

COLOMBIA

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

Special 301 Recommendation: IIPA recommends that Colombia remain on the Watch List in 2020.¹

Executive Summary: In 2019, Colombia adopted law 1995/2019, known as the National Development Plan, which created a set of regulations for copyright and neighboring rights contracts. Colombia also amended its copyright law in 2018. However, these reforms did not introduce enforcement mechanisms for countering online copyright piracy, and ineffective enforcement continues to stifle the legitimate online market for creative content in the country. For example, while legitimate music services have been operating in the Colombian market, their growth rate, while high, could have been much higher were it not for the prevalence of pirated material. In the Medellin and Bogota areas, physical notorious markets, street markets, and illegal fairs are still prevalent. At the same time, there is a growing problem with the commercialization of unauthorized digital goods (UDGs) for video games among Colombian gamers. Yet, there is no evidence that Colombian law enforcement has put forth a serious effort to prosecute administrators and owners of websites, stream-ripping services, forum sites, and digital and physical marketplaces involved in the distribution of illegal content. Operations should be coordinated by the cybercrime unit on multiple fronts, including a centralized nationwide initiative. Colombia's enforcement problems are compounded by the new government's failure to adopt a national anti-piracy campaign, which has prevented the development of training initiatives for enforcement officers, public prosecutors, and judges on the techniques to investigate and prosecute online piracy, and has resulted in a failure to investigate and prosecute online piracy cases.

PRIORITY ACTIONS REQUESTED IN 2020

- Ensure effective enforcement of Colombia's new copyright law and offer effective remedies against copyright infringing websites operated from outside the jurisdiction.
- Organize trainings for the judiciary and the law enforcement agencies to increase their awareness of the online piracy problem and the legal tools at the authorities' disposal.
- Devote law enforcement and specialized prosecutorial resources to combatting online piracy with coordinated operations and actions for a sustainable agenda of IP protection.
- Convene and facilitate public/private round tables with all stakeholders to promote cross-industry cooperation to tackle online piracy based on MOUs and industry best practices.
- Increase police enforcement and initiate coordinated actions and investigations of physical notorious markets.

THE COPYRIGHT MARKETPLACE IN COLOMBIA

Online piracy is a growing problem in Colombia. Internet penetration in Colombia has grown to over 65.8%, and the broadband speed rate has increased by 48% on fixed lines and 14% on mobile lines; yet, the problem of piracy has gone unaddressed by the Colombian Government, despite the existence of legal and investigative resources available to cybercrime police, judges, and prosecutors. Piracy in Colombia comes in many forms, and the audience to infringing websites and online marketplaces for creative content continues on an upward trend. Online marketplaces are extremely popular in Colombia and a constant focus of e-commerce infringement and fraud. Pirated video games, movies, TV series and paid-TV channels are accessed via Piracy Devices (PDs). Illegal music streaming and music stream-ripping websites (e.g., *y2mate.com*, *savefrom.net* and *flvto.biz*) are popular (the top three most popular sites in the country are driving over 72 million visits yearly). Additionally, linking sites and cyberlockers (e.g., *1fichier.com* and

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/2020/02/2020SPEC301HISTORICALCHART.pdf>.



zippyshare.com) are also popular. Repeat infringers are also becoming a major problem to be addressed, as many physical notorious markets vendors have migrated to these online platforms.

While the legitimate digital music market in Colombia is growing, Internet piracy occupies the vast majority of the total digital music market in the country. Stream-ripping of music videos from online platforms like YouTube is increasingly prevalent. One of the most popular stream-ripping websites in the Latin American region, *Bajaryoutube.com* (and its mirror *descargaryoutube.com*), are operated by a Colombian company and counts for more than 60 million visits yearly. There has also been an increase in the offer of live content online, IPTV streaming, and piracy apps. The video game industry also reports that digital account resales, both primary and secondary video game accounts, are becoming a growing trend in Colombia. It is estimated that this illegal business model accounts for 50% of all game titles available on local online marketplaces, specifically *Mercado Libre*. In addition to digital account resales, *MercadoLibre.co* and *Linio.co* offer circumvention devices and modified consoles. Unfortunately, compliance with takedown requests is low. Digital account resales are also available on local infringing websites in the Colombia video game space. The motion picture industry reports that 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. Individuals also utilize social media to promote and sell infringing copies of movies in Colombia. On a positive note, in 2019, no video or audio camcords of MPA member films were traced to Colombian theaters, down from seven in 2018.

