

ARGENTINA

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2020 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that Argentina be maintained on the Priority Watch List in 2020.¹

Executive Summary: Despite some positive developments in 2019, the Government of Argentina continued to demonstrate an overall lack of commitment to effective copyright enforcement.

In November 2019, the Macri Administration presented a National Plan Against Cybercrimes (NPAC) to establish suitable personnel, technology and regulations to combat cybercrime by 2023 through collaboration between security forces; public-private initiatives, particularly with Internet service providers' (ISPs) and information and communication technology's (ICTs); and joint efforts with international organizations. A draft reform to the penal code was presented to the Argentine Congress in March 2019 with some provisions that, if properly implemented, would improve the enforcement landscape for copyrighted works. It is unclear whether President Fernandez will follow through on these initiatives.

The absence of a strategic enforcement policy and interagency cooperation, especially between prosecutors and law enforcement cybercrime experts, continues to allow pirate sites to thrive in Argentina and expand to other Spanish-speaking countries. Hard goods piracy, linked to organized crime groups, also remains rampant. Notorious market *La Salada* remained open in 2019 and its owner was released on bail in a significant set-back for the case. To address these significant piracy problems, IIPA recommends the new Government of Argentina: (1) apply existing Civil and Commercial Code provisions on ISP liability for storing infringing content; (2) host private sector discussions on cross-industry cooperation; (3) create a specialized IP Prosecution Office to promote cross-agency law enforcement cooperation and ensure the diligent investigation and prosecution of copyright infringement cases; (4) undertake routine, *ex-officio* inspections and raids of physical markets; and (5) actively involve the Argentinean Customs Office (AFIP). It would also be helpful for Argentina to bring copyright under federal jurisdiction, as it has done with trademark law.

Market access obstacles persist in Argentina, including film and television quotas, and high taxes on copyrighted content. IIPA urges the removal of these barriers to ensure a level playing field for U.S. creative industries.

PRIORITY ACTIONS REQUESTED IN 2020

- Increase resources and develop a coordinated, long-term antipiracy agenda at the federal and local level to address online piracy.
- Continue to apply the Civil and Commercial Code to ISP liability cases.
- Host private sector discussions on potential cross-industry cooperation to tackle online piracy more effectively and support the development of the local digital economy.
- Create a specialized IP Prosecution Office and establish federal jurisdiction over copyright crimes.
- Undertake routine, *ex officio* actions such as inspections and raids of physical markets to stop hard goods piracy.
- Remove quotas for motion pictures and television content, and electronic devices.
- Engage customs authorities to monitor and perform border operations against counterfeit high value products (such as modified game consoles) entering the country via airports and land borders.
- Monitor proposed ISP liability legislation.

¹For 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/2020/02/2020SPEC301HISTORICALCHART.pdf>.



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, stream-ripping and linking sites. The prevalence of piracy fundamentally undermines the emerging digital economy in the country. In a recent 19 country study of Internet users, a recording industry survey found higher rates of music piracy in Argentina than in any other country but one, with 47% of Internet users (and 66% of 16-24 years old users) pirating music on a regular basis.

The U.S. Government has said that Internet piracy rates have reached extremely high levels in several content areas. One positive development, relates to the notorious Argentine-run market *Cuevana*. *Cuevana* offered pirated movies and TV shows and had expanded to include a mobile streaming application. A key figure responsible for the site indicted in December 2017, which took six years to accomplish, and in 2019 the court issued a blocking order that mandates ISPs to block the website in Argentina. Other cases however have continued to languish. For instance, a case against the operators of a prominent infringing TV and movie release group has been stalled for two years with little movement expected anytime soon. The lack of a level playing field in the digital content market stymies the growth of legitimate services that struggle to compete with vast quantities of copyrighted material available from a multitude of unauthorized 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 home to heavy users of BitTorrent (e.g. *1337x.to* and *rarbg.to*), cyberlockers (e.g. *1fichier.com*, *zippyshare.com*), stream-ripping sites (e.g. *y2mate.com*, *flvto.biz* and *savefrom.net*) and pirate streaming websites. Following a regional trend, Argentina continues to see an increase in the usage of Piracy Devices (PDs), 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 creative industries report that in 2019, there was also an increase in consumption of films and television through piracy mobile apps and add-ons.

