

# PERU

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

**Special 301 Recommendation:** IIPA recommends that Peru remain on the Watch List in 2020.<sup>1</sup>

**Executive Summary:** Trade with Peru has almost doubled since the entry into force of the U.S.–Peru Trade Promotion Agreement (TPA) on February 1, 2009. Peru has yet to implement the necessary high standards of copyright protection to meet its international trade obligations and develop further the country’s digital and creative economy. 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. Peru, one of the main sources of camcorded materials in the region, continues to lack a specific law dealing with camcording. To facilitate enforcement against this form of piracy, criminal penalties without a need to prove a profit intent should be enacted.

Peruvian authorities, especially the *Instituto Nacional de Defensa de la Competencia y de la Protección de la Propiedad Intelectual* (INDECOPI) and the courts, have made evident efforts to improve enforcement against more than 18 major local sites infringing music and film copyrights. Online and physical piracy continue to be serious problems in Peru that undermine the market for legitimate content in the country and across the region. Individuals based in Peru operate many websites, which profit from selling advertising and user data, offering vast movie and music catalogs to stream and/or download. These sites are highly popular in places such as Argentina, Mexico, and Chile, where they attract hundreds of thousands, and for some countries millions, of visitors. For example, the website *MusicaQ.info* had more than 900,000 visitors from across the region in December 2019. Urgent action is required from the government to tackle this piracy problem.

In addition to necessary legal reforms, IIPA urges Peru to make more use of its existing judicial and administrative powers to address its evolving piracy problem and properly protect the legal digital market. For instance, Peru should increase the funding for the INDECOPI, the agency charged with promoting and defending intellectual property rights, so that it can conduct better administrative enforcement operations against online infringing sites. Finally, Lima’s *Fiscalía Especializada en Delitos Aduaneros y Contra la Propiedad Intelectual*, the specialized IP prosecution offices, should have national jurisdiction to pursue criminal action against copyright infringers.

### PRIORITY ACTIONS REQUESTED FOR PERU IN 2020

- Devote significantly more resources and political support to combat digital piracy.
- INDECOPI should work to consistently build upon the recent positive examples of IPR enforcement against piracy website operators in the country. Equally, INDECOPI should also take into consideration contractual practices within industries such as film and music and adequately enforce the existing rights of music rights holders to authorize public performance of music in movie theatres and other venues open to the public. These rights are not transferred to movie producers when a recording is synched to a movie and it is the music collective management organizations (CMOs) that are typically mandated by music rights holders to carry out relevant public performance licensing activities.
- Repeal Decreto Legislativo No. 1391 of 4 September 2018 or, at a minimum, amend the law to remove the “one member, one vote” governance system from CMOs which prevents more equitable voting systems based on the amount of distributions to members.
- Pass legislation criminalizing the unauthorized camcording of films without the need to prove an intent to profit.

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



- Pass legislation to introduce clear secondary liability principles for online copyright infringement, establish obligations for Internet Service Providers (ISPs) to apply preventive technical measures to combat digital piracy, and provide for statutory damages for copyright infringement.
- Improve the efficiency and effectiveness of the judicial system, including through raising greater awareness among judges about international best practices on copyright protection and online enforcement.
- Grant country-wide jurisdiction to Lima's *Fiscalía Especializada en Delitos Aduaneros y Contra la Propiedad Intelectual*, the specialized IP prosecution offices in the capital.

## **THE COPYRIGHT MARKETPLACE 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 and the number of smartphone subscriptions has increased significantly. At present, there are approximately 22 million Internet users in Peru, representing about 67% of the population.<sup>2</sup> Mobile broadband penetration is growing rapidly. In 2017, there were 64 active mobile broadband subscriptions per 100 inhabitants, up from 62 the previous year.<sup>3</sup> Fixed broadband is not nearly as prevalent, with only 7.2 fixed broadband subscriptions per 100 inhabitants (up from 6.7 in 2016).<sup>4</sup>

