru is still the second largest source for camcorded films in South America, after Mexico. Professional cammers feel safe to conduct this activity in Peru because criminal convictions require proof that the recording was made with an economic intent, which makes it virtually impossible to obtain a conviction. Peru needs to enact legislation that would effectively criminalize unauthorized camcording of films.

COMPLIANCE WITH EXISTING OBLIGATIONS TO THE UNITED STATES

The TPA entered into force on February 1, 2009.⁵ As part of the TPA, Peru also signed IPR-related Side Letters, including one on ISP liability and another on retransmission issues. While Peru acted expeditiously to implement many IPR provisions of the TPA,⁶ it has not yet achieved the objectives of the TPA, which were to improve the level of effective enforcement of copyrighted content online, including through confirmation of secondary liability principles and the availability of statutory damages. With no clear secondary liability principles in place, online intermediaries are not incentivized to participate at a level that will create a sustainable and lasting effect on the piracy situation. In addition to supporting the implementation of clear provisions on liability principles, INDECOPI should encourage engagement between rights holders, ISPs, and other key Internet intermediaries. Also, Peru's obligation to provide for pre-established, statutory damages in civil judicial proceedings (TPA Article 16.11.8) remains outstanding. This long-overdue reform is needed to provide deterrence and encourage settlement of civil claims of infringement. Total trade between Peru and the U.S. has expanded significantly since entry into force of the TPA, with Peru particularly benefiting from it.⁷ As such, Peru should fulfill its obligation to implement all provisions of the TPA.

OTHER COPYRIGHT LAW AND RELATED ISSUES

Bill on Performer Remuneration Rights: The motion picture and recording industries are concerned with a mandatory licensing bill, known as either the Cultural Workers Bill or the Art Worker Bill. This bill, if implemented,

⁵The final text of the U.S.-Peru Trade Promotion Agreement (TPA) Intellectual Property Rights (IPR) Chapter is posted on USTR's website at <https://ustr.gov/trade-agreements/free-trade-agreements/peru-tpa/final-text>.

⁶Peru passed several pieces of legislation that implemented various copyright and enforcement measures. Legislative Decree No. 1076, published on June 26, 2008, amended the copyright law in a number of positive ways to implement the TPA, especially with respect to technological protection measures (TPMs) and judicial remedies.

⁷See <https://ustr.gov/trade-agreements/free-trade-agreements/peru-tpa>.

would grant an unwaivable, nonassignable remuneration right for audiovisual and music performers on top of the existing contractual payments they receive, and even when such rights have been transferred or assigned through contract. The bill also creates an unwaivable remuneration right for made for hire authors of musical works and a mandatory remuneration payable when a recorded performance is copied to a new format. The remuneration claims will be subject to mandatory collective management. This would benefit the collecting societies involved at the expense of restraining trade for U.S. works because performer compensations are collectively bargained for and subject to worldwide exploitation. Peru has already implemented the rights of performers and other rights holders as provided in the international treaties. The proposed bill would only complicate the launch and operation of legal audiovisual and music services. Furthermore, it would frustrate the freedom of contract in the industries.

Copyright Levies: Peru is one of the few markets in the region that has implemented a private copy levy (along with Paraguay, Dominican Republic, and Ecuador), to compensate rights holders for the private use exception applicable to blank media. Unfortunately, the effort was abandoned mainly due to the lack of coordination with customs authorities. INDECOPI needs to urgently update the list of media to which the levy applies in order to keep up with and accurately reflect the current consumption habits. Also, new regulations need to include provisions that empower customs to enforce the levy.

Camcording Legislation: Anti-camcording legislation is necessary to address the rapid increase in camcording. Peru should adopt a legislative framework specifically criminalizing illicit camcording in theaters without requiring proof of profit intent. The lack of anti-camcord laws to criminalize unauthorized movie recordings makes it difficult to obtain cooperation from law enforcement and prosecutors.