The illegal distribution of physical and online video game content continues to grow. Online marketplaces, such as *Mercado Libre*, remain increasingly popular with providers of unauthorized copies of video games and counterfeit consoles. Social media platforms enable online pirates to attract wider audiences. Infringing linking sites in Spanish—monetized by advertisements—are the most popular piracy channels for video games in Argentina and other Spanish-speaking countries such as Spain, Mexico, and Colombia.

There are currently 13 legal digital music services in Argentina, including Spotify, Apple Music, Tidal, Personal Música, Claro Música, Napster and Deezer. While Argentina has a relatively large physical and digital public performance rights market, demonstrating the country's appetite for music consumption, digital sales are currently well below potential. Direct download and stream-ripping are the most widely used piracy tools, and are undoubtedly having the highest negative impact on the market, followed by free mobile apps. Despite promising growth in streaming revenue in recent years (up by 59% in 2018), it is clear that the digital market cannot flourish while widespread piracy continues to be an issue.

Physical Piracy. According to local reports, there are more than 490 illegal open-air markets in the country, and hard copy piracy is still rampant in major public markets and by street vendors, especially in Buenos Aires. It is estimated that hard copy piracy accounts for 60% of the illegal market for some industries such as video games.

Despite a reported 17% reduction in open-air markets in recent years, 2019 did not bring marked improvement. For example, 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.² 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. The Government of

²USTR, 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>.

Argentina should renew these efforts and conduct such actions regularly. The high profile arrests of two alleged leaders and many associates of notorious market *La Salada* in June and October 2017, followed by large-scale enforcement operations in December 2017, showed a renewed governmental interest in cracking down on marketplaces known for counterfeit and pirated goods. Unfortunately, *La Salada*'s owner was released on bail and the market remained operational in 2019. There was also a significant growth in the number of locations and vendors across the entire city of Buenos Aires.

Camcording. Three illicit recordings of MPA member films were sourced from Argentine cinemas in 2019, consistent with the figures in 2018. Moreover, Argentina is home to a number of release groups, which source camcorded material from all over the region and resell it online. Despite the fact that the industry works with law enforcement to bring criminal cases against owners of camcording groups, the pace of development of such cases is so slow that years go by before any concrete measures are taken.

COPYRIGHT ENFORCEMENT IN ARGENTINA

The creative industries report that, as in previous years, there were no significant enforcement actions in 2019. Only a few basic actions (such as small street raids) took place, despite the government being in a position to do more. Greater protections are especially needed online.

In its 2018 and 2019 Special 301 Reports, the U.S. Government noted long-standing deficiencies in Argentina's IPR protection, especially the lack of effective enforcement at the national level. In addition, the U.S. Government said that "criminal enforcement for online piracy is nearly nonexistent."³ In all cases, the copyright owner has to invest a lot of resources and time to actively urge and promote actions. These problems persist.

Some of the weakness in Argentina's copyright enforcement regime is attributable to a lack of resources during an ongoing economic crisis; but much rests on failings in procedures that do not make use of the existing laws to tackle the challenge. A lack of sustainable action and public policies at the federal and provincial levels directed to combat online and offline piracy allows for multiple markets and sites to adapt and grow. *Ex officio* action by enforcement agencies remains nonexistent and the police fail to comply with search warrants in a timely manner. Moreover, few cases are being brought to the courts because the pre-trial judicial investigation (*instrucción del sumario*) tends to be lengthy and extensive, and piracy crimes are not a priority for the investigative authorities. All of this makes enforcement very difficult.

The general perception is that while enforcement actions in 2019 remained at the same low level as previous years, during the Macri Administration there was improved government initiative to: (1) tackle organized crime; and (2) promote a legitimate digital market in Argentina. However, law enforcement agencies were not assigned adequate human and technical resources, without which agencies have a difficult time investigating and enforcing against IPR crimes.