In 2019, the piracy landscape in Peru remained unchanged. Streaming of pirated audiovisual content continues to be prevalent in Peru, with an increase in consumption of Internet protocol television (IPTV). This has materialized through all forms of streaming, including through websites, Piracy Devices (PDs) such as Android and Kodi boxes pre-loaded with piracy software, and mobile piracy apps and add-ons. In 2018, the top 180 Spanish-language audiovisual piracy websites received more than 200 million visits from Peru. Two websites the MPA identified as notorious markets in 2018, *Pelispedia.tv* and *Pelispplus.tv*, are also highly popular in Peru and offer tens of thousands of infringing links to movies and television series. Such piracy websites, as well as PDs and apps, undermine the legitimate market in the entire region and must be addressed with urgency. Peru's 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 an increase in digital sales of recorded music in 2018 (up by 20%), with almost all growth coming from licensed streaming platforms usually accessed on smartphones, often through a bundled subscription service. That increase is compensating for the steep decline in physical sales revenue which has gone down from US\$0.6 million to US\$0.1 million in just three years.<sup>5</sup> However, unfair competition created by pirate websites that operate openly in Peru and offer millions of illegal music tracks to consumers, mainly via mobile devices, dampens the rate of market growth for the music sector and negatively affects the prospect of users switching to premium tiers of the various legitimate music services. Digital piracy businesses, including streaming and stream-ripping, download, and linking websites, have flourished by selling advertising placements and user data. Although many of them have numerous domain names registered abroad, they often were created, and are administered by, individuals operating within Peru. In 2019, there were more than 120 million visits to illegal stream-ripping sites from Peru such as *y2mate.com*, *flvto.biz* and *mp3-youtube.download*. According to SimilarWeb data, in the last quarter of 2019, there were over five million visits to *y2mate.com* and *flvto.biz*, and over two million visits to *mp3-youtube.download*. Beyond Peru, the following download websites have over 75% of their audiences in Argentina, Mexico, and Chile: *Foxmusica*, *FullTono*, *BuenTema*, *BateriaFina*, *GentleFlow* and *Musica*. If the legitimate music market is to develop to its full potential and to the benefit of Peruvian and international composers, artists, performers, publishers, and producers, IIPA urges the Peruvian Government to take substantive and sustained action to tackle these endemic piracy problems.

<sup>2</sup>See [www.Internetworldstats.com](http://www.Internetworldstats.com).

<sup>3</sup>Data from International Telecommunication Union, *Measuring the Information Society Report 2018*, p. 141, <https://www.itu.int/en/ITU-D/Statistics/Documents/publications/misr2018/MISR-2018-Vol-2-E.pdf>.

<sup>4</sup>Id.

<sup>5</sup>IFPI, *Global Music Report* (April 2019), at p. 117, available at <http://www.ifpi.org/recording-industry-in-numbers.php> ("GMR 2019").

**Hard Goods Piracy:** Some industries, such as the motion picture and software industries, have found that hard goods piracy is still prevalent in the Peruvian market, though Peruvian Customs has been cooperative. 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 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 and counterfeit consoles bundled with hundreds of infringing video games (“legacy” titles). 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 is a persistent challenge for rights holders in Latin America. With the developments in camcorder technology, 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. Fifteen illicit audio and/or video recordings of MPA member films were sourced from Peruvian theaters in 2019, up from ten in 2018. 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.

## **COPYRIGHT LAW AND RELATED ISSUES IN PERU**

**Bill on Camcording:** In a positive development that would address a longstanding piracy issue in Peru, INDECOPI, Peru’s agency charged with promoting and defending intellectual property rights, developed draft legislation to criminalize camcording, regardless of profit intent. The proposal, Bill 4423, was submitted to the legislature in June. However, President Vizcarra dissolved the legislature during political clashes in September. Legislative activity will resume when a new Congress is elected in January. IIPA urges lawmakers to prioritize this bill in 2020.

**Peru’s Compliance with Existing Obligations to the United States:** The U.S.–Peru TPA entered into force on February 1, 2009.<sup>6</sup> Peru has not yet achieved the objectives of the TPA, which were to improve the level of effective enforcement of copyrighted content online, including through the availability of statutory damages (TPA Article 16.11.8). This long-overdue reform is needed to provide deterrence and encourage settlement of civil claims of infringement.

**Copyright Levies:** Peru is one of the few markets in the region that has implemented a private copy levy to compensate rights holders for the private use exception applicable to blank media and recording devices. Unfortunately, the provision has become seriously outdated in that the levies are limited to blank media and recording devices from the analogue and early digital eras and do not include the typical devices on which private copying takes place these days. INDECOPI needs to urgently: (1) update the list of media subject to the levy to accurately reflect the current consumption habits; and (2) issue new regulations that empower customs to enforce the levy.

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<sup>6</sup>The final text of the 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>.

**Copyright Law Amendments:** An unexpected amendment was passed in September 2018 (Decreto Legislativo No. 1391). The partial amendment to the Copyright Law, sponsored by INDECOPI and approved at Congress without consultation with any Peruvian rights holders' groups or copyright organizations, included provisions intended to modify the legal regime for CMOs. Among other modifications, the law imposed artificial and discriminatory rule that any one member of a CMO would be entitled to one vote only. This rule is completely inappropriate for CMOs of music producers. Before these amendments passed, votes at general meetings were assigned to members in proportion to the distributions received from the CMO. The prior system allowed members with commercially significant catalogs, such as international rights holders, to secure direct participation in governing bodies.