The Colombian Government has not acted to protect new legitimate markets and the emerging digital economy 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. Moreover, although most of the online notorious markets are hosted and operated outside of Colombia, numerous pirate websites (mostly stream-ripping and MP3 download sites) have ".co" top level domain names and are administered by a company called Neustar Inc., operating in Colombia as .CO INTERNET SAS, which is appointed by the Colombian Government via a concession contract with the Ministry of Technology and Information. The Colombian 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.

COPYRIGHT LAW IN COLOMBIA

National Development Plan: In May, 2019, Colombia adopted law No. 1995-2019, which created the National Development Plan. This complex legislation is intended, among many other goals, to facilitate administrative processes and streamline bureaucracy in the Colombian Government. This law contains many reasonable and potentially useful provisions for the creative economy, including production incentives. However, Article 181 of the law amended article 183 of the copyright law and created a set of regulations for copyright and neighboring rights contracts that appear to limit the freedom of foreign rights holders to contract with local parties for future forms of commercialization, which could result in a restriction of foreign investment in Colombia. These new legal provisions could also have a negative impact on the ability of phonogram producers to manage their business and produce new local talent, and will require further analysis to determine if they violate Colombia's obligations under international treaties.

Copyright Act Amendment: In early July 2018, Colombia's legislature amended the copyright law that updates Colombia's copyright framework as part of the implementation process of the U.S.–Colombia Trade Promotion Agreement (TPA) with the U.S. The amendment contains some helpful provisions, including: an extension of copyright term to 70 years for sound recordings and corporate rights holders; a making available right; a civil liability rule for circumvention of TPMs; a statutory damages provision for copyright violations and circumvention measures; and authorization to destroy seized infringing goods. However, the law contains anti-circumvention exceptions and copyright limitations that may harm rights holders. Colombia should clarify that new permanent exemptions to TPM protection are subject to review, allowing proponents to offer substantial evidence of actual or likely adverse impact on

non-infringing uses. In addition, Colombia should make clear that circumvention of a TPM is not permissible for any exception or limitation under the copyright law because that would be inconsistent with the provision agreed to in the TPA with the United States, which requires that a violation of TPM protections “is a separate civil or criminal offense, independent of any infringement that might occur under the Party’s law on copyright and related rights.” Further, while it criminalizes the retransmission or reception of illegally decrypted satellite signals, a profit requirement may complicate enforcement. Also, the law introduced an annual revision of copyright exceptions and limitations through public hearings in the Colombian Congress, making them subject to possible change each year. This has created uncertainty over the stability of copyright exceptions and limitations, and has negatively impacted both criminal enforcement efforts and impeded private investment.

Performance Rights Licensing Roundtable: In June 2019, an Executive Directive was issued implementing roundtable negotiations between the Colombian Government and stakeholders’ organizations in order to establish a legal framework for a single national organization for public performance rights licensing. Although interested parties held roundtable meetings in 2019, and there is a general consensus that one single national organization for public performance licensing is necessary, no agreement has been reached and more consultation will take place in 2020.

COPYRIGHT ENFORCEMENT IN COLOMBIA

Due to the lack of coordinated actions to tackle online and physical piracy and to enforce the existing legal protections for copyright, enforcement actions in Colombia have become more difficult and local consumers find few hurdles in purchasing or locating illegal content. The cybercrime unit of the Colombian police, the Directorate of Criminal Investigations and Interpol (DIJIN), and the Cyber Police Center (CAIVirtual) report a 54% increase in the volume of online frauds last year and indicate that 15% of all online crimes reported to the police by citizens are related to problems with e-commerce. The cyber police have a strong framework and have applied effective strategies against cybercrime in the country, however, similar efforts are needed in the copyright infringement area. Moreover, law enforcement agencies, including the DIJIN and CAIVirtual units, provide rights holders with access to important tools to enforce copyright protection and to fight online piracy and have initiated a promising exchange of information to analyze some high profile cases. Still, the problem remains.