Online Piracy. With regard to online piracy, there is a noticeable lack of action by either federal or local law enforcement. Thus, online infringement remains a major problem. Despite the laudable progress in getting the *Cuevana* website blocked in Argentina, difficulties still generally persist in the investigations of copyright violations, evidence gathering procedures, and the assessment of monetization structures based on advertisements by infringing sites. Further, a general perception of tolerance, including from the judiciary, for online copyright infringements presents obstacles to law enforcement efforts and to rights holders' own civil litigation. There is also a recurring jurisdictional issue between local and federal police forces when it comes to online piracy cases, as Argentina has not federalized copyright law as it has done with trademark law. The effects of this uncertainty can be seen in the enormous amount of time cases presented to the judiciary system in Argentina take to progress. Moreover, both local and federal authorities suffer from a lack of technical support and human resources able to tackle the problem on a large-scale. The lack of units that specialize in intellectual property enforcement also makes IP crime in the context of other crimes prosecuted by the enforcement units in Argentina.

³See, e.g., USTR 2018 Special 301 Report, at p. 58 (April 2018), available at <https://ustr.gov/sites/default/files/files/Press/Reports/2018%20Special%20301.pdf>, and USTR 2019 Special 301 Report, at p. 63 (April 2019), available at https://ustr.gov/sites/default/files/2019_Special_301_Report.pdf.

While there are agreements involving U.S.–based companies that include DMCA-style requirements for content removal, ISPs typically ignore takedown notices submitted by rights holders. The agreements need to be improved to counter rampant piracy levels, especially for repeat infringers.

To address digital piracy, the government should: (i) facilitate the bringing of civil cases based on the Civil and Commercial Code concepts of liability where liability in the online environment is concerned; (ii) encourage the development of processes that enhance cooperation between rights holders and online intermediaries; (iii) establish voluntary best practices or codes of conduct to combat copyright piracy over Internet services and to increase enforcement measures; (iv) ensure that the law establishes sufficient liability for knowledge or inducement of, or material contribution to, infringement, and permits courts' access to incriminating data regarding online piracy; (v) create and train special working groups on federal and local levels for police and prosecutors and the judiciary; (vi) encourage and promote the engagement of prosecutors on a wider agenda of online activities against cybercrime in Argentina to generate the necessary framework for future cases;⁴ and (vii) create an IP-specialized Prosecution Office and establish a federal jurisdiction over copyright crimes. Currently, there is no official initiative with respect to Argentina's huge Internet piracy problem, and there has been no significant progress or evidence of political will in this area.

Physical Piracy. As for piracy of hard goods, there are simple measures that the new Government of Argentina can take. 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, especially the markets located in the city center, which are more accessible to customers. 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, such as those to pursue organized crime groups behind many of these markets. Authorities should receive institutional support and training, including training on organized crime activities, to effectively deal with these cases. Active involvement by the Federal Administration of Public Income (AFIP) is needed to reduce hard goods piracy, including the importation of illegal video game devices, consoles, and video cards, many of which come into Argentina from Paraguay. The lack of enforcement against physical piracy has gained more relevance as the penetration of Piracy Devices (PDs), also called ISDs (Illegal Streaming Devices), has soared. The inability to control the widespread sales of DVDs has the same root cause as the government's inability to control the burgeoning importation, distribution and sales of devices dedicated to illegal online piracy: lack of focus on the IP problem due to the absence of specialized units, and conflicting jurisdictional spaces.

Civil and Criminal Prosecution. Notwithstanding some positive developments, criminal and civil prosecution of pirates continues to present significant procedural hurdles, and criminal prosecution of cases remains non-deterrent due to a very slow criminal prosecution process. For example, criminal cases can take up to nine years to reach a final verdict. Thus, improvement is needed to help cases move through the system. Providing authorities with information on digital piracy could potentially improve the duration and success of criminal prosecution. A targeted amendment of the Criminal Code should also clearly criminalize camcording activities

Importantly, Argentina does not have a prosecution unit dedicated to IP crimes, and law enforcement in general does not prioritize IP cases. The creation of that unit is absolutely indispensable to develop enforcement of IP rights in the country. Similarly, the judiciary should be exposed to the international best practices in this area.

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. A 2018 survey revealed that the *Pirate Bay* site was still blocked by ISPs and that the blocking was active with respect to all domains except one which still could be accessed. This was brought to the attention of the court, which in turn requested the

⁴In December 2018, a nine year piracy-related judicial procedure against *Taringa!*, the Argentine information exchange platform, resulted in an acquittal. In 2009, several legal publishing companies initiated a claim stating that copyright-protected material was being uploaded to the *Taringa!* site without proper authorization. According to the court, even though its users shared links to pirated material, given that the material was not stored on the *Taringa!* platform, obliging them to stop its publication would be tantamount to committing an act of prior censorship. See <https://www.lanacion.com.ar/2204758-la-justicia-absuelve-fundadores-taringa-9-anos>.