COPYRIGHT ENFORCEMENT IN PERU

Criminal, civil, or administrative enforcement against piracy is hampered by a distinct lack of resources devoted to combatting piracy, and, in particular, online piracy. There has been some improvement in this area and industry sectors generally report good cooperation with the criminal enforcement authorities (prosecutors, police, and tax authorities) handling hard goods piracy, but continuing difficulties exist in obtaining prosecutions and administrative measures that would result in effective sanctions to deter piracy. Peru has a cross-commission established by law, *Comisión de Lucha contra los Delitos Aduaneros y la Piratería*, to “fight against border-control infringements and piracy.”⁸ This commission should focus on establishing priority enforcement targets from each affected industry to make combatting piracy a governmental priority. The U.S. Secret Service agency deployed to Lima has conducted trainings and assisted local police efforts against organized crime, which is usually related to the large and organized distributors of pirated media content. In the longer term, this effort should counteract piracy and counterfeiting activity in Peru. Additionally, the deployment of a Department of Justice Law Enforcement Coordinator (IPLEC) to Latin America should help coordinate training efforts across the region. However, more needs to be done to ensure effective and proper copyright enforcement.

Criminal Anti-Piracy Enforcement in Peru

Police actions and prosecutions: The copyright industries have excellent relationships with the Fiscal Police, as well as with the specialized prosecution division in Lima for Intellectual Property and Border Enforcement (*Fiscalía Especializada en Delitos Aduaneros y Contra la Propiedad Intelectual*). However, this specialized prosecution division has very limited geographic jurisdiction, which limits its effectiveness. For example, the jurisdiction of the specialized IP prosecution offices in Lima are based on territory. Cases outside of Lima need to be

⁸The commission is comprised of the Ministry of Production; the Ministry of Economy and Finance; the Ministry of Trade and Tourism; the Ministry of Internal Affairs; the Ministry of Defense; the Commissioner of Tax Administration; a representative of the General Prosecution Office; the President of *El Instituto Nacional de Defensa de la Competencia y de la Protección de la Propiedad Intelectual* (INDECOPI); and representatives of the National Association of Industries, the Finance Intelligence Unit of Peru, the National Group of Commerce Chambers, Small and Medium Company Associations, the Association of Border Agents of Peru, the Association of Exporters, the State Governments, the Committee to Fight Against Piracy (*Contracopia*), the Peruvian Books Chamber, the Association of Phonographic Producers, the Association of Cities of Peru, the National Association of Authors and Composers (APDAYC), and the National Council of Cinema (CONACINE).

prosecuted by local prosecutors, many of whom are not specialized in this matter. Specialized prosecution offices should have jurisdiction over the entire country. There is also a continued need to allocate more public resources to support the special IPR unit of the Fiscal Police (*Division de Investigacion de Delitos contra los Derechos Intelectuales*) in order to conduct effective anti-piracy investigations, support the National Police, and provide troops when large raids are conducted. Moreover, the National Police lacks sufficient resources to develop intelligence plans that would support investigating and discovering large warehouses of pirated goods.

The four IPR prosecutors in Lima's special prosecution division work with INDECOPI when they are requested to do so. Unfortunately, filing a complaint before a judge can take four to six months after the raid has occurred; in fact, some cases have seen delays as long as two years from the time of the raid before getting to court. Amidst all of these challenges, Peru has made some positive strides in enforcement. On September 13th, 2017, the High-Technology Police Unit in Lima, Peru, (DIVINDAT) and the 2nd IP Prosecution Office executed raids on four premises belonging to the operators of the websites *Pelis24.tv*, *Series24.tv*, and *Pelis24.com*. These sites were constantly amongst the five largest Spanish-language websites in the LATAM region. These raids were executed following a court order obtained on September 8th, 2017, which authorized raids on professional and home premises in order to seize electronic equipment, documents, and any evidence related to the three mentioned websites; temporary arrest of the three operators of the websites for 48 hours, extendible for up to 6 months, depending on the evidence collected and cooperation of the subjects; and suspension of the three websites. The result of the court order was very positive and produced the first-ever precedent on a digital copyright infringement criminal case in the country. It was the first of its kind, in Peru, to recognize an injunction as an adequate means to interrupt the continuous, criminal, intellectual property violations. Additionally, the court order solidified that this type of activity may constitute an act of infringement by distributing copyrighted works to the public and that the monetization through advertisement suffices as indicating a profit intent. While these victories are well-received, more resources need to be invested in enforcement to ensure sustainable change.