**Music in audiovisual works:** In 2019, the Peruvian Association of Authors and Composers (APDAYC) continued its appeal against two INDECOPI 2017 administrative decisions<sup>7</sup> that held that, once a musical work is synched for a film, the owner of the musical work forfeits its remaining right to license the public performance of the work in cinemas in other countries. The decisions are misinformed as to the operation of sync contracts and the practices in the music and film industries. They also depart as a matter of law from the correct interpretation of the existing Peruvian law, including INDECOPI's own prior guidance on the application of the public performance rights. As a result of these rulings, APDAYC cannot license, enforce, or collect royalties for musical works used in films from either cinemas or the largest cable operator in the country, *Telefonica*. This has, in turn, hampered the ability of the American Society of Composers, Authors, and Publishers (ASCAP) to license U.S. musical works because ASCAP relies on APDAYC to license public performances of its repertoire in Peru. The music industry is concerned that these erroneous administrative decisions might impact the market more broadly and is closely monitoring ADPAYC's cases which are currently pending before the Civil Court.

## **COPYRIGHT ENFORCEMENT IN PERU**

On balance, enforcement has improved in the past three years, though criminal and administrative enforcement against piracy, especially online, is hampered by a distinct lack of resources. Industry sectors generally report good cooperation with the criminal enforcement authorities (prosecutors, police, administrative, and tax authorities) on hard goods piracy, but continuing difficulties exist in obtaining prosecutions and administrative measures that result in effective, deterrent sanctions. On a positive note, IIPA acknowledges the significant efforts by INDECOPI on the matter of administrative site-blocking procedures and the longstanding commitment of this entity to fight piracy in Peru. It is very important to increase INDECOPI's funding to enable its practices to have a meaningful effect on piracy in scale.

The Peruvian Government should encourage engagement between rights holders, ISPs and other key Internet intermediaries to address online 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."<sup>8</sup> 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 and the UK Intellectual Property Office (UKIPO) have conducted trainings in coordination with the recording industry and assisted local police efforts against organized crime, which is usually related to the large and organized distributors of pirated media content. These training activities should result in more effective enforcement actions against copyright piracy and counterfeiting activity in Peru in the long term. Additionally,

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<sup>7</sup>Asociacion Peruana de Autores y Compositores (APDAYC) v Cineplex SA, 24 May 2017 (case reference 002902-2016/DDA, Resolution number 278-2017/CDA-INDECOPI) and APDAYC v. Cinemark del Peru Srl, 24 May 2017 (case reference 002903-2016/DDA, resolution number 279-2017/CDA-INDECOPI).

<sup>8</sup>The 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).

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 (*Fiscalia Especializada en Delitos Aduaneros y Contra la Propiedad Intelectual*). However, this specialized prosecution division has very limited geographic jurisdiction, which continues to limit its effectiveness. Cases outside of Lima are prosecuted by local prosecutors who lack knowledge of IPR. In addition to national jurisdiction for the specialized prosecutors, there is 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.

**Problems with the judiciary—non-deterrent results and delays:** Few criminal IPR cases reach the Peruvian judiciary, and if they do, many judges do not impose deterrent sentences because they do not appear to perceive IPR crimes as dangerous or important. Furthermore, the Peruvian Criminal Procedure Code allows sentences of four years or less to be suspended. This has continued even after several positive amendments to the criminal code increased the minimum sentencing for copyright infringement to four years (2004), and the penalties for repeat offenders and other crimes (2006).

Criminal sentences generally take three to five years to be issued, and many cases remain “pending” and languish in the courts—in some instances, for over nine years 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.

### **INDECOPi and Administrative Enforcement**

INDECOPi serves as an administrative enforcement agency for the copyright sector. It is also active in public awareness and educational campaigns. INDECOPi is supposed to be self-funded through its income from patent and trademark registrations and from the fines imposed by its administrative bodies. To maintain consistent enforcement and strengthen INDECOPi’s commitment towards the digital piracy problem, Peru should dedicate additional resources to support INDECOPi’s *ex officio* enforcement efforts.

INDECOPi’s continued interest in, and attention to, digital piracy will be crucial for tackling pirate sites and services. The music industry has 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. In 2017, INDECOPi issued its first suspension order to a significant pirate service operating under the domain name *Foxmusica.me*, and 2018 saw the implementation of INDECOPi’s first site-blocking decision in an administrative case against *Roja Directa*, a site dedicated to the illegal streaming of soccer matches. In 2019, the music industry worked closely with INDECOPi to suspend several local and foreign domain names. The music and film industries are pleased with INDECOPi’s continued issuance of site blocking orders and will continue to assist the entity on antipiracy operations in 2020.

**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 served with an injunction from INDECOPi fails to comply, it will be fined the maximum allowable amount. If non-compliance persists after five days, INDECOPi can double the fine at established intervals and has the option of filing a criminal complaint with the Public Prosecutor. IIPA members report that, despite these provisions, few

administrative decisions from INDECOPI are followed up by criminal prosecution and cases often remain in “payment pending” status when defendants simply fail to pay their fines. To support greater enforcement against piracy and help fund INDECOPI’s actions, IIPA suggests improved coordination between INDECOPI and Peruvian Prosecutors, as well as regulations to establish, increase and effectively collect fines.