National Entity for Communications (ENACOM) to take action. Authorities should take *ex officio* initiative and also implement international best practices on disabling access to infringing websites.

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 consultation 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, it 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.

In a positive development, the Administration's draft Penal Code Reform bill, sent to Congress in March 2019, addresses a number of copyright issues, including: 1) reproduction of copyrighted material and programs from the Internet without proper authorization, 2) manufacturing, storing or selling copyrighted programs without authorization, and 3) circumvention of technological protection measures (TPMs). In addition, the proposal would make theft of IP equivalent to theft of physical objects and would make the incorrect reporting of pay-TV subscriber numbers a penalty under the law. The general provisions of the bill are being debated at the Senate's Judicial Affairs Committee, and the balance of the bill is set to be debated in 2020. Moreover, the Justice Ministry has signaled a commitment to amend the penal code to outlaw sale of PDs, which enable piracy of creative works. These provisions, if implemented, would improve the enforcement landscape for copyrighted works in Argentina. Unfortunately, the Bill is still awaiting debate in the Senate and near-term progress is dubious.

Regarding the protection and enforcement of copyright online, IIPA urges the U.S. Government to be vigilant to ensure that any draft legislation regarding ISP liability that might be proposed in 2020 does not jeopardize the development of the legitimate digital market for copyright materials and turn Argentina into a safe haven for even greater numbers of infringing sites and platforms. While rights holders appreciate the willingness of Argentine lawmakers to start a fresh discussion, Argentina should follow global best practices with respect to the breadth of safe harbors for online intermediaries, and should take note of developments in Europe on enforcement actions available in online copyright enforcement cases.

Within the former Ministry of Communications, a Commission (ENACOM) was set up to amend, update and unify Law No. 26,522 regarding Audio-visual Communication Services and Law No. 27,078 regarding Digital Argentina. The Convergent Communications bill has not yet been submitted to the National Congress for debate. Chapter IV of the bill incorporates the net neutrality principle indicating that users enjoy the right to access, use, send, receive, and offer content, and banning ISPs from engaging in any conduct resulting, among other things, in content blocking. However, technical steps relating to traffic management and network administration required to comply with a court order or a user's express request are listed as exceptions. The bill risks interfering with anti-piracy actions carried out by copyright rights holders and, therefore, copyright should be expressly excluded from its scope (similar to the approach in Marco Civil in Brazil), and the bill should state expressly that the principles in the bill do not have impact on other actions against unlawful content (i.e., the net neutrality principle and other rights apply to lawful content only).

MARKET ACCESS IN ARGENTINA

Local Content Quotas. Resolution 4773 E/2017 mandating certification of compliance with the screen quota provisions set forth in Section 67 of the 2009 Media Law and accompanying regulation (Decree 1225/10) went into effect on 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 0.5% of the previous year's annual turnover to acquire, prior to filming, the broadcast rights to locally-produced Argentine film and TV movies. Likewise, non-national (retransmitted) subscription television services that show primarily fiction programs are required to allocate 0.5% of the previous year's annual turnover to acquire the broadcast rights to independent Argentine film and TV movies.

Regulatory Decree 1225/2010, published in April 2019, established a registry of national films at the National Film and Audiovisual Arts Institute (INCAA) from which pay-TV programmers select productions to comply with the quotas imposed by Article 67 of Media Law 26.522. The list of works includes both existing and yet-to-be-filmed productions. ENACOM has not established compliance procedures for pay-TV programmers. The decree presents several problems, such as whether channels with highly specific content will be able to find suitable content in the registry and whether programmers are subject to fines if they do not broadcast productions that ultimately fail to be completed.

Pressure for content quotas increased last year. In May 2019, the Chair of the Senate Communications Committee proposed Bill S-709/208, which would have imposed an additional three hours of weekly local content quotas on pay-TV services and introduced 10% quotas on streaming services. Although the bill stalled, IIPA remains wary of proposals for additional quotas because they negatively impact non-Brazilian content industries.