Colombia’s lack of a national anti-piracy campaign to address piracy, and the belief by the Government of Colombia that online piracy is either not a problem or is one that only affects foreign interests, contribute to the country’s poor enforcement. 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 needs to significantly improve, and increased resources should be dedicated to the National Police and prosecutors. This National Unit is not prosecuting any music piracy cases. Just the establishment of the National Unit will not make any difference on the piracy problem unless resources and proper training are allocated. The Copyright Office (“Dirección Nacional del Derecho de Autor” (DNDA)) should play a coordination role in the education and training activities for enforcement officials in Colombia. However, the DNDA is not playing any role in that regard.

Further, the Attorney General’s specialized unit for IP crimes should increase its focus on a broader range of anti-piracy 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. The “orange economy” (or creative economy) initiative that the new government is instituting as a major public policy through the National Development Plan needs to have a powerful component to engage authorities to more actively protect IP and the digital economy in Colombia. But again, the DNDA should assume the leadership in the creative sector ecosystem and develop a conscious coordination effort.

ISP Cooperation: While many ISPs in Colombia are willing to cooperate with rights holders to combat online piracy, such cooperation is limited due to flaws in the underlying law and a lack of an MOU in place. The government should hold public/private round tables with all stakeholders to promote cross-industry cooperation to tackle online piracy based on industry best practices and facilitate a cross-industry agreement. Another possible negative influence on ISPs is the former Colombian president's failure to sign the national anti-piracy agreement, which effectively downgraded the weight attached to anti-piracy enforcement by civil servants and the public. Hopefully the new president will sign this agreement and shift the perception on the importance of an anti-piracy campaign. Colombia must follow through with legal reform to incentivize and compel cooperation by all intermediaries to effectively combat and 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. The U.S. Government should seek high standard remedies that support today's business models of the creative industries, including remedies that effectively respond to current challenges and reflect international best practices.

MARKET ACCESS

Potential Prominence Obligation for VOD Platforms: Article 154 of the 2019 National Development Plan mandates that Video-on-Demand (VOD) platforms include a section easily visible to the user that features audiovisual works of Colombian origin, which appears to run counter to Colombia's obligations under the TPA related to interactive audio-visual services. The Government of Colombia has indicated that it will engage in stakeholder consultation and issue implementing regulations in the first quarter of 2020.

Actors Law: On July 24, 2019, Colombian President Ivan Duque signed Law 1975, known as the Actors Law. The law regulates labor rights of actors in Colombia and promotes employment opportunities for those who work in the field. The text of the law constitutes a new regulatory framework for the work of artists, providing guarantees around social security; incorporating the right to constitute trade unions and professional organizations and/or associations; establishing the professionalization of the acting career; and ordering the creation of the National Registry of Actors and Actresses. However, depending on how they are implemented, some of the Actors Law provisions could have the effect of increasing production costs for film and television made in Colombia, which could potentially make Colombia less competitive as a location for audiovisual production. Although the law does not apply to performers of sound recordings; it is unclear if it will apply to music videos.

Implementation of VAT on Digital Services: Colombia Law 1819 applied the 19% VAT to digital services. The law was supposed to take effect in July 2018, but the tax authority published the implementation resolution (Resolution 51) on October 19, 2018. The Law is, however, retroactive to July 1, 2018.

Technical Assistance and Cooperation: The U.S. Department of Justice and U.S. Patent and Trademark Office conducted a training session for law enforcement authorities in Bogota in May 2019 with over 50 attendees, mostly from local law enforcement agencies, including the cyber police (DIJIN), special prosecutors, and forensic police experts. The creative industry was present at the event with various educational panels about online piracy and investigations.