Problems with the judiciary—non-deterrent results and delays: Few criminal IPR cases reach the Peruvian judiciary, and if they do, judges do not impose deterrent sentences. Judges are not sensitive to IP crimes, as they do not perceive the importance of IPR or see IPR crimes as dangerous; as a result, sentences are non-deterrent. Criminal sentences take between 3-5 years to be issued, and cases often languish even longer. For example, a criminal case involving circumvention devices that was filed in 2011 was repeatedly delayed due to excessive bureaucracy and appeals, but was finally concluded in 2017 when the Supreme Court of Peru rejected an appeal by the defendants. The defendant was found guilty of Article 220-B of the Peruvian Criminal Code: Products made to circumvent a technological protection measure. Despite this positive outcome, many cases remain "pending" and languish in the courts. Some cases for some of our members have been pending for nine years or more as a result of multiple appeals and administrative delays. Such delays cause brand owners to incur prolonged legal fees, which become even more burdensome when courts do not impose deterrent sentences. Furthermore, the Peruvian Criminal Procedure Code permits sentences of four years or less to be suspended. This has continued even after several positive amendments to the criminal code, including: (1) the 2004 amendments, which provided an increase of minimum sentencing to four or more years for copyright infringements, and (2) amendments made in November 2006 to penalize repeat offenders with stronger sanctions and establish additional penalties for more crimes.

INDECOPI and Administrative Enforcement

INDECOPI serves as an administrative enforcement agency for the copyright sector. It has been active in public awareness and educational campaigns, and collects royalties for the public performance right. INDECOPI is supposed to be self-funded through its income from patent and trademark registrations and from the fines imposed by its administrative bodies. However, significant fiscal restrictions have adversely affected *ex officio* enforcement activities. Additional resources should be allocated to support INDECOPI's enforcement efforts.

Need for consistent administrative enforcement: Despite some legislative deficiencies, INDECOPI must work within the current legal regime to take action against pirate sites, suspend their domain names, and fine the

operators. INDECOPI needs to maintain consistent enforcement and strengthen its commitment towards the digital piracy problem. Unfortunately, due to its wide range of activities and competences, INDECOPI tends to get pulled in different directions, resulting in a lack of consistent action or lasting effort on individual issues.

Increasing deterrent sanctions: Through Legislative Decree No. 807, INDECOPI has the authority to issue fines against individuals or businesses that refuse to be investigated. Article 28 of this law stipulates that if an individual or business is served with an injunction or receives a fine from INDECOPI and fails to comply, the maximum allowable penalty for the violation will be imposed. If the non-compliance persists, then INDECOPI may impose a new fine, the amount of which will be doubled at established intervals. INDECOPI can file a criminal complaint with the Office of the Public Prosecutor. To support greater enforcement against piracy, IIPA suggests that regulations be issued increasing and establishing fines, which would also help fund INDECOPI's actions.

Developing a digital anti-piracy campaign: Record producers have filed a number of cases with INDECOPI to address digital piracy. These collaborative efforts should remain consistent and develop into a long-lasting, anti-piracy campaign. On October 10, 2017, INDECOPI issued a suspension order to a significant pirate service operating under the domain name *Foxmusica.me*. IIPA expects that this action will be followed by more orders. At this point, 19 additional cases have already been filed. While this is a positive step, rights holders have identified more pirate domains that should be the subject of future orders. INDECOPI's continued interest in, and attention to, digital piracy will be crucial for tackling these pirate sites.