In July 2018, INCAA published a resolution (Resolution 1050/2018) regulating content quotas for movie theatres, which came into force on July 10, 2018. Domestically produced films must represent 30% of the volume of content shown, for the entirety of one week per quarter where there is a dedicated screen. While that 30% content quota was in effect previously, under the prior regulatory regime, the screen could be shared with another film. Under the new regulation, should the exhibitor share the screen with another movie, it will be considered a partial fulfillment, and the local production must be shown for two weeks (a minimum of one screening per day for at least one additional week) or until the full quota is fulfilled. Also in July 2018, ENACOM announced Resolution 4513 establishing that a 30% local content quota would be enforced on free-to-air TV in urban areas (10-15% for lesser populated markets). IIPA recommends that this quota provision be eliminated, as quotas distort the market, discriminate against U.S. audiovisual content, and are likely to result in increased piracy because Argentine consumers are unable to get sought after U.S. content.

Temporary Export and Import Tax. Enforced as of January 1, 2019, and originally set to expire on December 31, 2020, the Temporary Export Tax was set at 12% with a cap of \$4 per dollar and has had a direct impact on the audio visual industry, increasing local budgets by 12% to 15%. The tax was included in the 2019 Budget Bill passed in the Senate on November 14, 2018. The law modifies the Customs Code and provides for “services rendered in the country whose use or effective exploitation is carried out abroad” to be included in the concept of “merchandise,” including “copyrights and intellectual property rights.” The law also provides that services suppliers can be considered exporters.

Less than a month after taking office, and with a struggling economy, the new Administration extended the Temporary Export Tax beyond the end of this year, to December 31, 2021, a year longer than that originally set by the prior Administration, via Decree 99/2019, which regulates the Social Solidarity and Productive Reactivation (“País”) Law. While the Decree reduced the tax rate to 5%, it also eliminated the four-peso-per-dollar cap that had benefited exporters due to the steep depreciation of the peso over the past year.

Additionally, Argentina assesses customs duties on audiovisual works based on the potential royalty value of the work rather than on the value of the carrier medium. This runs counter to international best practice and is a form of double taxation, as royalties are subject to withholding, income, value-added, and remittance taxes.

In December 2017, the government passed a tax reform law that imposes a 35% customs duty on imported video game consoles, which negatively impacts the video game industry as well as consumers who resort to “unofficial importation” to avoid paying the extra charges. Moreover, the law also imposed a 21% Value Added Tax (VAT) on over-the-top (OTT) services as well as on a range of services provided by companies in the “collaborative economy.” Then, in December 2019, the new administration passed a law (which has now gone into effect) imposing a 30% VAT taxation over OTT services, including digital games, music and movies services. These laws are against international norms and should be amended or repealed.

COLLECTIVE RIGHTS AND COLLECTIVE MANAGEMENT ORGANIZATIONS IN ARGENTINA

In May 2018, an amended Defense of Competition Law (LDC) became fully effective. The purpose of the amended LDC is to make significant changes to Argentina's anti-competition regulations and enforcement procedures. The law seeks to foster competition, fairer market practices and prevent cartelization. It created the National Competition Authority and a Competition Defense Authority, which includes a tribunal that will investigate and penalize practices that threaten market competition. This responsibility no longer depends on just one government official's perspective. There is a concern, however, that the law has been used to undermine collective licensing practices of rights holders' CMOs who are considered by the government to be in the dominant position.

In connection with the amendment to the LDC, the Secretary of Commerce issued a fine on SADAIC (the Collective Management Organization representing Authors and Composers in Argentina)—later annulled by the courts—for charging allegedly abusive prices in the collection of performance rights to hotels; however, the litigation confirmed the government's recommendation to revise royalty rates applicable to these types of users. Therefore, there is concern that the law is being used to limit the amount of revenue that the music sector might be able to achieve in public performance licensing.

Two bills introduced in 2018 (S-537/18 and S-2884) would amend Section 36 of Law No. 11,723 for hotel rooms to be considered royalty-free areas, *i.e.*, exempting hotels from paying performance rights for the music played in their establishments. Such proposals would be inconsistent with Argentina's international obligations under the WPPT.